

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 405 of 1986

IN THE MATTER OF an application
by the Tasmanian Public Service
Association for interpretation
of the General Conditions of
Service Award

re Clause 10 - Hours of Duty
and Penalty Payments, sub-
clause B - Penalty Payments,
placitum 5 - Standby and
Availability

PRESIDENT

HOBART, 18 June 1986

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Appearances, thank you.

MR PHILP: If the Commission pleases, **GREG PHILP** for the Tasmanian Public Service Association. Sir, with me today I have **MR NEIL GRICE** who is a supervisor in the Housing Department, as an observer, who may be required if there is any particular questions anyone should want to ask. Thank you, sir.

PRESIDENT: Thank you, Mr Philp.

MR PEARCE: If it please the Commission, **PEARCE, A.**, for the Minister for Public Administration, together with **MR N. CLARK** and **MR L. FOLEY** as officers in the Housing Department and they're here in a similar vein to Mr Grice, and that is to inform the Commission or parties as to factual matters as related to the application, if it please the Commission.

PRESIDENT: Thank you, Mr Pearce. Yes, Mr Philp, what happened on this day in the past?

MR PHILP: Thank you, sir. I'm pleased to advise you that today is the 171st anniversary of the Battle of Waterloo.

 Now, I'm Wellington today, and I think Mr Pearce ought to realize that he's Napoleon.

 I should also add that when this 1983 award was varied in this regard, the decision of the Board was taken on or around 4 August 1983 and it just so happened that some ten days after that, I was at the Waterloo and I think that's very fortuitous. I think it's an omen of good tidings and I think they really ought to withdraw at this stage before being humiliated as Napoleon was.

PRESIDENT: Well, only time will tell, Mr Philp, if they are prophetic words.

MR PHILP: We'll see, yes.

MR PHILP:

Sir, I have already taken the liberty of providing yourself with a number of exhibits and in accordance with previous practice, I have also taken the liberty of numbering them P.1 to 7 and there's an index included in that table for exhibits and hopefully this time they'll be of more benefit to me than they were last time.

PRESIDENT:

I was going to say, you haven't taken the liberty of writing the decision as well, and we can all go home?

MR PHILP:

I have just about done that, sir.

Sir, what I would like to do in this case is outline the history of the stand-by and availability clauses in the General Conditions of Service Award.

I believe that's important in the sense that it will then be on record - a perspective of how the award provisions came into existence and how they've been varied in the past 10 or 11 years or so.

PRESIDENT:

It's a funny thing, Mr Philp. Last time you didn't want to hear anything of the history, did you?

MR PHILP:

No, that's not quite true, but then I'll outline why we believe the Housing Department have misinterpreted the award and in doing, will follow the guidelines established by yourself with regard to interpretations as established in T.30 of 1985 and I think properly followed at our last outing.

Sir, the history of the stand-by and availability allowances were that they were first inserted into the award, which was then known as the Public Service Conditions of Service (Miscellaneous Provisions) Award, in 1975.

The decision on that matter was made in 1975 in response to a claim from the T.P.S.A. called P.24 of 1975 and Exhibit P.1 is in fact a synopsis of

GM/CD - 18.06.86

PRESIDENT - PHILP

MR PHILP:

that decision as it relates to the stand-by and availability.

Sir, that decision was reached, based on evidence of Mr Winterborn of the Housing Department and if you look at the second page of Exhibit P.1, the Board writes (and I apologize for the poor quality) `ON STANDBY`, it outlines the claim lodged by the T.P.S.A. :

"An officer instructed to hold himself in immediate readiness for duty at an approved location shall be paid an allowance at a rate equivalent to two thirds of his ordinary rate for any such period of stand by."

It goes on and in the second-last paragraph :

"In the meantime we are disposed to include in the award provisions for separate standby and availability allowances, embodying in principle the sort of prerequisites set out in the Public Hospitals Principal Award but tailored where possible to the requirements of the Service."

Next page, on the second paragraph :

"The Association called one witness who gave evidence relating to his own position and that of certain of his colleagues (sic) employed in the Housing Department. This was clearly a case of a standby roster system with little likelihood of call back. Such officers were however subject to a considerable amount of leisure restriction and domestic disturbance due to receiving and making telephone calls."

MR PHILP:

If we skip a paragraph :

"Although it may have been wiser to defer until some other time implementation (sic) of this claim we have decided as ..."

PRESIDENT:

I imagine it's `determination`.

MR PHILP:

"... determination of this claim we have decided as already stated to include in the award ... (I think) ... a standby clause we consider appropriate to the evidence of Mr. Winterborn. But we wish to make it quite clear the clause proposed is not intended to be applied willy-nilly to officers said to be on standby or on availability but about whom no evidence has been called."

I think they are important parts of the decision made by the Board in 1975.

The precise wording of the two clauses is found in Exhibit P.2, and that's an extract from the Tasmanian Government Gazette in November of 1975. And in the first column, three-quarters of the way down the page, clause 5, `STANDBY AND AVAILABILITY ALLOWANCES` :

"1. Availability Allowance :

An officer, other than an officer to whom sub-clause 2 of this clause relates who is directed by his permanent head, or administering authority, as the case may be, to remain at home or within close telephone contact thereof and hold himself in readiness to return to work without delay or within a reasonable time of being recalled or to monitor telephone calls and/or attend to after-hour

MR PHILP:

calls, if required, shall be paid an allowance of \$3.00 per day for each day he is required to be so available.

Stand-by Allowance:

An officer authorised by his controlling authority or administering authority, as the case may be, to be regularly rostered, on an approved roster, for stand-by duty to meet emergency situations, who is required to stand-by at his home on immediate call, to perform intermittent duties thereat on an ad-hoc or pre-determined basis normally involving receiving and/or making telephone calls and who may also be required for immediate recall to duty, shall be paid \$8.00 per day when actually on stand-by duty, such payment to be inclusive of all overtime and other penalty rates which might otherwise have been payable."

As you'd be aware, sir, that decision was subsequently taken to the Public Service Arbitrator, and that rate of \$8.00 per day for the stand-by was lifted by the Public Service Arbitrator to \$12.00 per day.

Sir, the next sequence of events, I dare say, is the implementation instruction which was issued by the Public Service Board on 8 September 1976, and is included in here as Exhibit P.3.

The first page is to show the dates et cetera, and the second page relates to stand-by and availability allowances. And I think it's important - if we look at the following page, page 6, paragraph (b) :

"To attract the `availability

MR PHILP:

allowance an officer must hold himself in readiness to return to work without delay or within a reasonable time whereas to attract standby allowance he may be required for immediate telephone consultation and/or in certain cases recall. The provision that an officer in the standby situation must be regularly rostered on an approved roster does not necessarily apply in the "availability" situation."

Paragraph (c), second paragraph :

"In the case of the standby situation the allowance of \$8 per day is inclusive of all overtime and other penalty rates which would otherwise have been payable."

So that's setting the scene.

I don't think there's anything else in Exhibit P.3 which I need to draw to your attention.

And in essence, having got the Arbitrator's decision to increase that rate, these rates were subsequently indexed in accordance with the national wage Principles, and those rates continued to be indexed - both the availability allowance and the stand-by allowance continued to be indexed - for a period of time, until in 1982 the Public Service Association once again lodged a claim to amend the award in relation to the stand-by provision amongst many other matters.

The Exhibit P.4 is the extract from the Board's report on that particular matter. And if you turn to page 2 of Exhibit P.4 we can see that the stand-by allowance :

"During proceedings Mr. Philp sought and was granted leave to amend the Association's

GM/CD - 18.06.86

PHILP

MR PHILP:

original claim regarding standby allowance, to read :

"An officer authorized by his controlling authority or administering authority, as the case may be, to be regularly rostered on an approved roster for standby duty to meet emergency situations, who is required to stand by at his home on immediate call to perform intermittent duties thereat on an ad hoc or predetermined basis, normally involving receiving and/or making telephone calls, and who may also be required for immediate recall to duty, shall be paid one half of his ordinary rate of salary for the period that the employee is required to stand by, with a minimum period as for 8 hours."

And you will see that that claim was in a sense fairly similar to the 1975 claim - slightly different. And as the decision goes on, the reasons to change to the present daily rate into a fixed money amount based on salary.

On page 3 of the Board's decision, the second paragraph :

"This provision came into the award many years ago, and was intended to cater for Housing Department employees. In particular it was directed at supervisory personnel who were rostered as 'on call' after hours. Their function in those circumstances was to take complaints or emergency calls from tenants and persons of similar interest. The 'on call' officer would, in response to calls from the public, make an assessment of the situation and then request the appropriate artisan or professional staff

MR PHILP:

to attend at the address given to, where necessary, either make good the defect or inspect whatever it was the caller had complained about."

The next paragraph :

"It is most unlikely that the present standby provision was framed in a way intended to have equal application across the whole of the Service. Bearing in mind the diverse nature of activities carried out by the many Departments, a provision of the kind included for Housing Department Supervisors would be difficult to justify today."

The Board goes on :

"...time ... to rationalise (the situation) by recognizing that from time to time employees are required to remain in a 'close call situation' as distinct from holding themselves available for emergency recall."

The next paragraph, the Board referred to the Hospital Employees Awards and Nursing Awards :

"In each of those a fairly simple close call provision is to be found. This allows an officer on close call the equivalent of six hours pay for the inconvenience of being required to remain in a certain place with strict limitation on movement. Mostly he is expected to remain within earshot of a telephone or radio."

The final paragraph of that page :

"In my opinion therefore the Standby provision in this

MR PHILP:

award could and should be recast to provide the same recompense as the Hospital and Nursing Awards allow: that is, the equivalent of six hours pay by way of disability compensation for any person held on close call; without prejudice to the right to payment at overtime rates for any time spent on actual recall arising out of the standby arrangement."

...

Stand-by; then entitled to \$22.27:

"... I recommend that the provision relating ... be ... qualified by appending the following:

~with a minimum payment of \$22.27."

And :

"This savings provision should apply only for so long as it is necessary to protect the rights of existing staff already entitled to a flat money payment."

MR PHILP:

In that decision the Public Service Board (and one presumes that the Board with its employer hat on as distinct from the Board with its industrial hat on) issued an implementation of awards instruction and that is shown as Exhibit P.5, and that relates to the new stand-by arrangements. It goes on to say what the new award provision was and on the second-last paragraph the Board, with its employer hat on, says:

"The Board expects that there will be very few cases of officers rostered for standby duty under the new clause and approval should be sought before an officer is paid this allowance, whether previously in receipt thereof or not."

I should point out of course that it seems that the employer was advising client departments what it would expect to occur and this was done without any consultation of course between the unions or the employees affected themselves.

If we go to Exhibit P.6 - the purpose of Exhibit P.6 is to demonstrate how the awards were actually varied with regard to the availability and stand-by.

As you can see there is no change in the wording of the availability allowance except that there is an addition of a savings provision and that savings provision reads:

"An officer who, prior to the beginning of the first full pay period commencing on or after the first day of January 1984, was rostered for standby duty and entitled to payment therefore under the terms of the Public Service Conditions of Service (Miscellaneous Provisions) Principal Award (now rescinded) shall until

GM/CW - 18.06.86

PHILP

MR PHILP:

further order, if performing the same duties as before and for which he would now qualify for the above availability allowance, be entitled in any case to a minimum daily payment of \$23.05 for each day of rostered availability duty."

The stand-by proviso was altered in accordance with the decision but there was no change in the wording of the availability allowance apart from that savings provision being inserted.

PRESIDENT:

And somebody forgot to read the previous decision, you will notice. The savings should have remained at \$22.

MR PHILP:

Yes, that is another interesting point, actually. I will come to that in a minute.

I should state that, for the record, our concern that the stand-by provision was varied, I suppose, by the Public Service Board of its own motion effectively - I suppose you could say that's what happened in that decision. It wasn't in accordance with the claim sought by the applicant and I think it is important that the various parties that are interested in this particular award are aware of the sequence of events in terms of how that was done.

I think it is true to say of course in those days we worked under a different industrial system and I think we all appreciate some of the deficiencies and some of the merits of operating under that particular system. Nevertheless, I don't believe that such an action would take place in this jurisdiction in the sense that the awards would be varied effectively by the tribunal of its own motion, although I believe they have the power so to do.

GM/CW - 18.06.86

PRESIDENT - PHILP

MR PHILP:

That is by more way of comment so that the various parties are aware of how the new stand-by provision came to be inserted into the award. Of course the major deficiency from our perspective in that time was that there wasn't an employer with whom we could negotiate and deal and I think that was one of the major difficulties that existed in those days.

To continue with the history of the particular clauses - in mid-1985 the availability allowance was varied from a daily payment to an hourly payment by virtue of an anomalies conference before yourself, sir.

It became a rate of approximately 71 cents per hour with a minimum payment of \$8.77 per day which also was to be a non-indexed payment.

I have included Exhibit P.7 in the award and P.7 is taken from the latest consolidation of the General Conditions of Service Award.

There are a couple of points to note with regard to Exhibit P.7 and the first of those is that the savings provision, which was included in Exhibit P.6 under the availability allowance, has mysteriously disappeared. I am not sure why that ...

PRESIDENT:

It may not be necessary. It was \$7 something, was it?

MR PHILP:

No, it is the \$23.

PRESIDENT:

That's right. Yes.

MR PHILP:

If you compare, say, P.7 with P.6 the savings would be \$23.05 in those days. I am not sure why that has happened but I do believe it is an error of omission and needs to be rectified. I think that is the view of the other side as well.

The second comment simply relates to the fact that the minimum payments

GM/CW - 18.06.86

PRESIDENT - PHILP

MR PHILP:

applicable to the availability allowance and the stand-by allowance have been indexed.

Once again it should be pointed out that this has not been done at the request of the parties and although I suppose we don't necessarily object to it, it sometimes does cause difficulties for our side as well by indexing ...

PRESIDENT:

Well it shouldn't have been indexed.

MR PHILP:

No, but I know it has been. I think I know why but that is another story.

So those rates ... at the bottom of P.7 you will see my rough notes - \$23.05 - by the national wage decisions of 4.1, 2.6 and 3.8 brings it to \$25.56 minimum payment. As I say, it wasn't done at our request or the other side's request but by others.

PRESIDENT:

It was only intended to save the situation of individuals who were on that roster at that time.

MR PHILP:

Quite. So I think that is a potted history of the stand-by and availability allowances in this award.

I would like to now turn to why I believe the Housing Department has misinterpreted the award.

When the matter was brought to our attention earlier this year, we found that the Housing Department had apparently decided that the staff on the roster in question should be regarded as being on availability rather than stand-by and that they would get the savings provision which of course has since disappeared - it doesn't exist.

The discrepancy was picked up by the Association earlier this year and we sought to raise it with discussions with the Housing Department. However, at that stage we couldn't

GM/CW - 18.06.86

PRESIDENT - PHILP

MR PHILP:

reach agreement with them that the award had been misinterpreted and so we lodged this application with the Industrial Commission early in May.

We previously pointed out, sir, when I was outlining the history of the clause, that it was the maintenance staff on the maintenance roster (emergency roster) of the Housing Department in 1975 which saw the establishment of the stand-by provision.

This resulted from a very detailed examination of a member of the Housing Department in the 1975 case and we have seen that, because that is referred to in the actual decision of the Public Service Board in 1975.

When the stand-by proviso was altered in 1983 the decision of the Public Service Board was that clearly the Housing staff were to be regarded as being on stand-by. That is a clear reading of the decision.

So I think for the Housing Department to suggest otherwise is ludicrous. It must be stressed that the nature of the operation of the emergency roster has not changed fundamentally since the scheme was introduced in the early 1970's - I think it was 1974.

Since the Housing Department has effectively said that people on this roster will now be regarded as being on availability we will protect those current people on the roster, but since that change there has been no easing of restrictions placed on the Housing Department supervisors.

When they are on the roster they are not supposed to leave their home. They are required to remain in a certain place with strict limitation on movement. They must remain within earshot of the telephone and if their families go out, they probably can't even go out and mow their lawns.

GM/CW - 18.06.86

PHILP

MR PHILP:

Over a weekend they are tied up from 4.45 p.m. on Friday to 8.45 a.m. on Monday.

I don't think the Department really does expect people to do that on the availability allowance of the current rate of 74 cents per hour and I don't believe that they would expect anyone to join the roster on that sort of basis.

I believe it is only the savings provision on the roster which enables the roster to survive.

To my understanding no new people have come on the roster and been paid availability as distinct from the savings provision.

As we know, availability allows people to leave premises as long as they are capable of being recalled within a reasonable period of time. I don't believe such a system would work in this particular case because of the nature of the operation where (I think it was brought out in the 1975 evidence) a client rings an emergency number which is in the telephone book; that then gives that client another number to ring. And I think for an availability roster to work it just couldn't work for the Housing supervisors.

The award provision for stand by relates to a person regularly rostered on an approved roster for stand-by duty to meet emergency situations, who is required to stand by at his home on immediate recall and may be required, shall be reimbursed in a particular fashion.

I believe that Housing maintenance staff on this roster clearly meet all those requirements. They are regularly rostered on an approved roster; it is stand-by duty; they are there to meet emergency situations; they are required to stand by at his home and they are on immediate call.

GM/CW - 18.06.86

PHILP

MR PHILP:

As I said earlier, sir, we believe it is impossible for the Housing Department to suggest that these people should be on availability allowance because of the - I think the case was specifically referred to in the 1975 decision and the 1983 decisions of the Board and the most important factor is that there hasn't been any removal or lessening of the restrictions placed on the persons on that roster.

Sir, that is all I wish to say at this stage. I believe we have followed the guidelines for interpretation as established by yourself and we believe that we have demonstrated that the Housing Department has incorrectly interpreted the award.

PRESIDENT:

Could you give an example of the circumstance in which you believe 5 (a) (that's availability) might have application?

MR PHILP:

Yes. 5 (a) applies to a number of situations in the service at the moment, such as in the, probably, the water authorities where a person may be required to fix a breakdown of plant. However, that is an unlikely event and because of that they are free to move around within a certain radius and that is a radius I suppose of time to get back and rule of thumb, as I have always understood it, was that you should be able to return to your job within 20 to 30 minutes of being recalled. And for that purpose if you are going somewhere else, you leave a forwarding telephone number and if there is a breakdown of plant, then the person is then rung up and told that, 'You are required at work and you have got to get back there within a reasonable time'. That is availability as I would see that.

PRESIDENT:

Yes.

GM/CW - 18.06.86

PRESIDENT - PHILP

PRESIDENT: I note that both provisions make reference to persons being required to remain at home.

MR PHILP: Yes, well I noticed that too. The point that we would raise and that is of course the wording of the availability allowance has been of the same ilk since 1975, and in 1975 it was decided that the personal restrictions on these people would put them in the stand-by category, because in essence they both had similar words, which...

PRESIDENT: And you're saying it didn't cause any problem then?

MR PHILP: It didn't cause any problem then, no, that's right.

PRESIDENT: Yes, well now, Mr Philp, I take it you want me to interpret the award in the context of the situation in the Housing Department that you have described?

MR PHILP: Yes.

PRESIDENT: Yes. You are not able to hand up a roster by any chance?

MR PHILP: No, I haven't got a roster. I have got a handwritten copy of one which related from last December to early this year, which I have got. I could read it out to you if you like.

PRESIDENT: Yes, but who has written it? You, or...?

MR PHILP: No, no, no. Just bear with me and I will...

PRESIDENT: You see, it seems to me that it would be important to your case to be able to demonstrate, among other things, that there is in fact a roster, because the award requires that there be a roster among other things.

MR PHILP: Certainly, I appreciate that point, but of course one would presume that that roster existed in 1975 and was approved by the Public Service Board

GM/JS - 18.06.86

PRESIDENT - PHILP

MR PHILP: in those days. And my intuition suggests to me that that approval was probably delegated to the Housing Department.

The copy I have got is certainly a handwritten copy, but I presume there are official copies. I mean, this is just a copy for the troops.

PRESIDENT: Is it signed?

MR PHILP: Yes, by Mr John Venatacci, a clerk in the maintenance section. But that may simply be a copy for the people on the roster, as distinct from the official copy of the roster. And of course I would expect that the roster from '75 would have been approved by the Public Service Board in those days in any case.

PRESIDENT: Well you had better show that to Mr Pearce, if you will, and then perhaps I could have a look at it.

MR PHILP: Certainly.

PRESIDENT: Would anyone here present know if the names appearing on the roster are names of supervisory personnel? It is headed, 'Duty Clerk'. I think the original...

MR PHILP: Mr Grice is certainly a supervisor and I think he is first off... I think he got Christmas.

PRESIDENT: Yes.

MR PHILP: And certainly there are some clerks on the roster, as I understand it, but it was initially designed for the supervisors, as I understand it.

PRESIDENT: Yes, all right.

Mr Philp, then would you wish me to interpret the award in your favour prospectively or retrospectively?

MR PHILP: Retrospectively from the date when the error was made.

PRESIDENT: Can I do that, having regard for the

GM/JS - 18.06.86

PRESIDENT - PHILP

PRESIDENT: fact that the General Conditions of Service Award was made in 1986 - in effect, a new award? Can I take it back beyond the date of operation of this award, which is 3 January 1986?

MR PHILP: I would have thought so, sir, but...

PRESIDENT: It depends on which award you seek to have interpreted - the old award or the current award.

MR PHILP: Can't I have both? I think the question of that could best be resolved perhaps between the parties actually.

I think we are not unreasonable, but equally, we have got a concern for the people that have been on this restriction, and in our view, haven't been properly compensated for it.

PRESIDENT: Yes. There is a body of legal opinion that would allow you to interpret a rescinded award.

MR PHILP: Is there? Well, as I say, we ...

PRESIDENT: But the only award before me today is the current award of course.

MR PHILP: Yes, although what I have attempted to demonstrate is in fact that subsequent to the amendment by the Board in 1983 and the implementation of instruction, which is Exhibit P.5, in November 1983, in fact the award has been interpreted incorrectly since that change in the award.

PRESIDENT: Yes. Excuse me a moment please. I will have a look at section 43. I think it might say "...at any time while an award is in force", but I... Yes, "...while an award is in force", I think, may very well be the rock upon which you founder.

MR PHILP: While an award is in force...

PRESIDENT: Did you write that?

MR PHILP: No, I didn't, no.

GM/JS - 18.06.86

PRESIDENT - PHILP

PRESIDENT: That makes it awkward, doesn't it?

MR PHILP: Well, I think the question is that from our point of view we wish to see that the award is properly applied, and if the legislation prevents it from flowing any earlier than 6 January...

PRESIDENT: I notice Mr Gozzi has signed this on 3 January. I presume that that's when this consolidation took place.

MR PHILP: Yes, if that's where we are bound to, then so be it. It is unfortunate, but, yes.

PRESIDENT: Well if it were interpreted in your favour, no doubt there would be some offer of gratuitous settlement.

MR PHILP: I would hope so, but they are not terribly good at making offers at times actually.

PRESIDENT: Mr Pearce isn't smiling. Yes, all right, Mr Philp. Thank you.

MR PHILP: Thank you, sir.

PRESIDENT: Mr Pearce?

MR PEARCE: If it please the Commission. What we are here about is to determine by reference to the facts of the after-hours emergency service conducted by the Housing Department, as it might readily fit within the award provisions as they are written.

And one would assume that the immediate role of industrial officers, when confronted with specific facts, would be to determine what is indeed the specific clause which would apply in the circumstances with which they are confronted.

That of course would then lead to a perusal of the existing General Conditions of Service Award. The industrial officer in applying what he believes is the appropriate clause need not, and is not required to,

MR PEARCE:

have regard to how that clause came about, if he can readily ascertain by the reading of the words what is intended.

In the situation of the Housing Department after-hours emergency service, he might address himself to (a), the availability allowance provision, and he would read therein that, amongst other things, the employee is required,

"... to remain at home or within close telephone contact thereof and hold himself in readiness to return to work ... monitor telephone calls and/or attend to after hours calls if required ... "

That in itself would strike a bell and say, 'Yes, that would seem to fit the situation of the Housing Department personnel' - and I use the word, 'personnel' because as I would point out to the Commission, the after-hours emergency service at Housing is not limited to maintenance and technical staff. It also includes persons who are public servants, who in the course of their day-to-day activities are not associated with work in the trade; that is, the building industry trade which might encompass such matters as plumbing, electrical, or other matters.

The personnel on the emergency roster, for example, are merely required to, on the information given to them by a Housing Department client, and it must be of a matter which is serious to either life or property, before the matter is supposedly to be rung through by the Housing Department client.

He or she would then elect to either refer the call to a plumbing contractor or, for example, an electrical contractor - provided he can tell the difference between water and sparks, one would assume.

GM/JS - 18.06.86

PEARCE

MR PEARCE:

So to suggest that there is some expertise being exercised by the employees on the roster may be true in certain circumstances where maintenance supervisors are actually on duty, but in other circumstances where there are public servants, one might assume that there is no level of expertise required on their part in answering the telephone and re-directing the call to an electrical or plumbing contractor.

The `Standby Allowance`, if the industrial officer wished to have regard to both clauses before determining which one ought to be appropriate, would read that:

"An officer authorised by his controlling authority, ... as the case may be, regularly rostered on an approved roster for standby duty to meet emergency situations, who is required to standby at his home on immediate call and may be required for immediate recall to duty, shall, (i) if not required to commence work, be paid equivalent to 6 hours at his normal salary rate; or (ii) if required to commence work, be paid in accordance with Clause 10 B ... of this award."

The factual situation regarding the maintenance supervisors and other personnel who are rostered on the after-hours emergency call, is that it is the exception rather than the rule that these people are in fact called out.

MR PEARCE:

The only incidents which I understand that may involve these personnel in an actual call-out is to attend calls through either the police or fire, where there has been incidents involving life or fire.

But in the main, and the record would show, that there is very little incidence of an actual call-back.

Therefore, if the applicant seeks to have the `Standby Allowance` interpreted to include those personnel at Housing, then we would suggest that there would be some difficulty, if this Commission were behoved to declare that the interpretation should apply to stand-by, to the extent that there may be some difficulty in the Housing Department being able to determine, in fact, at what time a telephone call was received, to determine whether or not that came within the minimum `Call Back` provision of the first 4 hours. And one would assume that over a weekend, if an employee got a phone call at 6 a.m. in the morning who was on duty, and the stand-by provisions were to apply, then any other telephone call received between, say, 6 a.m. and 10 a.m. would be encompassed in that first overtime payment, an overtime payment of a weekend, Saturday work; perhaps time and a half for the first 2 hours and double time thereafter.

If he received another telephone call at 12 o'clock or noon on Saturday afternoon, then of course the telephone call, if it comes within the context of the word `work`, would only be paid for presumably for the duration of the telephone call.

So if there is going to be a declaration made by this Commission in relation to the application, then I suggest it be made prospectively, because it would be very difficult for the Housing Department to determine what the overtime payments

MR PEARCE: would be retrospectively, in the absence of knowing exactly at what time these telephone calls were made.

PRESIDENT: Well let me put your mind at ease. The award wouldn't envisage any payment for answering the telephone. He would have to be called out to work overtime.

MR PEARCE: Right. Well, that would leave it at point (b)...

PRESIDENT: You don't get paid 6 hours for answering the telephone.

MR PEARCE: Well perhaps the Commission could enlighten me as to what would be intended by sub-clause (b)(i) 'if not required to commence work'?

PRESIDENT: Yes, I can do that now.

MR PEARCE: So, I mean, are we assuming that these people are sitting at home doing nothing and being paid 6 hours for the privilege of doing nothing?

PRESIDENT: Not for the privilege - for the inconvenience of not being able to leave your home at all. And it could be for 24 hours, you see. You just can't leave the home. You must be within earshot of the telephone. That's what the 6 hours is for.

MR PEARCE: Yes, and I fully appreciate that that is the case.

PRESIDENT: As distinct from the fellow who is on availability. He might even be able to go to the football, so long as he can be contacted by P.A. or something of that order, you see.

MR PEARCE: Yes, well I believe that when the 'Standby' clause was recast it had regard to the 'Close Call' provisions which were particularly applicable in the hospitals area.

PRESIDENT: Yes. 'Close Call' and 'Standby' are one and the same.

MR PEARCE: One and the same, yes. And of course

GM/JS - 18.06.86

PRESIDENT - PEARCE

MR PEARCE: in the hospital situation we are dealing with people on close call who are to remain within the precincts of the actual hospital.

PRESIDENT: That's right.

MR PEARCE: In these circumstances we have a situation whereby persons are able to carry out certain functions within the confines of their own residence, and because the incidence of call out is minimal, one would assume that they are able to enjoy some of the trappings which come with the home life. But that is somewhat impinging perhaps on the merit.

But I make the distinction that the analogy between `Standby` hospitals, and `Standby` Housing is in some instances fairly distinct.

But Mr Philp indicated that since 1974 there had been no fundamental change to the roster system. As I understand it, in '74 it consisted only of maintenance supervisors - persons who were familiar with the sorts of in-coming calls and were able to assess the situation.

That has changed to some extent. As I have indicated, there are now a mixture of both maintenance supervisors and also public servant personnel.

Secondly, I understand that in the last - or for a period of some 6 years - the duty officer has been issued with a bleeper. The purpose of the bleeper and the issuing of same, I understand, was to give a greater flexibility to the employee to enable him to be in close contact with his home. That would assume perhaps a capacity to leave the residence.

PRESIDENT: Well you wouldn't need a bleeper if you were in your own home.

MR PEARCE: That is quite correct, Mr President. Thirdly, and of course one of the

GM/JS - 18.06.86

PRESIDENT - PEARCE

MR PEARCE:

distinctions which has been drawn in the past, and is recognized industrially as a distinction between `Standby` and `Availability` is the amount of limitation, or restriction, placed on the person's movement.

`Standby` of itself clearly determines an employee must remain in a fixed spot. `Availability` does provide the flexibility to be either at home or within close telephone contact thereof.

And indeed, I make the point which you have taken up, that the issuing of a bleeper would not seem to be necessary if these persons were held on close call.

PRESIDENT:

Well, the `Standby` provision says, among other things:

"...who is required to standby at his home on immediate call ..."

Now `immediate call` must mean immediate call.

MR PEARCE:

Yes.

PRESIDENT:

"... and may be required for immediate recall ..."

So he would have to be at home on immediate call to answer the phone and be prepared to drop everything and leave his home and commence some duty away from his home.

MR PEARCE:

Now, of which I would ...

PRESIDENT:

What is the range of a bleeper?

MR PEARCE:

I understand some of the hospital ones might operate from - they are in contact perhaps from the Royal Hobart Hospital up to New Norfolk - which is fairly extensive.

PRESIDENT:

Well, have you any idea of the range of the beepers that are issued at the Housing Department, if at all?

GM/JS - 18.06.86

PRESIDENT - PEARCE

MR PEARCE: No, I would be obliged for that information from ... It's not capable of defining in respect of all areas, given the incidence of hills, et cetera, but it could range from a person in the city being able to contact someone at Bridgewater.

PRESIDENT: I see.

MR PEARCE: Which does give scope for some...

PRESIDENT: Well if I can just stop you there. In order to interpret the award, I must be in full possession of the facts, because this provision has application across the State Service, or wherever this award applies.

Now in the context of a stated set of facts, as outlined by Mr Philp, I have to decide, it seems to me, whether or not sub-clause (a) or sub-clause (b) would apply in that circumstance. And Mr Philp hasn't informed me that these people are issued with beepers, he has left me with the very clear impression that they are in fact required, they are rostered for emergency duty, and required to remain at home and also be available for immediate recall to duty.

If they are issued with beepers then clearly they couldn't meet either of those tests. They couldn't answer the telephone immediately and they certainly could not be available for immediate recall to duty.

Now are you able to tell me what the factual position is out there, or do we have a mix of those two situations? Otherwise I can't interpret the award.

MR PEARCE: No. Well, as a background to providing you with this information, it's merely to reinforce the view of the Housing Department that they are in fact correctly adopting the 'Availability' provision. And I'm instructed that since about 1980 I was informed, some 5 to 6 years ago,

GM/JS - 18.06.86

PRESIDENT - PEARCE

MR PEARCE:

that the duty officer was provided with a bleeper. And he has this with him or her on each occasion that they go and undertake this function. I haven't been informed under the circumstances for which the bleeper has been issued. Well I am informed that ostensibly it was to provide a greater flexibility in the leisure time available to the employees in question - which would enable them to leave the immediate confines of their home.

PRESIDENT:

Well who would answer the telephone?

MR PEARCE:

Well one would assume that this is another situation whereby if there were nobody else at the house, and as I have already indicated it doesn't take any particular expertise to monitor a phone call and either direct it to a plumbing contractor or an electrical contractor, one would assume that if there was somebody else in the house who was able to determine similarly between water and sparks then they could perhaps be performing that duty.

I'm not suggesting that that is the case. I don't know. But I think it requires a little more information as to the purpose of the issue of the bleeper.

If these persons are required on stand-by - to remain on immediate stand-by and ready for immediate recall - then it escapes me as to why bleepers are in fact issued.

PRESIDENT:

It would escape me also. Mr Philp is dying to get up.

MR PHILP:

If the Commission pleases, the issue of the bleepers was precisely to take account of the situations where the supervisors are called out to do a particular job, and that is supposed to be rare.

I mean, that was the whole intention. That was only very exceptional circumstances, and the

GM/JS - 18.06.86

PRESIDENT - PEARCE - PHILP

MR PHILP:

bleeper - as I understand the situation - is only to be used where they are actually called out for their job. It is not for liberalization of the leisure time at all. It is for when they are called out on a particular job. They go out and it does require someone else in the family being able to bleep them, and there is no two ways about it.

And to the best of my knowledge the spouses of the people on the roster are not paid anything from the Housing Department.

PRESIDENT:

Then they are to be contacted when another emergency comes in?

MR PHILP:

Yes, when another emergency comes in. That's my understanding of the use of the beepers.

There has been no liberalization of the restrictions placed on the staff on the roster.

MR PEARCE:

Well I am informed the purpose of the issuing of the beepers is to provide greater flexibility in the leisure time which might otherwise be available to the officers concerned if they were to be held at their house next to the telephone.

And that, I suppose, is a fairly threshold matter upon which you might require some information.

PRESIDENT:

Yes, it is very difficult. I can only, I suppose, interpret the award in two ways: Where there is a restriction and when there is a greater capacity for the person to move away from the home.

MR PEARCE:

Yes. Perhaps the introduction of that particular matter might not be germane to the fundamental application of the availability clause to the Housing Department relying on the words of the availability clause as it is written anyway, because it does provide the capacity for persons to be placed on availability for the purposes of monitoring telephone calls or attending to after-hours calls.

Now that in itself implies that to perform that duty they must be by a telephone, presumably within their residence. So there is an element of stand-by contained within the availability clause as it is anyway, but there is a lesser rate applying to availability than there is for stand-by. And it is quite open and proper for the Housing Department to adopt the availability provision as it is written because it does provide the capacity for employees to be engaged to monitor telephone calls.

Now, one assumes that if they are placed on availability to monitor telephone calls and they go to the football then they can't perform that function. So there is an element of stand-by in the availability itself.

PRESIDENT:

Yes, well that would be something to be determined by management but couldn't it also mean this, Mr Pearce: That the general public are not aware who is on availability from week to week but they are aware of after-hours emergency numbers and so that is the number they ring - that is the number they expect to have answered unless there is some recorded message that gives them another number and, assuming a live person answers the call, that person is then supposed to contact the availability individual and, depending upon the seriousness or

GM/CW - 18.06.86

PRESIDENT - PEARCE

PRESIDENT: otherwise of the complaint, or the situation, the person on availability will attend to it either immediately or when he gets around to it.

Aren't they the two situations?

MR PEARCE: Yes, ostensibly, that would appear to be the case.

PRESIDENT: If I could just take it a step further: If I am to forget the merit and simply look at the words, I would be looking at what the words say in the context of what the factual position appears to be.

Now, we have been told there is a roster - that it is an approved roster; those people are required to remain at home but that might be arguable. The purpose of being on a roster is to meet emergency situations and I think one must read (i) and (ii) into that; that those people must also be prepared to be called out immediately to perform some work - that would be, leave their home to perform some work.

Now, if those criteria are met, prima facie that would be the provision that might be fairly relied upon. If those criteria are not met and it can be demonstrated that someone is not on a roster, has a bleeper, is prepared to hold himself available for call-out - if required - if properly contacted, then it might be that 5 (a) applies. But I imagine those words,

"regularly rostered on an approved roster for standby duty to meet emergency situations, who is required to standby at his home on immediate call and may be required for immediate recall ..."

... must mean something, otherwise why are they there?

But this being an omnibus-type award,

PRESIDENT:

of course, one could find different situations in different agencies and Housing is just one.

MR PEARCE:

Yes, well the `Standby` wording is far less expansive for the purposes of an industrial officer, for example, having to interpret which is the appropriate clause to adopt, given that the `Availability` is far more expansive to the extent that it does provide (a) a capacity to remain at home and (b) a capacity to monitor telephone calls which, of itself, are inexplicably entwined - if you are not at home you can't answer the telephone. If you are at home and you are required to be at home, you can answer the telephone and that provision is available within the availability allowance anyway.

The question of stand-by, of itself, it is in fact almost a punitive penalty against the employer when he has to pay a prescribed amount on the incidence of recall.

It has already been established - I think the facts would show that the incidence of recall of these actual supervisors and other personnel is almost negligible. One would assume that an employer in managing his affairs would not pay the price that would be required to have people on a stand-by situation as prescribed and described in (b).

PRESIDENT:

Why wouldn't he, Mr Pearce? If he knows that it is unlikely that the individual is going to be called out to perform any work but, nonetheless, he is going to restrict the movement of that individual for, say, 24 hours, why shouldn't he pay that individual some reasonable compensation for not being able to leave his home at all? If he were not to do that, why would an individual want to go on that kind of roster? No likelihood of overtime (it is extremely unlikely there would be overtime) but can't leave the confines of his home. Surely he must

PRESIDENT: be entitled to more compensation than the person who is on availability who is not so restricted, who may move around provided he is within reasonable telephone contact.

MR PEARCE: Well, the attraction or otherwise of the roster - I would inform the Commission there are 15 persons who now operate on the roster. In 1974 it was 5. I understand at the commencement of the dispute with the T.P.S.A. there were 11 and since the savings proviso of \$22, or \$23.05, has been maintained in respect to new persons coming on to the roster, as much as an interim measure and by way of an attraction, that the roster itself has swelled to 15 people.

It requires only one person to be on the roster per week so, effectively, a person rostered for duty after hours would be required only to perform 3 weeks' duty in every 12-month period.

They receive, as I understand it, what is provided for in the savings provision of 'Availability', that is \$23 for each day of rostered availability ...

PRESIDENT: Well, if that is what they receive, I am afraid the case will go against you because that savings only applies to stand-by at the moment. It might be an error, Mr Pearce, but I can only look at the award as it stands and that proviso, which happens to be \$25.56 by the way, relates only to stand-by allowance.

MR PEARCE: That is not paid per the award - it is paid as an over-award consideration, Mr President.

PRESIDENT: Does the Housing Department make over-award payments, Mr Pearce, and if so on what authority?

MR PEARCE: Where an award is deficient. And to that extent I would suggest that it would be capable in terms of previous custom and practice. And the award,

GM/CW - 18.06.86

PRESIDENT - PEARCE

MR PEARCE: we say, is deficient as pointed out by Mr Philp to the extent that the savings provision has not been reprinted through no fault of either party.

PRESIDENT: Well then, look at it from the point of view of the individual. If that individual receives \$25.56 and the award says \$25.56 shall be paid as a savings provision under item (b), how would the individual know that in fact he is not getting that amount under (b) but under (a) and by way of over-award payment?

MR PEARCE: I withdraw the words that it is an over-award payment. Let us just concentrate on the factual situation and the factual situation is up until such time as the General Conditions of Service was consolidated, No. 1 of 1986 ... bear with me please, Mr President. When the General Conditions of Service Principal ... yes, I suppose I am relying on observations but a consolidated award, I would take it, would replace a ...

PRESIDENT: Under this Act it does. We are using the term `consolidation` - in fact it is a new award.

MR PEARCE: I understand that the award made by way of consolidation was something done on the motion of the Commission. I therefore would suggest that in the circumstances of that, that it is an oversight which can be readily corrected, presumably by the Commission of its own motion in remedying a defect.

PRESIDENT: I suppose if the Commission are clever enough to consolidate the award of its own motion and omit something, it should be clever enough to repair that omission.

MR PEARCE: Certainly any persons who may have come on to the roster in recent times, having regard for the award, might say that that entitlement to the \$25.56 derives from (b). But in

MR PEARCE:

respect of all other persons (and I refer generally to 11 persons at least) they would have been aware of the decision in 1983 of the Board in relation to recasting `Standby` but making savings provisions in relation to people who were previously on what was known as stand-by, but because the `Availability` is now seen to be the more appropriate clause, were in fact not prejudiced in relation to the amount that they were previously receiving.

It is a fairly convoluted way of getting around of saying that in fact in the field people know why they are getting the \$23 and it doesn't derive from the stand-by provisions - the `Standby` clause itself.

If the \$23 was derived from the stand-by allowance, which provides 6 hours' pay at ordinary time, then 6 hours' pay of calculated ... one would assume what is the relevance of the \$25.56 proviso in `Standby`, because who's on a salary of something in the order of \$7,400 a year?

MR PEARCE:

And I suspect now that there's probably no employees in the State Service, full time at least, who would be receiving a salary of the order of \$7,400. That's if you were to equate, because that proviso wouldn't need to be in there, because these people, if they were on stand-by, would be getting either 6 hours' pay or the overtime rates.

Now, 6 hours' pay would far exceed \$25.56 or indeed, the \$23 when it was originally put in in 1983, so one might question as to why that proviso - savings provision - went into that clause, because it was subsequently reprinted in the 'Availability' where I believe it more rightfully belongs.

PRESIDENT:

Well, under the availability provision - I have forgotten how it stood before. I take it it was so much per hour. No it wasn't. It was so much per day, wasn't it - a flat rate?

MR PEARCE:

Yes, Mr President, yes.

PRESIDENT:

Then it was upgraded and brought across on the basis of a provision that appeared in the Hospitals Award, was it?

MR PEARCE:

Yes, those other awards which prescribed hourly and there was a matter put ...

PRESIDENT:

And they had had hourly rates for many years and the only reason there was a savings provision put in was because some people were on availability for 4 hours, some were available for 24 hours and some were available for 8 hours. And it was necessary to ensure that in rationalizing the availability provision, no one presently employed would lose as a consequence of being paid so much per hour, instead of so much per day.

GM/WL - 18.06.86

PRESIDENT - PEARCE

MR PEARCE: It effectively became a minimum payment.

PRESIDENT: That's right, and it would wither on the vine and die as the hourly rate increased, and it was known that no one would be likely to be on availability, say, for less than 4 hours, and the same with the stand-by in the Housing Department. That was fixed at a flat amount of money and it was necessary, not knowing the classification of the persons who might be on stand-by, to ensure a fail safe, if you wish, to put that \$22 or whatever it was in as a fail-safe method. Eventually that would disappear and perhaps should disappear now.

MR PEARCE: Yes, we have some difficulty making it disappear, Mr President, if it keeps getting updated.

PRESIDENT: Well, that's quite right, Mr Pearce. We've already read this morning that it was never intended to be adjusted.

I am sure that message will get back. In fact, it may have been passed on this morning before we came in.

Well, where does that leave us, Mr Pearce?

MR PEARCE: Well, I believe it leaves us poles apart with the applicant.

PRESIDENT: But, have we got a situation at Housing where there are persons on a stand-by roster required to remain at home, not issued with a bleeper, expected to answer the telephone and depending on the nature of the call, call somebody out or pass that information on to someone else?

MR PEARCE: There is a roster and I note that of the two provisions, the only one which specifically prescribes a roster itself, is 'Standby'.

Your other observations are correct, with the exception of that in fact

GM/WL - 18.06.86

PRESIDENT - PEARCE

MR PEARCE: these employees are issued with bleepers.

PRESIDENT: They've all got bleepers?

MR PEARCE: Each duty officer as he comes on for the week is given the bleeper.

PRESIDENT: Even the clerks?

MR PEARCE: The clerks, all officers who participate.

PRESIDENT: Well then, the only reason you would rely on 5(a) would be because of the reference in 5(a) to the words 'to remain at home', I presume, or do you read on 'or within close telephone contact' having regard for the bleeper?

MR PEARCE: I would suggest 'or within close telephone contact', having regard to the bleeper.

I suppose, to make some observations, if the limitations on movement are not as the Association might suggest is the case as prescribed by 'Standby', if the limitations on movement are not as inflexible as to deny these people the capacity to go out, but remain within close telephone contact thereof to respond to telephone calls, then that's perhaps something that may have to be determined as a matter of fact by, presumably, evidence to perhaps determine this matter.

PRESIDENT: You don't feel, Mr Pearce, that 5(a) is directed more toward the artisan-type person who is in fact likely to be called out to do some work? Because, you see, he's requested to hold himself in readiness 'to return to work without delay or within a reasonable time of being recalled'.

Certainly it says, 'or to monitor telephone calls', but that might be to monitor the calls and then make a decision whether or not he has to go out.

But he seems to be the person who is

PRESIDENT:

going to do the work.

Perhaps the other person is the person who's going to take the calls and then direct or request the availability person to turn out and do the work.

It's true that b(i) envisages that person doing some work, but it does say "and may be required" whereas (a), it seems to me, makes it more probable that that person will be required to turn out.

See, he's got to hold himself in readiness to return to work without delay.

The other person may be required for immediate recall to duty, but he shall be required to stand by at home to answer the phone.

MR PEARCE:

Well, I think it would be more than helpful if the word "work" was defined. Clearly it is not but I'd suggest that the stand-by allowance goes more to persons who are called out to perform something which is akin to their normal duty, whereas I have already submitted that the role of people on the roster is merely to monitor telephone calls.

There is no requirement of those persons to be experienced in facets of the building industry, that if they are called out, I would understand, it would merely be to provide a key to enable either emergency services to gain entry to houses, or on occasions that little old ladies might lock themselves out.

PRESIDENT:

Yes, but isn't that the thrust of (b)? Isn't that the intention of (b)?

We are trying to decipher the difference between (b) and a bull's foot now, are we?

MR PEARCE:

Well, (a) is definitive; (b) is not,

GM/WL - 18.06.86

PRESIDENT - PEARCE

MR PEARCE: in terms of what can be done in terms of work at home.

PRESIDENT: Except that we do get some assistance from the reference to ...

MR PEARCE: The specific function of the employee is to remain at home.

PRESIDENT: Well, (b) doesn't make any reference to a telephone, does it?

MR PEARCE: Not in (b) it doesn't, but the specific ...

PRESIDENT: He's standing by to meet emergency situations. That doesn't tell us how he might meet those emergency situations.

MR PEARCE: Yes, but these people aren't placed on stand-by to meet emergency situations. They're not expected to go out and be recalled to work. Their primary function is to remain at home and answer the telephone.

There may be instances of recall as I've submitted to provide a key which ... I won't qualify that as work or define it as work. It's a, say, function.

PRESIDENT: But if he has to leave his home and travel to a Housing estate somewhere and provide a key, then he's performing some work, isn't he?

MR PEARCE: He's performing work of a description, and indeed, if he was recalled, although it doesn't appear to say under the availability allowance clause, one assumes that the recall would attract ...

PRESIDENT: He'd get a minimum of 4 hours, wouldn't he?

MR PEARCE: ... some form of overtime provisions.

PRESIDENT: He'd still get 6 hours' pay, at least; possibly 8. It would be a minimum of 4 hours.

MR PEARCE: It would be a recall and one would

GM/WL - 18.06.86

PRESIDENT - PEARCE

MR PEARCE:

have regard to the call-back provisions of the award, by reference to another particular clause, 'Call Back'.

Yes, that's already catered for within the award so, I mean, the incidence of the fact when the person is recalled under 'Availability', is provided for by the call-back provisions of the General Conditions of Service Award, whereas the stand-by allowance is a little more expansive to the extent that it says 'if required to commence work, be paid in accordance with Clause 10B ... ', which is in fact recall.

So, ipso facto, they mean one doesn't say what should be there, but 'Availability' should, I believe, provide that where an employee is actually called back, that he should be entitled to overtime payments as provided by the call-back provisions of the award.

PRESIDENT:

Well, he's not precluded from it.

MR PEARCE:

He's not precluded from it. No.

PRESIDENT:

No, so it would apply. (b) makes it clear that if a person, notwithstanding the fact that he gets a minimum of 6 hours anyway, if he is required to commence work, he ...

MR PEARCE:

This is where our fundamental distinction lies, I believe, between the two matters.

They both provide that where a person is called out, that there are other payments to come into effect, being call-back payments.

PRESIDENT:

The important distinction is that one has to remain at home within immediate earshot of a telephone; yet I'm saying that, but I can't read that into it, so perhaps I shouldn't be saying it. But he certainly must remain at home and hold himself available for immediate recall, if

GM/WL - 18.06.86

PRESIDENT - PEARCE

PRESIDENT: you like.

MR PEARCE: Yes.

PRESIDENT: We can read that into it.

MR PEARCE: Yes.

PRESIDENT: You've already told me it's unlikely that they'll be recalled anyway, but nevertheless, that's what they must do and for that they are paid a minimum of 6 hours.

MR PEARCE: Yes.

PRESIDENT: In the unlikely event they are called out, then 10B.2. would apply. Right?

Now contrast that with 'A'. It's highly probable that person will be called out because he's on availability. And it says he must be in readiness to return to work without delay. And for that he's going to be paid so much per hour for every hour that he's holding himself available. He's not confined to his home although he may be. But he will get the hourly rate in addition to any penalty overtime payment if he is required to return to work. He's got 2 situations.

PRESIDENT: The stand-by person doesn't get the hourly rate. He just gets 6 hours' pay ...

MR PEARCE: It doesn't need saying that there is a fair distinction, Mr President.

I think we would submit and leave our observations to the fact that the words of 'Standby' and 'Availability', clause 5(a), the words in paragraph (a):

"... to remain at home or within close telephone contact thereof ..."

Further down:

"... or to monitor telephone calls ..."

We believe that that is explicit for the purposes of someone - an industrial officer - being required to apply an award provision to what he believes is the factual situation. And as we understand it, the factual situation that these persons are required to remain at home or within close contact thereof for the purposes of monitoring telephone calls.

If they were to be absent from their house, then of course the second part of that, the capacity to monitor telephone calls, couldn't be achieved. Therefore the application of the provision to these employees otherwise would be rendered nebulous. It would have no meaning.

PRESIDENT: Yes, but Mr Pearce, what do you say about those words 'and/or'? Let's read (a) in context:

"An officer other than an officer to whom sub-paragraph (b) of this paragraph relates, who is directed by his permanent head or administering authority ... to remain at home or within close telephone contact thereof and hold himself in

PRESIDENT:

readiness ..."

So he has to be at home or in close contact. He must also hold himself in readiness:

" ... to return to work without delay or within a reasonable time of being recalled or to monitor telephone calls and/or attend to after hours calls if required ..."

Now, does he not have to monitor telephone calls and attend to after-hours calls or monitor telephone calls or attend? Can he just monitor telephone calls?

MR PEARCE:

I believe he can.

PRESIDENT:

Then why the `and`? He must monitor telephone calls and do something else.

MR PEARCE:

The `and/or` there being to cater as a direct consequence of the nature of the call.

PRESIDENT:

No, I don't think I could agree with that. If he is going to monitor telephone calls, he must also attend after-hours calls if required. If he is not going to monitor telephone calls, he is going to be required to attend to after-hours calls.

You see, it says he must:

"... within a reasonable time of being recalled or to monitor telephone calls and ..."

... do something else.

MR PEARCE:

Perhaps the words `or attend to` might mean the very action of attending to the phone.

PRESIDENT:

You see, one is a disjunctive. It seems to me that he can be on availability to attend to after-hour calls if required. Right? Or he can

GM/JR - 18.06.86

PRESIDENT - PEARCE

PRESIDENT:

be on availability duty to monitor telephone calls and attend to after-hours duty if required; otherwise, why have the `and` after `telephone calls`?

As you argue it I think you are saying, after the word `recalled`:

"... or within a reasonable time of being recalled; (that isn't there) or to monitor telephone calls; or attend to after hours calls ..."

Of course, that clause doesn't say that at all.

In point of fact, the whole thing should be argued on merit, not interpreted, if there is some confusion. But I am asked to interpret the award and I must do it, because Mr Philp doesn't give me the impression that he is going to let up on you.

MR PEARCE:

No, it is a matter which is probably not helpful but I also understand, one of the distinguishing features, I have indicated, between a stand-by and availability is the capacity to interchange on that roster and this occurs with some frequency amongst the officers on this particular roster.

PRESIDENT:

Wouldn't you believe that the person on availability is more likely to be the person who is capable of performing some physical work, arising out of the emergency call?

In other words, make good some damage, whereas the person on stand-by certainly might be able to do the very same thing, but it is more likely to be the person who monitors the calls and then calls out the artisan staff.

MR PEARCE:

(b), you are saying, is more ...

PRESIDENT:

For the person who stays at home, monitors the calls from the public

GM/JR - 18.06.86

PRESIDENT - PEARCE

PRESIDENT:

and then calls out whoever is on availability. I think in another case (and this is going to the merit, I know), it was put that if a hot water cylinder burst or something of that nature, the call comes into the after-hours duty officer who makes an assessment of the nature of the complaint and then immediately rings the availability person to have him go out and fix it.

And that is the way it was. I don't know if that is the way it is but that is the way it was.

MR PEARCE:

Yes.

PRESIDENT:

And the occasion when they might be called out, which was a rarity - I think on the last occasion I dealt with this on merit, I think there had been about 4 or 5 calls in perhaps a year or something of that nature. It was because of the situation described by you or Mr Philp, where there had been a fire or something and the police had to - or somebody - had to get into a building and the duty officer needed to be there with a key or something of that order.

But of course you can't read all of that into that provision and I would agree with you, Mr Pearce. I can only interpret the words in the context of a given situation.

You may very well be right - that under 5(a) you could have a person monitoring calls. I'm sure you could, if that person was also the person who went out and did the work. There would be nothing to say they couldn't do both.

MR PEARCE:

I think an observation made in a matter in Western Australia between distinction and stand-by went to some sort of observation, that the distinction became when the employee's time really became the employer's time. That was a matter in the Western Australian Police, I believe.

GM/JR - 18.06.86

PRESIDENT - PEARCE

PRESIDENT: Yes. Well, wouldn't that be the case when ...

MR PEARCE: No, not in relation to the specific facts of this matter, where it is suggested that there are some - an average of 30 calls received on `availability` at Housing. That would embrace 30 calls over a period of 130 hours per week of availability duty - some 30 telephone calls. That certainly leaves a great deal of flexibility for the employee to pursue normal activities in and around his own home - within the comforts of his own home, with his family and certainly wouldn't preclude him, presumably, from partaking of alcohol, within moderation of course.

PRESIDENT: A little imbrication?

MR PEARCE: Yes, for medicinal purposes only.

PRESIDENT: We are getting into merit, aren't we?

MR PEARCE: Yes. That is really going to the distinctions between availability and stand-by.

PRESIDENT: For the purpose of both provisions one could say then, isn't it an imposition to require a person - a family man perhaps - to remain at home on a weekend and not be able to take his family out?

MR PEARCE: Well, if that is the case, yes; an imposition to the extent that he may not be able to take all of his family out.

PRESIDENT: He would have difficulty taking any of his family out, unless he took them for an outing around the house.

MR PEARCE: Provided there was someone there to answer the phone, Mr President.

PRESIDENT: On the other hand he might be able to take somebody else's family out while his family are out of the house or entertain somebody else's family.

GM/JR - 18.06.86

PRESIDENT - PEARCE

MR PEARCE:

Well, I suppose the application seeks a declaration from you, Mr President, that the Housing Department have been interpreting the award incorrectly - that is the provisions of availability and stand-by ...

PRESIDENT:

No, I won't say that. All I can say is that on the facts before me - as I understand them - persons on such and such a roster, required for such and such a purpose - if they meet that definition, then they are on stand-by. If they don't meet that definition, then they are not on stand-by. That is all I can say. I can't say that the Housing Department has been interpreting the award the wrong way. That is not for me. That is for the Department of Labour and Industry or somebody else to say.

MR PEARCE:

Yes, I take the distinction.

Allied to, and I suppose basically, the submission on behalf of the department is related to the first rule of your principles, in relation to interpretation matters, that being the ...

"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."

PRESIDENT:

Yes.

MR PEARCE:

We have endeavoured to relate the day-to-day facts of what these people do and have submitted that there is a capacity for flexibility of movement, a la to the issuing of the bleepers.

Mr Philp would maintain that that - the issuing of the bleeper - is merely to enable the employee to answer a telephone call if he is in fact on a recall arising as a consequence of a telephone call.

GM/JR - 18.06.86

PRESIDENT - PEARCE

PRESIDENT:

I can't do anything about that. I can't read that into those words. That is something that the parties would have to sort out between themselves. I can only say, if a person is required to be at home to answer telephone calls; he is on a roster; the roster is for emergency services - then it seems to me that they would fit more properly into (b).

Of course, as you quite properly point out, in the event a person is called out, then he could still be entitled to (b) but be out on a call. It then becomes a question of fact, I suppose, as to whether the bleeper is issued for that purpose - to apprise him of a subsequent emergency, or whether he is issued with a bleeper to allow him some flexibility to stray away from his home, as it were, in which case he is certainly not on stand-by.

PRESIDENT: The stand-by provision does not permit that at all. He must be required to stand by at his home.

MR PEARCE: Yes. Well, I would submit that any declaration made to provide that one provision applies rather than another, be done at least prospectively. If it please the Commission.

PRESIDENT: But, preferably not at all.

MR PEARCE: That would be my threshold position, Mr President.

PRESIDENT: Yes, thank you, Mr Pearce.

Now, Mr Philp.

MR PHILP: Yes, sir. I have a number of comments arising from Mr Pearce's submission. I think the first one is that I think the responsibilities of the discussion have too in a sense, but I suppose Mr Pearce in his submission, in my view, can detach this sufficient responsibility to the job in question of being the duty officer answering that emergency call. I understand even as recently as last week, because of inappropriate action taken by the duty officer at that time, that particular person was on the mat (so to speak) as a result of a call coming in from a fire from a property.

It is a responsibility, because I understand also in the past that persons have used that number to get their own private residence repaired by Housing Department staff. And unless the person or duty officer is fully aware of what is a Housing Department residence and what isn't, then of course public money is wasted for the wrong purposes.

As I say, that in a sense goes to merit, but I think it needed to be said because Mr Pearce did touch on that particular matter.

The second comment that I'd

MR PHILP:

particularly like to make is that Mr Pearce has indicated that since this matter was raised with the Department in February, I take it some 4 new people have been added to the roster, and they've been paid the rate of either \$23.05 or \$25.56 - whatever the case is - bearing in mind that the savings provision isn't there anyway.

But I would suggest to you that that was an incorrect use of the savings provision, because the savings provision was to protect the people that were previously on the old thing. That's a clear indication that the Housing Department doesn't believe this category of restriction is in the availability camp.

The third point, the major point of issue I think, seems to somehow rely on the bleeper - the introduction of the bleeper in 1980 or thereabouts. I don't think that has a terrible significance, because as I've indicated the bleeper is used for when the duty officer has been called out for an emergency, and it is supposed to be ... we've heard before and we've heard in '75 that it is a rare occasion, and of course that is quite provided for under the stand-by provisions.

PRESIDENT:

If that's the case - if I could interrupt you, Mr Philp - then why do you think, if it's such a rare occasion, why would they be issued with a bleeper? If it's such a rare ... if it's unlikely to be required.

MR PHILP:

Well, I cannot answer that particular point, but it would seem to me that had that been the case in 1980, and if, as it's alleged, the bleeper was really introduced to liberalize the leisure restrictions, then I would have thought it would have been appropriate for the employer to table a document from the Department to its employees, outlining the liberalization of the restrictions.

GM/CD - 18.06.86

PRESIDENT - PHILP

MR PHILP:

And the view of the staff is that the restrictions haven't been liberalized at all since the introduction of the roster. I think if that is their defence then I think that they ought to have demonstrated that that was the case.

And finally, Mr Pearce mentioned that in his view the question of interpretation really was what an industrial officer would do, looking at those particular clauses.

I suppose Wellington did it too, at Waterloo, but I'd like to ...

PRESIDENT:

He didn't have a bleeper.

MR PHILP:

I'd like to table this document which first came into my possession this morning and ...

PRESIDENT:

Are you tabling documents in your address in reply, Mr ...

MR PHILP:

No, but Wellington did.

And that's from the Admin. Officer of the Housing Department to the Acting Executive Officer, Maintenance.

PRESIDENT:

Exhibit P.8.

MR PHILP:

Thank you, sir.

"In future any staff member on the after hours emergency roster will be paid the full entitlement under clause 6E (2) of the Conditions of Service Award."

The attached 6E (2) - because there have been numerous changes in numbers ...

PRESIDENT:

That's `Standby`.

MR PHILP:

`Standby`.

Now why that hasn't been applied, I don't know. It seems to me that the department did, in November '84 anyway, consider that these persons should have been paid for stand-by.

GM/CD - 18.06.86

PRESIDENT - PHILP

PRESIDENT: You were keeping this back, were you, as your ace?

MR PHILP: Yes, it was just in case. Just in case. As I said, Wellington at Waterloo.

So I think that's all I need to ...

PRESIDENT: Yes.

Mr Philp, it's one thing to carry a bleeper, but when they bleep it means somebody must be paging you.

MR PHILP: Yes, it must. And it must be the spouse, presumably, or the children of the person on the roster, who of course may not want to be at home at all in any case, and may not be. I mean, if ...

PRESIDENT: So somebody would still have to be taking the calls?

MR PHILP: The calls. Someone would still have to, because the after hours number - the number in the telephone book - and that gives a message which says, 'The duty officer for this weekend (or this week) is Mr and Mrs ...' on that number.

Now someone has to be there. And of course if the person in question has actually gone out on a call, which can happen occasionally as we've heard, then of course that person is there to take calls for the department. And I know in some areas of course that allowances are paid to spouses for that type of work. But I notice that nothing has been said in this regard from the Housing Department in that regard as well.

Thank you, sir.

PRESIDENT: Yes, thank you.

Well then gentlemen, I will reserve my decision.

HEARING CONCLUDED

GM/CD - 18.06.86

PRESIDENT - PHILP