

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

No. T124 of 1985

IN THE MATTER of an application
by the Hospital Employees
Federation of Australia, Tasmanian
Branch No. 2, for interpretation
of the Hospitals Award re
definition of shift worker

PRESIDENT

LAUNCESTON, 23 MAY 1985

TRANSCRIPT OF PROCEEDINGS

PLEASE NOTE that due to loss of first the cassette tape which recorded these proceedings (through no fault of the Commission's staff) the first six pages (as indicated) have been prepared from notes taken at the hearing, and may not be verbatim.

PRESIDENT: Appearances please.

MR. FRUIN: **M. FRUIN**, representing the **TASMANIAN CHAMBER OF INDUSTRIES.**

MR. SIMMONDS: **J.W.L. SIMMONDS**, representing the **HOSPITAL EMPLOYEES FEDERATION OF AUSTRALIA, TASMANIAN BRANCH NO. 2**, the applicant in this matter.

MR. BENNETT: **G. BENNETT**, appearing for the **HOSPITAL EMPLOYEES FEDERATION OF AUSTRALIA, TASMANIAN BRANCH NO. 1.**

MR. GRANT: **I.G.M. GRANT.** I appear for the **ROYAL AUSTRALIAN NURSING FEDERATION, TASMANIAN BRANCH.**

MR. FRUIN: Mr. President, I would like to raise a preliminary point. The officer dealing with this matter, Mr. Fitzgerald, is unavailable. I have no instructions, but would be seeking an adjournment for four weeks. Mr. Fitzgerald would not be available for two weeks.

MR. SIMMONDS: Mr. President, I consider that this request borders on impertinence to this Commission. The matter has been a matter of discussions back to 29 March 1985 with the Tasmanian Chamber of Industries. Seeking an adjournment for a further four weeks for unstated reasons is why I suggested impertinence.

My understanding of why Mr. Fitzgerald is not here is because he is before another tribunal. Nevertheless in the course of discussions with Mr. Fitzgerald he said he had his instructions on more than one occasion and further negotiations were a waste of time.

I do not comment on the submission that it is rather short notice. It was a longer time than we normally get - over a week.

MR. SIMMONDS:

The matter is a matter of some importance and must be resolved before negotiations in respect of 38-hour for the private sector can proceed. Negotiations in respect of the public sector have concluded in relation to a large number of day workers in the public sector. There is a need to distinguish between day and shift workers is the reason this matter is before you now.

What has been proposed is not only a delay in this interpretation but a delay in the shorter week in private hospitals and homes. It could provoke unnecessary industrial unrest.

PRESIDENT:

What have you to say, Mr. Bennett?

MR. BENNETT

I endorse and support Mr. Simmonds' submission, sir.

MR. GRANT:

I agree. I support Mr. Simmonds also.

PRESIDENT

I uphold the applicant's point of view, Mr. Fruin. Mr. Fitzgerald was contacted personally a week ago and he indicated he was somewhat pressed for time due to certain commitments. He had hoped the matter would not come on today. I suggested he contact the applicant and if it could be mutually agreed the matter not proceed then to advise me accordingly.

Unless I missed it I don't think I had the courtesy of a response.

If I rule against you and you have no instructions my concern is that you may not be afforded fair play. That is really the concern of the Chamber rather than mine. The Commission is not obliged to wait for people who have been given due notice. I really see no reason why this matter cannot proceed.

MR. FRUIN: I can only advise that I do not have instructions in this matter at all. I was asked to represent the Chamber and seek an adjournment.

PRESIDENT: Mr. Simmonds, I do not see how I can proceed on this unless you are prepared to put your case. I am not sure you should because it seems to me you may be at some disadvantage before hearing your opponent on the other side.

MR. SIMMONDS: It would assist if we knew the extent of the delay. I would be prepared to put our submissions. We are not seeking any advantage - just a ruling. If people are assisted so much the better so far as the Commission is concerned. I take exception to a delay of four weeks.

PRESIDENT: In the event the Commission finds in your favour and is required to make some order having an operative date, that operative date would have regard to today's proceedings.

MR. SIMMONDS: There is a problem with a delay because of the 38-hour week application. It would be four weeks down the track. A week's delay would certainly be more acceptable.

MR. FRUIN: Mr. Fitzgerald is available the week commencing 10 June.

PRESIDENT: Would 4, 5 or 6 June be convenient dates?

MR. SIMMONDS: Tuesday, 4th June would be convenient.

MR. SIMMONDS: There is disagreement between the Hospital Employees Federation of Australia, Tasmanian Branch No. 2 and the other parties, (the Hospital Employees Federation, No. 1 Branch, the Royal Australian Nursing Federation) and the Tasmanian Chamber of Industries. The disagreement is about interpretation of who constitutes day workers and who constitutes shift workers.

MR. SIMMONDS:

The parties were originally scheduled to meet on 13 March 1985 - that was postponed. The matter came on 15 days later, 29 March. Discussions took place about the 38-hour week.

The history of the Hospitals Award is that it picked up what happened in the Hospital Employees (Public Hospitals) Award or the Nurses Principal Award.

The Hospitals Award has been amended twice to give the 38-hour week to day work staff in a number of hospitals. In the light of that this meeting took place.

The No. 1 Branch confirmed its position on 29 April by correspondence.

MR. SIMMONDS QUOTED THE CORRESPONDENCE.

That represented the position.

Because of this problem, the T.C.I. held that all people who work Monday to Friday and do not work weekends were day workers, and they asked for time to research the matter and obtain instructions from the members of the T.C.I.

A meeting was subsequently scheduled for 24 April at the T.C.I. request - but the T.C.I. had not finalised the position on the question of day workers and shift workers. Subsequently I was advised and other unions, by Mr. Fitzgerald, that the T.C.I. could not accept our interpretation. They did seek further discussions and they were unable to give me any answer.

Part of the argument about flowing on the 38-hour week to day workers in the private sector is determining who does day work.

MR. SIMMONDS:

If our interpretation of the award is correct then there are very few day workers and the amount of offset is considerably lower. It is a fundamental threshold question in the negotiations to determine who the day workers are.

It is for that reason that this application is before you to obtain an interpretation of the award.

I emphasize for the record and members of the Federation there is no application by us to alter the award but to have the award as it stands interpreted once and for all in its present form on this matter. We understand we cannot go to merit.

I refer to the President in his former capacity as Industrial Commissioner of the Public Service Board who determined the provisions of the Public Hospitals Award. Any ambiguity in the current phrasing, sir, you would be in a position to know.

The first test is what do the words of the award to the ordinary person mean?

Briefly summarised, the position of the union is that any person who works in accordance with a roster which regularly includes Saturdays and Sundays is a shift worker.

If the work of that classification objectively, on objective examination of the circumstances, extends over 7 days of the week, then regardless of whether a formal roster is in place it is our submission there is a roster de facto that regularly includes Saturdays and Sundays and persons working in accordance with that are shift workers and the rest are day workers.

MR. SIMMONDS:

The employers are saying that whether the work extends over the 7 days of the week or not, and whether there is a de facto roster or not is largely irrelevant. What is relevant to them is whether there is a roster which covers 7 days of the week and if the people working on all of those 7 days are in some form of rotation. If they are not rotating if there exists an agreement not to rotate.

All others are day workers. e.g cleaners in wards, Monday to Friday, on one piece of paper it says they are day workers and another group on the same wards on a different piece of paper it says they shift workers - their roster does not extend over 7 days of the week.

Shift work is on a roster from Sunday to Saturday (7 days) and there are people working on all of those days whether or not they are rotating.

That establishes the position of the dispute.

I would appreciate the opportunity to reply to the T.C.I. submissions when they are made. There was an offer to negotiate. That offer would have obviated the potential for there being back payment because the date of operation in an interpretation matter does not count.

PRESIDENT:

An award can be interpreted retrospectively or prospectively these days?

MR. SIMMONDS:

The legal effect?

MR SIMMONDS:

... your correction of my position is taken, but the offer was made to the Chamber of Industries to negotiate it and resolve it. As I have said, the Chamber of Industries saw, on my questioning, no point in that. They were effectively not prepared to negotiate; they were under instructions; they had to fight it to the end. My words of course. That is certainly the impression they gave, that they had to fight it to the end.

Can I now turn to the detail of the award and for convenience, can I simply refer to Section I of Part II of the Award? It is just a fact that similar clauses and similar verbiage generally applies in Section III which is the other section in dispute.

Interestingly, there is no similar dispute in Section II or, indeed, in the Public Hospitals Award. It may be that they have got it wrong, but they are the major employers of hospital workers, that is the employees covered by Section II of the Award.

The employers in Section II are the major employers of hospital staff in the State and we do not have this dispute. It may in fact assist you if I refer to a matter that affects people in Section II. It was heard before the Public Service Board. I appreciate that this is in no way binding, but it may assist you to have the information; the Chamber of Industries certainly has this and the other parties certainly have it, so there is no reason why the Commission shouldn't have it.

It was Matter I.33 which was an application for interpretation by the No. 2 Branch of the H.E.F. and was heard on 21 November, 1980.

MR SIMMONDS:

It may have been the force of the argument from the applicant association but it may have also been some of the words that came from the Commissioner hearing the matter that caused the controlling authority to withdraw his position and alter it so as the interpretation that the Director-General of Health Services placed on the matter was similar to that of the applicant organization. However, it related to the matter of a laundry hand at the Queen Victoria Hospital who was employed Monday to Friday and another laundry hand employed on Saturday and Sunday. It was submitted by the applicant union that both of those people should be regarded as shift workers, working on a roster which regularly included Saturday and Sunday and that one of them was not a day worker and the other a shift worker. It was originally argued that the one who worked Monday to Friday was a day worker and the one who worked Saturday and Sunday was a shift worker.

The controlling authority saw the error of its ways in that matter. I am not saying that it is on all fours with the matter before you today although it has a lot of similarities. That information and that argument may assist you, Mr President, in your consideration of this although there is no decision.

The first point of reference is on page 9 of the Hospitals No. 2 of 1984, clause 4, Shift Work. 4(a) Definitions contains a number of definitions and one of those is the definition of shift worker. I will read it;

"`Shift Worker' includes an employee whose ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays. PROVIDED ALWAYS that to qualify as a shift

MR SIMMONDS:

worker under this definition for the purpose 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."

The words of that seem fairly simple to me and hardly worthy of bringing the matter before you on interpretation, but it is not our fault.

If we turn now to clause 37, which is the Definitions Clause - the particular reference is on page 30.

We have definition (j), which I will come to first:

"A 'shift worker' is an employee ... "

and so on, which is exactly the same as the one I have read, but goes on to say:

"... and notwithstanding includes all employees who are not dayworkers. Provided always ... "

The same proviso. In 37 (i):

"A Dayworker is one whose weekly ordinary hours of work are performed within the days Monday to Friday inclusive."

I think it is fair to say that some ambiguity arises as a result of that.

On the next page, under item (x), we also have a definition of 'roster':

"'Roster' - for the purposes of Clause 4, Shift Work, a roster is a document setting out clearly the names of the employees required to work in accordance with such roster, the days, dates and hours

MR SIMMONDS:

during which each employee is required to attend for duty."

So we have a definition of a roster; we have a definition of a shift worker twice (slightly different on one occasion) and a definition of a day worker. In a sense it is a question of which definition rises over the other, because on the one hand the shift worker definition in clause 4 says that a shift worker is a certain sort of person and that is a person whose "ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays". That is clause 4.

What that means, in my submission, and what it can only mean is that if there is a roster (I will come to that question a little later) and people are working on that roster and that roster covers the seven days of the week then all of the people on that roster are shift workers. There can be no other interpretation.

However, what if for five of those days - Monday to Friday - some people only work five of those days and we extend the roster over 52 weeks of the year and look at those people? They are only working Monday to Friday; this is where the ambiguity may creep in, because the day worker is defined in item (i) of clause 37 as a person whose weekly ordinary hours of work are performed within the days, Monday to Friday inclusive and that is equally true. So you can have a person who, under clause 4, is a shift worker but under clause 37 (i) is a day worker and it becomes a question of which clause takes precedence.

Now, within the context of clause 37, it is arguable that sub-clause (i) takes precedence because of the words in sub-clause (j), because it includes all employees who are not day workers. However, I think this

MR SIMMONDS:

would be putting too fine a point on that word 'notwithstanding', because the first part of it says, "a shift worker is an employee whose ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays". If we leave the rest of the words out, under clause 4 our argument is and our submission is that a person who, in that circumstance I just described, works on a roster which covers the seven days but only works Monday to Friday, is clearly a shift worker. Under clause 37, in terms of sub-clause (i), he is clearly a day worker and leaving those last few words in the first part out, he is also clearly a shift worker.

PRESIDENT:

I hesitate to interrupt you, but wouldn't you have to read the definition of day worker in the context of the ordinary hours of work for day workers?

Am I ahead of you?

MR SIMMONDS:

You are ahead of me, sir.

What I was going to say is that 'notwithstanding' includes all employees who are not day workers so that if we can't define them as day workers, it is saying they are shift workers.

So, how do we find out if they are day workers? We go to the Hours clause. That may help us with some but it doesn't help us with all of them I'm afraid, because the Hours clause says that the ordinary weekly hours are 40 in the instant case but the 40 hours are worked between the hours of 7 a.m. and 5.30 p.m., Monday to Friday.

However, you can have a group of people, clearly, who don't work in those hours - who work outside those hours and who are otherwise paid

MR SIMMONDS:

shift allowances - they are clearly shift workers. I don't think there is any argument about it, but what of those people who work, for instance, from 7.00 (this is where the first argument comes in) until 3.30, Monday to Friday and there is someone doing the same hours on Saturday and Sunday?

The people on Saturday and Sunday can't be shift workers because the roster doesn't rotate over the seven days of the week. In other words, if one was to argue that because of 37 (i) they are day workers because they fit within the day workers' hours of clause 1 and because they work Monday to Friday, then they are day workers, that answers that question nicely and precisely despite the fact that there is the ambiguity there and I stress that there is the ambiguity there. However, to make any sense of that, it must mean that the people who work on Saturday and Sunday are day workers working outside their spread of hours.

PRESIDENT:

Supposing the shifts didn't extend over Saturday and Sunday, but in fact extended through to 11 p.m. Monday to Friday with one shift commencing 7 a.m. till 3 p.m. and another one 3 p.m. to 11 p.m. - they would still be shift workers wouldn't they?

MR SIMMONDS:

Certainly in my submission they would be, but in the employer's submission ...

PRESIDENT:

They couldn't be day workers unless they attracted a great deal of overtime because they would be outside the spread.

MR SIMMONDS:

The people who work 7.00 until 3.00, in the employer's submission, would be day workers.

PRESIDENT:

Those who took over the process from 3.00 until 11.00 would be day workers working overtime, would they?

MR SIMMONDS:

I think, knowing the employers, they would argue that they are shift

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MR SIMMONDS: workers because it is cheaper.

PRESIDENT: How could they be shift workers if there isn't a rotation of shifts throughout either two thirds of the day or the whole of the day?

MR SIMMONDS: I agree entirely. This is where the difficulty arises.

I think I can see where the employers get their position from, it comes from that conflict between 37 (i) and (j). If the definition of (i) was not there and 'notwithstanding' was not there in the award, it would be quite clear. I think it would be unarguable from the employer's position. What they must be relying on is that ambiguity. I think we have to go down the track to see how we redress that ambiguity because the award clause, and in particular clause 4 and its definition of a shift worker, is so straightforward as to be beyond misinterpretation and it is the inclusion in the award of (i) that has made things difficult.

Now, unfortunately I don't have it with me, but in overcoming the ambiguity it would assist us to look at when these clauses were placed in the award and (i) was placed in the award well after clause 4 and its definition. It was placed in there in what I would submit is an unsuccessful attempt to clarify the situation because, clearly, it goes to make it a lot more difficult.

PRESIDENT: What is the factual situation, Mr Simmonds? What annual leave would a permanent afternoon shift worker receive?

MR SIMMONDS: Not working Saturdays and Sundays?

PRESIDENT: Yes.

MR SIMMONDS: They would receive four weeks the same as a permanent day shift worker, Monday to Friday.

PRESIDENT: Plus overtime for all time outside the spread of hours?

MR SIMMONDS: No, they would be shift workers - there is no spread of hours. They would receive a 15 percent shift loading.

PRESIDENT: They can't be both. If they are being paid shift penalties they must be shift workers and entitled to the annual leave. If they are not shift workers they must be paid overtime each day, Monday to Friday, that they work outside the spread.

MR SIMMONDS: However, they are not treating them as day workers, they are treating them as shift workers when it suits them. That is the difficulty I have in answering your question.

The factual situation, as best I am able to determine, is that there are very few people working outside that spread. There are some (I am quite happy to talk about them) such as telephonists and the like who are required to work on shifts that may run from 3.00 (usually part-time shift workers) until 10.00 or 3.00 until 9.00 - something like that and they are definitely paid as shiftworkers. They are paid a 15 percent loading for afternoon shift. The interesting thing is that their corresponding workmates are not paid as shift workers, they are paid as day workers.

PRESIDENT: Can you have a shift worker working one shift a day?

MR SIMMONDS: Yes. A clear example is the domestic staff - cleaners for example who only work one shift a day. (One doesn't readily come to mind under this award but others may be able to assist.) There are cleaners, for example, under the Hospital Employees' (Public Hospitals) Award which contains a similar clause, who work one shift 7.00 until 3.00, seven days a week. They don't individually work a 7-day week but it is worked over seven days

MR SIMMONDS:

a week and they are shift workers under this definition because they are working in accordance with the roster which regularly includes Saturdays and Sundays. So there isn't the requirement for it to be continuous around the hours of the day, but there is the requirement for the shift to be continuous over the seven days of the week. So you can have someone working, just one shift a day, and being called a shift worker. I think if you reflect on that, that was part of the argument between continuous and non-continuous shifts and eventually in the Public Hospitals it was argued that they all be treated the same because it is, genuinely speaking, a continuous industry in that the industry itself is over the seven days a week, 24 hours a day.

The other argument could arise from the point of view of the roster. It could be open to the employers to say, "Look, these people at work ...". (Can I use the example of people who work from, for example, 7.00 until 3.00 or 3.30, depending on whether they are shift workers or day workers? The way the employer is working I think I had better try to stick to a factual situation in hospital `x"). There are people, cleaners, working from 7.00 until 3.30, not being paid 30 minutes overtime, being given half an hour for lunch, so they are working eight hours a day and having an unpaid meal break of half an hour. They work Monday to Friday.

There is another group of people who work on Saturday and Sunday as part-time employees, that is employed for less than the normal weekly hours of work, who work shifts of five and a half hours on Saturday and five and half hours on Sunday, but they do work that is normally done by those other people, that is the eight-hour people, on Saturday and Sunday. They don't do it all but they don't do anything that isn't done by the Monday to Friday workers. They do cleaning but there are some areas

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that are not cleaned to the same extent because it is the weekend.

The employer holds that those people who work on weekends are shift workers and pays them as such - time and a half Saturday, double time Sunday plus a 20 percent loading in lieu of sick leave, annual leave and public holidays because they don't work 20 hours a week and the people who work Monday to Friday are paid the standard rate for the shift.

It could be argued that there is no roster which regularly includes Saturdays and Sundays, because there is not a roster as defined in sub-clause (x) of clause 37. In other words there is not a piece of paper or a document which sets out clearly the names of the employees required to work in accordance with the roster, the days, dates and hours during which each employee is required to attend for duty, or if there is there is more than one. There is one for the weekend workers and one for the Monday/Friday workers.

I put it to you, however, that that would be a total misinterpretation of the award because the real reason that that definition of roster is in there as sub-clause (x) of clause 37 is because clause 4 (c) states that there shall be a roster for shifts (That is on page 10).

What the purpose of clause (x) is, in my submission, is to overcome any disputes about what the roster would look like because it then lays down in clause 4 certain things that that roster must provide.

It must:

(i) for rotation unless all the employees concerned desire otherwise;

(ii) provide for not more than eight shifts to be worked in any nine consecutive days;

(iii) not be changed until

MR SIMMONDS:

after four weeks' notice.

That is the purpose of it. To escape the definition of the shift worker by saying that there is not a roster is in a sense a 'chicken and the egg' situation. (I think these words were used in I.33 that I referred to). To say that if you are in a shift work situation you must have a roster, but if you haven't got a roster you haven't got a shift work situation is not, in my submission, what is intended. Nor is it a reasonable way in the real world or even in the construction of the award generally to be interpreting the award, although it is where the words lead us - they lead us into an impossibility and in that situation you must go beyond the words. Which one comes first? You must go beyond the words and go to the reality. The reality is that you look objectively at the situation and say, "Is this shift work?" If it is, then other things apply. The question of whether it is shift work or not is whether it extends over the seven days of the week. You can then argue that the employer is or is not complying with the rest of the clause. Has he got a roster. That is, a roster as defined by sub-clause (x) of clause 37. Does that roster provide for shifts which will rotate unless everyone agrees otherwise, and so on and so forth? That is the intent of the award, the award read as a whole - that is the only way it can be interpreted.

I just wanted to move away from that as to whether there is a roster or not. I don't believe that the employer, or anyone, can escape the requirements of the award by not having that piece of paper or, alternatively, having two pieces of paper with the weekend workers on one and the Monday to Friday workers on the other. The issue is whether the work extends over the seven days of the week. If it does then they should be on the one piece of paper. That is the general construction of

MR SIMMONDS:

the award - it is the common sense approach.

I think I am at the position where I can summarize the argument.

It is our submission that the people who work Monday to Friday when someone else works on Saturday and Sunday should be working in accordance with a roster which regularly includes Saturdays and Sundays. That being so, they should be treated in accordance with the award, and in particular in accordance with clause 4, as shift workers.

Some things follow from that and if I could just briefly summarize some of them: They should be working on a rotating roster unless all of the employees concerned desire otherwise. Clearly, if all the employees concerned desire otherwise, they should not be working on a rotating roster.

I won't go into all the consequences, just some of the important ones. That is one of them.

The other important one that follows is that "a shift shall consist of not more than 8 hours" (one has to go back to the Hours clause to find this - clause 1 (b)) "... inclusive of crib time; (this is not all, but things I am pulling out of it), "... 20 minutes shall be allowed to shift workers each shift for crib which shall be counted as time worked.", except in the case of student and registered nursing staff when it is 30 minutes. There are various other things that flow, but they are the two crucial ones and they are of course the ones that cost money.

The question of annual leave does not of itself come into it simply by defining someone as a shift worker because the definition itself (both definitions) make it clear that to qualify as a shift worker for the purposes only of annual leave, the

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MR SIMMONDS:

individual (not the roster) "shall be rostered to work on not less than 10 Saturdays and 10 Sundays in any one year". No relief for the employer can be obtained from that approach by reference to clause 37, sub-clause (i) because if sub-clause (i) means anything, it does not mean that clause 4 is meaningless. That would be the effect if one were to look to sub-clause (i), because looking at sub-clause (i), one could produce the result that you yourself referred to that someone working between, for instance, 3 p.m. and 11 p.m., Monday to Friday only, would be a day worker even if he were going on on weekends. Frankly, I would agree with that submission. If they weren't working on weekends and if they were working 3.00 to 11.00, Monday to Friday, they should be paid overtime for the work outside the spread of hours for a day worker; the determinant is whether they work on weekends. That is the determinant as to whether they are shift workers or not and that is properly the determinant and for sub-clause (i) to mean something else means that clause 4 and

MR SIMMONDS:

everything that flows from clause 4, including rosters, rotational shifts, straight 8-hour shifts and everything else, is rendered meaningless by the mere act of the employer saying, "Well, you are going to work Monday to Friday" and to the other persons, "You are going to work Saturday and Sunday".

That was never the intention nor it is the meaning of the award.

On the other hand what we are submitting is, what is quite clear, that a day worker is a person whose ordinary work and ordinary hours are only between Monday and Friday. Any additional time they work outside that spread of hours that is set down, or on weekends, because that is outside the spread of hours, is paid for at penalty rates as overtime. It is as simple as that.

Where the work extends over the seven days of the week, there ought to be a roster which includes all of those employees. Whether they rotate or not is beside the point. The roster shall rotate unless all the employees concerned desire otherwise. So there is no requirement for the roster to rotate as long as all of the employees want it that way. However as soon as one employee wants it to rotate then it must.

PRESIDENT:

Am I understanding you correctly? Are you suggesting that it would be possible for a hospital administration to invite one group of employees, for example laundry workers, to work their ordinary day work between the hours of 7 a.m. and 3 p.m. Monday to Friday and another group to work their ordinary 40 hours between the hours of 3 p.m. and 11 p.m. and provided the appropriate penalties were paid to the second group, regardless of whether anybody else came in on weekends, they would be day workers?

MR SIMMONDS:

No, it is not regardless. Only if no one else came in on the weekends.

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SIMMONDS - SUB - PRESIDENT

PRESIDENT: You would suggest that they could still be day workers and not shift workers?

MR SIMMONDS: That is in fact the only way they could be construed under this award.

PRESIDENT: By extending the spread of hours by agreement?

MR SIMMONDS: No. You can extend the spread of hours and pay them the rates that are prescribed for work outside the spread of hours but you cannot call them shift workers. You cannot call them shift workers unless the roster extends over the seven days of the week.

PRESIDENT: Would that not be a bit artificial though because surely that would be a shift if you had one process following another?

MR SIMMONDS: I do not argue with that and indeed such an interpretation does not cause any difficulty in terms of what I am arguing but, on the words that are before us, artificial or not, that would be the effect.

There is just no provision because they are not shift workers within the terms of clause 4 and if we go to the 'Definitions' clause, they are not shift workers in terms of sub-clause (j). They must be day workers because their ordinary weekly hours of work are performed within the days of Monday to Friday inclusive.

If perchance they were working from 5 p.m. till 1 a.m., then their ordinary weekly hours would go into Saturday.

PRESIDENT: Because the majority would fall on Friday that would still be deemed to be Friday's work?

MR SIMMONDS: Only if they were shift workers. If their ordinary weekly hours extended into Saturday then they would fall under sub-clause (j). In fact that is precisely what it is there for, I would suggest; "and notwithstanding includes all

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PRESIDENT - SIMMONDS - SUB

MR SIMMONDS: employees who are not dayworkers."

Because their ordinary weekly hours of work extend beyond Friday, they would then be picked up by that other clause. As long as their hours of work are within Monday to Friday inclusive and they are not on a roster which regularly includes Saturdays and Sundays, then they are day workers. Rightly or wrongly, that is what the award says, in my submission.

PRESIDENT: Which brings me back to an earlier question. What is the factual position? What is being paid to these people who work other than, for example, 7.00 till 3.00 or 8.00 till 4.30?

MR SIMMONDS: You mean?

PRESIDENT: The people who might be affected by this interpretation.

MR SIMMONDS: The vast bulk of them are being paid as day workers. That is, the ones who work Monday to Friday are just being paid their flat rates and are not being paid any overtime for that extra half-hour. If our interpretation is correct they would become shift workers and be paid overtime for all time in excess of 8 hours, inclusive of the 20-minute paid meal break.

PRESIDENT: Is there another shift worked on those days?

MR SIMMONDS: Not on those days in that area.

It is purely cleaning.

PRESIDENT: We are talking about cleaners are we?

MR SIMMONDS: In this case.

PRESIDENT: The award covers persons other than cleaners?

MR SIMMONDS: Yes. Interestingly, the only ones of whom I am aware who fall under this problem are cleaners but if I could just have a moment.

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SIMMONDS - SUB - PRESIDENT

MR SIMMONDS: If the Commission pleases, I am personally not aware and my friends in the No.1 Branch and the RANF, cannot bring to mind readily anyone who falls into that category.

The only possibility that comes to mind is that of the switchboard operator, who may be working outside the spread of hours and as I understand it, they are paid as shift workers.

PRESIDENT: The catering staff would work Saturdays and Sundays?

MR SIMMONDS: Yes. We run into the same problem with some catering staff. I am sorry, that was the other group. Most of them are cleaners. There is a group of kitchen staff and I think there the people who work on Saturday and Sunday of course, in both instances, are paid as shift workers and the people who work Monday to Friday are paid as day workers.

I make that point again and it may be that I have not emphasized this point, it seems beyond belief that the people who work Saturday and Sunday are shift workers when the people who work Monday to Friday are not.

PRESIDENT: The people who only work Saturday and Sunday?

MR SIMMONDS: Yes. Because they are not working on a roster which regularly includes Saturdays and Sundays. They may come under that 'notwithstanding' clause.

PRESIDENT: They are working on a roster that does not include Monday to Friday?

MR SIMMONDS: Yes and the roster that regularly includes Saturday and Sunday.

The seven days of the week is what the intention of that is, I am sure. However, it may be that the thing is deficient and it means nothing but certainly we think it is pretty straightforward.

PRESIDENT: How would one define a casual day worker then who works only on Saturday and Sunday?

MR SIMMONDS: A casual day worker, working Saturday and Sunday. I am sure that they are defined as shift workers because it is cheaper to define them as shift workers. What is happened is that they have decided that they are not day workers working outside the spread of hours, because that would mean time and a half for the first 2 hours and double time thereafter on Saturday.

If they call them shift workers it is time and a half all day Saturday and double time all day Sunday. Therefore they save the difference between time and a half for 2 hours and time and a half for 8 hours.

PRESIDENT: Is that what happens in public hospitals?

MR SIMMONDS: In public hospitals they would all be treated as shift workers. There would not be this problem of people working Monday to Friday because of that matter that I referred to before, I.33.

PRESIDENT: Do not public hospital "shift" staff take their annual leave and other entitlements from this award?

MR SIMMONDS: No, not any more, since Matters I.69 and I.70, but they used to. I am sorry, nursing staff certainly still do but not their shift conditions nor these 'definitions'.

If there was a person simply working on Saturday and Sunday in a public hospital system there would be someone else working Monday to Friday as there was in that matter I.33, which was (and still is) in the laundry at Queen Victoria Hospital but they are both regarded as shift workers.

PRESIDENT: In the instant case you are telling me, I take it, that as far as cleaners are concerned, one group

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PRESIDENT - SIMMONDS - SUB

PRESIDENT: works Monday to Friday and that same process is carried on Saturdays and Sundays by casuals, who work five and a half hours and not eight? Is that right?

MR SIMMONDS: They are not casuals, sir. The award itself contains definitions of part-time employees and they are permanent part-time employees. A 'casual' is a touchy subject but whatever they are they are not casuals.

PRESIDENT: They work eleven hours per week do they?

MR SIMMONDS: Yes, that is correct. During those five and a half hours they would not be doing exactly the same work but they would be doing work that is done by the other people. You cannot do eight hours' work in five and a half hours.

PRESIDENT: It is the same work?

MR SIMMONDS: It is the same sort of work. They are cleaners and they use the same materials, the same equipment and go to most of the same places.

PRESIDENT: It is work that would otherwise be done by the Monday to Friday staff?

MR SIMMONDS: That is precisely the situation.

If they did not have that they would be rostering the Monday to Friday staff over those days and some additional staff as well. They would have to because there are only eight hours in a shift.

I think we got a bit tangled up there but it is fairly tangled but I think, nonetheless, despite that, it is clear that you are either a shift worker or a day worker.

If you are a shift worker you should be on a roster which includes the seven days of the week and these people clearly are.

The perfect example of the day worker is the laundry hand who works in a

MR SIMMONDS:

laundry which runs from Monday to Friday. It closes down and opens again on Monday.

Or the gardener who works in the garden from Monday to Friday and there is no gardener employed on Saturday and Sunday. That work is not done.

Or the office assistant who works in the office and the office is closed over the weekends.

They are the day workers.

The shift workers are those who work over the seven days. I think that is the common sense and that is what the award leads to.

PRESIDENT:

Yes.

MR SIMMONDS:

You may even have a cleaner who only cleans offices in a hospital and although there are other cleaners there who clean wards, that cleaner would be a day worker because the offices are not cleaned on Saturday and Sunday. The work is not done then but where the work is done over the seven days of the week, then all of the people who are in that area are rostered and are shift workers.

Does that clarify it?

If the Commission pleases.

PRESIDENT:

Thank you.

Mr Bennett.

MR BENNETT:

Thank you Mr President.

I have nothing further to add only to say that I fully support and agree with Mr Simmonds' submission.

Thank you.

PRESIDENT:

Mr Grant.

MR GRANT:

I support the submissions made by Mr Simmonds also Mr President.

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SIMMONDS - PRESIDENT - BENNETT - GRANT

PRESIDENT: Yes. Mr Grant, would you be able to tell me if nurses working in private hospitals, who, I understand are able to (my words) bid for certain permanent night shifts or certain shifts Monday to Friday or perhaps just Saturday and Sunday, would be paid as shift workers in those circumstances?

MR GRANT: Where an employee works a permanent, for instance night shift, it must be by agreement. That agreement must be in writing. The penalty payable at present is 15 per cent.

PRESIDENT: They are deemed to be shift workers?

MR GRANT: Yes.

PRESIDENT: I am aware that there might be found in private hospitals, as there might be found in public hospitals, certain night staff who, by agreement, work the same shifts and not necessarily on weekends.

MR GRANT: They would be deemed to be shift workers.

PRESIDENT: Yes and paid in accordance with this award if they are employed in private hospitals?

MR GRANT: That is right, yes.

PRESIDENT: Thank you.

Mr Fruin do you wish to say anything before we adjourn?

MR FRUIN: Mr President, yes. The only comment I would make at this time is that it would appear that there is quite a bit of confusion in the award, to say the least. It may well be that the draftsman has not shown the intent of the parties at the time the document was drafted and I think I could say at this time that whatever interpretation finally does come down, we would reserve our rights to come back to the Commission, possibly with a clarification and maybe a re-drafting of the particular clauses.

PRESIDENT: That is if the Commission does not do it for you?

MR FRUIN: Yes, that would be so, sir.

PRESIDENT: It is unlikely that the Commission will do that, of course, without hearing from the parties if it was going to make significant changes.

MR SIMMONDS: Without wanting to respond, sir, I just want to point out that this award did come from the old jurisdiction, which was the Hospitals' Industrial Board Award. The people who intended it to be there were the people who drafted it.

PRESIDENT: Say that again Mr Simmonds.

MR SIMMONDS: The people who made the award were the people who drafted it. That is, the members of the Hospitals' Industrial Board..

PRESIDENT: I see.

MR SIMMONDS: They were the draftspersons so that at least prima facie (and as one of those people, I have got to say) if the award does not reflect the intentions of the draftsman, it is not the draftsman's fault, it may be their poor expression.

PRESIDENT: Yes, thank you.

MR GRANT: If it pleases the Commission, as a member of that Hospitals' Industrial Board then and up until the demise of the Board, I can plead guilty to that as well.

PRESIDENT: Yes, thank you.

If there are no more submissions and for the reasons given earlier, Mr Fruin and gentlemen, we will adjourn until 5 June, 10.30 a.m.

PROCEEDINGS ADJOURNED