TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s43(2)(a) application for interpretation of an award

The Minister administering the State Service Act 2000
(T13572 of 2009)

MISCELLANEOUS WORKERS (PUBLIC SECTOR) AWARD

PRESIDENT P L LEARY HOBART, 1 February 2011

Interpretation of award - Clause 15(c) General Conditions - declaration pursuant to section 43(1A)(a) that clause applies only to employees who are requested/directed by the employer to wash towels and dusters away from their work site - declaration retrospective to time award was made being 1 September 1988

REASONS FOR DECISION

[1] This is an application pursuant to section 43(2(a) of the *Industrial Relations Act 1984* (the Act) by the Minister administering the State Service Act 2000 (the Minister) seeking an interpretation of Clause 15(c) General Conditions of the Miscellaneous Workers (Public Sector) Award (the MW award).

[2] The Liquor, Hospitality and Miscellaneous Union (LHMU) is a named party to the MW award and is the respondent to this application.

[3] The MW award prescribes at Clause 15(c)(i) General Conditions:

> *"Where an employee is called upon to wash articles the following amounts shall be paid extra:*
>
> | | |
> |---|---|
> | *washing towels* | *$0.50 cents each* |
> | *washing dusters* | *$0.26 cents each* |
>
> *All materials for cleaning purposes shall be supplied by the employer."*

[4] For ease of reference I have adopted the description *'tea-towel'* allowance which was the description used by the parties when deleting the provision from the Cleaners Award in 1988. Of course the award refers only to *towels* without definition.

The Minister:

[5] The Minister described the work requirements of the employees the subject of the application, outlined a brief history of the MW award provision and the intent of the provision, as applied by the Minister, and noted that the *'tea-towel'* allowance has not been paid to employees undertaking the washing of towels and dusters at work.

[6] It was submitted that the employee classification of Education Facility Attendants (EFAs) performed a range of tasks within the school environment and the duties depended on the size and individual requirements of the particular school. There are some 800 employees within the classification.

[7] The duties are normally grouped into three main categories being: cleaning, grounds keeping and kitchen assistants. EFAs performing cleaning duties generally undertake cleaning of school facilities; those performing grounds keeping roles are charged with the responsibility of the upkeep of school grounds and kitchen assistants generally prepare demonstration ingredients and equipment for classes, prepare teaching aids and education displays and maintain appropriate areas to the required cleaning standards and undertake other related tasks.

[8] It is the EFAs performing the role of kitchen assistants who are the subject of this determination.

[9] It was submitted that the duties performed can be very broad and that the Department maintains a steady workforce, a stable industrial framework and a good working relationship with the representative union being the Liquor Hospitality and Miscellaneous Union.

[10] Mr Mazengarb for the Minister said that:

> *"In the majority of instances, the employers were contractors engaged by contract to clean specific sites owned by a variety of businesses. In turn, as still is the case, the contractor engages employees for the purpose of carrying out cleaning tasks to enable contracts to be met. If we accept this postulation, then it is understandable that the Cleaners Wages Board, by agreement, determined that if the employer, or if the employer called upon an employee to take home and wash towels and dusters, then such an employee should be reimbursed for the additional tasks associated with such a calling by the employer. And in addition the employer, quite correctly, would be required to provide the necessary materials for such cleaning purposes."*

[11] With the advent of the Act, determinations of the Wages Boards became awards of this Commission and the Cleaners Wages Board determination became the Cleaners Award and included the *'tea–towel'* allowance.

[12] It was noted by the Minister that the *'tea-towel'* allowance was removed from the Cleaners Award by decision in T1153 of 1988 as part of a negotiated package to implement the second tier wage principle effective from the first full pay period on or after 1 September, 1988.

[13] The *'tea-towel'* allowance was transported into the MW award, by agreement, when the award was made by decision of a Full Bench with an operative date also being the first full pay period on or after 1 September 1988.

[14] The Minister said that on occasions where a school had called upon an employee to take articles home to wash and an employee has made application for the *'tea-towel'* allowance pursuant to the MW award clause it has been paid. It was submitted that such request has usually been made where a school did not having a washing machine on the premises.

[15] The three main industrial instruments currently covering the employment relationship for EFAs are:

(i) the *Miscellaneous Workers (Public Sector) Award;*

(ii) the *Education Facility Attendant Salaries and Conditions of Employment Industrial Agreement 2008*; and

(iii) the *Education Facility Attendant Job Security Industrial Agreement 2008*.

History:

1966

[16] It was submitted that research by the Minister revealed that the Determination of the Cleaners Wages Board, found in the Tasmanian Government Gazette, dated Friday 18 November 1966, provided at Clause 8 under the General Conditions provision that:

> *"(i) Where an employee is called upon to wash articles the following amount shall be paid extra:*
>
> *washing towels 8 cents each;*
> *washing dusters 3 cents each.*
>
> *All materials for cleaning purposes shall be supplied by the employer."*

[17] The determination was made on 5 August 1966, and came into effect from the beginning of the first pay period to commence on or after 1 September 1966.

[18] The above entitlement is reflected in the current MW award although the amounts paid (8 cents and 3 cents) have been increased following safety net decisions and now prescribe 50 cents and 26 cents respectively.

[19] The Cleaner's Wages Board was:

> *"…established in respect of the trade of cleaning buildings, including the cleaning of floor coverings, furniture, fixtures, fitting and equipment within a building."*

[20] The definition of *'cleaner'* found in the Wages Board determination was as follows:

> *"Cleaner – means an employee who is engaged for the greater part of his or her working time in cleaning work of any description, on premises or in bringing into or maintaining premises in a clean condition, whatever may be the nature of his or her other duties."*

[21] The definition of *'cleaner'* in the MW award is in identical terms and remains unchanged.

[22] The nature of the Wages Board system does not provide any insight as to the reasons for the *'tea-towel'* allowance being inserted into the Determination. A Wages Board comprised an equal number of employer and employee representatives with an independent Chairperson. Negotiations sought a consensus outcome and no records

exist as to the reasons why any particular provision became part of a Determination or whether any provision was as a result of a determination by the Chairperson and if so, on what basis it was so determined.

1988

[23] The application to the Commission to vary the Cleaners Award at the time of the 4% second tier agreement resulted in the parties:

> *"rationalising the present allowances, deleting tea-towel and incinerator allowances with the remaining allowances being grouped into the allowances clause and covering steam cleaning, window cleaning and toilet cleaning."*

[24] A decision was issued dated 31 August 1988 endorsing the consent variations to the Cleaners Award to take effect from the first full pay period on or after 1 September 1988. The base rate of pay for all adult employment classifications was increased by 4%.

[25] The rate for *'cleaner, (as defined)'* was increased to $287.60 per week. The definition of *'cleaner'* remained unchanged but the *'tea-towel'* allowance found under General Conditions had been deleted. The deletion was a cost offset in the second tier negotiations.

[26] The classification of '*kitchen assistant (schools)'* was inserted into the new MW award following the 4% second tier negotiations effective from the first full pay period on or after 1 September 1988. The *'kitchen assistant (schools)'* definition aligned with the cleaner definition in the Cleaners Award and the rate of pay was identical ($287.60). However the *'tea-towel'* allowance was retained in the MW award whereas it was a cost offset in the Cleaners Award and was deleted. The cost offsets for implementation of the 4% second tier negotiations were different in each award.

[27] Submissions by the union representative in that matter record that the classification definitions for the MW award were:

> *"…drawn from the definitions currently in existence in the Cleaners award and in some cases from the Miscellaneous Workers Award. There are some definitions which relate to classifications not previously included in awards – kitchen assistant (schools) which relates to an employee who works in the school in the home arts area."*

[28] As noted above that new classification represented the work undertaken by the cleaner classification in the Cleaners Award.

1994

[29] The Department of Education and the Arts Position Description for the classification of Kitchen Assistant in August 1994 required the employee to, amongst other functions, *"…maintain tools and equipment including the washing of linen and towels."*

[30] The Department of Education, Community and Cultural Development Position Description for School Attendant Trainee/Level 1, School Attendant Level, 2, Level 3 and Level 4 - Kitchen Assistant as at March 1997, included the requirement to *"wash linen and towels."*

2008

[31] The Department of Education Statement of Duties for School Attendant Levels 1, 2, 3 and 4 as at October, 2008, required the duties for the Kitchen Assistant to include the requirement to *"…wash linen and towels."* This remains in the current Statement of Duties.

[32] The *Education Facility Attendant Salaries and Conditions of Employment Industrial Agreement 2008,* provides at Clause 8 Allowances that:

> *"The following allowances from the Miscellaneous Workers (Public Sector) Award will be absorbed into the salary rates described in Clause 7 of this Agreement from the first full pay period on or after 1 December, 2008:*
>
> *Height Allowance*
> *Washing Allowance*
> *Incinerator Allowance*
> *Steam Cleaning Allowance*
>
> *Employees covered by this agreement may be paid a Trade Work Allowance in accordance with the conditions of Schedule 1."*

[33] The relevant facts, as known, are not in dispute between the parties in this matter.

Union:

[34] The union submitted that the *'tea-towel'* allowance should be paid to employees for washing towels and dusters as part of their normal work performance.

Authorities:

[35] The Minister referred to the decision of the High Court in *Amcor Limited v Construction, Forestry, Mining and Energy Union; Minister for Employment and Workplace Relations v Construction, Forestry, Mining and Energy Union*[1] [(Amcor case) where the Full Court discussed the language found in an agreement to which the parties in that matter were respondent. In that decision His Honour Justice Kirby said:

> *"The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combined to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court, of interpreting industrial agreements and especially certified agreements. I agree with the following passage in the reasons of Madgwick J in Kucks v CSR Ltd, where his Honour observed:*
>
> *It is trite that narrow or pedantic approaches to the interpretation of*

[1] 2005 HCA 10; 9th March, 2005 [M311/2004 & M312/2003]

> *an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."*

[36] The Minister said that the comments of Kirby J were *"pertinent"* to this matter.

[37] The union cited *Kucks v CSR Limited (1996)*[2] (Kucks) which considered whether a particular allowance should be included in the calculation of certain other payments.

[38] In *Kucks*, Madgwick J said:

> *"The estimable Macquarie Dictionary second edition gives the relevant meaning of allowance as an addition on the count of some extenuating or qualifying circumstances. That meaning for the word, as used in each of the subclauses referred to, seems to me to be apt. To my mind, not only is there nothing in the award to indicate the necessity for a departure from this meaning of the word 'allowance', but ample reason to confirm that such was what was intended."*

[39] The union said that allowances found in awards were to:

> *"…compensate employees for having to perform work – part of their work – in extenuating circumstances such as high, cold, heat, confined spaces or to compensate for costs such as meals, travel, the purchase of tools or to address additional duties or responsibilities such as higher duties."*

[40] It was submitted that the *'tea-towel'* allowance satisfied the dicta in *Kucks* as it was an allowance payable for the performance of additional duties.

[41] In the decision of His Honour Justice Gilchrist in *Hyatt Regency v Pratt and Harford* (2007)[3] (Hyatt Regency case) His Honour said:

> *"Award interpretation can be a difficult exercise. The task before the court is to interpret the award and not to re-draft it. But the distinction between those two functions can, at times, be elusive. An award is an instrument often drafted by persons who know what they mean, but who might not express what they mean in a manner reflecting the skill of an expert draftsperson. Sometimes the relevant clause reflects a compromise with bits and pieces of diverse positions cobbled together. This can result in infelicities of expression and the*

[2] IRCA 166 (19 April 1996)
[3] [SAIRC 32]

> *formation of phrases or sentences that when read literally make little or no sense. Faced with such difficulties it is appropriate for a court* 'to read the award to give effect to its evident purposes….and meanings which avoid inconvenience or injustice may reasonably be strained for.' *But there are limits. For as Hayne J explained, that exercise cannot be undertaken simply for the purpose of achieving:* '….some result that might be considered fair or desirable according to some a priori standard of fairness or proper employment practice'*."*

[42] And further:

> *"The line between the permissible straining of a meaning to avoid inconvenience or injustice and the impermissible straining of a meaning prompted by a desire to achieve a fair result can be blurred. Doubtless this is a reason why many cases concerning award interpretation are littered with equally reasonably conflicting opinions."*

[43] Gilchrist J also cited *Kucks* where it was said:

> *"A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award…ordinary or well understood words are in general to be accorded their ordinary and usual meaning."*

[44] Kirby J noted at paragraph 56 in the decision of the Full Court of the High Court in *Australian Communication Exchange Limited v Deputy Commissioner of Taxation* (2003)[4] (ACE case):

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

[45] The union referred to an extract from the decision of His Honour Justice Hayne at paragraph 115 of *ACE* where he said:

> *"It would also be wrong to strain the words of the award to achieve some result that might be considered fair or desirable according to some prior standard of fairness of proper employment practice. To do that would ignore the very real significance which should be attached to the fact that the terms of the award will usually reflect compromise. Nonetheless, the award must be given a construction that not only accords with the language which the parties – or the relevant*

[4] [HCA 55 at 56]

industrial tribunal – have used to express the rights and obligations of the parties, but also gives sensible work for them to do."

[46] It was submitted by the union that the accepted principles applying to award interpretation are found in the decision of the Full Federal Court in *Short v Hercus Pty. Ltd* (1993)[5] (Hercus). His Honour Justice Burchett in his judgement at paragraph 6 confirmed the importance of reading an expression in its context in the case of an ambiguity. He said:

"And if, for example, an expression was first created by a particularly respected draftsman for the purpose of stating the substance of a suggested term of an award, was then adopted in a number of subsequent clauses of awards dealing with the same general subject, and finally was adopted as a clause dealing with the same general subject in the award to be construed, the circumstances of the origin and use of the clause are plainly relevant to an understanding of what is likely to have been intended by its use. It is in those circumstances that the author of the award has inserted this particular clause into it and they may fairly be regarded as having shaped his decision to do so. The rules of construction, as their Honours Mason and Wilson JJ said in Cooper Brookes (Wollongong) Pty Limited v The Commissioner of Taxation, [1981] HCA 26; (1981) 147 CLR 297 at 320, are really rules of commonsense. Commonsense would be much offended by a refusal to look at the facts I have summarised. As Isaacs J said in Australian Agricultural Company v Federated Engine Drivers and Firemen's Association of Australasia [1913] HCA 41; (1913) 17 CLR 261 at 272, citing Lord Halsbury LC 'The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it'*."*

[47] And further:

"The context of an expression may thus be much more than the words that originally it neighbours. Context may extend to an entire document of which it is part, or to other documents of which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be assumed, in the case of an expression with its known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce, could not be read in ignorance of the source of their language, nor should a legal document, including an award be so read."

[5] [FCA 51] (1993)

[48] In considering where an ambiguity or obscurity may not be obvious he said:

> *"But an ambiguity or obscurity may not be immediately seen on the face of a document. Both the problem and its solution may appear only when the wider context in which the expression first sprang is brought to notice. Is the court then forbidden to look past the document itself that is before it? The respondent says the instant award is clear and we must shut our eyes to what went before. I think there are two answers to this argument. On the one hand I do not accept that the award is clear on its face. The fact that I have given it a meaning by a process of construction (as it happens, contrary to the respondent's contention) cannot disguise the possibility of understanding the language, as the learned judge understood it, differently. That is certainly sufficient to justify a reference to its source. Where circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form, only a kind of wilful judicial blindness could lead the court to deny itself the light of that history, and to prefer to peer unaided at some obscurity in the language. 'Sometimes', as McHugh J said in Saraswati v R, [1991] HCA 21; (1991) 172 CLR 1 at 21, the purpose of legislation 'can be discerned only by reference to the history of the legislation and the state of the law when it was enacted.' Awards must be in the same position.*
>
> *But even if the language, read alone, appeared pellucidly clear, the tendency of recent decisions – and this is the other answer to the argument put – would seem to require the court to look at the full context. Only then will the nuances of the language be perceived."*

[49] In citing the decisions of the Federal Court in *Australasian Meat Industry Employees Union (WA Branch) v Woolworths Limited* [2007][6]; *Van Efferen v CMA Corporation Limited* [2009][7] (Van Efferen) and the *Australian Rail, Tram and Bus Industry Union v Rail Corporation New South Wales* [2009][8] (Rail Corporation), the union said these decisions addressed the concept of business commonsense. His Honour Justice Jagot said in the Rail Corporation that:

> *"Business commonsense is not to be identified by reference in the interests of one party only. It is a bilateral or multilateral concept."*

[50] The union said that this concept was an important one in this matter as the Minister argued that there would have been little business commonsense in agreeing to a clause which meant that every *'article'* washed should be paid an additional allowance albeit that there were facilities and time to wash the articles during work time.

[51] In *Van Efferen* reference was made to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004][9] (Toll) where the High Court said:

> *"It is not the subjective beliefs or understanding of the parties about their rights and liabilities that govern their contractual relations. What*

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[6] FCAFC 201 (21 December 2007)
[7] FCA 597 (4 June, 2009)
[8] FCA 894
[9] HCA 52; (2004) 219 CLR 165 at 179

> *matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe…..That normally requires consideration not only of the text but also of the surrounding circumstances known to the parties and the purpose and object of the transaction."*

[52] Further in *Van Efferen* it was said:

> *"The terms in which industrial instruments are drafted often require a distinction to be drawn between aspirational and promissory statements. In accordance with the objective theory of contract expounded in Toll, a provision in a document proffered by an employer will be treated as promissory in nature if the hypothetical, reasonable, potential employee to whom the document is presented would have concluded that CMA intended to be contractually bound to follow the procedures outlined in it if CMA developed any concerns about the behaviour of the employee. Whether or not he or she would have so concluded will depend on a consideration of the terms of the clause, the surrounding circumstances known to the parties and the nature of the arrangement which is being entered into."*

[53] In a decision of the Full Court of the High Court in *Attorney-General (Qld) v Riordan* [1997][10]; Kirby J in commenting on the expertise of members of the Federal Commission said:

> *"Practical considerations will demand that considerable deference be paid to the opinion of the Commission in its ascertainment of the existence, or absence, of a dispute, the matters in dispute and the parties to the dispute. The establishment of the Commission as an independent tribunal with specialised jurisdiction, constituted by members with appropriate expertise, provides one reason for this latitude. Another is the organisation of the Commission with industry panels within which members may acquire general knowledge about the background to claims not easily reproduced by evidence in formal proceedings. Such information will inform the Commission's findings and decisions in contested matters, including on the issue of the existence, or absence, of an industrial dispute."*

[54] It was the submission of the union that the same applied equally to this Commission and one could *"hazard a guess to say the Wages Board also."*

[55] This Commission, in an application for an interpretation of a provision in the Hospital Industrial Board Award in Matter T91 of 1985 said:

> *"Speaking generally unless drafting is such as to lead to no other conclusion, interpretation of the rules followed should not ipso facto become the absolute authority for construing a provision in such a way as to confer extreme advantage or disadvantage on an employee. One should be satisfied that the result is not otherwise out of step with the general provisions of the award as a whole."*

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[10] HCA 32 (1997) 192 CLR 1; (1997) 146 ALR 445; (1997) 71 ALJR 1173 (5 August 1997)

[56] It is appropriate for the Commission to direct its attention to the history of the *'tea-towel'* allowance without declaring any ambiguity with the words used. This approach, according to the union, was consistent with the view expressed by the Full Court of the Industrial Relations Court (SA) in *Department of Human Services v Australian Nursing Federation South Australian Branch* (2002)[11].

[57] In the High Court decision in *Australian Broadcasting Commission v the Australasian Performing Rights Association*[12] (Barwick CJ, Gibbs and Stephens JJ) (ABC) Gibbs J said:

> *"It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are ambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and not withstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in Locke v Dunlop (1888) 39 Ch D 387 at p.393…."*

[58] The union said that the application by the Minister sought that the Commission correct the instrument to avoid what is argued to be an absurdity or inconsistency. Further it was submitted that authority to do so can be found in the decision of the High Court in *Fitzgerald v Masters* [1956][13] where the majority said:

> *"It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words (cf. Norton on Deeds, 2nd. Ed. (1928). Many illustrations may be given of the circumstances in which these processes have been followed but to do so would add nothing to the rule that the intention of the parties is to be ascertained from the instrument as a whole and that this intention when ascertained will govern its construction."*

[59] The union submitted that reliance on the authorities to which it has referred is apposite in considering determination of the application. It said that the authorities say that it is relevant to have regard to the setting and context of the award provision at its

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[11] SAIRC 16
[12] [129 CLR 99]
[13] 95 CLR 420

inception. Once the offending provision is identified it must be considered against the factual background of the wider clause of the award. The language of the award is generally assigned its natural and ordinary meaning but where it is ambiguous any surrounding circumstances may be taken into account in assigning the presumed meaning. Extrinsic material may be considered such as the matrix of mutually known facts, the background and object, content and purpose of the award and an objective view as to what it was that the parties would have had in mind when creating the award.

[60] The authority for consideration of extrinsic material is found in the High Court decision in *Codelfa Constructions Propriety Limited v State Rail Authority of New South Wales* [1982][14] where Mason J said:

> *"…it has frequently been acknowledged that there is more to the construction of words of written instruments than merely assigning to them their plain and ordinary meaning…This has led to a recognition that evidence of surrounding circumstances is admissible in aid of the construction of a contract."*

[61] It was submitted by the union that in construing a provision in an award the Commission will, as the authorities show, avoid a construction which results in an industrial nonsense or is shown to be industrially inconvenient. In this matter it is necessary to give consideration to the practical purposes at the time of the making of the award and the purpose it was intended to serve. It is argued that the clause has two different meanings and the interpretation sought will need to determine whether the intent was for the payment of the *'tea-towel'* allowance to be restricted to employees taking the articles home for washing or to be paid for performing the work at the place of work.

[62] In response to the argument that no claim had ever been made for the *'tea-towel'* allowance since its insertion some 21 years ago the union referred to the Federal Court decision in *Australian Municipal, Administrative, Clerical and Services Union v the Treasurer of the Commonwealth of Australia* [1998][15], where His Honour Justice Marshall said:

> *"A further issue in respect to award interpretation was raised at the hearing. This issue related to whether it was permissible to have regard to the conduct of the parties subsequent to the making of the award. In my view, the overwhelming weight of authority supports the proposition that it is impermissible to have regard to such subsequent conduct."*

[63] The decision of this Commission in T91 of 1995 talks about extreme advantage or disadvantage and in this matter should the interpretation be in favour of the union considerable advantage could be available to an employee or employees. The union submitted that the Commission is required to make a value judgement as to advantage or disadvantage.

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[14] 149 CLR 337
[15] 82 FCR at 178

Findings:

[64] The history of the MW award provision is agreed between the parties as far as that history is known.

[65] I agree with the union that the *'tea-towel'* allowance is paid for the performance of additional duties, albeit in specific, and under defined, circumstances.

[66] The following extract from the decision in *Amcor* in my view, and in very general terms, summarises the criteria to be considered in relation to interpretation. His Honour Justice Kirby said:

> *"The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combined to suggest that the construction to be given to cl 55.1.1* [in this case clause 15(c) of the MW] *should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement."*

[67] In my view a literal and common sense interpretation would suggest that the *'tea-towel'* allowance is paid for employees taking the named items home, or elsewhere, for laundering, it does not apply unless the employer exercises its discretion and requests an employee to perform the function and the employer is required to provide the necessary materials.

[68] The provision has survived the award review process undertaken by the Commission which would have been an appropriate vehicle for its consideration. Principle 16, Award Review Process, as varied in July, 2000 said:

> *"The Commission will ensure awards are consistently formatted, do not contain discriminatory provisions and are expressed in plain English."*

[69] To that end the Commission would require that each award be reviewed to ensure, amongst other things, the:

> *"removal of discriminatory provisions*;"
>
> and the
>
> *"removal of obsolete or amendment of inaccurate award provisions."*

[70] The fact that the provision survived the review process may indicate that it has never been contentious.

[71] I have had regard to all of the authorities the parties have referred me to and they would indicate that the general approach to adopt in an interpretation of an award provision is common sense and the ordinary and general meaning of the words found in the relevant provision. Further it is necessary to consider the provision in the context in which it was initially agreed or determined. Kirby's J comments in *Amcor* would generally support such approach.

[72] Also relevant and worthy of consideration is the decision of then President Koerbin of this Commission in matter T30 of 1985 where he made the following observations:

"1. Construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts. It is futile to attempt such an exercise in any other way.

2. It must be understood that in presenting an argument in support of or in opposition to a disputed construction relating to an award provision it is not permissible to seek determination of the matter on merit; that is, on the basis of what one party or the Commission believes the provision in question should mean.

3 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 an intelligible way, there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage.

4. 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.

5. 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.

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

7. It is not permissible to import into an award by 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, any omission or imperfection of expression should be repaired by amendment rather than by implying into it provisions which are not clearly expressed by its language."

[73] The provision in question first appeared in a determination of the Wages Board in 1966 and at the time it would not be unreasonable to presume that the area in which the kitchen hands were engaged did not have facilities for the washing of towels and dusters. That is, there were no mechanical washing machines for such purpose. This was the submission of the Minister. It would also be reasonable to presume that the kitchen hands would then be requested to take the items home, or maybe elsewhere, perhaps to a public laundry, for washing. This it would seem was to be done in the employee's own time.

[74] The relevant criteria for entitlement to the *'tea-towel'* allowance is that the employer would request or direct the employee to make the necessary arrangement for washing the items away from the work site. In my view the words *"where an employee is called upon to…"* provides the discretion to the employer to decide whether to ask the employee to perform the additional work or not.

[75] That requirement was, and still is, mandatory to any entitlement to the *'tea-towel'* allowance. It is at the discretion of the employer to request the washing of the items off site to be performed by the employee.

[76] Further it was intended that the employee should not be out of pocket, nor should they, so the employer was responsible for providing the necessary washing materials.

Such requirement would indicate the function was to be performed away from the worksite. If the facility for washing the articles existed on site the words would be superfluous.

[77] As the *'tea-towel'* allowance applies per item it would be necessary that each item be counted and recorded on each occasion the employee was requested to wash them away from the work place.

[78] The wording of the provision raises questions as to why it only applies to towels and dusters and not to other washable items used in the work place, for example napkins, pinafores, wash cloths and possibly other items. Further there is no definition as to what sort of towels, or for that matter, what type of dusters are to be washed.

[79] Currently, and in circumstances where a school has a washing machine, all items required to be washed would be simply attended to with a minimum of fuss and in my view would not represent additional work justifying the payment of an allowance. To sort out the specific items and individually count each of them would be non-productive and inefficient.

[80] Position descriptions for kitchen assistants require them to *"wash linen and towels"* as part of normal duties. Accordingly the performance of such work is part of their normal day to day function and does not attract any additional payment.

[81] The amount of the *'tea-towel'* allowance seems to me to be excessive, particularly when it is prescribed for each item when it could be safely presumed that an employee would do little more than place the items in, and remove them from, a washing machine at home, or some other place, away from the work site.

[82] Nonetheless if an employee is required to perform the function outside the work site there should be some entitlement to recognition and any materials required should be provided by the employer.

[83] The current provision is lacking specificity and definition, is anomalous and anachronistic and requires review.

[84] The Act prescribes that when considering an application pursuant to s.43(1A)(a) of the Act the President MUST:

> *"(a) declare, retrospectively or prospectively, how the provision of the award is to be interpreted and, if the declaration so requires, by order, vary any provision of the award in respect of which the application was made; or*
>
> *(b) if satisfied that a declaration under paragraph (a) would be inappropriate, by order, direct that an application to vary the award be made to clarify the provision of the award in respect of which the application was made."*

[85] Accordingly, pursuant to s.43(1A)(a) of the Act I declare that clause 15(c) of the Miscellaneous Workers (Public Sector) Award applies only to employees who are requested/directed by the employer to wash towels and dusters away from their work site. If there is no request/direction by the employer there is no entitlement to the *'tea-towel'* allowance. Such application applies from the time the MW award was made being 1 September 1988.

[86] Having made such declaration it seems obvious that the current provision is requiring of amendment to reflect contemporary circumstances. The parties are directed to confer in an attempt to provide a more appropriate, specific and relevant award provision. It may or may not be relevant that the provision was removed, by consent, from the Cleaners Award in 1988.

P L Leary
PRESIDENT

Appearances:
Mr P Tullgren for the Liquor, Hospitality and Miscellaneous Union - Tasmanian Branch
Mr P Mazengarb for the Minister administering the State Service Act 2000

Date and place of hearing:
2009
December 14
Hobart