

## **TASMANIAN INDUSTRIAL COMMISSION**

### **Industrial relations Act 1974**

s29(1) application for hearing of an industrial dispute

### **The Community and Public Sector Union (State Public Services Federation Tasmania) Inc**

(T14642 of 2019)

and

### **Minister administering the State Service Act 2000 - Department of Education**

DEPUTY PRESIDENT NM ELLIS

7 OCTOBER 2019

### **Catchwords**

**Industrial dispute – interpretation of industrial agreement - entitlement to Easter holidays with pay TOIL provisions 2019 - school support staff – application dismissed**

### **DECISION**

[1] On 1 April 2019, the Community and Public Sector Union (State Public Services Federation Tasmania) Inc. (CPSU) (the Applicant) applied to the President, pursuant to s 29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 – Department of Education (DOE) (MASSA 2000) (the Respondent). The dispute relates to an alleged breach of the Department of Education School Support Staff Holidays with Pay Agreement 2015 (the Agreement).

[2] The alleged breach is the refusal by the DOE to provide School Support Staff who work school terms only, with Time Off In Lieu (TOIL) for Easter holidays falling during the school holiday break in 2019. The CPSU asserts this is a breach of Clause 10 of the Agreement. They are seeking an order that the employer give effect to the formula prescribed by the Agreement.

[3] Conciliation conferences were held in Hobart on 12 and 17 April 2019. The dispute was unresolved and following a directions hearing, directions were issued on 1 May 2019. A hearing date was listed for 5 July 2019. Ms Jones on behalf of the CPSU emailed the Commission on 25 July 2019 notifying the consent of the

parties to have the matter determined on the papers. Consent was granted to this request.

[4] The issue involves the construction of the Agreement. The question is whether the formula set out in the Agreement for the retrospective application in 2014 and 2015 and the prospective application in 2017 should be applied to the Easter Holidays with Pay which fall in the 2019 school holiday period. In 2018 the Easter Holidays fell during the school term and the formula was therefore not required to be applied.

### **The Agreed Facts**

[5] The Agreement was negotiated as a result of the change in 2013 from a three to a four term school year in Tasmania to align with the other States. This resulted in the Easter Holidays with Pay falling either during the working period for school staff or in a period of the school holiday break, as Easter holidays are not fixed under the *Statutory Holidays Act 2000* (Tas).

[6] The parties to the Agreement are the Applicant, the Respondent and the Australian Education Union (Tasmanian Branch) (AEU). The period of operation of the Agreement was from the date of registration remaining in force until December 2017.<sup>1</sup>

[7] The Agreement was approved and registered in the Tasmanian Industrial Commission on 21 December 2015.<sup>2</sup>

[8] Despite the nominal expiry date of 31 December 2017, the Agreement remains in force as there is no successive agreement and the parties have not retired from the Agreement.<sup>3</sup>

[9] School Support Staff covered by the Agreement are appointed on fixed term instruments of appointment for the school terms from February to December, over a 40/42 week period inclusive of an additional two weeks leave where applicable.<sup>4</sup>

### **The Agreement**

[10] Clause 8.1 of the Agreement defines "School Support Staff" as:

"...all employees employed in schools or colleges who are employed to work during school terms only. These employees include teacher assistance, school administration, library technicians."

[11] Clause 7.1 states the purpose of the Agreement:

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<sup>1</sup> Department of Education School Support Staff Holidays with Pay Agreement 2015, Clause 5.

<sup>2</sup> T14372 of 2015, registered on 23 December 2015.

<sup>3</sup> *Industrial Relations Act 1984* (Tas) s 55(7).

<sup>4</sup> Department of Education School Support Staff Holidays with Pay Agreement 2015, Clause 9.1.

"The purpose of this Agreement is to provide School Support Staff who work school terms only with time-off-in-lieu (TOIL) for:

- Easter Holidays with Pay that occurred in the school holiday period in 2014 and 2015 and which will occur in the 2017 school holiday period;
- and
- Whose normal hours of work include a day which is an Easter Holiday with Pay occurring in the school holiday period."

**[12]** Clause 10 of the Agreement sets out the formula for TOIL arrangements:

"10.1 School Support Staff whose normal hours of work include a Monday and/or a Tuesday and who would have worked on either or both Easter Monday or Easter Tuesday in 2014 and/or 2015 had those days not been Holidays with Pay and not fallen during the school holiday period, are to receive one day of TOIL at normal hours for each year, regardless of whether the employee would have worked one or both of those days.

10.2 The arrangements prescribed in sub-clause 10.1 will also apply in 2017.

10.3 TOIL accrued from 2014 and/or 2015 is to be taken at a time agreed between the employee and the Principal or School Business Manager by no later than the end of Term 4 2016.

10.4 TOIL which accrues in 2017 is to be taken at a time agreed between the employee and the Principal or School Business Manager by no later than the end of Term 4 2017.

10.5 School Support Staff who work each day of the week Monday to Friday, are to receive 8 Holidays with Pay (7.5 in metropolitan Launceston and 7 Burnie, Waratah-Wynyard and West Coast) in 2014, 2015 and 2017. One day of TOIL is to be added to the number of Holidays with Pay prescribed in this sub-clause for those employees who qualify for this day in either 2014 and/or 2015 and/or 2107 thus making the number of Holidays with Pay the equivalent of 9 per year (8.5 in metropolitan Launceston and 8 Burnie, Waratah-Wynyard and West Coast).

10.6 For those School Support Staff who do not work each day of the week, the entitlement to payment for Holidays with Pay shall be as per Part VIII Clause 1 (c) of the Tasmanian State Service Award provided that those School Support Staff who would have worked normal hours on either Easter Monday and/or Easter Tuesday in 2014 and/or 2015 and/or 2017 will be entitled to TOIL as per subclause 10.1 and/or 10.2.

10.7 School Support Staff will be paid for Christmas Day, Boxing Day and New Year's Day Holidays with Pay if these Holidays with Pay

fall on days that would otherwise have been or will be days on which the employee would normally be required to work. Payment for these days is to be included in the payment for accrued recreation leave which is paid at the end of term 4 each year.”

### **The Applicant’s case**

**[13]** The Applicant submitted the relevant School Support Staff did not accrue TOIL for 2019 for Holidays with Pay which fell during the school holidays on Easter Monday, 22 April 2019 and Easter Tuesday, 23 April 2019. Ms Jones alleges the employer breached the terms of the Agreement by denying TOIL for the Easter Holidays with Pay that fell within the school holiday period and failed to recognise the minimum number of public holidays for School Support Staff.<sup>5</sup>

**[14]** An email dated 14 March 2019 from Ms Jacqui Allen, Manager Workplace Relations, provided the DOE position as:<sup>6</sup>

“In relation to Easter TOIL, as indicated to you in the meeting on 7 March 2019, this forms part of the PSUWA negotiations.”

**[15]** The witness statement of Ms Chick, School Administration Clerk supports the position that the “...Department decided that they would not pay any of these staff for any of the official Public Holidays”, which made it “extremely difficult” to know income from year to year.<sup>7</sup> She stated the other impacts were inequalities with teaching staff, feeling undervalued and creating a ‘dual class status’ and financial difficulties. The previous year in 2018, the Holidays with Pay fell within the term and Ms Chick stated they were paid for all the holidays.

**[16]** The Applicant submitted the Agreement remains operative and therefore the principles of interpretation are required to determine if the formula should be applied to the Easter Holidays in 2019.<sup>8</sup>

**[17]** Ms Jones submitted the primary focus is construing the text, relevantly the plain and ordinary meaning of the words of the Agreement. She notes Clause 10 of the Agreement, sets out the formula to be applied retrospectively for 2014 and 2015 and significantly, prospectively for 2017.

**[18]** She refers to a range of prominent authorities for the principles of interpretation adopted by this Commission in decisions of President Abey, *T14366 of 2015* and the Full Bench in *T13915 of 2012*.

**[19]** I outline in full the excerpts of case law submitted by the Applicant in their outline of submissions to highlight their case:<sup>9</sup>

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<sup>5</sup> Applicant’s Outline of Submissions [26]-[27].

<sup>6</sup> Ibid annexure C.

<sup>7</sup> Ibid annexure E.

<sup>8</sup> Ibid [38]-[39].

<sup>9</sup> Ibid [44], [45], [49], [60] and [62].

- "These principles have stood the test of time and largely remain valid today. They should however be read subject to the refinements of more recent authorities. In particular I refer to the principles adopted by the Full Bench in T13586 as conveniently summarised in T13915."<sup>10</sup>
- "Terms of awards (and agreements) must be interpreted in light of their industrial context and purpose, including commercial and legislative context in which they apply."<sup>11</sup>
- "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."<sup>12</sup>
- "It is forbidden to use subsequent conduct as an aid to the construction of an award of industrial agreement."<sup>13</sup>
- "[I]ndustrial tribunals have always tended to lean toward construction of awards and employment circumstances which would preserve the operation of instruments of regulation such as awards rather than against their operation."<sup>14</sup>
- "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."<sup>15</sup>

[20] Ms Jones submitted that: "An ambiguity reveals itself upon closer examination of the terms of Agreement..."<sup>16</sup>. In reply, Ms Jones distinguished *T14581 of 2018* and *T14532 of 2017* as they did not consider submissions of ambiguity. She submits this Agreement has an ambiguity.

[21] She contends the purpose is evident;

"...to provide a formula of TOIL to ensure school support staff are remunerated through TOIL arrangement in recognition of a minimum number of public holidays (pro-rata)"

[22] Further:

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<sup>10</sup> *T14366 of 2015*.

<sup>11</sup> *Ancor Ltd v Construction, Forestry Mining and Energy Union* (2005) 222 CLR 241 [2], [13].

<sup>12</sup> *Kucks v CSR Ltd* (1996) 66 IR 182, 184.

<sup>13</sup> *CFMEU v John Holland Pty Ltd* (2010) FCAFC 90 [94], *Short and Hercus Pty Ltd* (1993) 40 FCR 511, 517.

<sup>14</sup> *San Remo (Southland) Pty Ltd v Farrell* (1987) 22 IR 291, 294-295.

<sup>15</sup> *Toll (FGCT) Pty Ltd v Alphaform Pty Ltd* [2004] 219 CLR 165, 41.

<sup>16</sup> Applicant's outline of submissions [49].

"...to resolve the disadvantage suffered by school support staff when Tasmania moved from a three term jurisdiction to a three to a four term jurisdiction."<sup>17</sup>

**[23]** She urged the Commission "...to avoid a construction of the Agreement that would encourage inconvenience for schools and greater industrial disharmony..."<sup>18</sup> She relied on the witness statements of Ms Chick and Ms Castle, Business Manager, Rosetta Primary School.

**[24]** Ms Castle stated:<sup>19</sup>

"With the delay in the arrangements in 2019 we are now left with only two student free days that we can utilise for days off in lieu. It has also been problematic to organise professional development learning due to the uncertainty of arrangements."

**[25]** Ms Jones submitted that subsequent conduct, such as, industrial communications and negotiations should be disregarded. She distinguished *AMWU v Berrri* as confining the principle of considering subsequent conduct to apply to circumstances where there has been a 'meeting of the minds, a consensus'. She stated there is not a common understanding between the Applicant and the Respondent in this case and therefore subsequent conduct is irrelevant.<sup>20</sup>

**[26]** Ms Jones stated a reasonable person would understand the Agreement to provide for the application of the formula while the four term structure remains in place.

**[27]** Ms Jones also relied on the transcript of the approval of the Agreement before Deputy President Wells in matter *T14372 of 2015*.<sup>21</sup> She stated the transcript revealed that: "...only the dates known to the parties and that were of consequence to the Agreement were specified."<sup>22</sup>

**[28]** She submitted the transcript indicated the employer stated the Agreement would mitigate the employee's disadvantage impacted by the change of school terms, as provided below:

"MR WATSON: 'So we've also worded the agreement on the basis that it does actually provide for a minimum number of paid holidays for these groups of staff and we think it's a fair and reasonable outcome given all the circumstances.'<sup>23</sup>

**[29]** Ms Jones submitted that if the formula was not applied in future years, it would result in a reduction in terms and conditions as School Support Staff would be denied a minimum number of pro rata public holidays. She referred to s 55(4A)

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<sup>17</sup> Ibid [49]-[50].

<sup>18</sup> Ibid [58].

<sup>19</sup> Ibid annexure E [5].

<sup>20</sup> Applicant's submissions in reply [9]-[10].

<sup>21</sup> Ibid, attachment G.

<sup>22</sup> Ibid [47].

<sup>23</sup> Ibid [54].

of the Act, which requires the Commission to ensure employees would not be disadvantaged.

[30] She also relied on s 55(4B) of the Act, which provides the conditions which would disadvantage employees as:

“...if its approval would result, on balance, in a reduction in the overall terms and conditions of employment of those employees compared with the award or agreement that would otherwise apply to those employees.”

[31] She contended the formula remains intact to fulfil its evident purpose and prevent disadvantage.<sup>24</sup>

[32] The Applicant sought an order to give effect to the formula prescribed by the Agreement.

### **The Respondent's case**

[33] The Respondent submitted the Agreement clearly outlines the entitlement for the Easter Holiday TOIL for the specific referenced years, that being 2014, 2015 and 2017. This is stated both in Clause 7 and Clause 10 the relevant entitlements are outlined in Clause 10 of the Agreement.

[34] It was submitted that sub-clause 10.1 outlines the entitlements for School Support Staff who would have worked Easter Holidays in 2014 and 2015, whereas sub-clause 10.2 extends the entitlement to 2017. Subclauses 10.3 and 10.4 outline the dates TOIL should be taken for 2014, 2015 and 2017.

[35] Further, sub-clause 10.5 outlines the number of Holidays with Pay based on the geographical location in the years 2014, 2015 and 2017. Subclause 10.6 outlines the entitlement to TOIL for School Support Staff who do not work each day of the week to Holidays with pay, and the effect of an additional day of TOIL in the years 2014, 2015 and 2017.

[36] The Respondent submitted that subclause 10.7 outlines the entitlement to payment for Christmas Day, Boxing Day and New Year's Day Holidays with Pay.

[37] It was contended that Clause 10 Easter Holiday TOIL provisions has no application in 2019 based on the clear articulation of the entitlement to TOIL in the years 2014 and 2015 and the period TOIL is to be taken. The Agreement specifically extends the TOIL entitlement to 2017 and specifies the date that TOIL must be taken.

[38] The Respondent submitted there is no application of the TOIL provisions beyond 2017 and stated:<sup>25</sup>

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<sup>24</sup> Ibid [55]-[57].

<sup>25</sup> Respondent's outline of submissions [19].

"If the Agreement was to have effect in years beyond 2017, it would have said so. It was open to the Parties to the Agreement to use wording that would enable the Easter Holiday TOIL entitlement to apply "in subsequent years" or "on an ongoing basis". Instead the wording is clear and unambiguous."

**[39]** It was submitted that industrial courts and tribunals have employed a purposive approach to interpretation of industrial agreements when the language of the document is ambiguous. However, this approach has no application where the Agreement has a plain and ordinary meaning.

**[40]** The Respondent referred to matters *T14532 of 2017* and *T14581 of 2018*, which it states affirmed the principles set out by the Full Bench of the Fair Work Commission in *AMWU v Berri*.<sup>26</sup>

**[41]** It was submitted that the starting point of interpreting the Agreement is the consideration of the ordinary meaning of the relevant words. It referred to the 'Purpose' and 'Holidays with Pay' clauses which specify the years to which the entitlement is applicable namely 2014, 2015 and 2017.<sup>27</sup>

**[42]** The Respondent contended that any evidence of surrounding circumstances, such as the shift from three to four terms, should not be admitted to contradict the plain meaning of the words.

**[43]** The content of the Applicant's witness statements were acknowledged by the Respondent. However, it was submitted following the principles set out in *AMWU v Berri*, that the interpretation of an Agreement, "...does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome."<sup>28</sup>

**[44]** The Respondent emphasised the importance of interpreting the plain and ordinary meaning of the words and that consideration of the surrounding circumstances are only required where an ambiguity exists. It was submitted there is no ambiguity in the relevant clauses of the Agreement.<sup>29</sup>

**[45]** Referring to the final principle in *AMWU v Berri*, it was acknowledged that in some circumstances post conduct of the parties may be relevant. The Respondent relied on two documents from the AEU. Firstly a claim for Easter TOIL days in the summary of the 'AEU Log of Claims' titled 'Support Staff Framework for Bargaining'<sup>30</sup> for the Public Sector Unions Wages Agreement negotiations. Secondly, an AEU update flier; 'Public Holiday TOIL slashed for Support Staff', dated 25 March 2019 which stated the agreement only covered the three years and had no application beyond 2019.<sup>31</sup>

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<sup>26</sup> *AMWU v Berri Pty Ltd* [2017] FWCFB 3005.

<sup>27</sup> Respondent's outline of submissions [22]-[23].

<sup>28</sup> *Ibid* [25].

<sup>29</sup> *Ibid* [26]-[28].

<sup>30</sup> *Ibid* attachment A.

<sup>31</sup> *Ibid* attachment B.



[46] The Respondent submitted while there is no requirement to consider surrounding circumstances to interpret the Agreement, this subsequent conduct by a party to the Agreement demonstrates a consensus was reached that there was no entitlement to the Easter Holiday TOIL provisions in 2019.

[47] The Respondent submitted the application should be dismissed.

### **Consideration**

[48] The issue at hand requires me to interpret the words in the Agreement commencing with an examination of the ordinary meaning of the words of the disputed clauses and only if I find an ambiguity, examination of the surrounding circumstances will be required.

[49] Justice Mortimer in *Polan v Goulburn Valley Health*<sup>32</sup> determined the adoption of a purposive approach to the construction of the terms of an industrial instrument and said in relation to the construction of agreements:

“Like other instruments creating normative rules, such as statutes and regulations, industrial instruments are to be construed in accordance with their language (or text), taking into account their context in the wider scheme or structure of the instrument, and the purpose of the provisions, again as seen in the wider scheme or structure of the instrument...”

[50] The principles of construing a single Agreement were summarised more recently by the Full Bench of the Fair Work Commission in *AMWU v Berri*<sup>33</sup> and summarised by President Barclay in *T14532 of 2017*. In relation to this matter, I have adopted the following principles from the Full Bench decision:

- “1. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.
2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome.
3. The common intention of the parties is sought by reference to that which a reasonable person would understand by the language without regard to the subjective intentions or expectations of the parties.
4. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists. However, if the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

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<sup>32</sup> [2016] FCA 440.

<sup>33</sup> *AMWU v Berri Pty Ltd* [2017] FWCFB 3005.

6. 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.

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. Subsequent conduct may be relevant to the interpretation of an industrial instrument. But such conduct must be such as to show that there has been a meeting of minds, a consensus.

9. 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.<sup>34</sup>

**[51]** The Agreement has a narrow focus and provides an entitlement for School Support Staff to accrue and take TOIL in lieu of Holidays with Pay under certain conditions.

**[52]** It is an agreed fact the Agreement was negotiated by the parties following the change from a three to four term school year.

**[53]** The parties agreed that despite the dates extending past the nominal expiry date the Agreement remains in force.<sup>35</sup>

**[54]** While the Agreement predominantly provides conditions for the Easter Holidays with Pay which fall at different periods each year, Clauses 10.5 and 10.6 also provide for the geographical difference of numbers of Holidays with Pay and Clause 10.7 provides for the Holidays with Pay for the Christmas period.

**[55]** The issue requiring determination is the application of the TOIL provision for Easter Holidays with Pay which fell during the 2019 school holidays. I am not required to consider Clause 10.7 relating to Christmas Holidays with Pay, which I note is not time bound by specific dates in the Agreement.

**[56]** I turn to the construction of the Agreement. The Applicant stated the wording of the Agreement was ambiguous but failed to highlight which words or clauses of the Agreement revealed an ambiguity.

**[57]** The Applicant provided evidence this dispute arose during a period of ongoing negotiation with the relevant parties for a new Public Sector Union Wages Agreement.

**[58]** I will focus on the following clauses of the Agreement; Clause 7 Purpose and Clause 10 Holidays with Pay. The stated purpose of the Agreement provides

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<sup>34</sup> Supra at paragraph 38.

<sup>35</sup> Statement of Agreed Facts [6]-[8].

School Support Staff, who work school terms only with the entitlement to TOIL under certain circumstances. This is not contested by the parties.

**[59]** However, the Applicant states the purpose is to provide a formula of TOIL while the four term structure is in place. It was submitted this should continue in years subsequent to those stated in the Agreement and should be applied to the relevant 2019 days.

**[60]** The Respondent stated there is no ambiguity and the ordinary, plain meaning of the words in Clause 7 should be upheld. I concur with the Respondent that to a reasonable person the understanding of the ordinary meaning results in the purpose of the Agreement providing School Support Staff with TOIL for the actual stated years of 2014, 2015 and 2017.

**[61]** The clause specifies the purpose is to provide School Support Staff who work school terms only with TOIL if they satisfy two conditions.

**[62]** Firstly, TOIL is provided where the conditions had been satisfied, for the years 2014, 2015 and the prospective year of 2017 (at the time of registration) and taken at an agreed time. It was not possible to include the exact years to apply the formula for prospective years past the nominal expiration date of the Agreement because at the time of registration school term dates were unknown for 2019 and beyond.

**[63]** In my view, if conditions in the Agreement were intended to continue, this intent could have been expressed in Clause 7 with words to that effect to ensure TOIL for subsequent Easter Holidays falling during school holidays were covered by the wording; "...and any other subsequent years where the Easter Holidays occur during the school holiday period."

**[64]** Secondly, the Agreement provides for School Support Staff to be provided with TOIL in those years: "whose normal hours of work include a day which is an Easter Holiday with Pay in the school holiday period."<sup>36</sup>

**[65]** These two conditions in Clause 7 are joined by the conjunctive "and" which I am satisfied gives a cumulative effect requiring both conditions to be met to fulfil the purpose of the Agreement.

**[66]** The words in Clause 7 are clear and unambiguous in my view, and this is supported by the transcript of *T14372 of 2015* which clarifies the position of the parties. Both unions party to the Agreement concurred with the position of Mr Watson representing the Respondent. He stated:<sup>37</sup>

"Term dates have been set through the end of 2018 at this stage, and again in 2018 the Easter break is outside the school holiday period. So when we go to set the dates we usually go on at least three years ahead then this matter will need to be revisited at that time." (my emphasis added)

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<sup>36</sup> Department of Education School Support Staff Holidays with Pay Agreement 2019, Clause 7.1.

<sup>37</sup> Applicant's outline of submissions, attachment G, [3].

[67] Mr Watson specified the formula conditions and application was "...the addition of the one-day time in lieu for each particular year."<sup>38</sup> (my emphasis added)

[68] The Applicant relied on the transcript submitting the Respondent stated the wording of the Agreement was on the basis of providing a minimum number of paid holidays which was a fair and reasonable outcome. I am satisfied that while Mr Watson noted the applicable dates and the fair outcome for these years, he went further to note the matter would need to be revisited when school term dates after 2018 were determined. Mr Watson further clarified the application of the formula was "for each particular year" and not for all relevant years on an ongoing basis.

[69] I am satisfied the words of Clause 7 limit the purpose of the Agreement to the application of the formula to the years 2014, 2015 and 2017 applicable to School Support Staff, whose normal work hours include an Easter Holiday day falling within the school holidays.

[70] Having found the purpose of the Agreement is limited in scope to the Easter Holidays, Clause 10 articulates and further expands the conditions and application of the TOIL formula. As stated in paragraph 52 above, the Agreement does contain an entitlement which is outside the stated purpose but in line with the title of the Agreement. I believe this is a drafting error omitting the inclusion of Christmas Holidays with Pay in Clause 7.

[71] I will turn to a closer examination of Clause 10 of the Agreement.

[72] I find that the subclauses of Clause 10 are not susceptible to more than one meaning. The ordinary meaning of the relevant subclauses 10.1 and 10.2 clearly specify the years 2014 and/or 2015 and 2017 as the applicable years. Subclauses 10.3 and 10.4 specify the accrual of TOIL in the years 2014 and/or 2015 and 2017 and when and how that accrued TOIL can be taken.

[73] Subclauses 10.5 and 10.6 specify the geographic areas to receive the differing quantum of Holidays with Pay for each condition for School Support Staff, who work either full time or part-time and limit this to the specific years 2014 and/or 2015 and/or 2017. I note, this subclause does not include an open ended timeframe.

[74] The Applicant stated that there was a consensus on the purpose and the ongoing entitlement and prospective years were intended to be covered to ensure fairness resulted from the change from three to four terms in the school year. It was alleged the disadvantage is significant and may cause workplace disharmony. In my view, there is clearly not a consensus of the interpretation of the Agreement between the parties to the Agreement.

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<sup>38</sup> Ibid attachment G, [4].

[75] I find there are no words to indicate that the entitlement will continue ad infinitum into the future. I concur with the Applicant in relation to consideration of subsequent conduct between the parties. Therefore, the submissions around conduct submitted by the Respondent relating to the AEU have not been considered as part of my findings.

[76] The Applicant alleged that if the formula was not applied in future years, it would effectively result in a reduction of conditions. It was alleged this would breach s 55(4A) of the Act which requires the Commission to ensure the Agreement does not disadvantage those covered employees. I am satisfied the Agreement provided no disadvantage for those employees for the specified periods and continues to provide a benefit for the Christmas Holidays with Pay. The parties concurred at the time of registration, that the Agreement would not disadvantage relevant employees.

[77] While I can understand the dissatisfaction of the School Support Staff and the perceived loss of a condition for the Easter Holidays with Pay for 2019, I note that the parties intended to re-negotiate this Agreement during 2019.

[78] In line with the principles set out in *AMWU v Berri*, I am unable to rewrite the Agreement to achieve what the School Support Staff would allegedly regard as a fair and reasonable outcome. I am required to interpret the Agreement as produced and registered by the parties.

[79] For the reasons set out above, I dismiss the application.



N M Ellis  
**Deputy President**

**Appearances:**

Ms N Jones, Ms M Castle and Ms D Chick for the Applicant  
Mr M Watson and Mr T Faulkner for the Respondent