

## TASMANIAN INDUSTRIAL COMMISSION

### Industrial Relations Act 1974

S29 application for hearing of an industrial dispute

**The Australian Education Union, Tasmanian Branch**  
(T14654 of 2019)

and

**Minister administering the State Service Act 2000/TasTAFE**

DEPUTY PRESIDENT N ELLIS

HOBART, 26 MAY 2020

**Industrial dispute - alleged breach of award - entitlement to meal allowance – overtime - normal hours of duty - span of hours - ordinary hours - application dismissed.**

### DECISION

**[1]** On 27 June 2019, the Australian Education Union, Tasmanian Branch (AEU) (the Applicant), applied to the President pursuant to s29(1) of the *Industrial Relations Act 1984* (Tas) (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA)/TasTAFE (the Respondent).

**[2]** The dispute concerns the alleged failure to pay a meal allowance to Mr Simon Bailey during his rostered evening teaching periods which allegedly conclude around 8:30 pm to 8:45 pm.

**[3]** Mr Steven Smith, AEU Senior Industrial Advocate, alleged Mr Bailey is required to remain on duty for not less than one and half hours after the normal hours of duty. The Applicant contends that the normal hours of duty refers to the span of hours to undertake ordinary hours which is between 7:00 am and 7:00 pm.

**[4]** Mr Smith submitted Mr Bailey has an entitlement to the meal allowance on Tuesday evenings as he is not working “normal hours” and is rostered to work past 7:00 pm which is outside the span of ordinary hours that ordinary hours are to be worked.

**[5]** The Applicant alleges a breach of clause 4(a)(i) of Part IV, ‘Meal Allowance - Overtime’ (meal allowance overtime clause), of the TasTAFE Teaching Staff Award (the Award) which requires the payment of a meal allowance for overtime. The Applicant alleges that Mr Bailey worked overtime on the evenings he teaches night class and requires a meal to be obtained away from home.

**[6]** The Respondent claims Mr Bailey does not claim or work approved overtime. Mr Bailey has a scheduled 60 minute meal break in between the two classes that he teaches, comprised of the required 30 minutes of Duties Other Than Teaching (DOTT) and a 30 minute meal break<sup>1</sup>.

**[7]** Mr Todd Sales, Industrial Relations Manager, representing TasTAFE, submitted there is no ambiguity in the relevant Award clause. He relied on clause 18(c) of the TasTafe Teaching Staff Industrial Agreement 2017 (the Agreement),<sup>2</sup> 'Hours of Work', where the span of hours provides for the first two hours of evening classes in any week timetabled after 7:00 pm to be deemed as ordinary hours.

**[8]** Mr Sales contends Mr Bailey is not working outside his normal hours of duty and he does not require a meal to be obtained away from home. Therefore, he is not entitled to a meal allowance. He submits the application should be dismissed.

**[9]** The parties requested the matter be determined on the submitted materials and I consented to this request. The listed hearing date was vacated.

### **Agreed Facts**

**[10]** Mr Bailey is employed by TasTAFE as a full-time Advanced Skills Teacher in the Plumbing, Refrigeration and Metals Team, working 70 hours per fortnight. He is paid the ordinary hourly rate for those hours worked. He has worked for TasTAFE for approximately 11 years.

**[11]** Each Tuesday since 29 January 2019 (with the exception of 5 February 2019, 7 May 2019, and 21 May 2019), Mr Bailey has taught and continues to teach two courses, namely:

- a) MEM20413 Certificate II in Engineering Pathways; and
- b) TASMSS0036 Introduction to Welding Skill Set (Welding class).

**[12]** The lesson for the Certificate II in Engineering Pathways course commences at 12:30 pm and concludes at 4:30 pm. Following this, Mr Bailey has a break from 4:30 pm to 5:30 pm. Mr Bailey then teaches the Introduction to Welding Skill Set course which commences at 5:30 pm and concludes at 8:30 pm.

**[13]** At the completion of the first lesson, Mr Bailey is scheduled 30 minutes of DOTT to complete lesson planning and preparation as part of the hour break. He has a 30 minute meal break from 4:30 pm to 5:00 pm, which the parties concur is not germane to the consideration.

**[14]** In accordance with clause 1(c) of Part V of the Award, Mr Bailey is required to be in attendance before beginning lessons and is on campus by 12:15 pm.

**[15]** At the conclusion of the Welding class, he shuts down and secures the workshop leaving TasTAFE at around 8:45 pm.

**[16]** The parties accept the hours worked after 7:00 pm are deemed to be ordinary hours.

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<sup>1</sup> Submissions of the Respondent.

<sup>2</sup> It is noted this Agreement has been replaced by the TasTAFE Teaching Staff Industrial Agreement 2019 on 1 July 2019. Both Agreements have used the same wording for "span of hours".

[17] Evening classes occur across many TasTAFE courses and are not unique to the classes taught by the Plumbing, Refrigeration and Metals Team.

### The Relevant Award Provisions

[18] The relevant clause is found at Part IV of the Award titled 'Allowances'. Clause 4, 'Meal Allowances', sets out the entitlement to meal allowances. It states:

#### **"4. MEAL ALLOWANCES**

(a) Meal Allowance – Overtime

- (i) Where an employee is required to commence duty not less than one and a half hours before, or to remain on duty for not less than one and a half hours after, the normal hours of duty which requires a meal to be obtained away from home, that employee is to be paid a meal allowance at the rates prescribed in subclause (d) of this clause. (my emphasis added)
- (ii) An employee required to work overtime on a Saturday, Sunday or holiday with pay and who has received notice of this the previous day, or earlier, is not entitled to payment of the meal allowances specified in this clause."

[19] The relevant provision in the Agreement is clause 18 'Hours of Work', which states:

"(a) The ordinary hours of work for a full-time employee shall be 35 per week, excluding time allocated for meal breaks. A part-time employee's ordinary hours of work shall be for a lesser number of weekly hours than is applicable to an equivalent full-time employee.

**PROVIDED** that where an employee works greater than 35 hours in any week, including work undertaken on a Saturday and a Sunday, any additional hours shall be deemed to be ordinary hours, unless the additional hours have been worked at the direction of or authorised by the employer whereby overtime provisions apply in accordance with Clause 19.

(b) An employee shall not be required to work more than 8 hours per day.

**PROVIDED** that where there is agreement between the employer and the employee an employee may work either a greater or lesser number of hours than 8 per day as part of a particular roster or work cycle up to a maximum of 35 hours per week.

**PROVIDED FURTHER** that in direct learning employees shall be in attendance at least fifteen minutes prior to the commencement of any teaching.

(c) The span of hours during which ordinary hours may be worked shall be 7:00 a.m. to 7:00 p.m. Monday to Friday inclusive.

**PROVIDED** that where the 35 hour week includes the time-tabled evening classes the first 2 hours worked after 7:00 p.m. in any week Monday to Friday shall be deemed to be ordinary hours." (my emphasis added)

## **Applicant's Case**

**[20]** The Applicant alleges that on the basis that Mr Bailey is required to remain on duty until 8:45 pm or 9:00 pm<sup>3</sup> on the evenings he teaches the night Welding class, and that the option to return home during his period of work for a meal is not reasonably open to him, he meets the requirement for the meal allowance set out in the meal allowance overtime clause of the Award. That is, he is required to remain on duty for not less than one and a half hours past the normal hours of duty and is required to obtain a meal away from home.

**[21]** Mr Smith stated the phrase "normal hours of duty" is not defined in the current Award or Agreement.

**[22]** It was contended the meaning of these words should be properly construed as being the span of hours that ordinary hours may be worked between 7:00 am to 7:00 pm, pursuant to clause 18(c) of the Agreement. He stated ordinary hours outside this period are abnormal and do not conform to a standard pattern.

**[23]** He conceded that working after 7:00 pm is normal for Mr Bailey as he is rostered for the evening class. He states:<sup>4</sup>

"However, it is not normal for ordinary hours to be worked outside the span of hours from a sector wide perspective. The Award is drafted to apply to all the employees in the sector."

**[24]** Mr Smith submitted that the normal hours of duty are not the same as a particular employee's rostered ordinary hours of work. He contends normal hours refers to the span of hours in which ordinary hours may be worked, i.e. 7:00 am to 7:00 pm.<sup>5</sup>

**[25]** He submitted to construe the meaning of the words, "the normal hours of duty", reference to the following issues are relevant factors:

- (a) The meaning of the spread of hours during which ordinary hours are to be worked;
- (b) The history of the provision;
- (c) The overtime provisions in clause 19 of the Agreement; and
- (d) The prior conduct of the Respondent.

**[26]** He contends that the ordinary hours of work is defined in clause 18(a) of the Agreement to be 35 hours per week, and the span of hours during which ordinary hours may be worked shall be 7:00 am to 7:00 pm inclusive. He submitted that the phrase "normal hours of duty" is used in other provisions of the Award in regards to parental leave and employment categories, but does not advance either parties argument.

**[27]** He refers to the history of the provision in the Tasmanian TAFE Teachers' Award 2003 (2003 Award), which mirrors the current relevant clauses. He notes that clause 11.1 of that Award provides a definition of the normal hours of work. It states:

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<sup>3</sup> Witness Statement of Simon Bailey.

<sup>4</sup> Applicant's Submission in Reply.

<sup>5</sup> Applicant's Outline of Submissions.

"Normal hours of work for teachers shall be 35 per week, to be worked between the hours of 8.00 a.m. and 6.00 p.m. Monday to Friday inclusive."

**[28]** Further, clause 11.1.1 of the 2003 Award provides that overtime will apply for hours worked outside these hours, when a teacher is required to undertake DOTT. He notes the current span of hours has been extended from 7:00 am to 7:00 pm. He submits the change in reference from "the normal hours of work" to "the ordinary hours of work" was introduced in the TAFE Tasmania Teachers' Agreement 2008.<sup>6</sup>

**[29]** He asserts that clause 19 of the Agreement provides further support for this position. It is contended an employee is entitled to overtime when they have been directed to work outside the span of ordinary hours of 7:00 am to 7:00 pm, pursuant to clause 19(b)(i)-(iii). He stated:<sup>7</sup>

"In keeping with the spirit of clause 19 of the Agreement, a reasonable conclusion can be drawn that the drafters intended that "the normal hours of duty" for the purposes of clause 4(a)(1) of Part IV is a reference to the span of hours that ordinary hours or work are to be undertaken in begin 7.00 a.m. to 7.00 p.m."

**[30]** Mr Smith submitted that TasTAFE employees, Mr Dale Wesley a teacher of Certificate IV Plumbing and Services, and Mr Andrew Sullivan, a teacher of Certificate II in Automotive Vocational Preparation, had received payment for the meal allowance in similar circumstances by teaching the night class as part of their ordinary hours.

**[31]** He alleges this demonstrates a "common understanding that the normal hours of duty were from 7.00 a.m. to 7.00 p.m."<sup>8</sup> It was contended that the allowance was paid on the basis the employees worked in excess of one and half hours past 7:00 pm on the evenings they taught night classes and which fell within the scope of the meal allowance overtime clause of the Award.

**[32]** Witness statements were provided from Mr Wesley and Mr Sullivan, who work in the Plumbing, Refrigeration and Metals Team and Automotive Team at TasTAFE respectively. Both employees were timetabled to teach evening classes concluding at 8:30 pm and 9:00 pm. They applied for a meal allowance and their manager's approved the payment of the meal allowance for teaching the evening classes. Mr Wesley's allowance was paid from 2015 until the end of 2018 and Mr Sullivan was paid the allowance in 2018.

**[33]** Mr Smith submitted TasTAFE ceased this payment at the beginning of 2019. In response to an email enquiry from Mr Bailey, Mr Mark Geeves, Education Manager wrote in an email, dated 22 March 2019:<sup>9</sup>

"Thanks Simon

I believe TasTAFE has communicated their position to the AEU that night classes do not trigger entitlement for meal allowances and that no claims will be approved or processed for meal allowances for night classes moving forwards.

I also believe that TasTAFE has had discussions with Natalie or Kirsten at the AEU and you may like to discuss it with them.

Kind regards

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<sup>6</sup> Applicant's Outline of Submissions.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, paragraph 71.

<sup>9</sup> Application, attachment C.

Mark.”

**[34]** The Applicant submits the first requirement for the entitlement has been met, and alleges the second requirement of requiring a meal to be obtained away from home is also met.

**[35]** He submitted there is no reasonable opportunity for Mr Bailey to go home for dinner from the TasTAFE campus, as he lives in Sandford and he could not get back in time to teach the night class. He stated the meal allowance is compensation for not having the opportunity to go home for a meal due to the back-to-back nature of his schedule. The result is that he has to purchase or obtain the meal away from home.

**[36]** As such, the Applicant contends that Mr Bailey is entitled to be paid a meal allowance for overtime at the rate prescribed for dinner pursuant to clause 4(d) of Part IV of the Award.

**[37]** Mr Smith sought a declaration that the words “the normal hours of duty” in clause 4(a) of Part IV the Award refers to the span of hours in which ordinary hours may be worked. The Applicant contends that the Respondent is in breach of the Award and sought such an order that Mr Bailey be paid the meal allowance backdated to 29 January 2019.

### **The Respondent’s Case**

**[38]** The Respondent’s position is Mr Bailey is not entitled to be paid a meal allowance for overtime on the evenings he teaches night class, pursuant to clause 4(a) of Part IV of the Award and clause 18(c) of the Agreement.

**[39]** Mr Sales contends all of Mr Bailey’s hours of work in 2019 were normal hours paid at ordinary time. There was no approved claim or payment for overtime in 2019.

**[40]** It was submitted that the Applicant is not working overtime when teaching the night classes, rather it is ordinary hours for all purposes.

**[41]** Mr Sales contends it is accepted practice for teachers to work up to two hours per week after 7:00 pm as ordinary hours, pursuant to clause 18(c) of the Agreement.

**[42]** It is submitted that the words in the meal allowance overtime clause of the Award are clear and unambiguous and have established ordinary meanings.

**[43]** Relying on the principles outlined by the Full Bench in *AMWU v Berri Pty Ltd*,<sup>10</sup> Mr Sales submitted that the starting point should be the consideration of the ordinary plain meaning of the words. He contends there is no ambiguity and therefore consideration of the surrounding circumstances should not be admitted.<sup>11</sup>

**[44]** Mr Sales referred to the Merriam Webster dictionary definition of ‘normal’ which is: “conforming to a type, standard or regular pattern”.<sup>12</sup> In this context, it was contended that normal hours of duty means normal starting or finishing time, being those timetabled start and finish times, i.e. 12:30 pm. to 8:30 pm.

**[45]** It was contended that “normal” in the context of overtime is work that is exceptional or abnormal compared to regular or standard patterns of work for that employee.<sup>13</sup>

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<sup>10</sup> *AMWU V Berri Pty Ltd* [2017] FWCFB 3005.

<sup>11</sup> Submissions of the Respondent.

<sup>12</sup> <https://www.merriam-webster.com/dictionary/normal>.

<sup>13</sup> Submissions of the Respondent.

**[46]** It was submitted the words “normal hours of duty” as found in the meal allowance clause can be read as plain English to mean “a minimum quantum of time outside of what the employee was expecting (i.e. rostered).”<sup>14</sup> If this unexpected time is outside what the employee was expecting, then the employee has no opportunity to arrange for a meal.

**[47]** It was submitted that the drafters have deliberately used the term normal in this clause and in other clauses in the Award, where there is a shared intention to remedy circumstances falling outside of normal or routine circumstances. Clause 5 ‘Excess Fares’ in Part V of the Award provides for the payment of reasonable additional fares and it states:

“An employee who in their normal course of employment is not required to travel to different locations...”

**[48]** It was submitted that ‘ordinary hours’ is a clearly defined term in the Award. Mr Sales provided a summary of the near identical provisions found in other State Service Awards relating to the meal allowance overtime clauses. He alleged this common contemplation was replicated to provide equity and consistency across the employee groups.

**[49]** Mr Sales states it is essential to keep the concepts of normal (usual and regular) and ordinary (within defined meaning) as distinct and separate ideas. He contends the normal hours of duty are dynamic and relates to the expected hours to be worked by an individual, rather than set static, fixed times. He alleges employees would be entitled to the overtime meal allowance for one and half hours work beyond their expected work finish, consistent with their work timetables.

**[50]** Furthermore, the Respondent argues that Mr Bailey does not require a meal to be obtained away from home because every Tuesday Mr Bailey has a rostered 30 minute rostered meal break from 5:00 pm to 5:30 pm, and could either buy or bring a meal from home.

**[51]** Mr Sales provides a definition from the Merriam Webster dictionary of “requires” as “to demand as necessary or essential: have a compelling need for” and “obtained” as “to gain or attain usually by planned action or effort.”<sup>15</sup>

**[52]** He contends that the plain meaning of the second criteria in the meal allowance overtime clause, “which requires a meal to be obtained away from home,” necessitates the need for a meal to have been attained during the period of overtime.

**[53]** He reinforces the principles in the *Berri*<sup>16</sup> decision, that there must be regard to the context and purpose of the language. It was submitted the purpose of the clause is to clearly reimburse an employee who is asked to work overtime without notice and has not had an opportunity to plan for an unexpected meal. The context requires consideration of the entire clause where the theme is compensation for elements of necessity and reimbursement.

**[54]** Mr Sales affirmed TasTAFE had paid the meal allowance to a limited number of teachers teaching night classes. He states the payment was made in error and in early 2019, TasTAFE became aware of the payment approved through the incorrect understanding of Mr Wesley’s Education Manager. The AEU was advised and the payment of the meal allowance was uniformly ceased.

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<sup>14</sup> Submissions of the Respondent.

<sup>15</sup> Ibid, paragraph 37.

<sup>16</sup> *AMWU V Berri Pty Ltd* [2017] FWCFB 3005.

[55] He confirmed the meal allowance has not been claimed or paid to any other teachers teaching night classes in the same circumstance as Mr Bailey. A timetable was provided showing two out of the ten teachers in the Automotive South team received the allowance and it was stated that they were the exception. It was alleged this was due to their Manager's incorrect understanding of the ability to offer additional conditions outside of the Award to make the night classes more appealing.<sup>17</sup>

[56] Mr Sales asserts there was no consensus between the parties and this is demonstrated by the overwhelming majority of night class teachers who did not receive the payment pursuant to the meal allowance overtime clause.

[57] Mr Sales contended the Applicant has ignored the final provision in clause 18 (c) of the Agreement, which states the first two hours worked after 7:00 pm for timetabled evening classes, are deemed to be ordinary hours.

[58] He contends the Applicant cannot utilise both categories in their interpretation; the two hours per week after 7:00 pm are ordinary hours and yet these hours are alleged by the Applicant to be one and a half hours after normal hours. He contends the worked hours after 7:00 pm are normal hours worked, which he states does not meet the eligibility under criteria one for the meal allowance for overtime.

[59] He asserts that there was also no requirement to obtain a meal away from home as he has a scheduled 30 minute meal break, it is timetabled and he can either buy or bring his meal from home, like every other employee. This is a normal meal break and there is no inherent entitlement to return home for any meal break, nor a second meal break.

[60] Mr Sales confirmed Mr Bailey was not working overtime when teaching night classes. He was working his timetabled ordinary hours from 7:00 pm to 8:30 pm. He was aware of his scheduled night class timetable in advance and could plan for his meal options. He submitted there is no entitlement under the meal allowance overtime clause of the Award, and the application should be dismissed.

### **Consideration**

[61] I agree with the parties that the question of whether the overtime meal allowance is payable turns on the proper construction of the relevant clauses in the Award and Agreement and then the application of that construction to the facts of this case.

[62] 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*.<sup>18</sup> I respectfully concur and adopt these principles. 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.

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.

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<sup>17</sup> Submission of Respondent, paragraph 53-59.

<sup>18</sup> [2017] FWCFB 3005.

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 aide 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."

**[63]** I concur with the Applicant's reference to *City of Wanneroo v ASU*<sup>19</sup> where French J outlined the approach to the construction of an Award. His Honour stated that it begins with the consideration of the ordinary meaning of the words and takes into regard the context and purpose.

**[64]** Mr Smith referred to the *Shop Distributive and Allied Employees Association v Woolworths*<sup>20</sup> where Gray ACJ found past conduct of the parties can be relied upon if they have conducted themselves according to a common understanding of the meaning of the provision. I am satisfied there is not a common understanding of the application of the clauses between the parties. This is demonstrated by the conduct of the Respondent who has not paid the allowance consistently across all employees teaching evening classes and has acknowledged those who have been paid, were paid incorrectly in 2019.

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<sup>19</sup> (2006) 153 IR 425 at 438, paragraph 53.

<sup>20</sup> (2006) FCA 616.

[65] 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. Both parties submitted the clauses were clear on the terms.

[66] I now turn to the language of the Award and Agreement, having regard to the context and purpose.

[67] 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.

[68] Mr Bailey is employed as a full-time teacher. The ordinary hours of work for a full-time employee is defined in clause 18 of the Agreement as 35 hours per week, excluding time allocated for meal breaks.

[69] Clause 5 of the Award, 'Relationship to Award', provides that the terms of the Agreement prevail over the terms of the Award to the extent of any inconsistency. Clause 18 of the Agreement sets out the hours of work while Clause 19 of the Agreement sets out the definition and application of overtime payments.

[70] Having established that Mr Bailey works ordinary hours of 35 hours per week in accordance with the Agreement provision, the next important consideration is whether these hours are worked in accordance with the ordinary hours or overtime hours as set out in the Agreement.

[71] Clause 18(c) of the Agreement sets out the span of hours in which ordinary hours can be worked as 7:00 am to 7:00 pm Monday to Friday inclusive:

"**PROVIDED** that where the 35 hour week includes time-tabled evening classes the first 2 hours worked after 7:00 p.m. in any week Monday to Friday shall be deemed to be ordinary hours."

[72] Mr Bailey is timetabled to teach night class one day a week. Most Tuesdays, Mr Bailey is scheduled to teach the Engineering Pathways course from 12:30 pm to 4:30 pm with a one hour break from 4:30 pm to 5:30 pm. Mr Bailey then teaches the Welding course which commences at 5:30 pm and concludes at around 8:30 pm.

[73] Mr Bailey works up to two hours as rostered after 7:00 pm on Tuesday evenings each week, which in my view, is deemed to be ordinary hours as provided in the Agreement. He does not work in excess of the two hours per week after 7:00 pm. I am satisfied these hours meet the ordinary hour requirements expressed in clause 18 of the Agreement. The provision in clause 18(c) of the Agreement clearly states "the first two hours worked after 7.00 p.m. in any week" are deemed as ordinary hours." (my emphasis added)

[74] There is no penalty or overtime component on these hours. These hours are ordinary hours and paid at the ordinary hourly rate of pay. I note Mr Bailey has not claimed any overtime hours in working his timetabled hours.

[75] I am satisfied that in the event Mr Bailey worked more than two hours in any one week, i.e. two night classes in any week, the hours in excess of the first two hours would attract overtime rates pursuant to clause 19(b).

**[76]** Clause 19 'Overtime and Penalty Payments' (excluding casual relief and sessional employees) of the Agreement sets out the overtime and penalty payments. Clause 19 (b) provision is subject to the Clause 18 specification which states the first two hours after 7:00 pm in any week are deemed as ordinary hours.

**[77]** However, I am satisfied the hours worked in excess of two hours in any one week would attract overtime as Clause 19 states:

- (a) Overtime consists of additional hours that have been worked at the direction of the employer and no overtime shall be undertaken unless express prior approval has been obtained.
- (b) Subject to Clause 18, overtime shall apply to work undertaken in the relevant delivery mode as follows.
  - (i) Direct learning

For employees working exclusively in this mode on a campus Tasmania work site:

- before 7:00 a.m. or after 7:00 p.m. Monday to Friday inclusive; or
- on a Saturday, Sunday or public holiday.

**PROVIDED** that where an employee undertakes teaching in excess of the annual teaching load of 760 hours, payment shall occur in accordance with the Excess Hours Clause, Part V, Clause 1(d) of the Award.

..." (my emphasis added)

**[78]** I have found that the two hours per week that Mr Bailey works after 7:00 pm are deemed to be ordinary hours specified in the Agreement. Accordingly, I find that no overtime payment could be made for these hours.

**[79]** I will now turn to the clause in dispute. Clause 4(a) 'Meal Allowances – Overtime' has two parts to meet the criteria for entitlement for payment of the allowance. The criteria are:

- (a) The employee is required to remain on duty for not less than one and a half hours after, the normal hours of duty; and
- (b) Which requires a meal to be obtained away from home.

**[80]** Adopting the principles set out in *Berri*, I will examine the construction of this clause in terms of the context and purpose of the Award. I adopt the findings of French J, and the Applicant's reference to *Wanneroo*<sup>21</sup> where His Honour stated:

"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."

**[81]** The relevant clause is found in Part IV of the Award which contains provisions for the payment of allowances. I am satisfied allowances are paid in addition to the base salary on account of one or more qualifying criteria.

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<sup>21</sup> *City of Wanneroo v ASU* (2006) 153 IR 425 at 438.

[82] The allowance central to the dispute is found in clause 4 of Part IV and titled 'Meal Allowances'. Under this clause, there are four different classifications of meal allowances, including respective rates; Overtime, Day Travel and Excess Rates. The relevant subclause is headed '(a) Meal Allowance – Overtime'.

[83] Pursuant to clause 19(a) of the Agreement, overtime hours are approved hours in addition to ordinary hours which are hours in excess of the 35 hours per week for full-time equivalent employees. Clause 19(b) provides that overtime may also be paid on hours worked in excess of two hours after 7:00 pm in any week, subject to clause 18. Overtime shall also apply to work undertaken on a Saturday, Sunday or public holiday. Clause 19(c) provides the rates of overtime payments and TOIL provisions.

[84] In my view, considering the context of the Award, the heading of the meal allowance sub clause contains the word overtime and the context of this clause is eligibility for a meal allowance while working overtime. This is consistent with subclause (b) which provides for a meal allowance for day travel more than 60km from the employees normal work location.

[85] I am satisfied that criteria needs to be met, to be eligible for the meal allowance, i.e., travel away from the normal workplace or working overtime. In the disputed clause, the employee must also require a meal to be obtained due to the unexpected overtime requirement and resultant inability to plan for a meal. This is consistent with context and ordinary meaning of the clause heading.

[86] Having found that Mr Bailey was not working or claiming overtime, the meal allowance is not applicable to Mr Bailey. However, it is worth further consideration whether the hours worked from 7:00 pm to 8:30 or 8:45 pm on one evening a week, meet the criteria of remaining on duty for not less than one and half hours after the normal hours of duty.

#### **What are the normal hours of duty?**

[87] I will address the term "normal hours of duty" which is one of the criteria in the disputed clause. There is no definition of the normal hours of duty in the relevant industrial instruments.

[88] The Applicant states the normal hours of duty is the span of ordinary hours during which ordinary hours may be worked, excluding the hours after 7:00 pm. The Applicant states the extension to when the ordinary hours can be worked in the Agreement, does not expand the span of hours in which the employee can work normal hours of work. It is contended the hours between 7:00 am to 7:00 pm are normal teaching hours and the evening classes are taught in abnormal teaching hours and these hours do not conform to a standard pattern.

[89] The Respondent states the normal hours of duty are the timetabled ordinary hours for each individual teacher.

[90] The Macquarie Dictionary states that normal is "conforming to the standard or the common type: regular, usual, natural, or not abnormal."<sup>22</sup> The Respondent cited the ordinary meaning of the term normal as regular or a standard pattern of work, whereas the Applicant stated the hours after 7:00 pm were abnormal. I find applying clause 18(c) of the Agreement with the scheduling of regular evening classes in the timetable, links these hours into a regular or usual pattern for teachers required to teach evening classes.

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<sup>22</sup> [https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=normal](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=normal).

**[91]** The meal allowance overtime clause requires the employee to remain on duty for not less than one and half hours after the normal hours of duty to be eligible for the allowance. I note the hours ordinary hours can be worked in the Agreement have been extended to include the time period for timetabled evening classes for the first two hours after 7:00 pm in any week.

**[92]** I am satisfied the parties considered the requirement for TasTAFE teachers teaching evening classes in the past and the current Agreements. The evidence indicates many teachers across the state are timetabled and teach evening classes. The drafting of the clause has limited the inclusion of only one evening class or up to two hours per week after 7:00 pm as ordinary hours. Any hours in excess of two hours after 7:00 pm in any week will attract the overtime rate in accordance with clause 19(b)(i). Mr Bailey is timetabled to work one evening class per week. He does not receive overtime payments.

**[93]** Timetabled classes are presented on weekly rosters which are developed and published ahead of the scheduled classes, designating the hours to be worked each day of the week including any scheduled evening classes. This enables teachers to plan their working lives.

**[94]** I am of the view the timetabling of the shifts within the ordinary hours as provided in the Agreement, is considered the normal hours of duty for an employee working within the agreed ordinary hours and correctly paid at ordinary time.

**[95]** These hours vary between employees and I accept the Respondent's scenarios of differing shift spreads in contrast to the narrow interpretation arising from all normal hours concluding at 7:00 pm for all teachers, regardless of their timetabled regular evening classes.

**[96]** Many teachers are not timetabled to work any hours past 4:30 pm. With the Applicant's interpretation that the normal hours of duty refers to the span of hours in which ordinary hours are worked i.e. 7:00 am to 7:00 pm, teachers working approved overtime, over one and half hours from 4:30 pm to after 6:00 pm would still be working normal hours. In my view, they would qualify for a meal allowance while working overtime, but the alternative interpretation does not enable qualification as they are still working within the normal hours hours. This does not meet the purpose of the clause.

**[97]** I am satisfied overtime is not routinely rostered and this is evidenced by the timetabling of only one evening session per week. This constrains ordinary hours of an employee to be timetabled within the agreed provisions set out in clause 18(c) of the Agreement.

**[98]** Accordingly applying the ordinary, plain English meaning, I am of the view the hours set out in the weekly timetable with a varying start and finishing time are the normal hours of duty for Mr Bailey worked within his ordinary hours. The timetable provides his regular or usual pattern of work. The shifts in the timetable are generated to meet the employee's ordinary hours per week and are scheduled in accordance with the Agreement.

**[99]** Having found Mr Bailey was not required to remain on duty for not less than one and a half hours after the normal hours of duty, I provide comments on the second criteria relating to the requirement to obtain a meal. I find the entitlement to this meal allowance is in the context of compensation to an employee who is working unplanned overtime. The purpose of this compensation through the payment of a monetary meal allowance is for that employee who is expectantly required to obtain a meal away from home while on overtime. They have no other option as they were unaware when they commenced duty that they would require a meal at work due to the overtime hours worked.

**[100]** In line with this purpose, clause 4(a)(ii) further restricts qualification to this allowance to an employee who has received notice the previous day or earlier and who works overtime on a Saturday, Sunday or public holiday. They are not compensated with a meal allowance. In my view that is because the employee could plan to provide himself or herself with an appropriate meal, either bringing it in from home or purchasing a meal during their meal break.

**[101]** In this matter, I am satisfied Mr Bailey was not required to obtain a meal away from home. He was on a timetabled evening shift and could plan and prepare to bring a meal to work or purchase a meal as is the normal practice of other state service employees. It is clear, Mr Bailey had a planned 30 minute meal break in between classes and he had not applied for a missed meal break claim nor was he paid as such.

**[102]** I shall comment on some further incidental issues arising from the submissions. The Applicant produced evidence to demonstrate the prior conduct of TasTAFE in randomly paying teachers the meal allowance when teaching evening classes. I accept that some teachers have been paid the allowance from 2015 to 2019.

**[103]** However, I do not find that there has been a commonality of understanding of the clause application, mainly an error in approval at the Manager's level. If there was a common understanding of the application of the clause, all teachers at TasTAFE teaching evening classes would have received the allowance. I accept the Respondent's submission that this payment was in error and the appropriate steps were taken to cease the above Award payment.<sup>23</sup>

**[104]** The Respondent tendered a document summarising and comparing the similar Award clauses across the State Service Awards. In this case, the meaning of the words is clear and unambiguous. In line with the authorities, I have therefore not considered the surrounding circumstances to aid the construction of the clause.

**[105]** The Applicant contends there is a lack of compensation for teachers working unsocial hours and I remark, that while the clauses providing meal allowances for working overtime are similar in many State Service Awards, other employees working unsocial hours have many other forms of compensation, for example shift penalties in their respective Awards and Agreements.

## **CONCLUSION**

**[106]** I find there has not been a breach of payment pursuant to clause 4(a)(i) of Part IV, 'Meal Allowance – Overtime' of the Award. Mr Bailey was working normal hours of duty when working his weekly timetabled evening shift and the hours of the shift fell within the period ordinary hours could be worked as provided by the Agreement. The hours were not overtime hours, a requirement for the entitlement under clause 4(a)(i) of Part IV, 'Meal Allowance – Overtime' of the Award.

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

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<sup>23</sup> *Shop Distributive and Allied Employees' Association v Woolworths* (2006) FCA 616.



**Appearances**

Mr Steven Smith for the Applicant

Mr Todd Sales and Ms Madeleine Brady for the Respondent

**Hearing on the papers**