TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s70(1) appeal against decision

Minister administering the State Service Act 2000
(T13586 of 2009)

and

Australian Nursing Federation Tasmanian Branch

FULL BENCH: HOBART, 4 February 2011
PRESIDENT P L LEARY
DEPUTY PRESIDENT TIM ABEY
COMMISSIONER J P McALPINE

Appeal against a decision handed down by Deputy President P C Shelley arising out of T12671 of 2006 shift workers and public holidays - admissibility of new material - principles of construction - appeal upheld and orders revoked - election to take time off in lieu - the Deputy President made no finding but suggested parties confer - no ground for appeal

REASONS FOR DECISION

[1] This is an appeal lodged against a decision of Deputy President Shelley dated 13 July 2009 and subsequent orders issued on 30 October 2009.

[2] The dispute notification was lodged by the Australian Nursing Federation Tasmanian Branch (ANF) on 12 May 2006 and related to public holidays and accrual of hours for shift workers under the *Nurses (Tasmanian Public Sector) Award 2005* (the Award).

[3] On 24 July 2006 the Minister filed a s.43 application seeking an *interpretation* of the same matters at the heart of the ANF application above.[1] On 17 April 2009 the Minister filed a s.23 *Application to Vary*[2] to 'remove ambiguity'. Initially the Minister sought to have the interpretation matter dealt with before the ANF application. Subsequently the Commission was informed that the Minister and the ANF were content for the ANF matter to be dealt with to finality ahead of the two applications from the Minister. The ANF application proceeded before Deputy President Shelley.

[4] The Deputy President identified the clauses subject of the dispute as follows:[3]

> *"The relevant award provisions read as follows:*
>
> 'Part V Hours of Duty – Clause 2 Shift Work:
>
> (h) Sundays and holiday shifts

[1] T12741 of 2006
[2] T13427 of 2009
[3] Paras 11,12

(i) Shift workers (other than Registered nurses level 4 and 5) for work on a rostered shift, the major portion of which falls on a Sunday or public holiday, shall be paid at a rate of time and three quarters in the case of Sundays and double time in the case of a public holiday. Such rate shall be in substitution for, and not cumulative upon the shift allowances more particularly set forth in 2 (e) hereof.

PROVIDED that:

...

(3) where a shift worker is required to work on a public holiday as herein defined and is granted time off in lieu thereof, the above penalty rate shall not apply.

...' (my emphasis)

In practice, no shift worker is paid the penalty rate. The Department has applied the proviso and there is no opportunity for a shift worker to elect to be paid double time.

'Part VI – Leave and Holidays with Pay - Clause 1– Annual Leave:

(b) Annual leave exclusive of public holidays

(i) Subject to this subclause the annual leave prescribed by this clause shall be exclusive of the holidays prescribed by Clause 2 Public holidays and if any such holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day there shall be added to the period of annual leave time equivalent to the ordinary time which the employee would have worked if such day had not been a holiday.

(ii) Notwithstanding the foregoing provisions, a shiftworker shall have added to his/her period of annual leave one day for each statutory holiday mentioned in clause 2 of this Part, whether or not such holiday is observed on a day which, for that employee would have been a rostered day off.

...

2. PUBLIC HOLIDAYS

(a) All employees, other than shift workers, casual employees and part-time employees engaged to work less than twenty hours per week shall be entitled to the following holidays without deduction from their weekly wages:

(lists statutory holidays)

(b) Payment for the holidays mentioned in 2(a) which are taken and not worked, shall be at the normal rate of pay which would have applied to the employee concerned, when if it were not for such holiday, he/she had been at work.

(c) Where an employee who is entitled to holidays in accordance with 2(a) hereof is required to work on any of the holidays mentioned in that subclause, either for part or the whole of such day he/she shall in the case of a shift worker, be paid at the rate prescribed in Part V – Hours of Duty, Clause 3(c)(ii) Overtime and in the case of a day worked be paid at the overtime rate prescribed in Part V – Hours of Duty Clause 3(c)(i)

… (my emphasis)'

[5] The Deputy President concluded as follows:[4]

"(67) The words in Clause 2(h)(i) Part V – Hours of Duty - clearly and unambiguously provide an entitlement for shift workers to be paid double time when they work on a public holiday. That much is agreed between the parties. Also not at issue is the proviso that the double time can be taken as time off in lieu (although there is an issue about at whose election the time off in lieu may be taken).

(68) It is also clear from the words that an employee does not receive both double time and the shift loading. This is also not at issue.

(69) The provision is clear. The words are capable of being construed in an intelligible way. Nowhere in the clause does it say that the entitlement to double time is able to be absorbed into the extended leave provisions contained in the annual leave clause. As said by Koerbin P, it is not permissible to import into an award by implication a provision which its language does not express.

[4] Supra

(70) The words in Clause 1(b)(ii) of Part VI – Leave and Holidays with Pay – say clearly and unambiguously that a shiftworker shall have added to their period of annual leave one day for each statutory holiday set out in clause 2 of Part VI whether or not the employee would have been rostered off. This provision cannot be read other than to mean that all shift workers shall have a number of days equal to the number of statutory holidays added to their annual leave – what Koerbin P referred to as 'an extension of the leave period'. Nowhere in the clause does it say that a shift worker is not entitled to these days where they have been paid double time for working on a public holiday or have taken time off in lieu of double time.

(71) Clause 2(c) – Public Holidays – again sets out the entitlement for a shift worker to be paid double time for working on a public holiday. Nowhere in any of those clauses does it say that one entitlement shall be set off against the other. Nowhere in the clauses is there provision for one entitlement to be satisfied by another.

…

(73) I agree with the union's submission that the two provisions are unrelated and should not be conflated. The concept of compensation for the social disadvantage of working unsociable hours is well established. I accept the union's submission that the payment of double time is for the social disadvantage of working on a public holiday. The purpose of the extended annual leave is to ensure that shift workers get a number of days off equivalent to the number of statutory holidays regardless of whether they were rostered to work on those days, or not. The purpose of this is to ensure that shift workers get 11 or 11½ days holidays with pay each year. The two entitlements are different and for different purposes.

(74) The employer contended that an employee should not receive any more than 11 or 11½ days off (plus annual leave entitlements) in a twelve month period because that is the number of holidays with pay employees are entitled to. This argument is misconceived; the shift workers are not, in fact, getting an extra holiday, what they are getting is a penalty payment converted to a day off. Such arrangements have been provided for in industrial instruments for many years. Time off in lieu of penalty payments is not 'leave' *or* 'holidays' *and is not able to be absorbed into entitlements to leave or holidays with pay. I observe that an employee would be most unlikely to opt for time off in lieu of payment of penalty rates if that time off were to be absorbed into their existing leave entitlements.*

…

(76) When construing an award, the construction is not determined by considerations of merit or equity, however I observe that, when the award is read as a whole, there is not such a great deal of difference between what a day worker receives for working on a public holiday (two and a half days'

> *pay) and what a shift worker receives (three days' pay but with the loss of shift loading).*
>
> *(77) As argued by the union, the employer has wrongly conflated two stand-alone provisions. The employer has read into the award provisions that are not there. The award provisions are clear and intelligible and, as said by Koerbin P in T30 of 1985:* '…there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage.'
>
> *(78) I find that, according to the terms of the award, a shift worker who works on a public holiday is entitled to be paid double time (which maybe taken as time off in lieu) and is also entitled to 11 or 11½ days of extended leave."*

[6] A further issue to be determined concerned the question of at whose election (the employer or employee) time off in lieu (TOIL) is taken rather than payment of double time for work performed on a public holiday. On this question the Deputy President concluded:[5]

> *"(81) I am of the view that it should be the employee's right to elect (a) whether to be paid or to take time off in lieu and (b) when to take the day off, subject to operational requirements. I am, however, aware of the difficulties with shortages of nurses and rostering requirements. This should be a matter for further discussion between the parties, given that the days off in lieu are, as I have found,* additional *to the extended leave already provided for pursuant to clause 1(b)(ii) of Part VI."*

Directions Hearing 24 March 2010

[7] Following this hearing a decision, pursuant to s71(4), was issued by consent, which had the effect of suspending, subject to conditions, the Deputy President's orders, pending the determination of the appeal.

[8] In addition the appellant made application to:

- Amend the Grounds of Appeal
- Join matters T12741 (interpretation) and T13427 (application to vary) to be heard in conjunction with the appeal.

[9] The Full Bench declined to join the above matters and determined that the appeal should be heard to finality, noting that additional evidence and matters may be admitted by leave of the Commission.

[10] Prior to the hearing of the appeal, the Commission, with the consent of the parties, made available the services of a private conciliator. However the process failed to resolve the dispute.

Admissibility of Additional Evidence and Argument

[11] The appellant sought to introduce additional evidence in the form of a statement from Philip Baker, Manager, Industrial Relations, (Public Sector

[5] Decision para 81.

Management Office) (PSMO) (Baker statement). The appellant also seeks to advance an argument which is substantially different to that presented to the hearing below.

[12] Section 71(8) reads:

> *"On the hearing of an appeal, evidence and matters, other than evidence and matters raised in the proceedings in respect of the matter appealed against, shall be admitted only by leave of the Full Bench hearing the appeal."*

[13] Mr Parry submitted that leave should be granted for the following reasons:

- S.71(10) requires the Full Bench on hearing an appeal to act according to equity, good conscience, and the merits of the matter without regard to technicalities or legal forms;

- Tribunals are more ready to grant leave where there is a question of law, as is the case in this matter (appeal grounds 1 – 4). Further, it is apparent that no additional evidence would, or could, have been called in the event that this question was addressed at first instance. See *O'Brien v Komesaroff,* as referred to in *Coulton v Holcombe:*[6]

  > *"In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided".* (Connecticut Fire Insurance Co. v Kavanagh (23); Suttor v Gundowda Pty. Ltd. (20); Green v Sommerville (24)*)*

- This is not a case where a point was deliberately conceded or avoided at trial.

- The prejudice to the appellant in the event that the new matter is not allowed to be raised is significant. There is no prejudice to the respondent.

- It is in the interests of justice to prevent a multiplicity of proceedings to the extent possible.

- It would not be in the public interest for the Commission to commit the appellant to the expenditure of many millions of dollars of public funds, irrespective of whether this was required or not, simply on the basis that an argument was not raised at first instance.

[14] The respondent opposed both the admission of new material and leave to amend the grounds of appeal. The contentions of Mr White are summarised below:

- Section 71(8) is limited to the grant of leave to admit new 'evidence and matters'. This does not extend to the making of an entirely new argument.

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[6] (1986) 162 CLR 1 p 8

- The fact that a full bench is required to act according to equity, good conscience and the merits of the matter without regard to technicalities or legal forms does not necessitate the grant of leave. The underlying rule in *Coulton v Holcombe* and other authorities applies equally to industrial tribunals as they do the courts.

- As to the matter being a question of law, this is not determinative. In *Multicom Engineering Pty Ltd v Federal Airports Corp* the Court of Appeal said[7]:

  "However there is another principle of more direct relevance. A party does not have a right to insist that a new point be decided on appeal simply because all of the facts have been established beyond controversy or the point is one of construction or of law, even constitutional law."

- The general practice in the public sector and the provisions of other awards and their history would have been a matter of direct relevance in this proceeding, particularly in circumstances where similar award provisions apply.

- The case the appellant now seeks to make was raised, abandoned and then finally conceded at the hearing of this matter.

- In circumstances where the appellant made a conscious decision to concede (below) the point now under debate it is now not open for the appellant to complain of prejudice in respect of a decision made within the confines of the matter argued.

- There is great prejudice to the ANF and its members. Nurses have conducted their lives, organised their affairs, sought, gained and remained in employment on the basis of the common understanding and practice that public holidays have been added to their annual leave.

- The appellant initially sought to have the interpretation application dealt with prior to the ANF application, but subsequently resiled from that position. In those circumstances it is now not open to the appellant to contend that a ground specifically disavowed should now be run on the basis of the public interest of avoiding a multiplicity of proceedings.

- This position advanced by the appellant amounts to a fundamentally new argument. This is inconsistent with the rule outlined in *Coulton v Holcombe.*

  "To say that an appeal is by way of rehearing does not mean that the issues and the evidence to be considered are at large. It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue

[7] (1997) 47 NSWLW 631

> *been raised in the court below, evidence could have been given which by any possibility could have prevented the point for succeeding, this Court has firmly maintained the principle that the point cannot betaken afterwards: see* Suttor v Gundowda Pty Ltd*. (20);* Bloemen v The Commonwealth *(21).*
>
> *...*
>
> *In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. Finally, in a recent decision of six justices of this Court (*University of Wollongong v Metwally *(No.2)(25)) the Court said:*
>
> > 'It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.'
>
> *The Court of Appeal recognized the great importance, in the public interest, of these principles. Their Honours summarized them in the following terms:*
>
> > 'the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court.' "

Finding

[15] The grant of leave is a discretionary matter and not one lightly entertained. As a fundamental principle we hold to the notion that a party is bound by the conduct of their own case. It would be in our view a very foolish strategy for a party to *'keep their powder dry'* in a hearing below with the view of running their full argument only on appeal.

[16] It is not entirely clear why the appellant adopted the position it did before the Deputy President. The argument it now advances was flagged in correspondence as early as 2008. Notwithstanding, there is no evidence, or indeed any suggestion, that the Minister pursued a strategy akin to the paragraph above.

[17] We note that new material relates to a question of law (construction). This is persuasive, though not determinative, as to whether leave should be granted.

[18] We are particularly conscious that the appellant has a live application for an interpretation (s43) which dates back to 2006. The timing of the prosecution of this application is, and has been, very largely in the hands of the Minister. We

note Mr White's submission as to the inherent inconsistency of the Minister's position on this issue over time.

[19] Notwithstanding, the reality of the current position is that, irrespective of the outcome of this appeal, the Minister is able to pursue the interpretation matter and seek retrospective effect. In such a hearing the new material the appellant now seeks to introduce would be readily admissible.

[20] Such a situation gives rise to the possibility at least of two different outcomes on the same question. Given the significant issues involved, this would be contrary to the public interest.

[21] It is in the interests of justice and expediency that this matter is heard to finality by this Full Bench. Apart from the requirement to meet the new argument of which they have had proper notice, this does not place the respondent in a position of prejudice.

[22] We propose to grant leave to introduce the new evidence and argument. We also grant leave to amend the grounds of appeal.

[23] More often than not when leave is granted to introduce significant new evidence and/or argument it would be referred back to the Commission below for further consideration. This of course is not an option as Deputy President Shelley has subsequently retired. We note however that the argument now advanced is fundamentally different to that advanced before the Deputy President.

Grounds of Appeal

[24] The grounds of appeal, as amended, are as follows:

> *"1. The Deputy President made a legal error in paragraph (5) of the 1st Decision in the construction of the* Nurses (Tasmanian Public Sector) Award 2005 ***(Award)*** *in determining that the Award entitles nurses who are shift workers to 'four weeks annual leave', plus '38 hours (for working weekends)', plus 'one day for each statutory holiday prescribed in the award...whether an employee is rostered to work public holidays, or not.' **(extended annual leave**.)*
>
> *2. The legal error in Ground 1 above is repeated in paragraphs (7), (55), (56), 69)-(74) and (77)-(79) of the 1st Decision, paragraphs (3), (22), (24), and (25) of the 2nd Decision and is manifested in Orders 1,3 and 4.*
>
> *3. In the alternative to Grounds 1 and 2 above, the Deputy President acted on a wrong principle in reaching her conclusions in the paragraphs set out above, and in Order 1, 3 and 4 namely the incorrect construction of the Award.*
>
> *4. In the further alternative to Grounds 1-3 above, the Deputy President gave weight to an irrelevant matter in reaching her conclusions in the paragraphs set out above, and in Order 1, 3 and 4, namely the incorrect construction of the Award.*

5. *The Deputy President made a legal error in paragraph (5) of the 1st Decision, in misconstruing the purpose for which shift workers receive an additional 38 hours annual leave per year of service.*

6. *In the alternative to Ground 5 above, the Deputy President gave weight to an irrelevant matter in reaching her conclusions, namely for which shift workers receive an additional 38 hours annual leave per year of service.*

7. *The Deputy President made legal errors in paragraph (73) of the Decision, in misconstruing the purpose of:*

   (a) *the payment of double time for work performed by shift workers on public holidays; and*

   (b) *the extended annual leave (if any) provided to shift workers.*

8. *In the alternative to Ground 7 above, the Deputy President gave weight to an irrelevant matter in reaching her conclusions, namely the incorrect purposes attributed to various 'benefits' as referred to above.*

9. *In the further alternative to Grounds 5-8 above, the Deputy President gave no or insufficient weight to a relevant matter, namely the correct purpose of the various benefits referred to above, including that the relevant clauses dealt with mechanisms to compensate shift workers for being on rosters or shifts, including shifts that require work on weekends and public holidays.*

10. *The Deputy President made a legal error in paragraph (81) of the 1st Decision in determining that clause 2(h)(ii)(3) of Part V of the Award entitles shift workers to* 'elect whether to be paid or to take time off in lieu.' *This error is repeated in paragraph (23) of the 2nd Decision, and manifested in Orders 1 and 2.*

11. *The orders made by the Deputy President rely upon her conclusions reached in the 1st Decision and the 2nd Decision, and for those reasons, each of the errors identified in these Decisions are reflected as errors in the orders.*

12. *Further or in the alternative to Grounds 1-11 above, the Deputy President made a legal error in Order 1, in not excluding from the circumstances where double time is to be paid for work performed by shift workers on public holidays, circumstances where a shift worker has not taken off time in lieu, but rather has had the time credited to their accrued leave balance, or has had such accrued annual leave credit paid out on termination of employment.*

13. *Further or in the alternative to Grounds 1-11 above, the Deputy President made a legal error in Order 3 in not*

excluding from the circumstances where amounts are to be paid to shift workers annual leave accrual, public holidays that fell on either a Saturday or a Sunday.

14. *Further or in the alternative to Grounds 1-11 above, the Deputy President made a legal error in Order 4 in not excluding from the circumstances where amounts are to be paid to shift workers no longer employed by the Minister public holidays that fell on either a Saturday or a Sunday.*

15. *....*

16. *Further or in the alternative to the Grounds above, Orders 1, 3 and 4 are plainly unreasonable and/or unjust in requiring the employer to take action in respect to a period prior to the time application was made to the Tasmanian Industrial Commission .*

17. *...*

18. *...*

19. *The Deputy President has made a legal error in the decision by acting outside her jurisdiction in interpreting the award provisions pursuant to s43* Industrial Relations Act 1984.

20. *....*

21. *The Decisions and Orders as a whole are plainly unjust in creating an anomaly of a penalty on a penalty, resulting in an entitlement equivalent to a triple time payment for working on a public holiday, which was never the intention of the original drafters of the Award.*

22. *Such further or other grounds as will be advanced at the hearing of the appeal.*

23. *..."*

Appeal grounds 1 – 4

[25] The fundamental issue in this appeal is the proper construction of clause 1(b) of VI. This was not the issue for determination in the matter below.

[26] By way of background, the employer had, for a period of at least 30 years, credited annually, pursuant to 1(b)(ii), either 11 or 11.5 days to a shift worker's annual leave entitlement, being the number of public holidays in a calendar year. That this was accepted by the parties as the correct construction of the sub clause, is clear from the Deputy President's comment in para 5:

"This much is agreed by the parties."

[27] It was also agreed that a shift worker who worked on a public holiday was entitled to be paid at the rate of double time, or, in the alternative, be allowed TOIL. (Clause 2(h)(i) and (ii)(3) of Part V.)

[28] In practice no shift worker was paid the penalty rate. The TOIL proviso was applied and the employer offset this entitlement against the additional 11 or 11.5 days arising out clause 1(b)(ii) of Part VI.

[29] Importantly, there was no suggestion in the matter below that the benefits flowing from both clauses should be characterised as other than legal entitlements. The question before the Deputy President was, in essence, whether one entitlement could be offset against another entitlement. The Deputy President answered, correctly in our view, that this was not permissible. It should be borne in mind that the Deputy President was dealing with a dispute notification. It was not unreasonable in the circumstances that the Deputy President confined her consideration to the issue/s in dispute, and did not go to the broader question of whether a provision, accepted by the parties as a legal entitlement, was in fact so.

[30] The argument now advanced by the appellant is quite different. In essence the appellant contends that clause 1(b)(ii) of Part VI confers only an additional day or days when a public holiday occurs during a period of annual leave. The appellant further contends that additional days that have been granted by the practice amount to an over award payment, which can be offset against the TOIL arising out of clause 2(h) of Part V.

[31] Mr Parry outlined the principles of construction as follows:

- *"Terms of awards (and agreements) must be interpreted in light of their industrial context and purpose, including the commercial and legislative context in which they apply. (*Amcor Ltd v CFMEU *(2005) 222 CLR 241 at (2) and (13))*

- *The matter must be viewed broadly, and after consideration is given to every part of the award, the Court must endeavour to give it a meaning consistent with the general intention of the parties, to be gathered from the award as a whole. (*CFMEU v Master Builders Group Training Scheme *(2007) 161 IR 86 at 91)*

- *The relevant 'context' to be considered in interpreting the award extends to the origins of the particular clause. However, most often the immediate context, being the clause, section or part of the award in which the words to be interpreted appear, will be the clearest guide.* (Short v FW Hercus Pty Ltd *(1993) 40 FCR 511 at 517-19 (Burchett J, Drummond J agreeing).*

- *Whilst context and purpose of an award will be relevant, ultimately a Court or Tribunal's task is to give effect to the meaning of the award as expressed in its words, objectively (as opposed to subjectively) construed. (*Amcor*, supra, at (69), (70) and (77)-(114))*

- *Other cases in which Courts or Tribunals have interpreted similar words in different awards and agreements, must also be treated with caution. This is because Courts and Tribunals are required to give effect to the terms of an award in the manner intended by the*

*framers of the document (determined objectively.) (*Kucks v CSR Limited *(1996) 66 IR 182 at 184 (Madgwick J)*

- *Further, it is not appropriate when undertaking that task, to look to evidence of prior negotiations or surrounding circumstances to contradict the language used by the parties. If the words used are susceptible to more than one meaning, only then will objective evidence of background facts be relevant to the interpretation of an award, to the extent it shows mutuality of intention. (AMWU v QANTAS Airways Ltd (2001) 106 IR 307 at (21) and (31)) The subjective evidence of a party's own particular intentions, is not admissible. (*Harbour City Real Estate Pty Ltd *v Cargill (no 3) (2009) 186 IR 260 at (61)-(62) (McKerracher J))*

- *It is forbidden to use subsequent conduct as an aid to the construction of an award or industrial agreement. (CFMEU v John Holland Pty Ltd (2010) FCAFC 90 at (94);* Short v Hercus Pty Ltd *(1993) 40 FCR 511 at 517.)*

- *Whilst some assistance might be obtained from the previous conduct of the parties to an award, particularly where the terms have been re-enacted, this is only so where it can be shown by clear evidence that the parties have conducted themselves according to a common understanding of the relevant provision, as opposed to common inadvertence. (*ALHMWU v Prestige Property Services Pty Ltd *(2006) 149 FCR 209 at (44);* SDAEA v Woolworths Ltd *(2006) 151 FCR 513 at (31))"*

[32] Mr White accepted these principles as being largely uncontentious, to which should be added "*either entirely or by way of emphasis"* the following*:*

"(a) the history of any provision is relevant and the fact that the parties have re-stated a provision which they have treated as bearing the particular meaning is relevant to the construction of the provision in the new agreement/award (see Short v FW Hercus Pty Ltd *(1993) 41 FCR 511 at 517);*

*(b) the beginning point of an award interpretation is to interpret the words in the context in which those words apply. Whilst it is so that frequently the immediate context is the clearest guide the Commission 'should not deny itself all other guidance in those cases where it can be seen that more is needed'. The context in which a document is to be interpreted may extend to the entire document with which there is an association. (*Short v FW Hercus *at 518)*

(c) in constructing an award or agreement the search is for the meaning intended by the framers of the document bearing in mind that they were likely to be of practical bent; it is justifiable to read an award or agreement to give effect to its evident purposes. Meanings which avoid

> *inconvenience or injustice may reasonably be strained for. (*Kucks v CSR Ltd *(1996) 66 IR 182 at 184)"*

[33] The appellant contends that there is no relevant past conduct that demonstrates any common understanding of the clause. Whilst the employer has historically adopted a practice that may be said to be consistent with a construction advanced by one party, it was done so in the context of applying 11 or 11.5 days of accrued leave in satisfaction of an entitlement to TOIL for work on public holidays. This does not amount to a common understanding or consensus, Mr Parry said. Accordingly, the Commission's task in interpreting the award, must focus on the words, properly construed, having regard to the surrounding context.

[34] Mr Parry submitted that the starting point is to recognise that, unlike day workers, shift workers have no general entitlement to observe public holidays without deduction of pay. The entire structure of the award proceeds on the premise that shift workers will, from time to time, be rostered to work on public holidays.

[35] Clause 2 of Part V deals with the payment regime for work performed on public holidays.

[36] Clause 1 of Part VI, on the other hand, deals with annual leave. The heading of the entire part is 'Leave and Holidays with Pay', and the heading of clause 1 is 'Annual Leave'. Mr Parry submitted that, given this structure, one would not ordinarily expect to find additional compensatory entitlements in relation to shift workers and public holidays, in clause 1 of VI.

[37] Mr Parry submitted that importantly, clause 1(b) is headed "*Annual leave exclusive of public holidays".* Read in proper context, each of clauses 1(b)(i) 1(b)(ii) and 1(b)(iii) deal with same subject matter, being the effect of public holidays falling during a period of annual leave being taken by an employee.

[38] Clause 1(b)(i) provides that annual leave taken by an employee, is exclusive of public holidays occurring during that period of leave and is observed on what would otherwise have been an ordinary working day for that employee. Such period of time is added to the period of annual leave.

[39] Clause 1(b)(ii) deals with the same subject matter. Reference to "*notwithstanding the foregoing",* and the necessity to deal with this clause separately to clause 1(b)(i) is, Mr Parry said, explained by the distinction between the operation of these two clauses: day workers only get the extra day added to their leave if the public holiday falls on an ordinary working day, whereas shift workers get the extra day added to their leave, whether or not it falls on an ordinary rostered day.

[40] Giving clause 1(b)(ii) this construction also gives consistent effect and meaning to clause 1(b)(ii). This clause provides that if the public holiday falls on a Saturday or Sunday and falls within the period of annual leave, then no day is added (either way). The words "*This shall not apply to…"* only makes sense if *"this"* is a reference to consistent subject matter.

[41] The appellant submitted that on this basis, clause 1(b)(ii) is not about, and does not require, the automatic addition of 11 or 11.5 days leave for shift workers. To the extent that the Deputy President regarded it as doing so, she erred. It is this error which leads to the appellant's central complaint below:

there is no industrial or other basis for the imposition of a triple penalty, or a penalty on a penalty.

[42] Mr Parry submitted a number of further reasons in support of the appellant's position.[8] These have been taken into account but we do not consider it necessary that they be reiterated here.

[43] Mr White agreed that clause 2 of VI (Public Holidays) makes no provision for a shift worker's entitlement to public holidays. The only reference in the award to shift workers and an entitlement to public holidays is found in clause 1(b) of VI.

[44] In relation to the structure of this sub clause Mr White submitted:

> *"(i) Part VI(b)(i) provides for the subject to the clause, namely an employee's annual leave extension if public holidays fall within that period of leave. The description of employee in that subclause is generic and makes no distinction between shift workers and non shift workers.*
>
> *(ii) Subclause (ii), to avoid doubt about shift worker's entitlements to leave, provides an exclusion or exception to the subject to subclause (b)(i) The subject matter of subclause (b) remains the provision for annual leave to be exclusive of public holidays but has within it, in subclause (ii), an exclusion to the subject matter's application.*
>
> *(iii) Part VI(1)(b)(iii) provides that the subject of the clause ie that which is set out in (b)(i), shall not apply to statutory holidays which are observed on a Saturday or Sunday. Subclause (b)(iii) must apply to the subject of the clause rather than the exclusion contained within the clause. Further, and to the same end, subclause (b)(iii) can be seen to be a further exclusion to the subject of the clause provided."*

[45] Mr Parry replied that if the respondent's position is to be accepted, the words *"whether or not such holiday is observed on a day which, for that employee, would have been a rostered day off"* in 1(b)(ii) have no work to do. They only make sense as a qualification for sub clause (i).

[46] That a shift worker's annual leave is extended beyond five weeks is made doubly clear Mr White said by clause 1(i)(iii)(2) of part VI which provides:

> *"**PROVIDED** always that such allowance shall:*
>
> *be calculated on the basis of a maximum period in any one leave year as follows:*
>
> *…*
>
> *(2) in all other cases a period of four weeks' annual leave;*

[8] Submissions of the appellant para 60

> *where in the case of a shift worker, more than five weeks' annual leave accrues per annum the excess above five weeks shall be paid only as per projected shift roster;"*

[47] Mr White submitted that this clause could have no meaning if shift workers were not entitled to extended annual leave by reason of public holidays as there is no other provision in the award for "*more than 5 weeks leave"* to be accrued.

[48] There was considerable argument presented as to the relevance of past conduct. Mr White contends that there is relevant past conduct of the appellant which demonstrates a common understanding as to the operation of the clause. Whilst there is dispute as to the application of the clause, this dispute has arisen out of the unilateral conduct on the part of the employer to change what had been until the unilateral change, the common practice. Nonetheless, despite the unilateral change, relevant past conduct by both the appellant and the respondent exists to establish the fact that for over 30 years shift workers have had public holidays added to their annual leave. In a similar vein the award has been remade a number of times by consent, and on each occasion the relevant clauses have remained relevantly the same.

[49] The Deputy President said at para 57

> *"(57) I am grateful to the parties for the detailed submissions in relation to the history of the award and the way in which the provisions have been applied in the past. The provisions in question have been applied in different ways at different times. The union relied upon the exposition of Mr Jarman on behalf of the Tasmanian government before the AIRC, where it appears that (what) was being applied then was similar to what the union is contending for now. The employer has applied the provisions differently since that time, and has again changed its position as to how they should be applied. The union cited the Woolworths case as authority for the proposition that past conduct can be regarded when determining the meaning where there is clear understanding between the parties. It is apparent that clear understanding between the parties has been lacking at various times. Although of interest, the way the award was applied at a particular time in the past is not of great assistance as an aid to construction now."*

[50] We have examined the history of this vexed issue. There is little doubt that a practice of adding 11 or 11.5 public holidays has been in place for many years. What has not been in place is a common understanding of the purpose of this practice. In fact we conclude that the matter has been the subject of serious dispute for many years. We note for example the tenor of the Corporate Services Management Circular dated 29 May 1991.[9]

[51] In this circular management expressed frustration as to lack of progress in resolving the issue of shift worker annual leave entitlements. Further, "*the department has no alternative but address the problem administratively".* It appears that this included the abolition of over award payments *and* an adherence to award provisions. Of interest this included the following:

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[9] AB Vol 2 tab 7.

> *"(ii) Days that are granted to shift workers in lieu of public holidays (12.5 per annum) and added to the annual leave entitlement are to be paid at the ordinary time.*
>
> *In conjunction with point (ii) above public holidays worked are to be paid at the ordinary rate."*

[52] This appears remarkably similar in nature to the matter currently before us.

[53] We are of the view that the Deputy President correctly applied the *Woolworths* case. There is no evidence of relevant past conduct that demonstrates a common understanding of the operation of the clause.

[54] Regrettably the award contains numerous examples of terminology which are inconsistent and difficult to comprehend. For example, clause 2(a) of VI makes it clear that shift workers are not entitled to public holidays. Yet sub clause (c) of the same clause states:

> *"(c) Where an employee who is entitled to holidays in accordance with 2(a) hereof is required to work on any of the holidays mentioned in that subclause...he/she shall in the case of a shift worker be paid..."*

[55] We would not for one moment suggest that shift workers are not entitled to be paid the appropriate penalty rate when working on public holidays, but the above is an example of numerous drafting oddities, some of which were canvassed during this proceeding, which make the task of construction more difficult.

[56] These difficulties aside, we have decided that the construction advanced by the appellant to be the preferred interpretation. Clause 1(b) of VI must be read in the context of the heading "*Annual Leave Exclusive of Public Holidays."* Whilst the words used are something less than absolutely clear, they are internally consistent and also reflect an industrial standard which appears in many awards.

[57] It is simply a bridge too far to accept Mr White's submission that sub section 1(b)(ii) should be read as an exception or exclusion from the subject matter of sub clause 1(b). We are strengthened in this view by the words:

> *"whether or not such holiday is observed on a day which, for that employee would have been a day off'.*

[58] If we accept the respondent's submission, those words have no work to do and are quite superfluous.

[59] We conclude that the totality of sub clause (b) is dealing with public holidays occurring during a period when annual leave is actually being taken.

[60] We uphold appeal grounds 1 and 2.

Appeal Grounds 5 and 6.

[61] At para 75 the Deputy President said:

> *"The provisions are consistent with other provisions of the award. Shift workers are entitled to an additional week of annual leave for the social disadvantage of working on weekends and in addition they receive penalty payments when they do work on weekends."*

[62] In reaching this conclusion we assume the Deputy President was influenced by the definition of a shift worker in Clause 7 of Part 1:

> *"**'Shift worker'** means an employee whose ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays."*

[63] Clause 1(a)(ii) of VI provides that shift workers (as defined), are entitled to an additional 38 hours hours' leave.

[64] It does not necessarily follow that the two provisions are linked in the manner that the Deputy President apparently linked them. It is well established in industrial law that the additional weeks leave which continuous shift workers invariably enjoy is in compensation for the requirement to regularly work on both weekends and public holidays. See the *Shiftworkers case*[10] and the *Hospital Employees' case.*[11]

[65] We conclude that the Deputy President fell into error in limiting the additional weeks leave to weekends alone.

[66] We uphold appeal ground 6.

Appeal Grounds 7, 8 and 9

[67] At para 73 the Deputy President said:

> *"I agree with the union's submission that the two provisions are unrelated and should not be conflated. The concept of compensation for the social disadvantage of working unsociable hours is well established. I accept the union's submission that the payment of double time is for the social disadvantage of working on a public holiday. The purpose of the extended annual leave is to ensure that shift workers get a number of days off equivalent to the number of statutory holidays regardless of whether they were rostered to work on those days, or not. The purpose of this is to ensure that shift workers get 11 or 11½ days holidays with pay each year. The two entitlements are different and for different purposes."*

[68] The Deputy President was not asked to determine the validity or otherwise of clause 2(b)(ii) of VI. That was presented by both parties as a 'given' and the only issue was whether one award 'entitlement' could be offset against another. In this context the Deputy President's comments are essentially *obiter* in nature and are largely directed at another issue (offsetting).

[69] In the circumstances we detect no error.

[70] We reject appeal grounds 7 and 8.

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[10] (1972) AR (NSW) 633
[11] (1976) AR (NSW) 275

Appeal Ground 10

[71] The Deputy President said:

> *"In respect of the election, or otherwise, to take time off in lieu, the union argued that it should be the employee's election and the employer argued that the employee was unable to make such an election given, they said, that the award requires that the extended leave for statutory holidays shall be added to annual leave. Again, this is conflating two separate provisions. There is no requirement for the time off in lieu to be added on to annual leave.*
>
> *Mr White referred to the National Rates case where a Full Bench of the AIRC said that they were of the view that the taking of substitute days should be "a matter primarily for a nurse", with the caveat that if a nurse wished to take them at a time considered inappropriate by the employer, then it would be a matter that could be resolved through the grievance procedure.*
>
> *I am of the view that it should be the employee's right to elect (a) whether to be paid or to take time off in lieu and (b) when to take the day off, subject to operational requirements. I am, however, aware of the difficulties with shortages of nurses and rostering requirements. This should be a matter for further discussion between the parties, given that the days off in lieu are, as I have found, additional to the extended leave already provided for pursuant to clause 1(b)(ii) of Part VI."*

[72] The appellant submitted that the Deputy President gave no reasons for her decision. Any reliance on the *National Rates* case was misplaced in that the Full Bench did not address the question of the primary election, but instead went to the secondary matter of how a day, *already substituted,* should be taken.

[73] The task of the Deputy President was to construe the words in their industrial context, the relevant words being:

> *"and is granted time off in lieu thereof."*

[74] Mr Parry submitted that on no view of the word 'granted' can it be said that the individual nurse maintains an election. It makes no sense to speak of a nurse 'granting' time off in lieu to themself. It makes more sense to speak of the employer granting that time off in lieu to the individual nurse.

[75] Mr Parry said that where the drafters of the award intended to confer on an individual nurse an election, they did so in clear terms.

[76] Mr White submitted that Deputy President was exercising a jurisdiction pursuant to s29 (disputes) which is different to power given to interpret or make and vary awards.

[77] In the hearing below the Deputy President raised the question as to whether there are any facilitative provisions in the award relating to TOIL or double time for work on public holidays. The answer was 'No'.

[78] Mr White submitted that the appellant made scant submissions in the hearing below and should not now be permitted to run a different case in respect of this point.

[79] The task before the Deputy President was to resolve an industrial dispute, not interpret or vary the award. In the absence of facilitative provisions, it was open to the Deputy President to reach the conclusion she did.

[80] We agree with the submissions of Mr White. The Deputy President expressed a view of what should happen and suggested the parties confer.

[81] We detect no error in this approach.

[82] We reject appeal ground 10.

Appeal Grounds 11 to 14

[83] As these grounds relate to the orders issued by the Deputy President, it is unnecessary that they be addressed.

Appeal Grounds 16 and 21

[84] In light of our earlier findings it seems unnecessary to address these grounds, at least at this stage. We are not, however, persuaded that the Deputy President fell into error in making orders retrospective to 1 January 2006.

[85] The extent, if any, of any retrospective liability is unknown at this stage and will, we suspect, turn largely on the outcome of the question relating to offsetting a payment in excess of award requirements against an award entitlement.

Appeal Grounds 15, 17, 18, 20 and 23

[86] These grounds were abandoned at the time the Grounds of Appeal were amended.

Appeal Ground 19

[87] This ground was not pursued.

Appeal Ground 22

[88] There were no further grounds advanced during the hearing.

Offsetting Payments in Excess of Award Requirements Against Award Entitlements

[89] In light of our findings in this matter, additional days granted pursuant to clause 1(b)(ii) of Part VI, other than days occurring during a period of annual leave, are clearly in the nature of payments in excess of award requirements due to an incorrect interpretation.

[90] The appellant has urged that we issue orders providing for the ‘set-off’ of these payments against any retrospective liability for penalty rates and/or additional leave arising out of subclause 2(h)(i) and (ii)of Part V.

[91] Having regard to the history of this matter, we are satisfied that the employer, whether explicitly or implicitly, has applied the additional days arising from clause 1(b)(ii) of VI against the time off in lieu obligation arising out of Clause 2(h) of Part V. We refer in particular to the Corporate Services Management Circular dated 29 May 1991, coupled with the Baker statement. (paras 9 and 10).

[92] Mr White reserved the right to respond further to this question when the Commission had made a determination about the characterisation of payments and past accrued benefits. We will allow that opportunity. We will not decide this question until the parties have been given the opportunity to make further submissions.

[93] Order

1. We uphold the appeal in so far as it relates to public holidays and annual leave.

2. Pursuant to Section 71(13)(a) of the *Industrial Relations Act 1984* we hereby revoke Orders Number 1, 3 and 4 made by Deputy President Shelley in T12671 of 2006 on 30 October 2009.

3. Order number 2 shall stand subject to "*20 November 2009"* being replaced with "*1 March 2011"*.

4. Whether or not further orders are required will be determined following the opportunity for further submissions in accordance with this decision.

Directions

1. The respondent is to provide any further written submissions in relation to offsetting (para 92) not later than 18 February 2011.

2. The appellant is to provide any written submissions in response not later than 25 February 2011.

3. The hearing will re-convene if necessary on 24 March 2011 at 10.30am to hear any further argument the parties may wish to present in relation to this issue.

P L Leary
PRESIDENT

Appearances:
Mr F Parry and Mr M Follet for the Minister administering the State Service Act 2000
Mr E White for Australian Nursing Federation Tasmanian Branch

Date and place of hearing:
2010
March 24
August 23, 24
Hobart