

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3824 of 1992

IN THE MATTER OF an application by
the Australian Workers Union,
Tasmanian Branch to vary the Fish,
Aquaculture and Marine Products
Award

re Second minimum rates
adjustment and contract of
employment

COMMISSIONER WATLING

HOBART, 29 May 1992

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER WATLING: I'll take appearances in that matter please.

MR G. COOPER: If the commission pleases, I appear on behalf of the Australian Workers' Union, Tasmanian Branch, COOPER G.

COMMISSIONER WATLING: Thank you.

MR D. HOLDEN: I appear on behalf of the Food Preservers Union, HOLDEN D.

COMMISSIONER WATLING: Good, thank you.

MR W.J. FITZGERALD: If it pleases, I appear on behalf of the Tasmanian Confederation of Industries, FITZGERALD W.J.

COMMISSIONER WATLING: Good, thank you. Mr Cooper?

MR COOPER: Commissioner, with respect to the application that's before you today, it could quite easily be divided into two parts, one part goes to the minimum rate adjustment and the other part goes to the amendment of the contract of employment clause. What I'd like to do first is deal with the minimum rate process and if I could tender a document in the form that reflects the minimum rate process that we would see.

COMMISSIONER WATLING: We'll mark this AWU.1.

MR COOPER: If we could spend some time with that document, commissioner. As we would be aware in talks that we had off the record in the making of the award, the base rates and supplementary payments that currently exist in the award aren't those that will be reflected at the completion of the minimum rates process. By that I mean a process attendant level 4, which is the 100% mark will, at the end of the process have a base rate of \$365.20, a supplementary payment of \$52.00, with an award rate of \$417.20. But being as though we haven't completed the process, at the moment the base rates are defined or are agreed as are contained in the document that you've marked AWU.1.

COMMISSIONER WATLING: Why do we actually do that?

MR COOPER: At the time, commissioner?

COMMISSIONER WATLING: Yes, well there was some discussion at the time about this and I'm just always a bit toey about it, leaving it until the end. For example, the employer can absorb against the supplementary payments and yet we're talking about \$12.40 when it's not the correct figure.

MR COOPER: No, the correct figure would be \$12.40 off \$52.00, it would be \$439.60 or something.

COMMISSIONER WATLING: So if it was \$361.00 or whatever it is in the -

MR COOPER: \$365.20.

COMMISSIONER WATLING: \$365.20 in the base rate column, the supplementary payment column should show the residue.

MR COOPER: Which would be \$39.40 or something to that effect.

COMMISSIONER WATLING: Yes.

MR COOPER: That's correct.

COMMISSIONER WATLING: And I'd have to say I would really prefer it to go the right way. In most other awards I've dealt with we've actually settled the base rate as quickly as possible.

MR COOPER: Yes, I understand that, commissioner.

COMMISSIONER WATLING: And then we've put all the MRAs on the supplementary payment column.

MR COOPER: That's correct. Yes, this matter has been raised with you before.

COMMISSIONER WATLING: Would there be any hassle us actually doing that?

MR COOPER: Well from our position, commissioner, the absorption amount would increase threefold.

COMMISSIONER WATLING: Yes, well it's meant to.

MR COOPER: I understand that.

MR FITZGERALD: Well from our position, commissioner, I would probably agree with you that it is an opportunity to correct that situation today and I think we should identify the correct supplementary payment for absorption purposes particularly.

COMMISSIONER WATLING: Yes, well I've had this run before and certainly in most other awards that I've dealt with I've suggested to the parties: Look we should finalise the base rate first and all the MRAs should go on the supplementary payment. If the supplementary payment is complete and the base rate is complete, obviously there is no increases at all. But the supplementary payment should be being increased all the time. We should be establishing an appropriate base rate.

MR COOPER: Does that present a problem for the commission with respect to AWU.1 for this minimum rate adjustment?

COMMISSIONER WATLING: Well we can redo the calculation and put the appropriate - it's possible for us to do the calculation.

MR COOPER: With respect, commissioner, what I was alluding to was that I would adjust that at the next minimum rate application which is in another six months time.

COMMISSIONER WATLING: Yes, well - I'm just not really happy with it -

MR COOPER: I understand you're uncomfortable.

COMMISSIONER WATLING: - because it's not giving a true picture of what's the base rate and what's the supplementary payment.

MR COOPER: No, commissioner. What it does do it does give a true picture of the agreement that was reached between the parties at the time of making the award, and I understand your comments and I understand your concerns. And while we may not object to that process happening now, I think it would be easier for us to address that at the next minimum rates process when we, in fact, present to you a draft order that reflects that.

COMMISSIONER WATLING: Yes. It's pretty easy to do it now, I'd think.

MR FITZGERALD: Could I make a comment just in response to that? Commissioner, I think - well we agree with the total wage outcomes as shown in AWU.1 but I think - given you've raised the matter now I think it would be better for the matter to be rectified now rather than in six months time. That's my view.

COMMISSIONER WATLING: Right. Well maybe we'll just go off the record then and have a look at it.

OFF THE RECORD

COMMISSIONER WATLING: Mr Cooper?

MR COOPER: Thank you, commissioner. Having resolved the matter in conference, it is now agreed that AWU.1 will be amended by - I should for the record - amending the base rate for a process attendant level 1, as defined, to \$277.60 and the supplementary payment to \$37.30, the total wage remains the same.

For process attendant level 2, as defined, the base rate is amended to \$292.20 and the supplementary payment to \$31.10, the total wage stays the same. For process attendant level 3 the base rate is amended to \$339.60 and the supplementary payment to \$36.90, and the total wage remains the same.

Process attendant level 4, as defined, it's \$365.20 and the supplementary payment is \$39.80 and the total wage stays the same. For the finfish farm attendant level 1, which is in Division B, the base rate is amended to \$328.70, the supplementary payment to \$35.30. A finfish farm attendant level 2, it's amended to \$368.90, that's the base rate, and the supplementary payment to \$40.50 with a total wage in both cases remaining the same.

Now what that does, commissioner, is - as you'd be aware with the principles - brings the base rates in line with the principles and preserves them with respect to what the base rates will be as assigned to the relativities that we've given those classifications.

I just noted, commissioner too when I was reading through the act, point 4 in Division A, the words level 4 have been missed out.

COMMISSIONER WATLING: Yes, right.

MR COOPER: So I would recommend AWU.1 in that amended form to you, commissioner. It does reflect the agreement we've reached between the parties in the proceedings that were before you in November last year. It does conclude the first minimum - or actually the second minimum rate adjustment for this award, being there's two further minimum rate adjustments to go.

So in finishing that part of my submissions to you with respect to the minimum rates adjustment in the application, I'd now like to speak on our application to amend clause 13 - Contract of Employment and would like to speak briefly to attachment A, commissioner, with respect to deletion of the words 'full-time employee as defined'. The reason for that was that I drafted it out of another award and neglected to amend the draft accordingly. So if we could just sort out where we started from.

COMMISSIONER WATLING: Rightio. So attachment A to your application will be amended to take out the words in (d)(i) for a full-time employee as defined.

MR COOPER: That's correct, commissioner. And that's consistent then. Now the other change with respect to the awards then, if I could speak to them. The reason that we have deleted provisions (iv) and (v) are a matter that I will

speaking to in a moment. But I would like to advise the commission too that (iii) was amended also. The provision in the existing award reads: For wilful misconduct or refusing duty. It now reads: Without notice for serious and wilful misconduct or neglect of duty - which I think is the intent of the parties but the word 'refuse' has been changed to 'neglect'. And the word 'serious' has been added. I think that makes the clause read more consistent with provisions in other state awards.

Now the reason that we have gone to the deletion of (d)(iv) and (v) results mainly from - in my part, I suppose, commissioner, some inexperience with respect to this jurisdiction in that I wasn't aware of a decision of the full bench in T.125 of 1985 which was presided over by the president, the deputy president and Commissioner King.

And that was an application by the Trades and Labour Council and is basically summed up in page 4 of the decision of that application with respect to a number of matters. And the matter that I relate the commission to is matter 1 - termination of employment. The application wanted to embrace matters relating to unfair dismissals, statement of employment on termination, notice of termination and time off during notice to seek other employment.

Now the commission had to determine whether it was going to be a test case and in that application they subsequently refused Mr Lennon's request that the application be regarded as a test case and ruled on the termination of employment provisions. At the time on page 17 of the decision the commission observed: I believe the approach that has been adopted by industrial boards is not something that we were necessarily dissatisfied with, that each case would be dealt with on its merits. The merits of each case being able to be dealt with by the bench, as it goes on later to say, by provisions of the act in that the commission does have the power under the legislation, the Industrial Relations Act, to deal with a dismissal.

And I notice too in that decision, commissioner, that the exhibit that was put up by the labour council was not dissimilar to the provisions that we have included in this award. And the concerns that we would have are those that are stated by the commission in its decision, in that we are of the opinion that there is a need to respond - reposed in the commission, sorry, sufficient authority to expeditiously inquire into and rule upon any application dealing with disputes about dismissals or likely dismissals.

And as the bench quite rightly points out, if we do have a provision that's contained in (iv) and (v), that allows for employment shall not be terminated for harsh and unjust reasons, it would actually be an award breach and it would be

something that would be then out of the commission's hands. And while the union movement could - or our union anyway could accept that may be all right if it was only us that could decide that, there's also the employer groups that will have that option to take the matter out of the commission's hands. And we're very concerned that that should occur given the powers that are reposed to this commission under the act. The other thing, commissioner, that I would say is that -

COMMISSIONER WATLING: It's already happened once in this award already.

MR COOPER: Yes, as I understand, commissioner. It wasn't with our union, it was with another, yes. So what we want to do, commissioner, is we wanted to, in the first instance, put in the award provisions that made it simple for an employer to read. So they'd pick up the award and they'd understand that they can't dismiss for these reasons. And we thought that would clarify the situation and, in fact, reduce the incidence of disputes. But, in fact, what has happened is, as you quite rightly pointed out, in one matter already on a termination with this award, because of the provisions that we put in, the award has been taken out of the hands of the commission, and that's something that this union does not want to see. We recognise the fact that the commission doesn't always give us what we want when we make an application with respect of termination but the system itself is fair and the system itself allows for a dispute to be heard and nine times out of 10 resolved to our satisfaction.

So with respect to my reference to T.125, commissioner, I believe that in my inexperience I have, in fact, included in that draft a provision that has already been dealt with by a full bench and which possibly in the manner in which that award was dealt, some two full days of discussions and some extreme pressure being placed on this commission by this union to have the matter expeditiously dealt with, we have, in fact, included the provision that this commission should not probably have included. And we seek to address that this morning.

So in speaking to that, commissioner, that would conclude my submissions that that award variation should be effected, should be supported by the commission for the reasons that I've outlined and, in fact, just by deleting those clauses, (d)(iv) and (d)(v), and amending (d)(iii). So that concludes my submissions on that, commissioner.

COMMISSIONER WATLING: Good. I don't think you should take it that it was your inexperience. I think the intention was to clearly indicate to the people through the award that

dismissals shouldn't be harsh and unjust and unreasonable. So therefore you shouldn't take the burden upon yourself in this areas. Probably in theory people should be given an indication that dismissals shouldn't be harsh, unjust or unreasonable, it's just the way that it can be turned around by some people if they wish to murky the waters during the times of an industrial dispute. I think are quite okay.

MR COOPER: Thank you for that, commissioner. What I was referring to - my experience of the - in fact, T.125, I was not aware of that at the time I made the application and had I been, the draft that you would have had to arbitrate on or in fact give an order to would have been different. So -

COMMISSIONER WATLING: Yes. Well I did let it go too so I'm partially to blame in that.

MR COOPER: But, commissioner, I must say that the intent of the parties was that it wanted to reduce the incidence of disputation in that area, and we thought those provisions would do that, but subsequently, we've had a rethink on that. If the commission pleases.

COMMISSIONER WATLING: Good. Thank you. Mr Holden?

MR HOLDEN: Thank you, Mr Commissioner. The Food Preservers Union supports the award variations as proposed by the AWU and believes that nothing further need be added because the matter appears fairly straightforward and Mr Cooper has argued the matter in a logical, sensible, responsible and diligent manner and we feel nothing needs to be added.

COMMISSIONER WATLING: Right. Thank you. Mr Fitzgerald?

MR FITZGERALD: Thank you, commissioner. I probably haven't much more to add. On behalf of the employers, commissioner, we accept, in terms of the first matter, the amended document AWU.1 which reflects the second minimum rates adjustment which is allowable under the commission's wage fixing principles and in which we have in fact agreed to in the initial making of the - at the time of the initial making of this award, so we indicate our consent to that matter.

In respect of the second matter, the amendment of the contract of employment clause, we can indicate our consent to that clause and in doing so - if we're all taking the blame I should also take the blame there, I think, in that in our haste during the award making process it's one which we didn't see as significant in terms of the commission's jurisdiction because we're always of the view, given the commission's practice in this area, that the commission had jurisdiction to handle dismissal matters and apply the harsh and unjust and unreasonable tests. However, we're aware now of course that

that could take it outside the jurisdiction of the commission which employers would not like to see.

We, as employers, do as a matter of policy in terms of our education program, make employers aware of their obligations when disciplining or terminating employees, and they are processes which I think are in line with the commission's previous rulings and practices in this area. So in that respect, commissioner, we would also consent to the amendment of the contract of employment clause as proposed by the AWU. If it pleases.

COMMISSIONER WATLING: Good. Thank you very much. No further submissions? Right. Well I can indicate to the parties that the application as presented will be endorsed by the commission and I'll hand down a written decision in due course. The only question is - that the parties might like to address me is the operative date from the first full pay period on or after, what?

MR COOPER: Mr Commissioner, I was remiss in my submissions, the 29th, today's date, commissioner.

COMMISSIONER WATLING: The 29th. Right.

MR FITZGERALD: Full pay period?

MR COOPER: Full pay period on or after today's date, commissioner.

COMMISSIONER WATLING: Right.

MR COOPER: And being as it is a matter that all the parties are aware of, commissioner, I can't see that creating any problems with respect to rates of pay.

COMMISSIONER WATLING: Right. Right.

MR FITZGERALD: We'd consent to that date proposed by the AWU, commissioner.

COMMISSIONER WATLING: Right. Well, the decision will include the operate date as being the first full pay period on or after today. Thank you. This matter is now closed.

HEARING CONCLUDED