

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. NO. 91 OF 1985

IN THE MATTER OF
Interpretation Hospitals
Industrial Boards Award

re Shift Workers Annual
Leave

PRESIDENT

HOBART, 10 May 1985

TRANSCRIPT OF PROCEEDINGS

(RESUMPTION)

PRESIDENT: Are there any alterations to appearances, since the last case?

MR FITZGERALD: If the Commission pleases, I would like to announce an alteration of appearance. With me today is **MR M. FRUIN**, who is appearing for the Tasmanian Chamber of Industries.

PRESIDENT: Thank you, Mr. Fitzgerald.

Mr Imlach?

MR IMLACH: If the Commission pleases, Mr President this application for interpretation relates to a situation that we have encountered on the job and relates to the interpretation applying to the award provision for payment for annual leave for shift workers.

Mr President, if I may, I will just quote the history and then go into the correspondence and the award provisions after that.

At the end of May 1984, one of our members employed at the Strathaven Home for the aged at Berriedale complained to us that she had been paid at the flat rate of pay for the last eleven and a half working days of her annual leave - that is, she was not paid according to roster or in the award terms, "the amount of wages she would have received in respect to the ordinary time which she would have worked had she not been on leave during the relevant period."

The complaint was then raised with the Home and at that time the Home confirmed that it was paying in the manner complained about and that the Department of Labour and Industry had so interpreted the award.

In other words, the practice is under the award, for shift workers employed under the Hospitals Award to be given seven weeks - approximately half plus half or one and a half days depending on the circumstances - annual leave.

The complaint was that the last

MR IMLACH: eleven and a half days (working days of that leave) which was approximately two and a bit weeks, the rostered rate was not paid - only the flat award rate.

We interpret the award to say that for the whole of the period of the leave the rostered rate should be paid or, alternatively, for the first five weeks of the period of the leave the rostered rate or the annual leave loading should be paid, whichever is the greater.

PRESIDENT: Are you saying for the first five weeks?

MR IMLACH: Yes. The rostered rate or the annual leave loading - whichever is the greater. Then for the remaining period the rostered rate should be paid.

That is what we have always maintained, Mr President. I have an exhibit, Mr President.

PRESIDENT: Mark that Exhibit A, Mr Imlach.

MR IMLACH: Mr President, this is four pages of copies of correspondence that has taken place over the issue, remembering that we have not yet got to the award provisions themselves in detail, but I believe that this is the best way of dealing with this matter.

Exhibit A covers, as I said, four items of correspondence and the top item is a letter dated 20 September 1984 that the Secretary for Labour, Mr Urquhart, sent to the Board of Management of the Strathaven Home and I will read it:

"Dear Madam, the Hospitals Award re payment for Annual Leave:

I refer to your recent discussions with Mr Roberts of this department regarding the method of payment of shift workers whilst on annual leave.

MR IMLACH:

I am informed that shift workers are paid five weeks of their leave as per their projected roster and the balance of eleven and a half days (or 10 and a half days) is paid without penalty rates.

I advise that shift workers should receive payment in accordance with their projected roster for the full seven weeks, plus either a half or one and a half days of their leave. Plus either.

The loading payable to a shift worker is either:

(a) 17 and a half per cent of the award rate for 5 weeks, or

(b) Shift premiums for 7 weeks, plus, according to the projected roster; whichever is the greater amount.

I trust this information will satisfactorily resolve the matter".

This letter Mr President, as he says at the beginning, followed previous discussions. In other words there was a bit more to it prior to this particular letter, but the nub of what we are talking about starts with this one.

PRESIDENT:

He is advising that the appropriate payment would be payment in accordance with the roster for the full seven weeks, plus either half or one and a half days of the leave. I confess I do not understand the last part of it.

MR IMLACH:

Neither do I, Mr President.

That is one reason why we are here because the people do not understand and we are trying to get a clear interpretation.

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PRESIDENT - IMLACH - SUB

MR IMLACH:

He does in later correspondence go into more detail. However this is the sort of problem we have to contend with.

On 24 December, following further discussions, I wrote to the Secretary for Labour, Mr Urquhart:

"Attention Mr Geoff
Roberts:

Dear Sir, I refer to your previous discussions with our Mr Connolly concerning our members employed at Strathaven Nursing Home.

As I understand it, the Home is including penalty payments to shiftworkers during all periods of Annual Leave which is in accordance with the Award of the Hospitals Industrial Board, Part II - Conditions, Section III, Clause 2(i) Annual Leave. Previously penalty payments were not being paid for Public Holidays taken as Annual Leave."

What that indicates Mr President, is that eventually the Home began paying as we said they should for the rostered rate for the seven weeks, put simply without complicating on the allowance. In practice we find the allowance is always less, so that in practice it is the rostered rates paid.

So the Home began paying seven weeks at the rostered rate.

It goes on:

"You would be aware this matter was first brought to the attention of the Department in May of this year, however, due to some confusion as to the exact interpretation of the Award by the Department a final

MR IMLACH:

determination was delayed somewhat.

I understand that advice given previously to Strathaven Home from the Department of Labour and Industry was that penalties were not to be paid on the 11 and a half Public Holidays when taken as annual leave. As a result of this advice we believe our members have suffered a substantial loss in earnings and it is our contention that compensation should be made for the period twelve (12) months prior to the error being made up to the time correct payment of annual leave commenced."

You will remember Mr President, I said there had been negotiations and discussions prior to the letter of the Secretary for Labour on 20 September and that is what that correspondence is referring to.

The initial advice from the Department of Labour and Industry, it was finally agreed by everyone, was wrong and that was followed up by this letter on 20 September.

As a result of that the Home began paying the rostered rate for the seven weeks.

In this letter we are asking for back pay because they had not been paying it.

It goes on:

"Your assistance in finalising this matter is earnestly requested."

No doubt there was more toing and froing in the background because there is another letter here from the Acting Secretary for Labour, Mr Noonan, to the Secretary of the Board of Management, Strathaven Home, dated 11 January 1985:

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IMLACH - SUB

MR IMLACH:

"The Hospitals Award re
Payment for Annual Leave:

I refer to my previous letter,
dated 20th September 1984. A
copy is attached.

It has now been brought to my
attention that a legal opinion
obtained in 1981 for a similar
problem differs to the
interpretation provided to
you. The difference occurs in
(b) of my previous letter.

The legal opinion is now the
basis of departmental policy,
and I advise that shift
workers should receive payment
in accordance with their
projected shift roster for the
full 7 weeks plus either half
or one and a half days of
their leave.

In addition, a loading is
payable, calculated as
either:-

(a) Seventeen and a half per
cent of award rate for 5
weeks, or

(b) Shift premiums for 5
weeks according to the
projected roster, whichever is
the greater amount."

As I understand it there Mr
President, the Secretary for Labour
through the Acting Secretary for
Labour, is saying that a shift worker
for the period of his annual leave of
seven weeks should receive the
rostered rate for seven weeks, plus
seventeen and a half per cent of the
award rate for five weeks or the
projected rostered rate for five
weeks, whichever is the greater.

In my own words Mr President, a
double payment and I make the
point, now, which our union did not
seek.

"I sincerely hope that my
previous advice has not
caused undue inconvenience,

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IMLACH - SUB

MR IMLACH:

but I understand that arrears have not yet been paid."

I will just say today, Mr President, nor have they. It goes on:

"It is usual in cases such as this, where a misinterpretation of the award has resulted in underpayments to employees, for arrears to be sought for the past 12 months in accordance with Section 52(1)(a) of the Industrial Relations Act 1984.

I suggest that arrears in this case should be paid for the 12 month period concluding when my previous letter was forwarded, that is for the period 20th September 1983 to 20th September 1984."

Which we would of course accept, Mr President.

We go on further and we have now, in the intervening period, even since we last met, another letter from the Department of Labour dated 7 May, which is earlier this week and it says:

"The Secretary, Board of Management, Strathaven Home, Dear Madam - The Hospitals Award re Payment for Annual Leave.

I refer to my letter of 11 January last and your subsequent discussion with Mr. Roberts of this Department regarding the abovementioned.

I understand that you dispute the advice provided and are reluctant to comply with my request regarding payment of arrears. As indicated previously, that advice is based on Crown Law opinion. In fact, earlier advice -

MR IMLACH:

refer (b) my letter of 20th September, 1984 - incorrectly indicated that the annual leave loading was shift premiums for 7 weeks. My letter of 11 January, 1985 correctly substituted shift premiums for 5 weeks.

I must confess that perhaps it was not intended to apply the clause the way it has been, however, you will appreciate that I cannot make allowance for the intention and must rely on the words actually used. This Department is responsible for ensuring award compliance, therefore, I trust that any underpayments will be rectified.

Finally, I would point out that the Industrial Relations Act, 1984 provides a means to have the award varied to clearly express the intention. Further, that Section 43 (1)(a) of the Act provides the President of the Tasmanian Industrial Commission with the authority, on the application of a registered organisation with members subject to the award, to declare, either retrospectively or prospectively, how the award should be interpreted.

Yours faithfully ..."

Another man, Mr Evans, acting on behalf of Mr Urquhart.

So you see Mr President, we have a problem.

PRESIDENT:

Are you taking any bets?

MR IMLACH:

I think if I were Mr President, I would increase my wager, however we will see.

I have some more exhibits. Would it

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IMLACH - SUB

MR IMLACH: be easier to put them all in as one, Mr President? Although for clarity I think it is better to take them one by one.

MR FITZGERALD: Mr President do you mind if I make a suggestion in respect to those last exhibits - rather than identifying them as one, for the ease of identification is it possible to separately identify them?

PRESIDENT: Yes, that is no problem. Those exhibits will be A, B, C and D. You have one more, Mr Imlach?

MR IMLACH: I have one now, yes.

PRESIDENT: That will be Exhibit E.

MR IMLACH: But there will be more.

PRESIDENT: That sounds ominous, Mr Imlach. We shall deal with these, shall we?

MR IMLACH: Yes, Mr President.

This is an extract from the Hospitals Industrial Board Award (as it was called) Section III - Employees in Establishments Providing Care for Aged Persons and as you will see, clause 2. Annual Leave.

The purpose of this exhibit Mr President, is to establish that the award clearly provides a total of seven weeks plus annual leave for shift workers employed in a place like Strathaven Home. Annual Leave - Period of Leave and if we go to sub paragraph (i) dayworkers it says:

"Subject to provisions of Clauses 9 (Part-time employees) and 6 Casual employees) and sub-clause (h) hereof a period of 28 consecutive day's leave shall be allowed annually to an employee after 12 month's continuous service (less the period of annual leave)."

Then if we go to the next sub paragraph (ii) Shiftworkers, it says:

MR IMLACH:

"In addition to the leave hereinbefore prescribed, shiftworkers (as defined) shall be allowed 7 consecutive days leave including non-working days."

Which would make a total of 35 consecutive days, Mr President.

If we go further down to subclause (b) Annual Leave Exclusive of Public Holidays the first paragraph refers to what happens if a public holiday occurs during the period of leave.

The next paragraph reads this way:

"Notwithstanding the foregoing provisions, a shiftworker shall have added to his or her period of annual leave ..."

And I stress those words, Mr President.

"... one day for each statutory holiday mentioned in Clause 13 hereof, whether or not such holiday is observed on a day which, for that employee would have been a rostered day off."

In the Tasmanian awards and particularly in this one Mr President, there are ten and a half public holidays prescribed. In the Public Hospitals Award they get Easter Tuesday which makes eleven and a half, but there are ten and a half - the half day being Hobart Cup Day - which is not found in most other awards - the half day.

PRESIDENT:

It is ten and a half working days?

MR IMLACH:

That is correct.

If you were to add all those days up - the four weeks, the one week and the ten and a half working days in the form of two weeks and half a day - you come to a period of seven weeks and half a day total.

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PRESIDENT - IMLACH - SUB

MR IMLACH:

We submit that the award prescribes that - seven weeks and half a day for a shift worker. That is our interpretation of that side of it.

If I could go on Mr President, I have another exhibit.

PRESIDENT:

Mark that Exhibit F.

MR IMLACH:

Mr President, the purpose of this exhibit is to establish what payment for the period of leave for a shift worker should be and again this is an extract from the award - still Clause II, (f) Payment for Period of Leave:

"Each employee before going on leave shall be paid the amount of wages he or she would have received in respect of the ordinary time which he or she would have worked had the employee not been on leave during the relevant period and no deduction shall be made for board and lodging."

So the only question there Mr President, that I can see as far as interpretation is concerned is what does 'ordinary time' mean?

Our submission is that ordinary time for a shift worker means the time he would have worked. In other words if it is a Saturday you would get the amount of wages you would have received for work done on a Saturday. That is how I interpret that term, Mr President.

So that establishes the pay that an employee will receive while they are on leave and I submit Mr President it establishes the ordinary salary that they would expect to receive.

Then when you go further to subclause (i) there is provision for an Annual Leave Allowance and I will read from that:

"During a period of annual leave an employee shall be paid an allowance by way of

MR IMLACH:

additional salary calculated on the wages prescribed for the relevant classification in Part I, Section III as follows:- ...

"Shiftworker - An employee who but for the period of recreation leave would have worked shift work - an allowance calculated at the rate of seventeen and a half per cent of his or her normal salary plus, where applicable, any higher duty allowance or all purpose payment payable to the employee concerned provided that an employee who would have received shift payments as prescribed by Clause 23 hereof, had he or she not been on recreation leave during the relevant period, and such shift payment would have entitled the employee to a greater monetary amount than an allowance of seventeen and a half per cent of his or her normal salary, then the employee's recreation leave allowance shall be calculated as an amount equivalent to the shift payment he or she would have received in accordance with his or her projected shift roster."

Then it goes on in the next line: "Provided always such allowance shall for a dayworker be four weeks Mr President and for a shiftworker five weeks".

As I confirmed earlier Mr President, our branch has always sought to have payment for seven weeks at the rostered rate, but the first five weeks it is either the rostered rate or the allowance, whichever is the greater.

Going into this particular matter, we persuaded that the interpretation of the Secretary for Labour is correct - applying the rules of interpretation - as you have kindly notified to us, Mr President.

PRESIDENT:

Which interpretation of the Secretary for Labour is correct?

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PRESIDENT - IMLACH

MR IMLACH: The final one.

PRESIDENT: That was the Crown Law opinion, wasn't it?

MR IMLACH: Yes, which he is sticking to and I would say the one reflected in his letter of 11 January which he confirms again this week - and by the way I did not receive that letter this week - the one dated 11 January.

PRESIDENT: It is your submission that a shift worker ought to be paid in accordance with projected roster, plus shift premiums or seventeen and a half per cent for five weeks or whichever is the greater?

MR IMLACH: Yes, Mr President.

I would like to make a nice distinction in that I am submitting that that is the interpretation that must be placed on the words before us.

I refer to what I said before, that our branch has never claimed that but now that we have been put in the position as late as this week of pursuing this matter, I feel I must say what has become clear to me as I read it.

PRESIDENT: You do not think that (f) and (i) are really saying the same thing?

MR IMLACH: No, I do not. I repeat what I have said - we have always up until now, interpreted that they must be read together and not separately - but on being faced with this confirmation by the Secretary for Labour and looking at it closely I must say that I agree with that interpretation on the words of the award in line with your guidelines which I accept.

I want to make the point Mr President, we came here to get payment for our members for the seven weeks roster period...

MR IMLACH:

...no more. You can see that it has been going on for a long long time. That was never our intention to seek double payment - my words - but on close inspection I am forced to say that on the award itself and your guidelines and the interpretation of the Secretary for Labour, it is the rostered rate plus the allowance.

I repeat, it was not our wish to pursue the matter to this extent, but we have been forced to.

So that my submission is, the interpretation is that. I am not submitting that that is how we think it ought to be, but my submission in the interpretation is that Mr President, and I realize that is hard.

If I can just confirm my interpretation of those two paragraphs of the award in Exhibit F.- paragraph 2 of (f) specifies "Payment for Period of Leave". That says what the ordinary time or salary shall be for that period.

Then 2 (i) says that on top of that there shall be an allowance - that is the interpretation that I forced to submit and ought to be the correct interpretation.

I have another exhibit Mr President.

PRESIDENT:

Yes.

Exhibit G.

MR IMLACH:

This is an extract Mr President, from the 'Collins English Dictionary' of the word 'ordinary'. It says :

"1. ... of common or established type or occurrence. 2. familiar, everyday, or exceptional. 3. uninteresting or commonplace."

The dictionary in its preliminary advice says that the first

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IMLACH - SUB - PRESIDENT

MR IMLACH: interpretation is to be taken as the prime one. Then as they go away it is a less significance.

So I would submit that what the word `ordinary` means itself Mr President, is "of common or established type or occurrence". Meaning what they normally get - regularly get.

PRESIDENT: You will have to invest in an Australian one - a Macquarie I think - Mr Imlach, because that even says "ordinary pay". It defines "ordinary pay" which says "...remuneration for an employees normal weekly number of hours fixed under the terms of his employment, but excluding any amounts payable to him for shift work, overtime or other penalty".

MR IMLACH: I am indebted to you for that Mr President.

PRESIDENT: Yes, it has even got that "excluding".

MR IMLACH: What excluding?

PRESIDENT: "... but excluding any amount payable to him for shift work, overtime or other penalty".

MR IMLACH: That is what it says?

PRESIDENT: That is what it says. You will have to invest in a copy of it.

MR IMLACH: Perhaps Mr Fitzgerald should rush out and get one.

PRESIDENT: I got it from Mr Fitzgerald.

MR IMLACH: Well that is what I rely on Mr President. I think the ordinary every day - what they are used to receiving. I hope that helps?

I have another exhibit - the second last one.

PRESIDENT: Exhibit H.

MR IMLACH: The purpose of this exhibit Mr President, is just to complete the

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IMLACH - SUB - PRESIDENT

MR IMLACH:

documentation in the definition of
`shiftworker`. To start with
definition (m) :

"A `shiftworkers` is an
employee whose ordinary
weekly hours of work are
performed in accordance with
a roster which regularly
includes Saturdays and
Sundays and notwithstanding
includes all employees who
are not day workers."

Then it goes on :

"PROVIDED ALWAYS that to
qualify as a shiftworker
under this definition for the
purposes only of calculating
annual leave entitlements an
employee shall be rostered to
perform work on not less than
10 Saturdays and not less
than 10 Sundays during any
one leave year."

PRESIDENT:

Are you aware that I have been asked
to interpret that last proviso?

MR IMLACH:

No I am not. I do claim to be the
one responsible for some of the
terminology in that, if I may
digress?

It did not have the words "... for
the purposes only of calculating
annual leave entitlements ..." in it.
I had that put in because it was
being used incorrectly.

PRESIDENT:

I think that is the subject of
application by the No.2 Branch.

MR IMLACH:

My purpose here today Mr President,
is to point out that for a
shiftworker - when we go back to
those words "ordinary time" - that in
my opinion bears out our submission
that it means that ordinary time for
a shiftworker includes Saturdays and
Sundays.

It is just to complete the
documentation that is all.

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IMLACH - SUB - PRESIDENT

MR IMLACH: This is my final exhibit.

PRESIDENT: An appropriate letter to finish on then - Exhibit I.

MR IMLACH: Mr President, I am aware, this is a little bit outside the guidelines that you have laid down, but in my opinion it helps to clarify the whole story and I think it is not wrong of me to put it in.

It shows how others interpret the ordinary pay to mean and I think it backs up our argument, although I acknowledge that the guidelines that you laid down or recommended do not include this sort of consideration. Nevertheless, I believe that it is as well to take into consideration the extent of this type of acceptance or interpretation that we are submitting is the correct interpretation of the words in this particular award.

Now if I may just read that?

" Ordinary pay "

The rate of payment for annual leave is usually expressed as "ordinary pay" or "ordinary time rate of pay" for the period of leave (to which is added the annual leave loading). In general, this "ordinary pay" concept means that a worker on leave is to receive the rate applying to his ordinary hours of work during the leave period, excluding any special payments that may have been granted during that period.

Standard Components

In the annual leave cases (1972) 144 C.A.R. 528 at pp. 544-545, a Full Bench of the Australian Conciliation and Arbitration Commission gave consideration to those items which should or should not be

included as annual leave payment.

The Full Bench decided that, in the general run of cases, the following items should be included in payment for annual leave:

- * overaward payments for ordinary hours of work;
- * shift work premiums according to roster or projected roster including Saturday, Sunday or Public Holiday shifts;
- * industry allowances;
- * climatic, regional etc. allowances; ..."

and so on, none of which apply in this case Mr President.

Then it goes on to those that should be excluded, which we agree with:

"The Full Bench's decision can be regarded as a most useful guide in determining the appropriate payment for an employee entering upon a period of leave. In general, it would be true to say that the Commission's approach is a reflection of practice throughout Australia. Decisions reflecting that general practice and supporting the observations of the Full Bench are ..."

and so on.

Now that is as far as I intend to go Mr President, but I submit that it adds to our case and I also submit to you Mr President, that there was never any need for us to be here before you. I am of the opinion that if people involved - apart from our own Branch and I refer specifically to the Department of Labour and my friends here - if they were aware of these things we would

MR IMLACH:

not be here, we would be paying what we have always sought - the rostered rate for the seven weeks.

Now that it has come to the position we are in I feel that I have to apply an interpretation that we have always accepted as in your guidelines. To me those guidelines only reflect what I vaguely understood it to be anyway. I appreciate those guidelines because they make it a lot easier.

If I may Mr President, just go over them because I think that it reinforces the whole of my submission.

I do not want to be repeating to you what you what you have already said, but it helps, in my opinion, to substantiate what I have submitted.

First :

"Construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts ..."

I submit that I produced the facts of what happened.

"... it is futile to do such exercise any other way."

Well we definitely have a case. Unfortunately Mr President, there are plenty of other cases as well, of the same type, because I submit, of ignorance not of deliberate non-payment or whatever - it is just ignorance of accepted standards.

Second :

"It must be understood then that in presenting an argument in support of or in opposition to a dispute of construction to an award provision, it is not permissible to seek

MR IMLACH:

determination on the matter on merit. That is, on the basis of what one party or the Commission believes the provision in question should mean."

Again, I believe I have attacked this matter on the facts and on interpretation. As I pointed out earlier I found it hard to do that because it has gone over, above and beyond that what we have always sought, but that is what comes out of it.

Thirdly :

" Provided the words used are in the general context of the award and its application to those covered by its terms capable of being construed in any intelligible way there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary english usage."

I believe I have endeavoured to do that.

Fourthly:

"An award must be interpreted according to the words actually used even if it appears that the exact words used do not achieve what was intended.

The words used can only have attributed to them their true meaning."

I personally am not sure what was intended, Mr President, although as I said we have always sought the one payment, not double payment - my words.

We have on occasion in award claims and reviews and so on sought the double payment - acutally claimed it - because it is paid in other areas.

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IMLACH - SUB

MR IMLACH:

I understand at the Zinc Works they get double payment. Certainly in that final exhibit it did say that.

So we have legitimately claimed it at times before and it has not been granted, which we have understood and accepted.

I am not sure what was intended, although I suspect the intention was one payment only. However as it says there we are not to look at that. We are to look at the words themselves.

Fifthly:

"If a drafting mistake has been made in not properly expressing the intention of the award maker then the remedy lies in varying the award to accord with the decision given."

No doubt my friends, if this decision goes against them we will be doing that. I tell you now, we will be opposing it having been forced to this position.

Sixth:

"Where genuine ambiguity exists resort may be had to the judgement accompanying the award as an aid to discovering its true meaning."

I do not think that is necessary in this case.

Seventh:

"It is not permissible to import into an award by an implication a provision which its language does not express.

The award being a document which is to be read and understood by persons not skilled in law or versed in subtleties of interpretation

MR IMLACH: any omission or imperfection of expression should be repaired by amendment rather than implying it in provisions which are not clearly expressed by its language."

PRESIDENT: What do you say to that one?

MR IMLACH: That follows up item 5 in my opinion, Mr President - that if there is a problem then it should be repaired by award amendment. But I submit on the interpretation, there is no problem. It is quite clear.

I do not believe the seventh condition applies in that on ordinary reading of we have had before us there is only one conclusion and that taken by the Secretary for Labour.

PRESIDENT: Or the Crown Law Department?

MR IMLACH: Yes, in the background.

As a practitioner, I am bound by the Secretary for Labour unless I come here for an interpretation.

You will note in the correspondence in the first exhibit, Exhibit B. 24 December, all we were asking for was back pay going on the interpretation on 20 September 1984. We are still pursuing our original attitude. The events have overtaken us because people will not pay.

That is our position. As I said, Mr President, I do not like to keep belting it, but we have been forced into it. I think we have to proceed along those lines.

Finally I seek - if you uphold our interpretation Mr President - an order along those lines as provided in the act.

PRESIDENT: I can only make a declaration as to what the award means, can't I?

MR IMLACH: Is that not in the form of an order, Mr President?

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PRESIDENT - IMLACH

MR PRESIDENT: You can call it what you like. It is a decision of the Commission.

MR IMLACH: Yes. I seek that.

PRESIDENT: But only as to what the particular provision means, not an order that Mrs X should be paid so much money.

MR IMLACH: No, I appreciate that.

I am seeking, in your words, an interpretation of the award.

PRESIDENT: Section 43 you are looking for, are you not?

MR IMLACH: Under Section 43.

Actually I am notifying that I will do that, as I read the subclause, Mr President.

PRESIDENT: I do not have it with me. You read it to me.

MR IMLACH: Section 43, subsection (4) :

"A declaration under this section may be made in the President's reasons for his decision but shall be made in the form of an order if, within seven days of the handing down of the President's reasons for his decision, an organization with members subject to the relevant award so requests."

I notify that I will be seeking that, Mr President.

I want to make the point - I will repeat myself - we would not be doing this unless we were forced into it.

You would know Mr President that it is not our habit to be adopting a hard line but in the view of the facts that our members through us, have been seeking back pay for over 12 months now. We have had nothing but obstruction and I say ignorance. We have found on going

MR IMLACH:

into this matter of interpretation we are forced to say that is what we submit the interpretation should be.

I am sorry that we have to do that but I feel that it would have been to some extent taken for granted, and that is why we are doing this.

Thank you Mr President, unless you have any questions.

PRESIDENT:

You are in fact, raising the ante, then? Originally you were seeking the difference between what was paid and what you felt ought to have been paid. Now you are seeking retrospectively what the Department of Labour and Industry in their latest communication indicate ought to have been paid. Is that what you are putting?

MR IMLACH:

No Mr President, I am not seeking retrospectively the double payment. That would be a matter for the future - if the interpretation were to be what we say it should be. I commit myself to that now. We are seeking back pay for that 7 weeks rostered rate, which has not yet been paid, and if the interpretation says in my words, that double payment applies, we will be seeking that for the future.

Only because that is what we have come to the conclusion is the only interpretation of the words of the award, not because we think that is how it ought to be.

Certainly we have claimed it before; we would like to get it but we have never said that we demand it and that is what it ought to be - from that point of view.

I hope Mr President, I have not over stepped the mark. I am just trying to explain the reasons why we are pursuing it in the manner we are.

PRESIDENT:

Would it be the view of your organization that as of 1 January 1985 it was within the capacity of

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PRESIDENT - IMLACH - SUB

PRESIDENT: the Department of Labour and Industry to interpret these awards?

MR IMLACH: I would have to refer to my sources to answer that. I could not say, Mr President.

You are asking me, do I know as from that date whether or not the Department of Labour and Industry does have power and truthfully I am not absolutely sure.

PRESIDENT: You have tendered documents purporting to be interpretations by the Department of Labour and Industry which presumably should carry some weight and I am asking you if you believe that they in fact now have that power.

MR IMLACH: I have always accepted that, yes.

PRESIDENT: You have always accepted that, but with the proclamation of the State Service Act, I do not see anything in that act that gives the D.L.I. the power to interpret awards.

MR IMLACH: The Industrial Relations Act, you mean, Mr President?

PRESIDENT: Yes.

MR IMLACH: You said the State Services Act.

PRESIDENT: I am sorry.

MR IMLACH: I was not sure of myself on that. If you say that ...

PRESIDENT: I am not saying it, I am asking you?

MR IMLACH: As I say, I would need time to have a look at the act, because I am not sure.

I would just say that in practice, I consider they have without really going into it that closely.

PRESIDENT: They have a policing role. It is their job to ensure the awards are properly applied. I am not sure that that goes to the extent of seeking legal advice as to the true meaning

PRESIDENT: of that clause and then stating that to be the interpretation.

MR IMLACH: I see. I know that the final interpretation is in your jurisdiction Mr President, and we accept that. In the meantime, if the Department of Labour and Industry tells one of our places of operation - in the area that we operate - that this is the interpretation, this is how you ought to pay and we agree with that - we will leave it at that but if we disagree we will come here. That is how we have been and that is how we are operating which is not entirely against what you have said.

PRESIDENT: So you seek an order having retrospective effect?

MR IMLACH: I see what you are saying, Mr President. Could I have time to consider that?

I have already said, we do not wish to seek retrospectivity on the double payment - my words - but we do seek retrospectivity on the payment of the rostered rate for seven weeks, as we always have and has not yet been paid.

I feel that technically, in seeking retrospectivity, I am seeking retrospectivity of what we have submitted on how the award should be interpreted. I feel I have to do that legally or technically but that is not our intention.

PRESIDENT: I think I understand what you are getting at, Mr Imlach.

MR IMLACH: Thank you, Mr President. Any other questions.

PRESIDENT: No. Mr Fitzgerald?

MR FITZGERALD: If the Commission pleases, Mr President, it is obvious from Mr Imlach's submissions today that it is

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MR FITZGERALD:

not as clear as he understands it to be. There are a number of different interpretations and certainly the one which the Department of Labour and Industry have put on it is, in my view, completely incorrect.

By way of preliminary submission, sir, I wonder if this may see some appropriate course to follow. It is my submission sir, that the way the Department of Labour and Industry have in fact interpreted it, does provide for double counting.

The award as it is framed is completely nonsensical. In my view incapable of intelligible interpretation.

For that reason I believe the most appropriate course of action would be to have this matter not proceed to finality as an interpretation before you but to be referred back as an award variation to have it determined on its merits.

As presented by Mr Imlach, I do not believe it is capable of interpretation because he says that the claim is in respect of projected shift for the seven weeks of the leave whereas the interpretation which the Department of Labour and Industry put on it allows clearly for double counting which is against all industrial precedent in Australia.

By way of preliminary submission sir, I wonder if you would give that consideration. If you feel that is not appropriate I am quite prepared to put forward fully fledged submissions before you this morning in respect of how I see the award should be interpreted.

MR FITZGERALD:

In view of the fact that Mr Imlach has put forward his submission this morning, which in my view makes it extremely unclear as to what the award means and what it should be, I believe the only appropriate course of action is to have the matter referred back as an award variation to have the matter considered on its merits. Certainly we are prepared to accept that as an appropriate course of action.

PRESIDENT:

Do I have that power, Mr Fitzgerald?

MR FITZGERALD:

I will just have to check that. I believe that is within your ambit, sir, certainly from a general point of view and within the guidelines which you handed down as part of T.No. 91 of 1985. I believe that is within the intent of those guidelines.

If there is a real problem which makes it impossible to give a proper interpretation, then the most appropriate course of action is in fact an award variation.

PRESIDENT:

I think that should be understood to mean that if on applying the usual tests and rules acceptable by industrial authorities as reasonable interpreting awards as distinct from statutes, one finishes up with a nonsense, then that might be the time to repair the deficiency by way of application.

Alternatively the parties themselves, if they are of that mind, could take the initiative by lodging the appropriate application before it comes to interpretation.

It seems to me that Mr Imlach has pursued his claim. He feels that on the basis of his submissions it is possible for the Commission to sensibly interpret this award.

I do not think I could agree to your preliminary submission that it would be impossible for me to make some

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PRESIDENT - FITZGERALD

PRESIDENT: kind of declaration in relation to the particular issue that exists between the applicant and you or your client.

I think you should proceed, if you will, Mr Fitzgerald.

MR FITZGERALD: Yes, I am quite prepared to do that, sir. I will certainly seek to show that in terms of proper and correct interpretation the way the award is constructed as it is presently, that it is in fact uninterpretable.

PRESIDENT: I suppose I ought to have included among those guidelines an eighth observation which is probably self-evident anyway; that where there is some difficulty being experienced in ascertaining the true meaning, it is permissible to consider the whole of the award in context in order to arrive at the intention of the award maker, but I am sure most practitioners would be aware of that anyway.

MR FITZGERALD: Do you wish me to proceed, sir?

PRESIDENT: Yes.

MR FITZGERALD: Mr President, I am aware that this in fact only the second application made pursuant to section 43 - certainly the second application which has come before you and it is a relatively new area.

Indeed I do not believe it is a mere coincidence that this application also relates to a hospitals award. The first one, as you would be aware, related to the Hospital Award in the public sector.

As you indicated before, there seems to be a further application (and I am aware of the circumstances) also in respect of this award and as I said, I do not believe it is coincidence. I believe what it reflects is the inept drafting which is contained within this award which causes

MR FITZGERALD:

enormous problems both for employers and employees alike.

I would not be surprised to see section 43 utilized quite often by the parties in respect of this award.

In the short time I have been involved with this award, I have been staggered with the number of problems which have in fact revolved around ambiguities, inconsistencies and difficulties in interpretations generally and they, in my view, have occurred because the construction of the award as such is indeed haphazard and piecemeal.

The inter-relationships of individual provisions make it even more difficult to interpret.

I realize sir, that we have before us a particular interpretative problem but I believe it is necessary to give you the background of this award in terms of its interpretation generally to outline the environment which we are in.

There appear to be, in my view, a number of particular individual provisions which, because of the deplorable drafting (and I am not going to lay any blame there in particular but the fact remains that it is bad drafting) create standards in excess of what is seen to be universally acceptable industrial standards.

I just instance here particularly the sick leave provisions and you will have to bear with me because of the fact that I was not involved at the time these provisions were put into the award.

From a general point of view sir, the award provides for 28 working days and my instructions are from those in the private hospitals and nursing homes that that is an absolute nonsense.

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MR FITZGERALD:

The intent apparently was to provide for 20 working days and the additional eight days I suppose similar to annual leave in that they provided 28 consecutive days. So a simple drafting error which stated 28 working days when it should in fact have been 20 working days or 28 consecutive days has created an additional entitlement and that is the sort of atmosphere we are in in this award.

I am certainly glad to have the opportunity to come to you for an interpretation. I am aware that in terms of the Industrial Relations Act you, in fact, are the only source from which to receive an authoritative interpretation - the question which you referred to Mr Imlach.

Certainly from our point of view the Department of Labour and Industry are now formally and have always been, just another opinion and it is an opinion we either agree with or disagree with. In the past if we disagreed with that opinion we could legally challenge that by reference to appropriate courts.

We have now (and I believe it is a more workable procedure) a provision which enables you to interpret the awards and to hand down an authoritative rule in respect of those awards.

So these anomalies which I refer to from a general point of view characterize this particular award.

It is indeed unfortunate that I myself have the displeasure to be associated with it because it is a very difficult area and I am sure in your experience sir, that you have experienced the same sort of difficulties in this area.

The problems manifest themselves in the field particularly when we are talking about Section III of the award which refers to nursing homes.

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MR FITZGERALD:

It is mainly the small to medium sized nursing homes in the community who have real interpretative problems.

They of course have an appropriate channel of advice from our organization but it appears in many instances, as it does with this particular instance, that there is a wide divergence as to what actually happens in the field.

Although I have not, on this particular issue, sought exact instructions from the total membership in this area, my instructions from a number of members are that some members apply it in the way Mr Imlach says it should be - for the full seven weeks. Others, from my instructions and from talking to principals of homes such as Strathaven, apply it in exactly the same manner as at Strathaven.

So it is obviously not as clear as Mr Imlach says it has been. Mr Imlach indicated that it is ignorance and I understand that from a legal point of view ignorance of the law is no excuse. However when you cannot interpret the law then it is a different proposition altogether.

In this case I would suggest that not only this provision but many other provisions of this award are in fact uninterpretable.

I think Mr Imlach indicated, there is no deliberate intent on the part of the nursing homes involved and they arise in my submission out of purely innocent circumstances. They arise principally because of the imprecise and badly constructed provisions of the particular award.

Mr President, both of us have in fact referred to the first application which came before this Commission and you indeed did hand out some very useful guidelines. I am fully cognizant of those guidelines and we

MR FITZGERALD:

read that first decision with a great deal of interest and I was certainly fully cognizant prior to this matter actually coming here for the first time.

Because there is a proscription on merit it places me in a difficult situation and I do not wish to get involved in the merit of the argument as you have indicated, but I believe the only way it can really be interpreted properly, is argument to the merit.

PRESIDENT:

You would need a different vehicle for that?

MR FITZGERALD:

That is correct sir and that is where I refer to my preliminary submission - in my submission sir, the award isn't interpretable.

The only other vehicle which we can use is by way of award variation.

PRESIDENT:

You see section 43(1) (b) would permit me in the appropriate circumstances to declare and at the same time require by order to vary the provision of the award. I would be reluctant to do that.

In fact, I frankly find some difficulty with that because as I am precluded - at least I feel I am precluded - to entertain argument on merit, it seems to me that it would be quite inappropriate for me to vary the terms of the award without hearing other interested parties. So I would be reluctant to do that.

What I should do in the circumstances is interpret the award as I see it and if anyone wishes to lodge an immediate application to vary the award consequent to my declaration, then that would be their prerogative of course.

MR FITZGERALD:

Yes, I understand that sir, and I was going to refer to maybe some inconsistencies between the guidelines which you handed down and section 43(b).

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MR FITZGERALD: It is my view, and I agree with you sir, that maybe section 43(1) (b) is in fact an inappropriate provision and should be repealed, as such.

PRESIDENT: We cannot both be right really, can we? On the one hand we cannot say there will be no argument on merit for the reasons given but the President is, notwithstanding, empowered to vary the award to clarify any ambiguity that he perceives without really hearing the parties on merit. I mean, he might be wrong.

MR FITZGERALD: Yes.

PRESIDENT: I, for my part would much prefer to hear argument on merit where there is genuine ambiguity but not in these proceedings.

MR FITZGERALD: Yes. Thank you sir, for those comments.

I suppose by way of general comment with this legislation, as you would be well aware, particularly with this provision it is fairly innovative in its character and with anything new obviously there will be some teething problems.

I certainly welcome this particular provision and particularly the circumstances which we have surrounding this application to at least get some clarity as to what the award should be.

PRESIDENT: That is a provision that always existed - not in those terms I hasten to add under the Public Service Act. I have interpreted many provisions of many awards using these criteria.

MR FITZGERALD: Yes.

The award as it currently stands in respect of the amount of annual leave payable to shift workers whilst on annual leave is, in my submission, a nonsense and it would benefit all the parties if it was redrafted to reflect the true intent and that is what I see as the ultimate position.

MR FITZGERALD:

The question then remains as to what is the true intent and it is hard under those guidelines of yours to answer that question. We can only therefore resolve it on the construction of the words as they appear in the award.

Mr President, clause 2(e) in Part II, Section III of the award deals with ordinary time and I believe it hinges around this concept of ordinary time. Mr Imlach has submitted that ordinary time for a shift worker is in fact the ordinary time pursuant to a shift. In other words, inclusive of shift penalties.

Simply expressed I suppose a better expression would be a projected shift.

PRESIDENT:

Yes because day work carries no penalty.

MR FITZGERALD:

That is correct.

Leave loading is the core issue of this application and the way it applies at the present time is that it is in addition to the projected shift rate and that clearly is double counting.

In other words we have what Mr Imlach says and what in fact is supported by the Department of Labour and Industry. We have a situation where ordinary time for the purposes of the award is (and I must preface this by saying this is incorrect) in fact projected shift rate to which you add the annual leave loading.

That clearly in my view runs against all industrial precedent in Australia. There is no doubt it is double counting.

I get back to the point which Mr Imlach made - the intent of his branch was that there should not be

MR FITZGERALD:

double counting. I want to distinguish the projected shift for the so called 'seven weeks' later because I believe there is a difference between true annual leave and that leave actually attributed to public holidays. I believe that is most important.

He is saying that it should apply to the full seven weeks.

As I said there has been some shift in position and he now says he has no option but to accept the view of the Department of Labour and Industry which effectively amounts to double counting.

I believe that that view is nonsensical but possibly reasonably open and the reason why it is reasonably open is because of the imprecise and unclear drafting of this award.

That imprecise drafting does enable the view to be taken which would create standards well in excess of any other shift workers, not only in this particular industry but also in the industry generally in Australia.

I will attempt sir to demonstrate this point later, on the incorrect assumption that ordinary pay for a shift worker includes the pay which he receives whilst on shift inclusive of shift premiums.

As I indicated sir, if you adopt this assumption, which I believe is an incorrect assumption - ordinary pay inclusive of projected shifts - then the provision relating to shift loading, clause 2 (i), imposes an additional imposition which must, in my submission, be simply regarded as double counting.

Mr President, I would like to get back to my original point where Mr Imlach has acknowledged that there is an interpretative problem surrounding

MR FITZGERALD:

this clause. I think that is clear in submissions that he says that it should just be a projected shift, but then he says he is forced to accept the opinion of the Department of Labour and Industry.

So from his point of view there is no clarity. Certainly from my point of view there is no clarity, sir.

Mr Imlach in his earlier submissions acknowledged that that is what he is seeking but he did indicate some shift of position in the final parts of his submission. However, his original submission indicated he is seeking full projected shift for the seven weeks, one and a half days or half a day as it may fall, or seventeen and a half per cent for five weeks - whichever is the highest.

He does not, until the latter part of his submission, accept that the award does allow for some double counting.

There is in my submission sir, a clear element of self-contradiction in Mr Imlach's position which I believe effectively sees him acknowledge that there is a real problem regarding this interpretation of these provisions.

Mr President, this matter has a long history, there is no doubt about that and my predecessors at the Tasmanian Chamber of Industries have been involved with Mr Imlach as have the Department of Labour and Industry. As we have seen this morning in the exhibits which Mr Imlach presented, there are some imprecise views expressed there and some change of position. So it certainly lacks clarity.

It is interesting to note that the Department of Labour and Industry have in fact formed the view that it is possible to allow for double counting. However, they acknowledged that this is perhaps what the parties did not intend to mean in the first place and they also acknowledged that

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MR FITZGERALD: on past occasions (and I would like to produce an exhibit in respect to that) the parties acknowledged that it was not projected shift plus loading but it was in fact just projected shift.

I would just like to, if I could sir, hand up an exhibit which indicates that.

PRESIDENT: Mark that Exhibit J.

MR FITZGERALD: Mr President, maybe this is an appropriate time to seek your guidance as to the time frame in respect of this hearing. What is your intention at this stage? It is likely that I will be another three quarters of an hour or probably even longer.

PRESIDENT: I am in your hands Mr Fitzgerald.

MR FITZGERALD: I think maybe on consulting Mr Imlach my wish is that we adjourn at approximately 12.30 and reconvene at say 2.15.

PRESIDENT: Yes, I am quite happy with that.

MR IMLACH: I have an appointment at 2.30 that I did not want to miss, Mr President and I am available until 1 o'clock or whatever.

MR FITZGERALD: The only problem in respect of that sir, is that it is likely with respect to the progress I have made so far that it may spill over past 1 o'clock.

MR IMLACH: If it continues, I will be here Mr President.

PRESIDENT: I am not enamoured with the idea of changing the normal sitting hours unless there is very good reason to do so. Ordinarily we would rise at 12.45 or something of that order and resume at 2.15.

You anticipate being that long, do you?

MR FITZGERALD: It is hard to anticipate accurately sir, but I would like also to have

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MR FITZGERALD: an opportunity to gather my thoughts as well because it is a difficult matter but I think it will easily last until 1 o'clock at this stage.

PRESIDENT: Of course you might be able to negotiate with Mr Imlach to settle this claim and then proceed by way of application to vary and give it a run on its merits. I think that is all he is after at this stage.

MR FITZGERALD: That is certainly my intent. Mr Imlach is not happy with that situation but I really believe that the way the award has been worded, at the present time that is the only viable option we have and in any event, notwithstanding this decision, I think that is the likely outcome of this problem - an award variation.

For that reason I suppose I seek a short cut and that is why I made that preliminary submission, sir.

PRESIDENT: It fell on deaf ears I take it.

MR FITZGERALD: It did unfortunately.

MR IMLACH: Mr President, we have reached that point and then it has been reversed - that the employers are insisting on proceeding - put it that way. There is no settlement; they are not offering to say, "We accept the projected roster". They are not saying that at all.

As I said and I tried to make it clear, I am forced to and I do not want to do it, but I am forced.

MR FITZGERALD: I think it is clear that Mr Imlach would not be prepared to go on and have the matter determined on its merits at this stage.

PRESIDENT: No, that is not quite what I meant. I thought you might be able to come to some mutually agreeable accommodation in relation to that one matter that seems to be of concern Mr Imlach, then if you feel there is some defect in the award proceed by way of ...

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MR FITZGERALD: I see, by way of consent variation.

PRESIDENT: Well consent if you wish, but by way of application to vary so that both sides could put argument on merit.

At this stage it is Mr Imlach's application, and if he has put his case I have no choice but to interpret the award as I see it unless he withdraws or something of that order.

MR FITZGERALD: I appreciate that sir. I understand the situation.

MR IMLACH: I will withdraw if we get agreement on the rostered rate for seven weeks.

MR FITZGERALD: Obviously sir, we will have to proceed.

Just getting back to the question of adjournments what was ...

PRESIDENT: If we are going to go on anyway after lunch, I think it will be about 12.45 - certainly no later.

MR FITZGERALD: Maybe I will finish prior to that. It is a bit difficult to estimate. So it is your intention to adjourn at 12.45?

PRESIDENT: Yes.

MR FITZGERALD:

Mr President, this letter as you can see dates back to December 1981, and it is a letter by the then Secretary for Labour, Mr J. Berry, to one of our members over this very problem. It is just interesting to note in the last paragraph on page 2, and I quote:

"Subsequently I was informed the parties had agreed to the annual leave payment being based for the first five weeks on the amount payable according to the projected shift roster or the 17 1/2 per cent leave allowance, whichever was the greater, together with payment for the remaining two weeks of the leave according to the projected shift roster."

Now that is obviously very much different to the way the Department of Labour and Industry have interpreted it in the past and continue to do so which is obvious by Mr Imlach's Exhibit A, where they continue to interpret it to mean 'double count' (if I can put it that way sir).

PRESIDENT:

That is presumably different from your own interpretation?

MR FITZGERALD:

Yes it is sir. My interpretation is one which I would like to come to later and it is something less than the interpretation of both the Department of Labour and Industry's and Mr Imlach.

Also, if I refer to Exhibit D, to the third paragraph there, it is also acknowledged by Mr Evans who was the author of the letter. He indicates:

"I must confess that perhaps it was not intended to apply the clause the way it has been, however, you will appreciate that I cannot make allowance for the intentions and must rely on the words actually used."

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PRESIDENT - FITZGERALD

MR FITZGERALD:

So we have a real problem with respect to the interpretation, and of course that is why we are here before you today.

Mr President, it may be useful at this stage - and I do this by way of indicating the position of the Department of Labour and Industry which quite clearly acknowledges that the award allows for double counting - if I produce a number of further exhibits at this point of time.

I would like just to refer to them generally without specific provisions.

PRESIDENT:

Exhibit K.

MR FITZGERALD

Mr President, once again this letter is in a similar vein. It confirms the Crown Solicitor's advice which Mr Imlach referred to in the correspondence relating to Strathaven. I will just quote the second paragraph of that letter.

"You will have been advised that the Crown Solicitor is of the opinion that payment while on annual leave should include shift allowance for the projected roster with additional payment of the annual leave allowance".

Clearly, double counting; the view allows for double counting which in my view is in excess of normal industrial standards and also is not what the award was intended to mean.

I can produce a further exhibit sir.

PRESIDENT:

Exhibit L.

MR FITZGERALD:

Mr President, once again this letter is in the same vein and as you can probably see there were some discussions which were referred to in the second-to-last paragraph between our organization and the Department of Labour and Industry. This matter, of course, was perplexing then also. It hasn't been resolved in any way since

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MR FITZGERALD:

that, not formally at least. Once again, the words "in addition" in the second paragraph are significant in that they clearly reinforce the view of the Department of Labour and Industry that there is potential for double counting to occur.

The next exhibit that I was going to produce sir which is unnecessary at this point of time because Mr Imlach has already done so, is that relating to the last letter received by Strathaven.

It is my submission that in relation to these exhibits sir, they quite clearly acknowledge that the view of the Department of Labour and Industry on the construction of the award allows for double counting. It is my submission further sir that this does not reflect the true intent of the parties.

The interpretation, in my submission sir, is based on the wrong assumption of the definition of ordinary time. Ordinary time for a shift worker may be referred to as ordinary time or ordinary time rate or some other similar phrase and it has been the subject of proceedings which have occurred before industrial tribunals in this country. Indeed Mr Imlach has presented one this morning as an exhibit, and it does cause some problems.

The point of view that Mr Imlach has adopted is that ordinary time includes shift premiums. It is my view that ordinary time is in fact ordinary time as it is meant to be, meaning base rates. That would be a more intelligible way of tying up these provisions. In other words, the shift worker gets ordinary time added to which he gets a shift loading which is calculated at his normal projected shift for five weeks, or 17 1/2 per cent, whichever is the greater amount. That is my view which is an intelligible view as to how the award should read.

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MR FITZGERALD:

If we look at clause 2(f) of the award, the clause allows, and I quote:

"Each employee before going on leave shall be paid the amount of wages he or she would have received in respect of the ordinary time which he or she would have worked had the employee not been on leave during the relevant period and no deduction shall be made for board and lodging."

If we adopt Mr Imlach's concept of ordinary time, then this obviously allows for payment in the form of projected shift.

I would like now sir to refer you to clause 2 (i), and I would like to quote that in full because I think it is important.

"During a period of annual leave an employee shall be paid an allowance by way of additional salary calculated on the wages prescribed for the relevant classification ...".

Clearly that is by way of additional salary. Now if we adopt Mr Imlach's interpretation which is, as he has previously claimed, that it is not intended to allow for double counting, surely there is some inconsistency there in that Mr Imlach says that clause 2(f) is in fact projected shift and that is all he is seeking. He later changed that point of view. If that is the case then that is inconsistent when you take that in relation to clause 2 (i) because there is, no doubt, an element of double counting.

In other words, if I can succinctly put it sir, if Mr Imlach's claim was to be fully satisfied, then clause 2(f) alone would be sufficient because that is all he is seeking. He is in fact seeking the projected

MR FITZGERALD:

shift and there would be no need, therefore, to refer to the shift load.

Clearly, the position which has been adopted by Mr Imlach this morning, and the position which has been adopted by the Department of Labour and Industry, (but I indicate that it appears that it is reasonably open for them to take that position on the construction of the award) is ridiculous and it is clearly, as I indicated, double counting.

As I indicated sir, in my preliminary submission, (which didn't receive your favour) I think the only way in which this interpretative problem can be properly sorted out is, in fact, by an award variation and by having the matter heard on its merits.

Mr President, I would concede that there are real problems in the interpretation of these provisions and I would suggest that Mr Imlach also concedes that same point in the position which he adopts because he basically says: "No, the Department of Labour and Industry are wrong in their interpretation". He has later changed that as I indicated. So from his point of view there is no clarity.

Mr President, I would like to get back to the core issue of this application before you and it relates to the position of the H.E.F. No. 1 branch. I refer to the five weeks' annual leave and that is provided in clause 2 (a)(ii) - in fact sir 2(a)(i) and 2(a)(ii) have to be read in conjunction. 2(a)(i) in fact provides a period of four weeks which is standard for most day workers and on top of that 2(a)(ii) provides additional leave for a shift worker. Once again, that is a common provision for shift workers in industry generally.

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FITZGERALD - SUB

MR FITZGERALD:

So that is the amount of leave which is actually provided by clause 2(a)(ii), annual leave in its truest sense - and I have to draw that distinction.

Now we've seen that Mr Imlach indicates that there are further periods of annual leave. Now it is my submission, and I will be making further submissions in respect of that sir, that that 'two weeks, one and a half days' or 'two weeks, one-half day' is in fact not annual leave in its truest sense, but for convenience purposes is taken in conjunction with annual leave.

PRESIDENT:

I was wondering when you were coming to that Mr Fitzgerald.

MR FITZGERALD:

I will certainly be making further submissions on that sir because that is, I believe, the nub of this problem before you. I will also be making submissions on what options are available to an employer when an employee works on a public holiday. There is an option I believe to pay the double time as allowed or provide another day. I don't think that, in its strictest sense, can be regarded as annual leave. It is taken in the form of annual leave. It is not annual leave as such.

It is my contention sir, that the ordinary rate of pay for a shift worker is in fact the base award rate, for the purpose of annual leave. Added to which is an annual leave allowance which is a general mode of payment for employees when they take annual leave and that annual leave allowance is based on 17 1/2 per cent or the projected shift for five weeks, whichever is the greater. That leave - being five weeks' leave - and the loading, makes up the total amount the person receives when they proceed on annual leave.

In other words sir, my submission is that the 'two weeks, one and a half days', or the 'two weeks, one half-

MR FITZGERALD:

day[^] is not true annual leave, but as a matter of convenience can be taken in conjunction with annual leave. It is my submission sir, that those two weeks - the subject of this application - should be paid at the base award rate and not at the projected shift rate.

PRESIDENT:

Don't you run into some difficulty then if you say: "Well it is not annual leave, it is simply leave or leave in lieu of something else"? Don't you then run into difficulty by reason of sub-placitum (f), "Payment for Period of Leave"? Neither you nor Mr Imlach have drawn my attention to the fact that that doesn't make any reference to annual leave. It simply says "Payment for Period of Leave", I would think that would be for any leave.

MR FITZGERALD:

I sir, would not concede that. I would suspect the leave that they refer to there is the leave referred to in clause 2(a)(ii) as being truly five weeks[^] leave or effectively five weeks[^] leave.

PRESIDENT:

I would agree that that would be a fair observation having regard for the subject heading but why do you suppose there is no reference to annual leave in that provision at all?

MR FITZGERALD:

There is no reference to...?

PRESIDENT:

It simply says "Payment for Period of Leave".

MR FITZGERALD:

I don't believe that that is deliberately constructed that way. I think if you look at the clause generally there are a lot of inconsistencies and I think that is one of them. I notice in another matter that with respect to "(i) Annual Leave Allowance" they refer to annual leave allowance and then further there is a reference to recreation leave.

PRESIDENT:

They have stolen that from the Public Hospitals[^] Award.

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PRESIDENT - FITZGERALD - SUB

MR FITZGERALD:

So I believe, sir, in respect of that, the absence of the word "annual" is not by deliberate omission, it reflects the imprecise drafting of this award and particularly this provision.

PRESIDENT:

Yes, but if I accept that submission then can I accept that the additional days that are added to a shift worker's true annual leave are not also annual leave because they are contained in the same clause? If I accept your submission that they are in fact not true annual leave but additional days, then wouldn't it be open for you to accept my suggestion that reference to leave simply means any approved leave with pay?

MR FITZGERALD:

I can certainly see the point you are making sir. If I can answer it by referring to the point which it refers to, that is the days attributable to public holidays and that is in 2(b). If I could just quote that:

"Notwithstanding the foregoing provisions a shiftworker shall have added to his or her period of annual leave ..."

Now my submission sir, is that the words "added to" do not necessarily mean that they are annual leave.

PRESIDENT:

I would agree with you.

MR FITZGERALD:

For that reason it is convenient to take them as annual leave, but that doesn't necessarily make them annual leave and that would be my submission sir.

PRESIDENT:

It doesn't say that it shall be additional annual leave, it says that it shall just be "added to" his period, the period is "extended by".

MR FITZGERALD:

Yes, that is right. However that doesn't necessarily mean that they are in fact annual leave by any means. It could, by way of another example, possibly be a rostered day which is added to the annual leave.

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MR FITZGERALD:

However, taking that example in other awards, if the rostered day is added to annual leave (which is possible within some days) it does not in itself become annual leave, and in my submission would not be subject to any leave loading because it is clearly distinct. That analogy can be drawn in this instance here sir where the days are attributable not to annual leave in its strictest sense, because that is in fact only five weeks, but they are attributable to public holidays. I would like to make some further submissions in that regard later on that particular point, on what can occur in respect of public holidays and that has a bearing on these particular provisions here.

PRESIDENT:

Make sure you read clause 8 before you do make those submissions.

MR FITZGERALD:

Right thank you. Sir, if I can continue. As I indicate sir, there are other provisions of the award which have a bearing on the interpretation of annual leave, and I am at a slight disadvantage in referring to the correct number because my copy of the Gazette has just disappeared with Mr Fruin. My loose-leaf award is for the convenience of our members, so I will have to refer to the actual title of the clause rather than to the clause number.

Before examining these provisions sir, which have I believe a bearing on the interpretation of the annual leave provision, I believe it is essential that we look at the objective of annual leave loading and the position of shift workers in industry in general in Australia when they proceed on annual leave. I would also like to examine the meaning of the words "ordinary time" particularly when they are used as a calculation base when shift workers proceed on annual leave.

To a great degree sir, I believe that the heart of this interpretative

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MR FITZGERALD:

difficulty is in the definition of ordinary time. From a general point of view the clear intention of leave loading originally - as you would be well aware sir with your experience - was to apply to shift workers only. Now, however, as a matter of universal standard (I hate to admit that but it appears that it is the case) it also applies to day workers.

The original intent of annual leave loading was to compensate shift workers, in my submission, whilst they were absent on leave and therefore unable to earn shift premiums or penalties in that period. 17 1/2 per cent was arrived at as I suppose an appropriate figure. However in respect of shift workers, the projected shift was retained as an alternative to 17 1/2 per cent.

In clause 2 (i) of the award it states:

"An employee who but for the period of recreation leave would have worked shift work..."

I emphasize sir (and I believe there are some problems with interpretation there as indicated by you formerly) that annual leave is in the real sense, in my view, in the case of a shift worker, five weeks' leave.

The most perplexing problem we have sir is to define the term 'ordinary time'. A number of authorities could have been presented here this morning (Mr Imlach has presented one) which support different positions. However I would submit sir, in respect of Exhibit I which was the well known annual leave case, that it is (I suppose) styled in the form of a test case and I would have to emphasize the second paragraph in the paragraph "Standard components":

"The Full Bench decided that, in the general run of cases,

MR FITZGERALD:

the following items should be included in payment for annual leave:..."

So it is generalizing. It is not specific. It is only a useful precedent in terms of the general position. In terms of the specific provision, I believe that that precedent is of no value whatsoever.

A number of authorities support the alternative position sir that ordinary pay means just that; the base rate. The ordinary time for annual leave purposes means the amount of wages payable for time usually worked during the normal span of working time prescribed by the award - the base hours. That is excluding and distinct from penalty rate payments for overtime, holiday or other special work.

I would like to present an exhibit here sir at this point of time.

PRESIDENT:

We'll call that 'M'.

MR FITZGERALD:

Mr President I would like to refer just to one particular section of this. The source of this exhibit is as shown on the top of the page, the Industrial Information Digest, which is well known and well recognized in industrial circles. I would like to refer to the part that has been marked in pencil, "Meaning of, in Awards". I quote:

"The expression "ordinary pay" or "ordinary time rates" in awards generally refers to the amount of wages payable for time usually worked during the normal span of working time prescribed by the award as distinct from penalty rate payments for overtime, holiday or other special work."

Quite clearly, that intent there is that it is a base rate. It is not a projected shift rate. That principle

MR FITZGERALD: is supported further in the Industrial Information Digest and I would like to present a further exhibit in that regard.

PRESIDENT: Exhibit N.

MR FITZGERALD: Sir, I will also present a copy of the decision referred to towards the bottom of the page, namely the "Metal Trades Case". I would like to quote from that paragraph:

"Most awards provide that payment for annual leave is to be made at the employee's ordinary rate of wage, exclusive of any shift allowance or other penalty payment...".

The intent of that reference there in the Industrial Information Digest is quite clear.

In support of that exhibit sir, I would like to produce one final exhibit which is in fact the Metal Trades Case.

PRESIDENT: Exhibit O.

MR FITZGERALD:

If the Commission pleases. In that case, the Union application in respect to the annual leave provision was overruled.

That is in fact in support of the Industrial Information Digest for your information. Justice O'Mara, I believe it was in that case upheld the principle that payment for annual leave be made at the employee's ordinary rate of wage exclusive of any shift allowance or other penalty payment.

Mr President, when we look at the Exhibit presented by Mr Imlach in relation to the annual leave case exhibit, I indicated that I believe it is from a general point of view. Clearly in this instant award before you the construction which we must put on ordinary pay, is one which is identical to the precedent which I have put to you. If you don't accept that concept of ordinary pay, what it effectually means is that there is double counting, or potential double counting.

PRESIDENT:

Is there a difference do you suppose between the term 'ordinary pay' and 'ordinary time rate'?

MR FITZGERALD:

I think there is a difference, sir, yes. The ordinary time rate could possibly refer to shift payments, but I think it amounts to the same thing. Effectively I think it is a question of terminology. From my research I have found there has been a reference to 'ordinary time' or 'ordinary time rate' or 'ordinary wages'. There are quite a number of different phraseologies which have been used in this particular matter. I am just trying to ascertain what they used in the annual leave. It is indicated that the expression is 'ordinary pay' or 'ordinary time rate of pay', so in that sense I see the two as being the same.

PRESIDENT:

Well, isn't overtime for a shift worker calculated at the ordinary

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FITZGERALD - PRESIDENT

PRESIDENT:

time rate, namely, the base rate?

MR FITZGERALD:

Yes, I would believe so sir. That would in fact support my position, I believe. There seems to be a trend generally from sources which were not available before this Commission was established, that the ordinary pay rate for a shift worker does in fact include the shift premiums. Another situation which I would like to quote would be in respect to casuals' ordinary time rate of pay or ordinary rate of pay. Generally, I believe, the Department of Labour and Industry takes the view that an ordinary rate for a casual is in fact the loaded rate (the casual rate) and that comes into play when overtime is calculated on that rate. I, from a personal point of view, would disagree with that interpretation, sir, and believe that the ordinary rate for a casual is, in fact, the base rate and that is the rate that shift premiums and any over time premiums are calculated on, not the 20% loaded rate. In a number of awards that position has been conceded to by unions involved as part of the offsets in respect to 38-hour week negotiations. In that matter particularly I can quote one reference - the Wholesale Trades Award - where that matter has been made clear by referring to the base rates rather than the ordinary rates. I am digressing, sir.

Mr President, Mr Imlach's interpretation of ordinary pay, if it is going to be accepted to be correct, and include shift penalties, then clearly there is potential double counting. I think the only construction you can put on ordinary time as defined in the award. That it is in fact the base rates. To do otherwise would provide for clear double counting when you apply the annual leave loading.

Mr President, I would again like to refer you to clause 2. As I indicated, clause 2 (a) (i) and (ii) read in conjunction, provide shift

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MR FITZGERALD:

workers with five weeks annual leave. I see that as annual leave in the strictest sense; in its truest sense. If we look at that per se and we also add the annual leave allowances provided in clause 1, then the additional salary as such, in my submission, by way of annual leave allowance can, in fact, only be added to the annual leave in the strictest sense, that being five weeks. There is specific reference to five weeks added to which you add the annual leave allowance. If you look at clause 1, it indicates during a period of annual leave and in my submission, annual leave in that respect is annual leave in the strictest sense, being five weeks for shift workers.

I did make reference to Exhibit I, but I would like to again just quickly refer to it, sir. I would submit that it is from a general point of view only. It is my submission that there is a specific provision within this award that makes it clear, or the only interpretation that it is possible to take, that ordinary pay or ordinary time is in fact base pay - base time. A specific provision in this award would, in my view (as it normally does from a legal interpretation), the specific would override the general. So, in other words, what I am saying is that this specific award overrides that general reference as shown in Exhibit I.

Mr President, a further examination of clause 2, in my submission, supports the following propositions. Firstly, that this clause is the only specific clause which provides exact entitlements to five weeks annual leave. The second proposition, I believe it supports sir, is that the annual leave allowance can only specifically apply to that specific amount provided by clause 2 - that being five weeks. Thirdly, if we look at clause 1 again, there is an overriding proviso. It starts with the words "provided always such

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MR FITZGERALD: allowance shall. That overriding proviso specifically limits the period of annual leave loading or specifically limits the period of leave for the purposes of application of annual leave loading to, in the case of a shift worker, five weeks.

PRESIDENT: Do you suppose it would mean that a shift worker who was unable, because of the exigencies of the job, to take his full quota of leave from one leave year but instead took it in conjunction with his next year's quota, would only be able to be paid in accordance with the projected roster for five weeks?

MR FITZGERALD: I understand what you are saying, sir. I do not believe it does mean that. The annual leave which was accrued but not taken as such still, in my submission, would remain in its truest sense, annual leave and, for that reason, would be subject to the leave loading. If we were to take an uncomplicated situation, for example, in respect of a day worker in that same situation, the day worker who didn't take his full amount of accrued annual leave, who instead took it on top of the next lot of annual leave accruing next year then, in my submission, the annual leave loading of 17-1/2% would apply to the total amount because, in every sense of the word, it still remains annual leave.

PRESIDENT: There is no authority for that in that clause though is there?

MR FITZGERALD: In this particular clause?

PRESIDENT: Yes. Because it limits it to a leave year doesn't it ... in any one leave year?

MR FITZGERALD: Yes. I understand what you say there but I don't quite know how to answer it.

PRESIDENT: You might say it is another defect in drafting.

MR FITZGERALD: Well, I have said that on previous

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MR FITZGERALD:

occasions and I will say it again. In many respects I think you could say that about every clause in this award. I am anxious, sir, that rather than coming before you with all of these problems that we should commence negotiations to re-draft this award to put it in proper sequence and to make the interpretation intelligible. The problem with that is that here is an example which shows that we cannot agree on what it should mean so how can we put that in proper, logical written form?

PRESIDENT:

I think Commissioner King is at this very moment in the process of transferring these provisions into the Public Hospitals Award.

MR FITZGERALD:

That is correct sir.

The problem with that sort of approach (with due respects to Commissioner King) is that you compound the mistakes. I would be anxious although I recognize the difficulties and the various nexus with other awards. It is not a simple matter to approach. But certainly that has been the direction which has been hinted and, in many cases, strongly put to me by our members. I would like to be able to fulfil their directions but, as I said, I don't see that it is any easy exercise.

PRESIDENT:

Would that be a convenient point at which to break?

MR FITZGERALD:

I believe it would be sir. If I can give some indication. I am conscious of Mr Imlach's appointment. I think I would be no longer than half an hour in finalizing my submission, sir.

PRESIDENT:

It would have been my intention had neither you nor Mr Imlach addressed yourselves to it, to have raised with either or both of you the matter of clause 8, Annual Leave, which applies to the section and, in particular, that part which refers in sub-clause

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PRESIDENT:

(b) of clause 8 to the payment of public holidays, which I think you would discover suggests that any payment for public holidays be at the rate the employee would ordinarily receive if he were at work, if one could construe that to mean if he were a shift worker and would otherwise have been rostered for afternoon shift he would get, for example, the 15% penalty and then carry that reasoning forward into sub-clause 2 presently under discussion where we find that an employee, whether he is rostered on or off (shift worker, that is) on a public holiday shall notwithstanding be given an extra day to his recreation leave. I agree with you, that is not annual leave. Would one not conclude that in those circumstances the intention would be that that extra day when taken would be paid in accordance with the projected roster, because had he been able to enjoy that day off, the award already says that he would be paid for that day as if he were at work and presumably rostered for whatever shift? Do you see what I am driving at?

MR FITZGERALD:

Not quite. I intended to raise that aspect later anyway.

PRESIDENT:

Perhaps if you just flag it over and have a look at it over lunch and see if you can agree with me that the intention appeared to be that whether rostered on on a public holiday attracts a different penalty. If rostered off on a public holiday, a shift worker would be paid in accordance with the projected roster for that day. Right?

MR FITZGERALD:

Right.

PRESIDENT:

So then the question arises, what should he be paid if in any case, in accordance with a subsequent part of the award, he is entitled to an additional day for each public holiday. They are the days we are talking about, aren't we?

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MR FITZGERALD: Yes, we are.

PRESIDENT: Yes.

MR FITZGERALD: Yes. I would simply say, sir, that in respect to those days that are worked on a public holiday, the shift worker would not receive any penalty for them except his normal shift premium. Now, if that day is carried forward, taken in addition to annual leave and taken at projected roster, then it would be my submission that there would be a strong element of double counting, because that day has already in fact been paid with the shift premium applying.

PRESIDENT: Yes, but assuming that the public holiday happened to fall on a rostered day off; now, he has already worked, for example, his 40 hours without the public holiday - that would have been a rostered day off.

MR FITZGERALD: Yes.

PRESIDENT: So it would have been a non-paid, non-working day.

MR FITZGERALD: Yes. Yes, I understand.

PRESIDENT: Because all employees are entitled to so many paid public holidays, it is then added to his leave in any case.

Now, the question arises, when he takes that public holiday, or the equivalent, is he entitled to be paid as if it were a working day? He may have been rostered for day work or he may have been rostered for afternoon. He may have even been rostered for Sunday, in which case it could be double time.

MR FITZGERALD: Yes. I see what you mean.

PRESIDENT: Two fifteen?

MR FITZGERALD: Yes.

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PROCEEDINGS ADJOURNED UNTIL 2.15 P.M.

RESUMED 2.20 PM.

PRESIDENT:

Yes Mr Fitzgerald.

MR FITZGERALD:

Thank you Mr President. If I could just recap from where we were prior to lunch. Without trying to go over old ground I indicated, for the purposes of examination, that clause 2 supports the following propositions: and that is that this clause is the only specific clause which provides entitlement to annual leave, and that that particular clause applies the annual leave allowance specifically to the amount of annual leave so provided, and that is five weeks in the case of shift worker.

Further, Mr President, in applying the annual leave loading or recreation leave allowances that are referred to, there is an over-riding proviso which would limit it to five weeks in the case of shift workers.

To put any other construction on it is difficult sir, I believe, because I ask the question why, in fact, is there reference to the five-week provision in view of Mr Imlach's contention that it applies to the full seven-week projected shift? If that is the case then why is there specific reference? In my view that would be superfluous. In any event it is there and it is my submission that the intent of it is that in respect to the annual leave loading, it is in fact limited to five weeks.

Mr President, you did refer us to clause 8 and I would like to refer to that particular clause. It is unfortunate that when I use our awards that the actual clause numbering doesn't initially add up, but it is in respect to holidays.

In the case of clause 8 (c) - I'll read the clause if I could:

"Where an employee who is entitled to holidays in accordance with sub-clause (a)(a) hereof is required to

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MR FITZGERALD:

work on any holidays mentioned in the sub-clause, either the part or the whole of such day, shall in the case of a shift worker be paid at the rate prescribed in clause 4 hereof. In the case of a day worker paid at the overtime rate prescribed in clause 6 hereof".

So it is clear in respect to the initial obligations of an employer that when a shift worker works on a public holiday, what can be done, is that the employee can be paid the rate prescribed in clause 4 . In respect to shift workers the rate is double time for public holidays. That option is clearly available to the employer. If that option is taken up and the amount of double time is in fact paid, that, in my submission, would see the end of his obligation. If that isn't taken up then it becomes pursuant to clause 18 where, if an employee is required to work on any of the holidays mentioned in the sub-clause, then the following would apply:

"... where such holidays apply at his or her normal place of work but because his or her duties require the employee to work at the place where the holiday does not apply ..."

I'm sorry, I'll have to go back on that sir. I don't believe that clause had any application. I think that was a clause which was inserted in recent times with respect to holidays applying in the north which may not apply in the south and vice versa.

If I could, in effect, cancel that aspect in relation to clause 18. But

MR FITZGERALD:

what I am saying is that the initial obligation as such is to pay overtime. It is my submission that the employer has the option of making the prescribed holiday penalty and that would see the end of his obligations.

PRESIDENT:

You haven't addressed yourself to 8 (b), that is, where the employee in fact enjoys the holiday. Wouldn't you agree that in those circumstances that if that employee happened to be a shift worker, he really couldn't be a shift worker and enjoy the holiday, could he?

MR FITZGERALD:

No.

PRESIDENT:

Yet it says that he would be entitled to receive the same pay he would have received if it were not for such a holiday and he had been at work.

MR FITZGERALD:

Yes.

PRESIDENT:

So a non-continuous shift worker who might be able to have the day off could be entitled to 15 per cent for that day off had that been his rostered shift, were it not for the fact that the job had closed down for the holiday. I'm not saying that it would. So there are two options the way I see it: one where the employee works on the holiday and is entitled to double time. If sub-clause (b) doesn't mean that the employee who enjoys the day off can pick up something other than ordinary rates, one wonders why sub-clause (b) is there at all. If one then carries the underlying philosophy of both (b) and (c) into the clause in question, specifically that part which refers to additional periods being added to annual leave, it seems to me to beg the question whether or not the underlying philosophy of clause 8 should not be carried into clause 18 is it?

MR FITZGERALD:

23 I think sir.

MR IMLACH:

Mr President could I interpose. It is section 3 and I believe the

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MR IMLACH: holiday's clause is clause 13.

MR FITZGERALD: Sorry, yes you are right.

MR IMLACH: They are you the same words.

MR FITZGERALD: You're right. I'm looking in the wrong section.

PRESIDENT: Yes, I would agree with that. The commencement of section 3 contains a whole list of clause headings which I took to be those that would apply to section 3 but presumably they apply to section 2. It's 13, is it?

MR FITZGERALD: Yes it is. I beg your pardon for that Sir. The wording, as Mr Imlach said, is in fact the same.

PRESIDENT: Right. You see it certainly means that someone who has the day off will lose no pay merely because they are not required to work on that day. They would be entitled to receive the same pay that they would have received had they been at work.

MR FITZGERALD: Yes, I can understand that.

PRESIDENT: Now if it happens to be a rostered day off, unless some provision is made for a shift worker who finds him or herself in that situation, then they would lose a holiday, or a number of holidays, because of that fact. So provision is made to give them credit for those holidays as an extension of annual leave. The question then becomes, when they decide to take those days off, at what rate shall they be paid. Are they to be paid, as I understand you are putting it, at the flat rate as if they would have been rostered for day work only, or should they be entitled to be paid in accordance with the projected roster for that period?

MR FITZGERALD: Yes I can see what you are getting at Mr President. It is my understanding that for those shift workers who work on a public holiday that they would in fact receive their normal designated shift rate. So, if in

MR FITZGERALD: fact they work an afternoon shift they would get their normal additional payment. They of course wouldn't get any penalty provision on top of that.

PRESIDENT: If a shift worker, as part of his or her roster, worked on a day that was a public holiday and it was an afternoon shift on a Monday, would you believe that person would be paid double time, time and a half or ordinary time plus 15 per cent?

MR FITZGERALD: I think the option is either to pay them at the double time which would then, in fact, absorb the shift penalty, or another day added on top of their annual leave. That is the option which is available sir.

PRESIDENT: So you would always regard it as a public holiday would you?

MR FITZGERALD: Yes. Well, for payment purposes no - if that is the arrangement, if they do in fact get another day. I believe there are establishments where penalty rates are in fact paid for that day. For payment purposes, for all intents and purposes, it is a normal day.

PRESIDENT: I am sure Mr Imlach will advise you that there are many establishments where they not only receive an extra day on their annual leave, but they receive ordinary time plus 15 per cent, which effectively makes it double time plus 15 per cent.

MR FITZGERALD: Yes, I meant to say that.

PRESIDENT: When they have that day off they might have it off on a Sunday, which being a rostered day they get double time again.

MR FITZGERALD: Yes. That would be my submission sir, with respect to someone who worked on a normal week day which is a public holiday, they have effectively already been paid that shift premium. Any premium which is passed on in the form of projected shift for those two subject weeks,

MR FITZGERALD: would in fact in my submission be double counting. For that reason I believe that the last two weeks attributable to public holidays, should be paid at base rates only.

PRESIDENT: That's all right when the person concerned has worked. But when the person concerned has not worked because it has otherwise been a non-paid non-working day, what would you expect to do then?

MR FITZGERALD: I can understand that. I can see the problems caused by that, but I think it is associated with the problems associated with the drafting difficulties of this award where I think it is manifestly wrong that someone should get an additional day whether they worked it or not - that public holiday. It may be, as you say, that the employee is not required to work that particular public holiday. It might be their rostered day off. In any event, it seems by the award they still get an additional day taken in the form of, but not in the same sense of, annual leave. I think that is, in fact wrong but nevertheless it is available.

PRESIDENT: I think if you do your sums you will find that there are approximately 260 working days in the year less say 11 public holidays, which would make 249 days upon which an employee should work and be paid for 260. Are you with me?

MR FITZGERALD: Yes.

PRESIDENT: If a person, because he happens to be a shift worker, physically works on 260 because that is the way the roster falls, then if you don't make some provision for all those public holidays he's missed out on, he in fact is disadvantaged. He has worked 11 extra days. That is the philosophy behind it.

MR FITZGERALD: Yes, I can understand that, but I just wonder whether that, in fact, extends to the question of

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MR FITZGERALD:

application of annual leave loading. That, I think, is the question at issue here.

PRESIDENT:

Perhaps we are getting too deeply into considerations of merit, and not what the award says. The fault is probably mine, not yours Mr Fitzgerald.

MR FITZGERALD:

No, these matters certainly need some conversation because, in my view, they are very difficult to come to grips with.

If I could proceed sir, as I indicated it is my submission that if the penalty rate does not apply the shift premium would still apply for a shift worker who works on a public holiday. I instanced the 15 per cent if it is an afternoon shift. Where they work that particular day is, in my submission, in the nature of a penalty. So effectively they are getting an additional day which effectively amounts to double time. It is my submission sir, that that penalty should not be subject to any annual leave loading. As I indicated, clearly it is available to the employer to pay the penalty of double time and that would see the end of the matter. Following that argument through, as it is in the nature of a penalty, the additional day is granted in that form, and in that respect I don't believe there should be any application in the annual leave loading.

Mr President, I would ask you in summary to find favour with our interpretation which we have put before you today. That is, that there are two weeks one and a half days, or two weeks one half day which has been referred to which, because shift workers are required to work on these particular days normally taken as public holidays that the leave loading should be in respect of the true annual leave, (that is, the five weeks annual leave) not that 'leave', and I call it 'leave' only, (not annual leave), but that leave which

MR FITZGERALD: is, in fact, attributable to public holidays. If the Commission pleases.

PRESIDENT: Thank you Mr Fitzgerald. Mr Imlach?

MR IMLACH: Mr President, if I could just take up the question that you asked about clause 13 Holidays, and you referred to sub-paragraph, sub-clauses (b) and (c). Whilst I appreciate that both those clauses do add a further dimension, or to me, cause further complication to the matter, my experience is that they would apply (I've actually never come across their use in practice) to a shift worker who was required to work on a rostered day off that happened to be a public holiday, and he would get the double time penalty, that is how I see it. However that is only an extension, that is not really a clear, simple interpretation.

I take that view, if we go further over to clause 23, "Shift Work" and then keep going Mr President to sub-clause (e) where it says "Sunday and Holiday Shifts":

"Shift workers who work on a rostered shift, the major portion of which falls on a Sunday or public holiday shall be paid as follows..."

PRESIDENT: Sorry, you've lost me. You referred me to clause 1?

MR IMLACH: Remember we were talking about clause 13, you first started referring to it as clause 8. Now its clause 13 on page 55 of my award. If you go to page 63 which is part of clause 23 "Shift Work", "Sunday and Holiday Shifts".

PRESIDENT: Yes I have it.

MR IMLACH: That is part of the shift work clause, and sub-clause (e) "Sunday and Holiday Shifts":

"Shift workers who work on a rostered shift, the major portion of which falls on a

MR IMLACH:

Sunday or public holiday shall be paid as follows:

1. Sundays

2. Holidays as prescribed in clause 13 hereof, at the rate of double time."

Then it goes down Mr President, to sub-paragraph 3 of the proviso:

"Where a shift worker is required to work on a public holiday as herein defined and is granted time of in lieu thereof, the above penalty rates shall not apply."

To me, that prescribes a general practice, and in the ones that you have mentioned, (13 (b) and (c)) seems to me to be extra to the practice although I don't deny it will apply. When and how I can't imagine but it does apply. Does that help at all Mr President?

PRESIDENT:

It doesn't tell me why they get it that way.

MR IMLACH:

Which way? The payment for the holiday work or this 13 (b) and (c) business?

PRESIDENT:

13 (b) and (c) - in addition to having a day on their annual leave for working the day, it says that penalties do not apply; that would mean of course the double time penalties.

MR IMLACH:

That's right.

PRESIDENT:

Because they have an extra day off, that's the equivalent of double time, the maximum penalty - but it happens, and you would be aware that it happens that in addition to all of those things happening, if that person happens to work on an afternoon or a night shift, they pick up the afternoon and night shift penalty.

MR IMLACH:

Yes, without prejudice, that is a matter of practice Mr President. I

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PRESIDENT - IMLACH - SUB

MR IMLACH: have discussed that confidentially with Mr Fitzgerald. So I don't want to interpret that.

PRESIDENT: No I shouldn't imagine you would Mr Imlach.

MR IMLACH: Well I feel as if I have confused the matter further, as usual. If I could just go and make comments on Mr Fitzgerald's submissions.

I would take exception to his general statements that the award is full of inept drafting and bad drafting which is an indication of the problem we have before us in that a large portion of that (without denying that the award is a sophisticated or complicated award and not easy to follow for lay people) whilst acknowledging that it is a very large award and covers quite a lot of conditions, I reject the concept that it is very badly drafted and ineptly drafted because, as you would know Mr President, many of those terms come from other awards, Federal awards and so on, that are well accepted in their phrases and meanings. I submit that Exhibit I that I produced tended to indicate that. It wasn't unknown what the interpretation was that I was putting on these things, and this is the problem we have.

You might remember I said a couple of times in my submissions that half the problem is ignorance of what these things are known to mean and what they do mean. Accept it. Not only Mr Fitzgerald, but you can imagine a person taking on the secretaryship of an aged persons home who had never been involved in the concept of shift work, it is completely foreign to them but they still apply their lay experience to it. When we go a bit further and we see those letters to the homes from the Department of Labour and Industry which the Chamber has access to but we don't, you can see the poor old union as a 'bunny', not knowing what is going on in the background, yet Labour and Industry is telling the employers: "You should

MR IMLACH:

be paying the rostered rate plus the loading", and here's the union going around saying: "We want the rostered rate". Now the employers knowing what the official interpretation was without coming to this jurisdiction are refusing to pay even the rostered rate. So we are 'babes in the wood' or innocents in that circumstance. I submit Mr President, that the employers do know and this argument that it is all bad drafting and so on, I think is tending to be superficial. However, that is without denying the fact that it is a very large award and incorporates concepts across a wide spectrum in industrial awards.

Also, Mr Fitzgerald attacked the sick-leave provisions. "There is something wrong with them" he said. Well I appreciate what he is saying. I know that there are 28 days the day they start, that is unprecedented - 28 working days the day they start. Nevertheless, if you look at the State standard, many accumulate to 90 days and can't go any further, whereas in the State standard it can go on indefinitely. As the Union Secretary I am more inclined to go for the indefinite accumulation even if you start with a smaller amount. We are caught with this situation, it is better in the short term, not so good in the long term. Also, hospital workers presumably are subject to infections and diseases that other employees are not. There are reasons why these things are there. Not the reasons, necessarily, that Mr Fitzgerald put forward.

Also I don't agree that the Department of Labour and Industry's opinion, (even though it is found to be wanting on many occasions), I don't agree that it is just another opinion. We have to accept it unless we go to the extreme of coming for an interpretation which we don't want to do unless we have to.

Also, Mr President, I hope Mr Fitzgerald is not displeased at being

MR IMLACH:

associated with the Hospitals' Award; he feels discomfort perhaps with it, but not displeasure. I am quite pleased to be associated with him.

Also, the matter of appropriate channels for advice he referred to. Here is the occasion where the union has said (before we came to today's meeting) that it interprets the award in a certain way, and the employer goes in all directions and won't take the advice of the union on the matter which I submit was quite reasonable in all the circumstances.

MR IMLACH:

We actually find Mr President that quite often happens at a private establishment, a hospital or a home. We give our opinion on what it should be, fairly.

In other words in this case we did not ask for double, we only asked for the rostered rate. The Home refuses to pay it, go off to the representative of the employers, who then support that contention knowing that they have got advice from the Department of Labour and Industry that they should get double.

In that context you can understand why we are not very happy.

I also dispute the claim that the award is unable to be interpreted. In this particular case I think it is quite clear. I submit that what I put earlier is definitely clear, there is no question as to what the interpretation should be.

Again Mr Fitzgerald said that what we were now submitting which in today's hearing I submit I did not change what we were submitting. I advised that previously we had this interpretation but at today's hearing I have been consistent in saying what I think the correct interpretation is.

So I submit I have not changed at all at this hearing. I have only advised that we have changed our interpretation and even up until now, we are not changing what we are seeking. We are seeking the payment of the rostered rate. But the employer will not agree to it Mr President, therefore we have to seek an interpretation and what comes out of the interpretation we will seek that.

It is not fair to say we are seeking double payment. We are not. I trust you can understand. We do not like the way it is going

MR IMLACH:

but because of the position we are in we have to pursue it.

Mr Fitzgerald said that what we are after is against all industrial precedent in Australia. It is interesting Mr President. We have a joke in our office about clerical efficiency and you might know that my assistant secretary was a painter and I have great respect for him in every respect.

He, having been a painter is a bit diffident about his ability clerical wise and I quite often say to him, "Don't worry about it; it is not all that important". But it is a little joke amongst us.

For example, this morning on a two page letter someone had written a note on the bottom page. That is clerically inefficient because it is not likely to be seen. It should be on the top page.

PRESIDENT:

Perhaps that is why it was written on the other page.

MR IMLACH:

No, it was meant to be seen Mr President.

Why I am making that small comment is this: that my exhibit, Exhibit I, whilst it does not have a date on it, it is easily ascertainable from it what the latest is.

In other words, just slightly down from the top:

"Standard components: In the Annual Leave cases (1972) ..."

Then even further down there is a reference to 1980. Just before New South Wales law:

"... State 1980 AILR ..."

In other words that document at least goes up to 1980, whereas the ones put forward by my colleague, Mr Fitzgerald, if we look at the

MR IMLACH:

bottom of Exhibit M for example:

"Revised 11/11/69."

Then Exhibit N:

"Revised 14/10/66."

Exhibit O, if my eyes serve me correctly:

"1942."

So I submit Mr Fitzgerald's submissions are a little out of date.

In that context the annual leave case which Mr Fitzgerald referred to of 1972 by a Full Bench certainly would set the standard I submit.

PRESIDENT:

Only if the words used in that particular award that was interpreted by a Full Bench were the same words that are to be found in this award.

MR IMLACH:

That is correct, Mr. President. I agree with that.

I have not got it in front of me so I suppose it does not help to go any further, although that exhibit does indicate that the terminology - if I just read from it:

"This ordinary pay concept means that a worker on leave is to receive the rate applying to his ordinary hours of work during the leave period excluding any special payments which may have been granted."

Then it goes on to the shift payment and so on.

I believe it was either that case or one very close to it where the judges said that if they were to implement this decision in the form of words in an award, they would use words found in Tasmanian

MR IMLACH:

Industrial Board awards, the amount of wages you would have received had you been at work.

There is a connection I submit, and I am sorry I have not got it here with me.

The point I was making Mr President, was that I submit my exhibits more authoritative than Mr Fitzgerald's, subject to what you have said - the terminology of the award.

PRESIDENT:

What do you say about the Macquarie Dictionary, which is the latest lexicon and is said to incorporate Australian English and that, as I read to you said:

"That ordinary pay means remuneration for an employees normal weekly number of hours fixed under the terms of his employment but excluding any amount payable to him for shift work, overtime or other penalties."

MR IMLACH:

I would say two things Mr President. Firstly, it is not an industrial dictionary - just an ordinary dictionary. Secondly, it is referring to ordinary pay.

Our award states ordinary time for a shift worker - ordinary time is his rostered time. That is all I can say on that.

There was a submission Mr Fitzgerald put which I believe was a matter of merit, but it is still worth considering. It relates to the ordinary pay and I believe in my submissions that I made it quite clear that in the award there is provision for settling what his ordinary time rate of pay would be, i.e. the rostered rate. That was what his annual leave payment for the period of his leave would be.

MR IMLACH:

Then it says in subparagraph (i) that there shall be an allowance and we have been over it before of course but it says:

"Annual Leave Allowance:
During a period of annual leave an employee shall be paid an allowance by way of additional salary."

Additional to what he normally gets, so therefore he gets not only his ordinary time rate of pay or his ordinary pay or his rostered pay - not only that - but an additional salary in the form of an allowance.

Now the concept was, as I understand it, that when a person went on leave they ought to first of all be able to get what they normally would get. The annual leave allowance was to give them a bit of money to be able to pay the cost of going on leave. That is the idea of the annual leave loading.

For a day worker who gets a certain amount regularly - week after week - when he goes on leave he gets the loading. The concept being to help him pay the extra costs of taking leave and that was established some 10 or more years ago.

If you apply that to a shift worker his ordinary pay - what he normally receives - is to him his standard amount of pay regularly received and in that context additional payment to help him pay for the extra costs of leave makes sense.

I acknowledge that is merit Mr President, but I believe Mr Fitzgerald touched upon that thing, so I just wanted to put that as well. But it does therefore explain why you have those two parts in the annual leave section of the award - payment period of leave and annual leave allowance - which fits in with the

MR IMLACH:

interpretation, I submit, must be read into that award.

The final point I want to make Mr President, is that in reading the annual leave clause of the award, found in that is the provision:

"That a shift worker shall have added to his or her period of annual leave one day for each statutory holiday."

Despite what has been said I take that to mean his period of leave will be increased to that amount - whatever it comes to - seven weeks and half a day or one and a half days, whatever it is, meaning period of annual leave.

It says here:

"... shall have added to his or her period of annual leave ...".

I interpret that to say that the annual leave is increased and becomes annual leave and I say that interpretation is buttressed by the fact that it is in Clause (ii), Annual Leave - provided for in Annual Leave.

Thirdly, and with less force, I submit that that complies with the Guideline 8 that you referred to today. In the context of the award, that is what is meant.

I have always held that view Mr President. If it is contrary to established interpretation well I will be disabused of that.

PRESIDENT:

Would it have any different meaning do you suppose to that which attaches to the award provision regarding the occasion of a public holiday falling during the period that the leave is actually taken?

MR IMLACH:

Not for a shift worker.

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PRESIDENT - IMLACH - SUB

PRESIDENT: Doesn't that particular provision say that the period of leave shall be extended by one day. In other words it is exclusive of the public holiday which happens to occur during the period the employee is physically taking his leave.

MR IMLACH: Yes it does. I agree to that. It does extend the period of annual leave.

PRESIDENT: It simply means that the period for which he can be off work is extended by one day. You do not have to take the annual leave for a holiday that occurs during the period of annual leave.

MR IMLACH: No.

PRESIDENT: But that does not give you an extra day's annual leave. It simply means that the leave is interrupted.

MR IMLACH: Yes, I accept what you are saying Mr President. I say that is my argument on the next paragraph where I said, it is added annual leave or extends the annual leave period.

I would apply that to that paragraph as well.

PRESIDENT: What do you suppose an employee would be entitled to if say he was taking (let us make it easy) a period of five weeks annual leave during which period Anzac Day fell. Anzac Day was on a Thursday; assume also that had he been at work he would have been on afternoon shift on that day. Would he be entitled to a flat rate for that extra day by which his leave would have been extended or would he be entitled to ...?

MR IMLACH: Mr President if he was a shift worker on Anzac Day - I presume he is a shift worker - which means he would be taking his leave as calculated by the employers, it

MR IMLACH: would be more than four weeks, it would be a longer period.

PRESIDENT: I said let us make it easy. Let us assume that he is only taking five weeks, and during that period Anzac Day falls.

MR IMLACH: He would get paid for that period if he is a shift worker taking annual leave - according to roster on that day. If he happened to be rostered off notionally on that day he would not get anything for it.

PRESIDENT: Except an extra day on his annual leave.

MR IMLACH: Yes, at the rostered rate.

I agree it could be double time or it could be flat rate time.

PRESIDENT: But it would not be 15 per cent?

Don't answer it Mr Imlach because you will get yourself into trouble if you do.

MR IMLACH: I am indebted to you Mr President.

That is all of my submissions.

PRESIDENT: Before you resume your seat will you now sum up and tell me exactly what it is you want because you and Mr Fitzgerald are to be congratulated, if nothing else for your filibustering.

You have almost lost me entirely. I do not really know what you want.

MR IMLACH: Mr President, I thought I made it clear. I really did.

PRESIDENT: Just make it clear again. You just conclude in the same way you began so I will know what you want. Do you want me to make an order?

MR IMLACH: Yes. I will be requesting an order if you interpret in the form that I say the award must be interpreted. It is not the way I like but I interpret it the way it is.

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PRESIDENT - IMLACH - SUB

MR IMLACH:

In other words, I want to repeat, I am seeking an interpretation. If the interpretation comes out and says it is only the rostered rate to be paid, I will seek that after the interpretation.

If the interpretation says it is the rostered rate plus the loading I will seek that but at the moment all I am seeking is interpretation and I submit that the interpretation is that: 'When a shift worker takes annual leave they should be paid the rostered rate for the period - which is seven weeks plus, plus their annual leave allowance for the first five weeks, the annual leave allowance being calculated at the rostered rate or $17\frac{1}{2}$ per cent, whichever is the greater.'

Do you want me to repeat that, Mr President?

PRESIDENT:

Let me repeat it back to you and see if I understand.

You are saying in a given case an employee who is a shift worker takes five weeks annual leave for which he should be paid in accordance with projected roster. In addition to that that person should also be paid an annual leave loading which would be exactly the same as the pay the person you submit should be entitled to in any case. Is that right?

MR IMLACH:

Yes.

PRESIDENT:

But we are only talking about five weeks.

In the event that person took seven weeks, then you are saying he or she should be entitled (to in the first instance) seven weeks in accordance with projected roster, plus five weeks in accordance with projected roster.

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PRESIDENT - IMLACH - SUB

MR IMLACH: Or $17\frac{1}{2}$ per cent, whichever is the greater.

PRESIDENT: I excluded that because I am sure $17\frac{1}{2}$ per cent would not be greater.

MR IMLACH: I agree with that, yes.

PRESIDENT: Another question. Are you saying that the annual leave loading is only the penalty that attaches to five weeks, or is it actually five weeks pay plus penalties?

MR IMLACH: It is five weeks flat pay plus the penalties that would have applied had he been at work.

PRESIDENT: Plus afternoon, night shifts and weekends.

MR IMLACH: Yes.

PRESIDENT: So it is really double penalties?

MR IMLACH: That is what I have said.

PRESIDENT: For five weeks. Payment as to roster for the remaining two weeks if you like, or 11 days?

MR IMLACH: Yes.

PRESIDENT: You are saying the award supports that submission?

MR IMLACH: Yes.

I submit that that is how it can only be interpreted and I say that is not what we sought from the employers. That was not our interpretation until we came to look at it on seeking to have the seven weeks pay at the rostered rate only.

PRESIDENT: Do you want me to make a general order, or only an order in relation to this specific case - is it Miss Tonks?

MR IMLACH: She is the Secretary of the home.

PRESIDENT: I thought that was the name of the person.

MR IMLACH: She is paymistress of the home.

General Mr President, because the problem applies across the board as Mr Fitzgerald freely admitted. The correspondence from the Department of Labour and Industry indicates we are going around seeking the rostered rate for seven weeks only. They are refusing it and when they go to get their advice they are told, what we are now submitting should be the interpretation.

PRESIDENT: Should that order apply prospectively or retrospectively?

MR IMLACH: Can I just digress for a minute, please.

We do not want to have anything retrospective any more than we have asked for but if it is in the form that we submit it should be, we would seek to have to prospective but we do seek retrospective for Strathaven Home where they have not had the rostered rate - only rostered rate.

Technically and legally I cannot put that to you, can I, like that?

PRESIDENT: You just did.

MR IMLACH: I said I was digressing. As far as I know, I cannot.

PRESIDENT: If I interpret the award the way you would have me interpret it and I interpret it retrospectively it will mean that the award has always meant that. Therefore it may mean that a lot of people have been underpaid.

MR IMLACH: That is right.

Perhaps if I could have a word with Mr Fitzgerald.

SHORT ADJOURNMENT

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PRESIDENT - IMLACH - SUB

MR IMLACH: I am making a hard judgement Mr President, but I will say prospectively - I claim prospectively.

PRESIDENT: In the event the interpretation favoured your viewpoint, what would happen in relation to that particular case that gave rise to all the correspondence because that occurred at an antecedent period, did it not?

MR IMLACH: Yes, well that is what the matter of our discussions ...

PRESIDENT: I see. That would be taken on board, would it?

MR IMLACH: Well I do not think it would, because it would apply across the board everywhere and that is why I say it is hard for me to judge. I think it is a bit big for me to be pursuing that because we, in all innocence, presumed certain amounts were being paid; went to Strathaven and followed that up. We would expect Strathaven to be settled, but Mr Fitzgerald thinks that everyone will have to be settled.

PRESIDENT: On the other hand if I was disposed to accept Mr Fitzgerald's interpretation, nothing prospectively is still nothing and nothing retrospectively is still nothing, is it not Mr Imlach?

MR IMLACH: Still nothing, yes. I still think it is a heavy weight to take on responsibility for imposing back monies we never claimed. I think I have got to make a judgement and it is prospective.

PRESIDENT: Yes. So long as I understand what you are saying - that if I interpret the award prospectively and the interpretation favours your viewpoint then obviously any members who might be affected prospectively would gain. Those whom, and one in particular whom you believe has been adversely

PRESIDENT: affected retrospectively, would lose?

MR IMLACH: Yes.

MR PRESIDENT: Do you understand that?

MR IMLACH: I do. It makes me think more seriously about it.

I would request time to get advice and instruction on that.

MR FITZGERALD: Mr President, I wonder if I can help in that respect. If we are referring to Strathaven only, who I suppose is the subject of this application, I have spoken to Mr Jack Eaton, who is in fact the Secretary of the Home and he is prepared to accept any decision of course, which he is obliged to do anyway. He has also indicated that he will apply it retrospectively to the time when it was first raised by the Department of Labour and Industry.

I think that will probably put Mr Imlach's mind at rest. I cannot give an undertaking at this stage on record, because I am without exact instruction on the point but certainly in the way they are approaching it, they are prepared to retrospectively remedy the situation if necessary.

MR IMLACH: Mr President I still stick with what I say. I think I will have to get instructions. The more I think about it - it is too serious for me to say now...

PRESIDENT: Let me save you the trouble Mr Imlach because regardless of what you have said, I consider that the only authority I have so far as retrospectivity is concerned would be from the date of proclamation of this Act.

If you think about it, to do anything other than that would be to cut across decisions and

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PRESIDENT - FITZGERALD - IMLACH

PRESIDENT: interpretations validly taken by other tribunals or other persons who had vested in them the power to give interpretations.

Does that make it easier for you.

MR IMLACH: I claim retrospectively to 1 January this year.

PRESIDENT: I understand that submission, Mr Imlach.

MR IMLACH: Thank you.

PRESIDENT: Why didn't you say that in the first place?

MR IMLACH: As I said, I do not know all about it. I should, but I do not.

PRESIDENT: Mr Fitzgerald, you are not entitled to right of reply but you did not specifically address that question of retrospectivity. I do not know that there is much you need say on that. I have made my position clear.

MR FITZGERALD: I do not think there is much I can say really, obviously depending on the way that you decide this matter.

I would be anxious I suppose if the decision was not in our favour from a general point of view to ensure if members of ours are in fact paying it in an incorrect manner that they have an opportunity to remedy the situation prospectively.

In my discussions with Mr Imlach during the short adjournment, I indicated that it is a bit unfair to single out Strathaven as they are the subject of this application because there are other members of ours in the same position.

Apart from that the Secretary of the Home assured me that any remedy will take place retrospectively back to the original letters from the Department of Labour and Industry.

MR FITZGERALD:

It would be my submission that if there is any general ruling on this particular matter that it should apply prospectively, sir.

PRESIDENT:

Thank you. That concludes a rather protracted hearing of this matter.

DECISION RESERVED