

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

S 29(1) application for hearing of an industrial dispute

Marlene Joyce Quinn

T14581 of 2018

and

Minister administering the State Service Act 2000/ Department of Primary Industries, Parks, Water and Environment

DEPUTY PRESIDENT ELLIS

17 August 2018

Industrial dispute-award interpretation- shift worker –span of hours-overtime for shift work-night shift penalty-change of shift commencement time-application dismissed

DECISION

Introduction

[1] On 19 February 2018, Marlene Quinn (the Applicant) applied to the President, pursuant to s 29(1) of the *Industrial Relations Act* 1984 (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (Department of Primary Industries, Parks Water and Environment) (DPIPWE) (the Respondent) arising from a dispute in relation to an alleged breach of the *Tasmanian State Service Award 2000*, (the Award).

[2] The Applicant, with representation by the Community and Public Service Union (Tasmanian Branch) (CPSU), asserted that the DPIPWE have not compensated her for the hours worked outside of the 'span of hours' through either the payment of overtime rates or a shift allowance as per the Award entitlements. They are seeking retrospective payment for all relevant shifts, commencing prior to 7:00am dating back to 5 August 2009.

Background

[3] Ms Quinn is a Biosecurity Inspector/Officer, whose permanent employment is covered by the Award and her classification is Band 3 of the General Stream. She is employed as a full time shift worker, working 36.75 hours per week in accordance with an approved roster. She commenced employment in August 2006.

[4] Ms Quinn works to the Shift Worker Running Sheets which provide the running roster and are produced on a six monthly basis. She has varied start and finish times on that roster in the range outlined in the six shift roster lines.

[5] The rostered shift times are¹:

- 05:15-13:36 only for double sailings
- 05:45-14:06 (or as req SPOT Double sailings) Mon-Fri
- 06:00-14:21 (or as req SPOT Double sailings) Mon-Fri
- 08:00-16:21 Mon-Fri
- 09:39-18:00 Mon-Fri
- 12:39-21:00 Mon -Fri

[6] Ms Quinn is paid the Afternoon Shift penalty of 15% for the shift commencing at 12:39pm and concluding at 21:00pm. The payment for shifts commencing at 8:00am, 9:39am and 12:39pm are not in dispute.

[7] Ms Quinn is not rostered to work weekends, but may by mutual agreement work additional hours to cover operational requirements on weekends in Burnie, for which she is paid overtime rates.

[8] There is no flexible working arrangements between the parties, however there are other DPIPWE employees working with fruit fly who are working under such arrangements.

[9] A series of conciliation conferences have been held between the parties but the dispute remained unresolved. The hearing proceeded in Devonport on 26 June 2018.

The Applicant's case

[10] The Applicant is regularly rostered to perform duties commencing prior to 7:00am, and it is alleged the Respondent has failed to remunerate the Applicant in accordance with the Award.

[11] The Applicant alleges the span of hours is 7:00am to 7:00pm and she has been paid the normal hourly rate of pay for working shifts commencing at early start times of 5:15am, 5:45am and 6:00am.

[12] The Applicant submitted there are two Award provisions that provide the Respondent with a mechanism to compensate the Applicant for work on the disputed shifts; a shift penalty or overtime rates.

[13] The Applicant is seeking payment to compensate all work performed outside the 7:00am to 7:00pm span of hours by treating shifts commencing before 7:00am as overtime, to be paid at the rate prescribed in Part V1, Clause 3(k), Payment of Overtime-Day Workers, which provides:

"Overtime is to be paid at the following rates:

(i) Monday to Friday inclusive – at the rate of time and a half of the employee's normal salary rate for the first three hours, and double time thereafter;..."

¹ The shifts rostered to commence at 05:45am or 06:00am may change commencement times for double sailings to an earlier start but this is not the rostered commencing time specified on the roster.

In the alternative, the Applicant is seeking a Night Shift penalty of 15% for the whole shift for those shifts which commenced prior to 7:00am.

The Respondent's Case

[14] The Respondent submitted that the Award does not provide a span of hours for shift workers and it only applies for dayworkers. It was submitted there has never been a span of hours for shift workers in the Award nor in other Tasmanian State Service awards covering shift workers. The other awards refer to 'ordinary hours' of a shift worker, usually 8 hours in a day, however, in this Award, it was submitted, there are no definitions prescribed.

[15] The Respondent relied on s.38(1) of the SS Act which states:

"...the terms and conditions of employment of employees are to be those specified in an award...or, if no such award is in force, are to be determined by the Employer".

[16] It was submitted that there is an Award in force outlining the terms and conditions of employment, which does not provide for a "span of hours" or "ordinary hours" for shift workers and there is no ability for these terms "...to be read in to the Award when it is simply not there."²

[17] The Respondent submitted that "...the Applicant is not entitled to overtime for working her ordinary rostered hours, unless these hours exceed her full time hours of 73.5 hours per fortnight."³

[18] Additionally, the Respondent submitted that there is no authority in the Award to pay an afternoon or night shift penalty rate to the shifts in dispute, which commence at 5:45am and 6:00am.

[19] In summary, the Respondent submitted there is no authority to pay either a shift allowance or overtime for rostered shifts commencing at either 5:15am, 5:45am or 6:00am and s.38(1) of the SS Act does not allow the Commission to imply terms into an Award which are not already there.

The Legal Framework

[20] The Award contains a number of provisions of relevance to the determination of this matter. They are:

"7. Definitions

'Ordinary Hours of Work' means the ordinary hours of work for a full time employee are 36¾ hours per week. However where a full time employee is required by an industrial instrument to work 38 hours per week, 38 is to be substituted for 36¾ [or fraction thereof] in all relevant parts of this award.

8. Employment Categories

² PN 12 Respondent's Outline of Submission

³ PN 41 Ibid

'Permanent full-time employee' means a person who is appointed to work the full ordinary hours of work each week (as defined) and who is appointed as such in accordance with section 37(3)(a) of the *State Service Act 2000*."

[21] Part VI provides provisions relating to day work, as follows:

"PART VI – HOURS OF WORK AND OVERTIME FOR DAY WORK

1. ORDINARY HOURS OF WORK FOR DAY WORK

(a) The ordinary hours of work for full-time employee are 36 hours and 45 minutes per week between the hours of 7:00am and 7:00pm each day Monday to Friday inclusive...

3. OVERTIME FOR DAY WORK

(a) The employer may require an employee to work reasonable overtime in accordance with the conditions of this clause.

(b) Overtime means all time worked in excess and outside of an employee's normal ordinary hours of duty which includes:

(i) time worked in excess of 7 hours and 21 minutes on any one day Monday to Friday inclusive; or

(ii) Time worked outside the span of hours of 7.00am to 7.00pm; or

(iii) Any time worked on a Saturday, Sunday or Holiday with Pay.

(c) Subclause (b)(i) of this clause does not apply to employees to whom Clause 2 – Flexitime for Day Work applies. These employees may work up to 10 hours in any one day as ordinary hours.

(d) Employees who have arrangements in accordance with Part V – Workplace Flexibility Clause 3 – Workplace Flexibility Arrangements may agree to vary any of the provisions of subclause (b).

(e) This clause does not apply to employees covered by Part VII - Special Provisions for Shift Work. Provisions for overtime for these employees are included in Part VII.

(f) An employee is to be given reasonable notice of the requirement to work overtime, where practicable.

(g) No payment is to be made for overtime worked unless the work was required by the employer. "Authorised" means a verbal or written requirement to undertake work that is recognised as overtime or an instruction that necessitates work outside of or in excess of an employee's ordinary hours of duty.

...

(j) An employee may refuse to work overtime in circumstances where working overtime would result in the employee working hours that are unreasonable having regard to:

(i) any risk to the employee's health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace;

(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and

(v) any other relevant matter....

(k) Payment of Overtime – Day Workers

Overtime is to be paid at the following rates:

(i) Monday to Friday inclusive – at the rate of time and a half of the employee's normal salary rate for the first three hours, and double time thereafter;

(ii) Saturdays and Sundays – at the rate of double the employee's normal salary rate for all time worked;

(iii) Holidays with pay – at the rate of double time and a half of the employee's normal salary rate for all time worked.

No employee is to receive in aggregate more than the equivalent of double time and a half of the employee's normal salary rate.

[22] Part VII of the Award sets out provisions for shift work, as follows:

PART VII – SPECIAL PROVISIONS FOR SHIFT WORK
1. SATURDAY, SUNDAY AND HOLIDAY WORK

(a) Saturday Work

...

(b) Sunday and Holiday Work

...

The above rates are to be in substitution for, and not cumulative upon the shift allowances more particularly set forth in Clause 2 - Afternoon, Night Shift Penalty - of Part VII – Special Provisions for Shift Work.

PROVIDED that where a shift commences before midnight on a Sunday or a holiday and where the major portion of such shift falls on the following day the time so worked before midnight does not entitle an employee employed on such a shift to the Sunday or holiday rate.

PROVIDED FURTHER that the time worked by an employee on a shift commencing before midnight on a day preceding a Sunday or holiday and extending into a Sunday or holiday is to be regarded as time worked on such

Sunday or holiday; where a shift worker is required to work on a holiday as herein prescribed and is granted time off in lieu thereof the above penalty rate does not apply;

for the purpose of Part VII – Special Provisions for Shift Work - Clause 3 – Overtime for Shift Work, Part VII - Clause 2 - Afternoon, Night Shift Penalty, Part VI – Hours of Work and Overtime for Day Work - Clause 4 - Availability and Recall and this clause '**shift worker**' means an employee who is regularly required to undertake shift work (other than overtime) in accordance with a roster approved by the employer.

[23] The following clauses found in Part VII of the Award also relate to provisions for shift work and the above definition of 'shift worker' applies to the following clauses:

2. AFTERNOON, NIGHT SHIFT PENALTY

An employee regularly rostered for duty on afternoon or night shifts is to be paid 15 percent more than the normal salary rate for such shifts.

3. OVERTIME FOR SHIFT WORK

An employee engaged as a shift worker is entitled to the conditions prescribed by Clause 3 – Overtime - of Part VI - Hours of Work and Overtime for Day Work - of this award, except where such conditions are in conflict with those set out below, in which case this clause will apply.

An employee required to work shift work for all time worked in excess of or outside the ordinary working hours prescribed, or on a shift other than a rostered shift is:

- (a) if employed on continuous work (as defined) be paid at double his/her ordinary salary rate;
- (b) if employed on other than continuous shift work be paid from Monday to Friday, inclusive, at the rate of time and a half of his/her normal salary rate for the first three hours and double time thereafter, and for overtime worked on his/her rostered day off or on a Saturday, Sunday or a public holiday, at the rate of double his/her normal salary rate, except in each case when the time is worked either by arrangement between the employees themselves or for the purpose of effecting customary rotation of shifts.

PROVIDED that when not less than eight hours notice has been given to the employer by a relief employee that he/she will be absent from work and the employee whom he/she should relieve is not relieved and is required to continue to work on his/her rostered time off, the unrelieved employee is to be paid double time.

The Evidence before the Commission

[24] The Applicant provided various documents to the Commission, including her application with the following attachments:

- Statement in support of the application drafted by CPSU representing the Applicant and signed by Ms Quinn, dated 25 August 2017.

- Overtime Calculation spreadsheet for period 11/6/09 to 19/6/17;
- Shift Work Running Sheets for periods 20/6/16-12/12/16 and 13/2/17-26/6/17;
- Timesheets for various periods 24/6/09-27/3/13.

Further documents consisted of:

- CPSU filed submissions on behalf of the Applicant in relation to the hearing dated 30 May 2018 ;
- Statement from Ms Quinn, dated 28 May 2018;
- Statement of Duties (SOD); Quarantine Officer, 702284, dated 29 May 2009 in which the special conditions of employment in the current SOD, which stated "or after hours", was not included.

[25] The Applicant gave sworn evidence in which she confirmed her position in relation to the various assertions contained in those relevant documents. I found her evidence to be honest and succinct.

[26] Ms Quinn stated that as a shift worker, the core hours were 7:00am to 7:00pm and under cross examination elaborated⁴:

"MS JONES: Can you explain why you believe the hours of 7 am to 7 pm are your core hours?---That's what I've always been told, and our charging guidelines are always between 7 am and 7 pm, so anything we work after or before 7 am or 7 pm we charge differently. So – yes, so I've always - - -

Who is that charged for, sorry?---

MS QUINN: Like, so any charges – say if we do an inspection before 7 pm or after 7 pm. The person we're doing the inspection for incurs overtime or an extra charge on their charge because it's out of – outside of our core hours.

MS JONES: And so are those core hours that you're referring to stipulated anywhere?---Yes. Well, in the award, I believe they are – I don't – stipulated, but, yes – and that's what we've always been told as a – as a staff member: that our core hours are 7 to 7."

[27] Ms Quinn provided evidence that she understood that she received the afternoon penalty rate for the shift concluding at 21:00pm as it concluded outside the span of hours. She provided evidence that she previously did receive an overtime penalty payment for work commencing before 6:00am for around twelve months around 2006, which stopped when there was a rewrite of the Award:⁵

"MS JONES: Now, during your employment with DPIPWE, have you ever received either a shift penalty or overtime for those shifts commencing prior to 7 am?---

"MS QUINN: Yes. When I first started with Quarantine, as it was then called, when we worked before 6 o'clock, we used to get a 50 per cent – I think it was overtime. I don't think it was a shift penalty. I'm pretty sure it was 50 – 15 per cent overtime for working before 6 o'clock."

And was that paid for your entire shift or just for - - -?

⁴ Transcript, Page 14, Lines 7-20

⁵ Transcript, Page 11, Lines 20-30.

MS QUINN: ---Just for the time before 6 o'clock.

Okay. Thanks --?---Yes.

MS QUINN: That was overtime."

[28] In cross examination, Ms Quinn noted a change of completion time for a shift resulted in the payment of penalties;⁶

"MS PETERSON: You say you were paid a 15 per cent shift allowance as the shift concludes outside of core hours --?---Yes. And when our - - -

- - - so I was just trying to understand about --?---

MS QUINN: And when our afternoon shift actually changed from 10.39 to 7 o'clock because we didn't need to work as late our shift penalty stopped because we were working – we were finishing before 7. So – and as soon as it went back to 12.39 to 9 o'clock our shift penalty was paid again."

[29] Ms Quinn also provided unchallenged evidence that colleagues working in Launceston are paid the 15 per cent night shift penalty for commencing work before 7:00am, when they start between 3:00am and 4:00am and there is no on a flexible working arrangement in place.

[30] She originally stated in cross examination that 5:45am was "the morning" but in reply, noted that she believed her shifts commencing before 7:00am were "nearly a night shift because of the time we start."⁷

[31] Ms Quinn provided an explanation of how the change of rostered start time process worked due to double sailings and noted there could be short notice change of less than eight hours but normally the change is known up to three or four months in advance. She stated:⁸

"MS JONES: What exactly happens, and how much notice do you get? Can you explain what happens when you start earlier than you're rostered?---Yes. Like, usually, the roster is done probably six months in advance.

MS JONES: Right?---Yes.

MS QUINN: roster?---Yes. Usually – like, we've just had a new one done. So we usually are aware, but, obviously – when we're going to start early, but, obviously, with staffing requirements or – or fruit fly, for instance, that we've had recently, it – it does change quite frequently.

MS JONES: And so how much notice would you have, knowing that you're going to start earlier than 0600?

MS QUINN:---Sometimes only 24 hours, yes, just depending on, yes, requirements."

⁶ Ibid, Page 15 Lines 39-45.

⁷ Transcript, Page 16, Lines 24-25.

⁸ Ibid, Page 13, Lines 10-14

[32] The Respondent provided an outline of submissions which included various documents including:

- Letter of appointment from Karen Steenhuis, HR Management, DPIPWE, dated July 2006;
- Fixed Term Instrument of Appointment, dated 28 July 2006;
- Statement of Duties; Biosecurity Inspector, DPIPWE, dated 20 January 2017.

A timesheet for the period ending 13 April 2011⁹, was tendered to demonstrate the payment of overtime rates for hours worked in excess of the ordinary hours and the payment of a 15% afternoon shift penalty paid for the shifts finishing at 9:30pm. This was not contested.

No witness evidence was relied on by the Respondent.

The Applicant's submissions

[33] The Applicant submitted that the shifts commencing before 7:00am are outside the span of hours and therefore should attract compensation, either as a shift penalty or overtime.

[34] The Applicant submitted that one mechanism would be to treat time worked outside of the span of hours, ie time before 7:00am as overtime. It was submitted that in the absence of conflict or inconsistency that would otherwise prevent the application, the following Award clause should be relied upon:

"PART VI – HOURS OF WORK AND OVERTIME FOR DAY WORK

1. ORDINARY HOURS OF WORK FOR DAY WORK

(a) The ordinary hours of work for full-time employee are 36 hours and 45 minutes per week between the hours of 7:00am and 7:00pm each day Monday to Friday inclusive."

[35] The Applicant submitted the following overtime provisions should be considered:

"PART VII- SPECIAL PROVISIONS FOR SHIFT WORK,

3. OVERTIME FOR SHIFT WORK:

An employee engaged as a shift worker is entitled to the conditions prescribed by Clause 3 – Overtime - of Part VI - Hours of Work and Overtime for Day Work - of this award, except where such conditions are in conflict with those set out below, in which case this clause will apply.

An employee required to work shift work for all time worked in excess of or outside the ordinary working hours prescribed, or on a shift other than a rostered shift is:

(a) if employed on continuous work (as defined) be paid at double his/her ordinary salary rate;

⁹ Exhibit R2

(b) if employed on other than continuous shift work be paid from Monday to Friday, inclusive, at the rate of time and a half of his/her normal salary rate for the first three hours and double time thereafter, and for overtime worked on his/her rostered day off or on a Saturday, Sunday or a public holiday, at the rate of double his/her normal salary rate, except in each case when the time is worked either by arrangement between the employees themselves or for the purpose of effecting customary rotation of shifts."

[36] The Applicant noted there was no requirement to work shift work in excess of the ordinary hours or on a shift other than a rostered shift, and submitted, therefore there was no conflict and the overtime provisions and Part VI- Hours of Work and Overtime for Day Work are engaged.

[37] The Applicant submitted the IR Act set out the Tasmanian industrial context and s.49(5) provides for an entitlement to be paid overtime for any overtime worked in accordance with the relevant Award. This was only limited and does not apply pursuant to s.49(6):

"(a) if the employee is employed on a casual basis; or
(b) if the award or registered agreement or the disciplinary provisions of an Act otherwise provide.

[38] It was submitted the industrial purpose of overtime payments was to "compensate employees for working unsociable, irregular, unpredictable or additional hours."¹⁰

[39] The Applicant relied on the principles of Award interpretation summarised by DP Abey in *ANF v MASSA* (T13858 of 2011), which set out¹¹:

"...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 at 517-19(Burchett J, Drummond J agreeing)).

It was submitted that the ordinary language of Part VII- Special Provisions for Shift Work, Clause 3, Overtime for Shift Work, lends itself to the interpretation that as no conflict arises, three circumstances arise for an entitlement to overtime:

"...where a shift worker has worked either¹²:

- (a) In excess of ordinary working hours
- (b) Outside of the normal span of hours; or
- (c) On a shift other than a rostered shift."

[40] On this basis the Applicant, submitted that the work outside of the span of hours, being prior to 7:00am, should be treated and paid as overtime at the relevant Award rate, which it was submitted is time and a half as per Part VI Clause 3(k), which provides:

"Payment of Overtime – Day Workers
Overtime is to be paid at the following rates:

¹⁰ Para 23 Exhibit A1

¹¹ Ibid, para 24

¹² PN26, Applicant's Outline of Submissions.

(i) Monday to Friday inclusive – at the rate of time and a half of the employee's normal salary rate for the first three hours, and double time thereafter;...”

[41] The second mechanism submitted in the alternative, would be the payment of a shift penalty for the whole shift. The Award clause providing shift penalty rates states:

“PART VII – SPECIAL PROVISIONS FOR SHIFT WORK
2. AFTERNOON, NIGHT SHIFT PENALTY

An employee regularly rostered for duty on afternoon or night shifts is to be paid 15 percent more than the normal salary rate for such shifts.”

[42] The Applicant is paid an afternoon shift penalty of 15 percent for rostered shifts finishing after 7:00pm for all hours worked. The Applicant submitted that the same shift penalty of 15 percent should be paid for all shifts commencing before 7:00am, which would be consistent with the 15% night penalty paid to the Launceston colleagues.

[43] The Applicant relied on the principles of Award interpretation summarised by DP Abey in *ANF v MASSA (T13858 of 2011)*, which set out¹³:

“...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 a 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).”

[44] The Applicant submitted that reliance on the *General Conditions of Employment Award* was irrelevant because the terms are not restated and:¹⁴

“....clearly didn’t survive the review process and are irrelevant to the interpretation and construction of the current Award.”

[45] It was submitted that to avoid injustice or inconvenience, the payment of a 15 per cent shift penalty for the whole shift would be appropriate compensation.

The Respondent’s submissions

[46] The Respondent submitted that the Award does not provide a span of hours for shift workers and that the span of hours provided in Part VI (I) Ordinary Hours of Work for Day Work, only applies to day workers. It was submitted there has never been a span of hours for shift workers in this Award or other Tasmanian state service awards covering shift workers, who work in accordance with the roster and there is no ability to read this into the Award, when it is not there.

[47] The Respondent submitted the Award in force outlines the terms and conditions of employment pursuant to s.38(I) of the *State Service Act 2000* (SS Act) which states:

“...the terms and conditions of employment of employees are to be those specified in an award...or, if no such award is in force, are to be determined by the Employer”.

¹³ PN16, Exhibit A1.

¹⁴ Line 23-34, p 18 Transcript.

Response in relation to an overtime payment

[48] The Respondent submitted that the disputed shifts are rostered shifts and worked as ordinary rostered hours which do not attract overtime payments, unless these hours exceed the full time hours of 73.5 hours per fortnight.

[49] The Macquarie Dictionary Seventh Edition definition of overtime was relied on, which provides:

“**..overtime**-time during which one works before or after regularly scheduled working hours; extra time”

[50] The Respondent disputed the Applicant’s reliance on Part VI Clause 3-Overtime for Day Work, and contended the clause does not apply to shift workers, rather only to day work as implied. Part VI Clause 3(e) states:

“This clause does not apply to employees covered by Part VII – Special Provisions for Shift Work. Provisions for overtime for these employees are included in Part VII.”

[51] The Respondent submitted:¹⁵

“It is not open to the applicant to read into the Award the provisions relating to overtime for day workers and apply that to a shift worker using the day worker span of hours provisions.”

[52] While the Respondent submitted the Award did not provide a definition for a shift worker, and relied on the predecessor Award, the *General Conditions of Employment Award No. 2 of 2007*, which defined¹⁶:

“Shift worker” means an employee who is regularly required to undertake shift and/or weekend work (other than overtime) in accordance with a roster approved by the controlling authority concerned.”

[53] It was noted that the “spirit and intent of shift work remains the same in the Award” and referred to matter *Australian Communication Exchange Limited v Deputy Commissioner of Taxation (2003)* and *T13572 of 2009* Interpretation of Award Miscellaneous Workers (Public Sector) Award.

[54] Relying on Part VII, Clause 3 –Overtime for Shift Work of the Award, it was contended that there are only two conditions requiring the overtime penalty to be paid; the first being “...for all time in excess of or outside the ordinary hours prescribed...” or “on a shift other than a rostered shift...”, which the Respondent stated neither of which apply in this case.

[55] The Respondent concluded that the disputed shifts are rostered and not in excess of the Applicant’s fortnightly ordinary hours, therefore the overtime provisions for shift workers do not apply.

¹⁵ PN 44, Exhibit R1

¹⁶ PN 46, Ibid

Response in relation to a shift penalty

[56] In reply to the Applicant's second argument, the Respondent submitted that the majority proportion of the disputed shifts fall within the morning and they are not afternoon or night shifts so the Afternoon, Night Shift Allowance in Part VII, Clause (2) of the Award does not apply.

[57] While there is no definition in the Award of the "afternoon shift" or the "night shift", the Respondent referred to the definitions in the *General Conditions of Employment Award 2007*, which became the *Tasmanian State Service Award* in 2008. It was noted, for reasons unknown, these definitions did not transfer to the new Award. It stated:

'Afternoon Shift' means a shift terminating after 7.00 pm and at before midnight.

'Night Shift' means a shift terminating after midnight and at or before 8.00 am.

[58] The Respondent submitted "these definitions are a clear indication of the Minister's position for Part VII (2) of The Award."¹⁷ The wording for the Afternoon, Night Shift penalty is identical to that in the *General Conditions of Employment Award 2007*.

[59] The Respondent compared the *Health and Human Services Award* definitions for Afternoon, Night and Day shifts, where the 'Day Shift' means a shift commencing at or after 6am and terminating at or before 6pm and is worked in accordance with a roster and includes Saturdays and Sundays.

[60] In terms of Award interpretation, the Respondent referred to the decision of the Full Court of the High Court in *Australian Communication Exchange Limited v Deputy Commissioner of Taxation (2003)* at 56 states:

"Even if the constitutional problem is put to one side, the practical difficulties of incorporating by reference the requirements of a state industrial award remain. One of those difficulties is that such awards are not always drafted with the precision of language and logic of expression that one expects to find in federal legislation. Common experience teaches that the provisions of industrial awards are frequently hammered out between lay negotiators. They are typically submitted to tribunals, also often comprising lay members. Quite frequently they are drafted in factious and urgent circumstances. It follows that such provisions often present difficulties of construction that have to be resolved or repaired in later disputes by tribunals paying close attention to the purpose and spirit of the award, rather than to the overly nice construction of its ambiguous language."

[61] Reference was also made to matter *T13572 of 2009*, an interpretation of the Miscellaneous Workers (Public Sector) Award, where President Leary stated at 71:

"I have had regard to all of the authorities the parties have referred me to and they would indicate that the general approach to adopt in an interpretation of an award provision is common sense and the ordinary and general meaning of the words found in the relevant provision. Further it is necessary to consider the provision in the context in which it was initially agreed or determined."

¹⁷ Para 22 Exhibit R1.

[62] Reference was made to matter *ANF v MASSA (T13858 of 2011)* at 66, where by Deputy President Abey, stated:

"The starting point in determining the meaning of an industrial instrument, including a registered agreement, must be the actual words used in the provision under consideration."

The Respondent submitted the terms "afternoon" and "night" speak for themselves. In the above matter, Deputy President Abey then stated:

"However, the provision should be interpreted in light of the industrial context and purpose in which it applies."

[63] The Respondent submitted¹⁸:

"...the wording is clear enough and not ambiguous, if you move to the context, the definitions that were originally drafted as part of the General Conditions of Employment Award 2007 should be considered as part of the industrial context of that clause."

[64] The Respondent submitted that the ordinary and general meaning of the key words, 'afternoon' and 'night' must be considered and the disputed shifts are not afternoon or night shifts as they are "clearly morning shifts"¹⁹

[65] It was further submitted that the spirit and intent of the Award carries over from the predecessor Award, noting the clause remains the same and assuming the intent has not changed and the clause is aligned with the previous definitions. The disputed shifts do not cease within the timeframes of 7:00pm and 8:00am.

[66] The Respondent submitted that the Applicant receives payment for the Afternoon, Night Shift penalty when "...when she works a shift that falls within the scope of this provision"²⁰ referring to the shift which finishes at 9:30pm.

[67] The Respondent submitted there is no penalty that can be paid on shifts commencing at 5:45am or 6:00am, as these "...shifts do not fit the commonly understood definitions of afternoon or night shift..."²¹ and it is not possible to infer a meaning to a new form of penalty which is not in the Award.

[68] In conclusion, the Respondent submitted there is no authority to pay either the afternoon or night shift penalty for shifts commencing at 5.45am or 6:00am or the Overtime for Day Work clause relating to work outside the span of hours for day work, as that clause is not applicable to shift workers. It was submitted that s.38(1) of the IR Act does not allow the Commission to imply terms into an Award, unless already present.

CONSIDERATION AND FINDINGS

[69] The question for determination is confined to whether a shift worker has an entitlement to the span of hours between 7:00am and 7:00pm, and if so, whether she is subsequently entitled to penalties for hours worked outside this span? The relevant

¹⁸ Line 10-15, p 8, Transcript.

¹⁹ PN 30, Exhibit R1.

²⁰ PN 33, Ibid.

²¹ PN 34, Ibid.

clauses providing the obligations and entitlements are found in the Award, some of which have been cited by the parties and are summarised in the legal framework section.

[70] The beginning point is the application of the relevant clauses as provided in the Award. There is a myriad of industrial case law over time to assist in the framework for interpretation and developed principles to be applied.

[71] The words of the clauses in the Award must be given their plain meaning and only if ambiguous, interpretation requires the examination of the surrounding circumstances. (*Codelfa Construction Pty Ltd V State Rail Authority of NSW*)²²

[72] Both the Applicant and Respondent referred to the decision of President Abey, in T14366 of 2015²³ where he outlined the principles and more recent authorities that apply in interpreting industrial instruments, as summarised by the Full Bench of the Tasmanian Industrial Commission in matter T13986 which included:

- 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))
- ...
- 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

²² [1982]HCA 24;(1982) 149 CLR 337.

²³ Para 7, page 3.

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)

- 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)"

...

- The meaning of an industrial agreement, like the meaning of a contract, is to be determined by what a reasonable person would have understood it to mean having regard not only by the text but also by surrounding circumstances known to the parties and the purpose and object of the transaction. (*Toll [FGCT Pty Ltd v Alphaform Pty Ltd]* [2004] 219 CLR 165 at 41.)
- Evidence of surrounding circumstances is admissible to assist in the interpretation of the clause language where the clause is ambiguous or susceptible of more than one meaning. (*Codelfa Constructions Pty Ltd v State Rail Authorities of NSW* [1982] 149 CLR 337 at 352.)"

[73] In *The Australian Meat Industry Employees Union v Golden Cockerel Pty Limited*²⁴, the Full Bench of the Fair Work Commission more recently confirmed the approach of consideration of the ordinary meaning of the words within the context and purpose of the provisions:

"The general approach to the construction of instruments of the kind at issue here is set out in the judgment of French J, as he then was, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*²⁵ (Wanneroo):

"The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '... the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken' — *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518 (Burchett J); *Australian Municipal, Clerical and Services union v Treasurer of the Commonwealth of Australia* (1998) 80 IR 345 (Marshall J). "

²⁴ [2014] FWCFB 7447 at para 19-20

²⁵ (2006) 153 IR 426

To this we add the oft-quoted observations of Madgwick J in *Kucks v CSR Limited* [18] that a narrow pedantic approach to interpretation should be avoided, a search of the evident purpose is permissible and meanings which avoid inconvenience or injustice may reasonably be strained for, but:

"... the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some interiorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."

[74] In this decision, the Full Bench referring above to *Kucks*, confirmed at 21 that:

"Although their Honours were each dealing with the proper interpretation of an award, the same principles are apt to apply to the interpretation of enterprise agreements"

[75] In a recent decision relating to the construction of agreements, Mortimer J in *Polan v Goulburn Valley Health*²⁶ stated (omitting citations):

"In relation to industrial instruments, considerations of context include the wider industrial circumstances in which a particular agreement has been negotiated and concluded, taking particular account of the "practical frame of mind" that might often be brought to its drafting and of the "industrial realities" in which such instruments are drafted. Examination of the history of industrial instruments is as justified as examination of legislative history. It is critical that construction of industrial instruments should contribute to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the industrial instrument. Although it has been held that ss 15AA and 46 of the Acts Interpretation Act 1901 (Cth) do not impose obligations to construe the instrument in a way which would best achieve the objective of the instrument (those provisions having been held to be inapplicable to enterprise agreements), it is nevertheless clear from the authorities to which I have referred that a purposive approach to the construction of the terms of an industrial instrument is required just as much as it is required in construing a statute."

[76] In a recent decision, *T14532 of 2017*, President Barclay affirmed the principles of the construction of industrial instruments set out by the Fair Work Full Bench under the *Fair Work Act 2009* in *AMWU v Berri Pty Ltd*²⁷. The Full Bench stated:

"2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.

3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

²⁶ [2016] FCA 440

²⁷ [2017] FWCFB 3005.

4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aid the interpretation of the agreement.

6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:

- (a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
- (b) notorious facts of which knowledge is to be presumed;
- (c) evidence of matters in common contemplation and constituting a common assumption.

7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.

8. Context might appear from:

- (a) the text of the agreement viewed as a whole;
- (b) the disputed provision's place and arrangement in the agreement;
- (c) the legislative context under which the agreement was made and in which it operates.

9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.

10. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties."

[77] Having considered the authorities, I consider that all these decisions, provide guidance in the task ahead. The parties did not raise the question of any ambiguity in the words of the relevant clauses.

[78] To address the questions in dispute by the parties, consideration of the whole award and how the clauses interact to create the rights and obligations of the parties and the context is required. However, the first consideration is to the plain, ordinary meaning of the words in the relevant clauses.

Should shift workers have an entitlement to the 'span of hours' of 7:00am to 7:00pm or does the roster provide the 'span of hours'?

[79] Firstly the clauses relating to day work and shift work are found under different parts of the Award; Part VI-Hours of Work and Overtime for Day Work and Part VII-Special Provisions for Shift Work. The drafting of different parts to describe similar

provisions relating to hours of work and overtime provisions indicates a clear intent to separate the relevant provisions for day work and shift work. The provisions under consideration in this matter relate to shift work.

[80] While there is no definition for the span of hours in the Award, Clause 1 of Part VI, Hours of Work and Overtime for Day Work, states the ordinary hours of work for day work are between the hours of 7:00am and 7:00pm each week day. In this part, Clause 3(b) states that work outside this span of hours attracts overtime payments for those employed to work day work. However, Clause 3(e) states:

"This clause does not apply to employees covered by Part VII-Special Provisions for Shift Work. Provisions for overtime for these employees are included in Part VII."

[81] In Part VII, Special Conditions for Shift Work, Clause 1- Saturday , Sunday and Holiday Work, Clause 2-Afternoon, Night Penalty, Clause 3-Overtime for Shift work and Part VI- Clause 4-Availablity and Recall, the definition of shift worker is stated and "means an employee who is regularly required to undertake shift work(other than overtime) in accordance with a roster approved by the employer."

[82] It is an agreed fact that Ms Quinn is a shift worker. The Statement of Duties for the Applicant dated 20 January 2017²⁸ states the ordinary hours per week are 36.5 hours per week (in accordance with an approved roster) and the special employment conditions state: "The occupant may be required to work in accordance with an approved roster or after hours and may be required to serve elsewhere, on an as needs basis..."

[83] I am satisfied that the Applicant is a shift worker and her shift times vary in accordance with the approved rosters. Therefore the provisions of Part VI, Clause 1, Ordinary Hours of Work for Day Work, do not apply to the Applicant. Her ordinary hours are 36.5 hours per week and are worked as rostered which are contained in lines of various shifts commencing from 05:45am to 12:39pm Monday to Friday. She is not rostered to work weekends, but may elect by mutual agreement, to work additional hours at the relevant overtime rate. The span of hours of 7:00am to 7:00pm relate only to employees employed for day work. The range and span of hours worked for the Applicant, as a shift worker is in accordance with the approved roster.

[84] In cross examination, Ms Quinn stated she had always been told her core hours were 7:00am to 7:00pm and noted the Employer charges extra for inspections outside of these times. I find the charges for services irrelevant to the application of the Award provisions. She also provided evidence that she was paid overtime rates for around 12 months prior to the Award consolidation around 2006 and stated²⁹:

"...when we worked before 6 o'clock, we used to get a 50 per cent-I think overtime. I don't think it was a shift penalty. I'm pretty sure it was 50-15 percent overtime for working before 6 o'clock"

[85] The Applicant submitted that the lack of specification of working outside the span of hours in the Clause 3, Overtime for Shift Work, results in there being no conflict and therefore there must be a referral to Part VI, Clause 3, Overtime for Day Work. Part VII, Clause 3, Overtime for Shift Work states:

²⁸ Exhibit R1

²⁹ Transcript, page 11

"An employee engaged as a shift worker is entitled to the conditions prescribed by Clause- 3 – Overtime - of Part VI - Hours of Work and Overtime for Day Work - of this award, except where such conditions are in conflict with those set out below, in which case this clause will apply.

An employee required to work shift work for all time worked in excess of or outside the ordinary working hours prescribed, or on a shift other than a rostered shift is:..."(my emphasis added)

[86] This clause prescribes the conditions where overtime payment is applicable for Day Work and states:

"Clause 3, Overtime for Day Work

...

(b) Overtime means all time worked *in excess and outside of an employee's normal ordinary hours of duty* which includes:

(i) time worked in excess of 7 hours and 21 minutes on any one day Monday to Friday inclusive; or

(ii) Time worked outside the span of hours of 7.00am to 7.00pm; or

(iii) Any time worked on a Saturday, Sunday or Holiday with Pay."
(my emphasis added)

[87] I do not find that words can be read into this clause to enable the span of hours to apply to shift workers. Part VII, Clause 3, Overtime for Shift Work prescribes the criteria for shift workers to receive overtime payments, which is threefold and includes working shift work for all time:

- in excess of ordinary hours; or
- outside the ordinary working hours prescribed by the roster; or
- on a shift other than a rostered shift.

Evidence was provided from pay sheets³⁰ that the Applicant has been correctly paid overtime for all time worked outside the ordinary working hours when extending hours worked until 6:00pm, resulting in three hours of overtime payment. I am satisfied the disputed shifts do not meet the above criteria to enact the provision for the payment of overtime penalties. The shifts are all 7.35 hours in length, worked within the rostered timeframes and as per the roster.

[88] I do not support the Applicant's position that there is no conflict between the conditions as set out in the overtime provisions for day work and shift work in relation to the criteria set out in the relevant clauses, Part VII, Clause 3, Overtime for Shift Work and Part VI, Clause 3, Overtime for Day Work. I am satisfied there is a conflict to read into the Award the condition of a span of hours for shift workers, when it is simply not applicable for shift workers. By the very nature of shift work, shift workers frequently work outside the day work span of hours as part of the operational requirement for shift work and are compensated with payment of afternoon and night shift penalties, where applicable. Therefore, I find that the shift work overtime provision should apply and working the disputed shifts does not comply with the requirements and criteria for overtime payment.

³⁰ Exhibit R2

Should shift workers receive a Night Shift penalty for shifts commencing prior to 7:00am?

[89] As noted the Applicant relied on the span of hours of 7:00am to 7:00pm as stated in Part VI, Hours of Work and Overtime for Day Work, Clause 1, Ordinary Hours of Work for Day Work, to draw the alleged requirement for a penalty, of either overtime for hours worked before 7:00am, or a night shift penalty as the shift commenced before 7:00am. However, considering the determination that the Applicant is not entitled to the day work span of hours and resultant inability to an entitlement of overtime rates for working outside the day work hours, the alternative option submitted by the Applicant, is to pay the shifts commencing before 7:00am a night shift penalty.

[90] The absence of a definition for a night shift penalty in the Award, leads to the consideration of the ordinary meaning of the words of a night shift. It is agreed that the Applicant is currently being paid an afternoon shift penalty rate for work commencing at 12:30pm to 21:30pm, the hours predominantly being worked in the afternoon.

[91] The Applicant correctly, in my view, submitted that it is irrelevant to construe definitions of afternoon shift and night shift from the predecessor Award, the *General Conditions of Employment Award 2007*, as those definitions have not been restated and omitted from the current Award. Without a definition, it is a matter of applying the ordinary meaning of the words. I do not concur with the Respondent's submissions that the absent definitions should be considered as the spirit and intent. In my view, the definitions they have been omitted for a reason, which was not made clear in submissions and therefore are not considered.

[92] The Macquarie Dictionary Seventh Edition states that:

'Night' is the interval of darkness between sunset and sunrise; nightfall; the darkness of night; the dark.

[93] Ms Quinn provided unchallenged evidence her Launceston colleagues are paid a night shift penalty for work commencing around 3:00am to 4:00am. In my view this period does fall within the night, in accordance with the ordinary meaning of the word and correctly receives the night shift penalty rate. However, I do not consider that shifts commencing at 6:00am or 5:45am could be considered a night shift, due to the hours of the shift falling during the day. Ms Quinn also confirmed in evidence that the shifts were "nearly a night shift" because of the start time. However, I find the disputed shifts are correctly paid as ordinary rates.

Does the Award provide any penalty for the change of shift commencement time due to double sailings?

[94] Ms Quinn's evidence demonstrated that the roster includes a start time for lines A,C,D of either 05:45am or 06:00am including the comment "or as req SPOT Double sailings". She provided further evidence that there is "sometimes only 24 hours" to six months notice that an earlier start time to that rostered is required due to a double sailing of the Spirit of Tasmania ship.

[95] The parties did not make significant submissions on the change of shift commencement time system, and I find that the Award is silent on change of the commencement time of the rostered shifts and therefore there is no remedy in this aspect of the disputed shifts.

[96] It is my view that in light of the absence of the provisions and definitions in the Award to recognise the individual flexibility provided by employees working in Biosecurity, to meet the requirements of efficient servicing of the Spirit of Tasmania, it would be strongly recommended the parties develop a workplace flexibility agreement under Part V, Clause 3, Workplace Flexibility Arrangements.

[97] For the reasons set out above, the application is dismissed.



N M Ellis
Deputy President

Appearances:

Ms N Jones for the Applicant

Ms J Peterson; Ms L Ross for the Respondent

Date and place of hearing:

2018

June 28

Devonport