

**TASMANIAN INDUSTRIAL COMMISSION**  
Industrial Relations Act 1984

T No. 6430 of 1996

**IN THE MATTER OF** an application by the  
Automotive, Food, Metals, Engineering  
Printing & Kindred Industries Union for an  
interpretation of the Fish, Aquaculture and  
Marine Products Award

re Clause 16, subclause (c)(ii) payment for  
rest after working time

PRESIDENT

HOBART, 4 October 1996

**TRANSCRIPT OF PROCEEDINGS**

Unedited

PRESIDENT: Appearances, please.

**MR P. BAKER:** Sir, I appear on behalf of the applicant organisation, P. BAKER.

PRESIDENT: Thank you, Mr Baker.

5 **MR W.J. FITZGERALD:** If it pleases, I appear on behalf of the Tasmanian Chamber of Commerce and Industry, FITZGERALD, W.J.

PRESIDENT: Thank you, Mr Fitzgerald. Very good. Mr Baker, this has been the subject of a dispute?

10 MR BAKER: Yes, it has, sir, and perhaps just by means of background and for the record, it may be appropriate if I just spend two minutes and just quickly go back over that as to how this matter originally arose.

PRESIDENT: Yes.

15 MR BAKER: It arose out of an application which the AMWU made in matter T6282 of 1996, which was the finding of a dispute between ourselves and a company, titled Tasmanian Seafoods Pty Ltd and it arose out of correspondence of 21 June 1996 under the signature of the assistant manager of Tasmanian Seafoods to a member of ours, together with a number of other employees of the company, which was tendered as an exhibit in those proceedings, B.1, and primarily that letter dealt with the interpretation of clause 16, section (c) Part 2 of the Fish, Aquaculture and Marine Products Award and in particular that clause, which is the subject of today's  
20 proceedings is - in relation to it, says:

25 *If an employee is engaged on overtime to the extent that it does not allow an employee eight hours rest before the next regular starting time, the employee shall be allowed at least eight hours rest without deduction of pay or shall be paid at overtime rates for all time of duty until the employee has had at least eight hours rest.*

That letter actually went on to say that this clause was misread, to read:

*That we must allow you 8 hours rest without penalty for not including pay -*

30 And the company then went on to indicate that they intended to rectify that situation. You may recall, sir, that during the proceedings before the commission in respect of that matter, we indicated that the company's interpretation of the award was indeed still wrong and required some rectification. Mr Fitzgerald, on behalf of the employer, indicated that in fact he believed their interpretation of the award was indeed correct and that this matter ought to be referred, if there was to be any further proceedings on the matter, it should be dealt with by way of a section 43 application.

35 Indeed, Mr Fitzgerald concluded his comments at paragraph 45 on page 5, where he comments:

*I think you can proceed - is in fact by legal interpretation of the award and that's by a section 43 application.*

40 Now, those proceedings were in fact adjourned on the basis that we believed that we may in fact have reached a settlement and indeed the TCCI responded to us by way of correspondence on 23 July, two days following the proceedings. Unfortunately, that did not result in a settlement of the matter and as a consequence of that, we filed the subsequent application for the section 43 hearing, which brings us before you today.

I think, sir, that concludes the rather brief background view of where we're at as far as the situation is.

5 The award provision, which is the subject of today's proceedings, are also found in other awards of this commission. There is an identical provision that exists, both in the Shellfish Award and also the Farming and Fruitgrowing Award, therefore I would submit to the commission, that any decision which may or may not arise out of the proceedings today will also have an impact upon those two awards of this commission.

10 Before I commence my submission proper, I think perhaps I should hand to the commission a couple of exhibits which are basically designed for the information of the commission, in so far as rest periods are concerned within awards of the State Commission.

PRESIDENT: This is one, two-sheet exhibit?

MR BAKER: Yes.

PRESIDENT: B.1.

15 MR BAKER: This is a document that simply outlines the awards of the commission and whether or not there is a rest period applying and to the extent of what that rest period is and you'll see, sir, that some of - there is a variance between eight and 10 hours. Some of the awards of the commission - in fact, 55 awards of the commission do not have a rest period at all in them, but some 35 do and they vary between eight  
20 and 10 and indeed you'll note the Electrical Engineers in fact has a double provision applying for both eight and 10 hours and the one out of the ordinary is the Shipbuilders Award which - on the second page actually had a 9-hour break and down the bottom of the list, the Wireworking Award has an eight hour break where its practicable to have one, which I suppose really means they don't have one at all. I'm  
25 not sure, but -

MR FITZGERALD: That's it.

PRESIDENT: Yes. Who determines, practicable?

30 MR BAKER: So, sir, as I indicated, that's just an indication of where you may or may not find a rest period in an award. So, it's certainly a common provision. As I said, 35 awards have and 59 do not, so around 40% of the awards of the commission do in fact have a provision. Of those provisions - and I will hand to the commission a second exhibit -

PRESIDENT: Before we move off B.1, Mr Baker, what's the DTO in the minimum period for architects?

35 MR BAKER: As far as that is concerned, that award actually picks up its conditions from the Drafting and Technical Officers Award, and that's what my shorthand there is. I should have simply put in the eight hour break.

PRESIDENT: Ten?

MR BAKER: Ten, I'm sorry. Yes.

40 PRESIDENT: So it should be a Y10 there?

MR BAKER: Yes, a Y10.

PRESIDENT: Does that affect your numbers?

MR BAKER: Well, I don't think - it's really just an exercise in offering some information.

PRESIDENT: Yes, I was just interested, that's all.

MR BAKER: Just as a side issue, I find that there is very little of this information  
5 around. You've actually -

PRESIDENT: Got to do your own research?

MR BAKER: You do your own research.

PRESIDENT: How dreadful.

MR BAKER: .... and said, you'll find all this in these awards and away you go.

10 PRESIDENT: Anyway, your next exhibit - which we'll mark B.2.

MR BAKER: My next exhibit is B.2 and this is just an indication that the awards listed on this page - there is 18 of them listed there, have in fact, what I would consider to be identical provisions as far as the rest period for overtime is concerned. Now, I've included a copy taken out of the Metal and Engineering Industry Award,  
15 clause 21(b) which deals with rest period after overtime and that is a little more precise than the one which we are dealing with today, but it does spell out quite clearly what it is about, and under (b):

20 *When overtime work is necessary it shall wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.*

25 *An employee (other than a casual employee (as defined)) who works so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day that the employee did not have at least 10 consecutive hours off duty between those times shall subject to this subclause be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary work occurring during such absence.*

30 *If on the instructions of the employer such an employee resumes or continues work without having had such 10 consecutive hours off duty the employee shall be paid at double rates until released from duty for such period and shall be entitled to be absent until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.*

35 And I indicate to the commission that appears to be the prevalent rest period clause that occurs in awards of this commission. Indeed, as I've indicated there, there are some 18 of them. There are other awards such as the Abattoirs Award and the Community Services Award, for example, don't have the second paragraph of clause (b) there which talks about the instruction of the employer - that seems to be missing.

40 Other awards are foremost similar, such as the Furnishing Trades, the Hotels, Resorts, Hospitality and Motels Award, Meat Trades and the Wholesale Plant Bakeries. A couple of the others that are perhaps a little different are both the Building Trades and the Building & Construction Industry Awards. They actually contain some more detail in them, but it makes perhaps the intent of the clause a little clearer.

So, that's just by way of background, Mr President, in so far as where we've come from and where this clause appears in awards of this commission. Indeed, perhaps it may be now appropriate to turn to our submission proper in so far as how we perceive this clause ought to be read.

5 If an employee is engaged on overtime to the extent that it does not allow that employee eight hours rest before the regular starting time, the employee shall be allowed at least eight hours rest, without deduction of pay or shall be paid overtime rates for all time of duty until the employee has had at least eight hours rest.

10 It is now perhaps appropriate that we should dissect the clause in question, one line at a time, so to speak. To commence: If an employee is engaged on overtime to the extent that it does not allow that employee eight hours rest before the next regular starting time - is this not a clear statement. That is, an employee is expected to have an eight hour break between the knock-off time and the clock-on time the following day. The key words are eight hours rest before the next regular starting time.

15 The next part of the clause states - the employee shall be allowed to have at least eight hours rest. It reinforces the previous part of the clause - an employee is entitled to a break from work. How long is the break? The clause tells the inquirer - at least eight hours. Now, what else does the clause say about the eight hours rest which is afforded to an employee. It says, Mr President, three things, we would suggest. Firstly, it says,  
20 the employee shall be allowed at least eight hours rest without deduction of pay. The clause to date, I would suggest, says that the employee shall have at least eight hours rest between the finish of one work period and the recommencement of a further period of work and now the clause says, without deduction of pay.

25 This part of the clause is very clear - an employee is entitled to an eight hour break without loss of pay. The question is then asked, what happens if the employee returns to work before the expiration of the eight hour break. The clause continues, and I would submit its intent is clear. It states:

*- or shall be paid at overtime rates.*

30 Overtime is found in Clause 16, Holidays, Saturday, Sunday and Overtime Payments. Clause 16(c) Payment for work on overtime and I quote:

*Subject to the provisions of clause 18 Hours of Work subclause (b) -*

And I might point out, sir, there is no subclause (b) in the award and is something that needs to be attended to -

MR FITZGERALD: Where are you working from?

35 PRESIDENT: Paragraph 1, is it?

MR BAKER: I'm sorry. Clause 16, paragraph (c)(i) Payment for work on overtime.

MR FITZGERALD: Thank you.

MR BAKER: -

*Subject to the provisions of Clause 18, Hours of Work subclause (b) -*

40 And I will just indicate that there is no subclause (b) -

5           - an employee including a casual employee as defined who performs work in excess of 38 hours per week or before the time fixed for commencement of work or after the time fixed for ceasing work or in excess of eight hours a day, payment shall be made at the rate of time and one half for the first three hours and double time thereafter. In computing overtime, each day's work shall stand alone.

10       We are now aware the payment due to the employee when the clause says, 'Paid at overtime rates', and the critical last line of the clause. The clause continues from, 'Paid at overtime rates to be paid at overtime rates for all time of duty'. Duty is the continuance of the work. In fact, it's defined within the Oxford Dictionary as, 'The performance or the engagement in business', and I refer there to page 300 of the 1983 edition.

15       Therefore, we now know from the clause that an employee is entitled to an 8 hour break from work without loss of pay or if a resumption of work occurs the employee shall be paid at overtime rates.

And, finally, what advice does the clause offer? It concludes, 'until the employee has had at least 8 hours rest'.

You will note, sir, an expression of at least 8 hours rest again.

20       There is a consistency within the clause. Earlier it states, 'An employee shall be allowed at least 8 hours rest', and here is the repeat, 'at least 8 hours rest'.

Earlier I have submitted that the employee shall be entitled to at least 8 hours rest without deduction of pay.

Those words, as I expressed earlier are without ambiguity or any form of contradiction. That is, an 8 hour rest without loss of pay.

25       The alternative to the rest period is overtime payments, and for what period - until the employee has had at least 8 hours rest.

30       Again, I would submit that this part of the clause is without any ambiguity or any form of contradiction. It states, 'The employee shall be paid', 'the employee shall be paid at overtime rates', 'the employee shall receive the payment for all time of duty', 'the employee shall continue to receive such payment until the employee has had at least an 8 hour break'.

35       The clause is really in three parts. Firstly, there is the introduction. It tells the reader what this clause is about. That is, if an employee is engaged in overtime to the extent that it does not allow the employee 8 hours rest before the next regular starting time. That's what it deals with.

The clause then continues and is defined into two further parts. It tells the reader what will occur if the employee is unable to have the 8 hour break as designated by the phrasing of the introduction of the clause.

40       Secondly, the clause states, 'The employee shall be allowed an 8 hours rest without deduction of pay', and thirdly, 'or shall be paid at overtime rates for all time of duty until the employee has had at least 8 hours rest'.

As I have previously stated there is no ambiguity here. The clause is clear. The employee shall be, the employee shall be allowed, or shall be paid. There is no halfway here.

Again, the Oxford Dictionary defines the word `shall' as an emphatic intention. It is quite clear then that the emphatic intention of the clause is that the employee shall be allowed or shall be paid, and what is the employee `shall be allowed'? The employee shall be allowed at least an 8 hour rest without deduction of pay, and what shall the employee be paid? The employee shall be paid at overtime rates for all time of duty until the employee has had at least 8 hours rest.

Hence, it follows that if an employee resumes work without having rested for at least 8 hours the employee so concerned shall receive overtime payments until such time as that employee is relieved from duty for a period of at least 8 hours.

In conclusion, I would offer the following observation: If you take clause 16(c)(2) and split it into two parts and look at the meaning; namely, if an employee is engaged on overtime to the extent that it does not allow the employee 8 hours rest before the next regular starting time the employee shall be allowed at least 8 hours rest without deduction of pay; and the other, if the employee is engaged in overtime to the extent that it does not allow the employee 8 hours rest before the next regular starting time, and if you simply remove the little bit about the payment for overtime rates and continue to read the sentence it says, `If an employee is engaged on overtime to the extent that it does not allow the employee 8 hours rest before the next regular starting time the employee shall be paid at overtime rates for all time of duty until the employee has had at least 8 hours rest'.

The intent of the clause, in our submission, is clear. An employee who resumes or continues to work without having had at least an 8 hour rest period shall be paid overtime rates until such time as the employee is so relieved from duty to have such a rest period.

I would submit to you, Mr President, that our submission in support of this matter is clear and the intent of the clause is clear, and I would ask you to rule accordingly.

And, subject to any questions you may have, that is my submission in respect of the interpretation of this clause.

PRESIDENT: Are you asking for a declaration and an order?

MR BAKER: Yes, sir.

PRESIDENT: Right.

MR BAKER: Perhaps there was one thing I forgot to indicate to you, sir, in my opening comments. While we were having those jovial comments about doing research I did actually attempt to research this clause to indicate that we would try and find out if and when that had been, in fact, the matter of arbitration elsewhere in the commonwealth, and I am unable to locate any previous decisions of either the federal or any of the state commissions insofar as the interpretation of the clause itself is concerned.

PRESIDENT: Very good. Thank you, Mr Baker. Mr Fitzgerald?

MR FITZGERALD: Thank you. I hope I can be as brief. I may go a little longer than Mr Baker, but I hope I can be just as brief, Mr President.

These interpretation matters are not ones which I think you could call enthralling but, nevertheless I think they are necessary, particularly in the circumstances to have this situation sorted out, which was previously before you in the earlier dispute matter.

But, in opening, Mr President, we wouldn't agree that the matter is clear as Mr Baker has stated. In fact, what he has ignored is some fundamentals in relation to how these particular employees are engaged and the clause itself.

PRESIDENT: I don't think that's before us, is it?

5 MR FITZGERALD: Well, I think you need to consider that, Mr President.

PRESIDENT: I am only being asked to declare what clause 16(c)(2) means, and the question of what is an employee hasn't been raised.

10 MR FITZGERALD: Well, it's important and critical that that issue be raised, because it does impact on the interpretation of 16(c)(2) as to how these particular employees are engaged, and we will be submitting that they are engaged on a casual basis and, quite clearly, the intent of clause 16 as a whole, particularly (c)(2) doesn't have application to casuals, and that's what has been ignored, and we will be making further submissions in respect to that.

15 It is not possible, in my submission, particularly in terms of the rules set by this commission as to interpretation and rules adopted generally by industrial tribunals just to simply look at that issue in isolation. So I would submit, Mr President, that you need to look at not only that particular clause but the whole clause which Mr Baker has done partly in his submission, in any event; and, further, you would need to look at the clauses in the award which have some impact, and that's the basis of engagement.

20 I could say, Mr President, that if you took that view and stringently in matters of other awards that are not before us that have been raised here, and I took no objection to that and, in fact, I think it does assist -

25 PRESIDENT: No, I couldn't agree with you there. That's simply information relating to other provisions going directly to payment for work on overtime. There was no going outside the boundaries there.

MR FITZGERALD: Well, the matters aren't before us, but they have been put before us.

30 PRESIDENT: Yes. I think they are in a different category, though. However, you proceed with your submissions.

35 MR FITZGERALD: I certainly will make submissions. Mr President, as you are aware, the guidelines for interpretation were initially laid down by your predecessor in Matter. T.30 of 1985 and the president at that stage says it was the first application before the commission in respect to section 43. If I can just read those guidelines into the record and, further, just reinforce that they have been generally adopted as principles of interpretation of industrial tribunals.

PRESIDENT: I don't think you need to put them into the record - onto transcript - if you don't - I mean, we are fairly well aware of them.

40 MR FITZGERALD: We are aware that they are there, but maybe if I can just highlight that -

PRESIDENT: If you can identify those that you think I should pay particular attention to.

MR FITZGERALD: Well, I think I should just make some comments in respect to them.

The first principle was in respect to specific facts and in this circumstance of course we have a specific circumstance relating to Tas. Seafoods.

5 The second principle is it must be understood that in presenting an argument in support of or in opposition to a disputed construction relating to an award provision it is not permissible to seek a determination on the merit. That is, on the basis of what one party or the commission believes the provision in question should mean.

I don't think Mr Baker has done that today. I wouldn't suggest that at all. He's clearly restricted himself to the words used.

10 But I think it is something that we should remind ourselves of, that it is the words used and not what we think it should be; and, in that regard, I would submit that the provisions which Mr Baker has introduced I submit that those matters shouldn't influence you in any way, in that that in some way by implication indicates what Mr Baker thinks it should be, because other awards have some similar provisions.

15 PRESIDENT: Well, can I just - and I apologise for doing this - can I just stop you at that point. Do you disagree with what Mr Baker has put in relation to clause 16(c)(2)?

MR FITZGERALD: I do, yes. Quite strongly, Mr President, and I will be taking you to our interpretation of that.

PRESIDENT: Right. Okay.

20 MR FITZGERALD: And it goes specifically to the engagement of these particular employees.

PRESIDENT: No, no, no. Do you disagree with what Mr Baker has put in respect of the words in 16(c)(2) -

MR FITZGERALD: I do.

PRESIDENT: - and what they mean?

25 MR FITZGERALD: Yes, and I think you need to read that, and you probably -

PRESIDENT: And I am not talking now about what an employee is.

MR FITZGERALD: Well, I think it is impossible to consider that question in isolation.

PRESIDENT: With respect, I don't think that is the case. Can you tell me whether or not the way Mr Baker has described clause 16(c)(2) operating is right or wrong?

30 MR FITZGERALD: I think it is wrong.

PRESIDENT: So if a full-time permanent employee was in this situation and was worked overtime which would not allow that employee to commence work after having 8 hours rest, this particular provision wouldn't be applied in the way that Mr Baker described it?

35 MR FITZGERALD: That may be in respect to a full-time employee, but what we are not doing -

PRESIDENT: Well, but an employee is defined, is it not?

MR FITZGERALD: A casual employee is defined, yes, and this is the category in which we - and that is what we are ignoring, Mr President, and I don't think that -

PRESIDENT: Well, look, no, can I just put it to you this way?

MR FITZGERALD: Yes.

PRESIDENT: If all I am being asked to do is to declare what (c)(2) means you can tell me what an employee is -

5 MR FITZGERALD: Yes.

PRESIDENT: - and what, and who the clause applies to -

MR FITZGERALD: Yes.

PRESIDENT: - and that would be quite appropriate.

10 MR FITZGERALD: I can understand the point you make. It would seem somewhat pointless, and I raise it in terms of specific facts, and that is a requirement which the commission has set itself. You must consider it in terms of those specific facts, in my b, Mr President, with respect, and in that regard -

PRESIDENT: Yes, I don't have any problem with that.

15 MR FITZGERALD: And in that regard, we are talking about casual employees. Now, we are not talking - and the specific fact is casual employees - and in that regard we are not talking about full-time employees.

PRESIDENT: That hasn't been put to me.

20 MR FITZGERALD: Mr Baker hasn't, but I am now putting it to you, and they are the facts. The employees in this instance were engaged not as full-timers but as casuals, although, quite clearly it is pre-empting some of the argument which I intend to put later; but, clearly, the provisions in respect to casuals are only those as described in subclause (d) of that clause, not that as described in subclause (c).

Those other matters in clause (c)(2) and (c)(3) are those matters which do not pertain to full-time employees

25 PRESIDENT: Precisely.

MR FITZGERALD: Now if you go ahead and declare that that is the case, then it has no relevance in terms of these specific facts, because the facts are that these employees are engaged as casuals not as full-time employees.

PRESIDENT: Yes. All right, I accept that line of argument.

30 MR FITZGERALD: So I don't see -

PRESIDENT: But I was getting concerned about the way in which you appeared to be going to approach it.

MR FITZGERALD: Yes.

35 PRESIDENT: And I think I have got from you an agreement that if the employee is an employee other than a casual you would agree with Mr Baker's assessment of what (c)(2) means.

MR FITZGERALD: I would just like to ponder on that, but I think I have some reservations about just categorically conceding that, but more appropriately I just

wonder why we are here? If we are seeking a declaration in respect to a full-time employee they are not the specific facts - the specific facts that they are casuals - and I just wonder what purpose your declaration, whichever way you proceeded would serve, if you declared that a full-time employee was entitled to an 8 hour break or payment -

PRESIDENT: Well, that's up to the applicant, isn't it?

MR FITZGERALD: Well I just wonder whether I just simply allow Mr Baker to put his view at this time, and his view in terms of how these employees are engaged, but it really, in my view, has no relevance to a casual employee. It's not in any way going to resolve this dispute because you are simply proceeding - say, if you do declare that the full-time employee is entitled to 8 hours or if that break is not provided that an overtime penalty - that does nothing so solve the dispute.

PRESIDENT: Now, but I am just asking you whether or not you would agree with that?

MR FITZGERALD: I am not sure whether I would reserve - I would agree with it in some - reservedly, I would say, Mr President - because I do have some problems in terms of the words 'without deduction of pay'. It just seems to be a nonsense in terms of - particularly in respect of a casual employee - but it does differ to some of the other provisions which are provided in other awards, and I do have some concerns.

That is not my principal argument, but I do have some concerns about the meaning of the clause.

But if I did agree at this point that, as Mr Baker has indicated, and I am reluctant to do that at this time, it really serves no usual purpose if you now declare that that is the case, then in terms of the specific facts it does nothing to solve the dispute.

PRESIDENT: All right. Well, perhaps I will ask Mr Baker a couple of questions.

MR BAKER: Sorry, sir, I beg your pardon.

PRESIDENT: Yes, can I just ask one question to start things going?

MR BAKER: Yes.

PRESIDENT: What group of employees, and I use that word only to get the question rolling, would you believe that the word 'employee' in the first line of (c)(2) applies to?

MR BAKER: I believe it applies to all employees who are covered by this section of the award, and I do so, sir, for a very good reason. In the award, after Clause 13 - Contract of Employment a full-time employee is specifically defined at page 18 of the award.

Now it says, 'A full-time employee shall be an employee who is engaged by the week'. It also makes reference to casual employees, and there is some advice provided to the reader as to what constitutes a casual employee.

The construction of Clause 16(c)(1)(2)(3) etc., and particularly (c)(2) refers only to an employee; (c)(1) makes particular reference to a casual employee. You will note here in (c)(1) it says, 'including a casual employee'.

In (c)(2) it talks about an employee and, likewise, in (c)(3) it talks about an employee. Now clause (d) makes particular references to casual employees and what they shall be paid.

Now, it would seem to me that upon reading those various clauses and going back to the definitions of what a casual employee is and what a full-time employee is, I believe those clauses are clear.

5 One clause talks about an employee, including a casual, the next one simply says an employee. In my opinion that is all employees, and then (c)(3) is the same, and (d) relates to the payment.

10 Now, one of the issues which I didn't really want to get into an argument today about, but if Mr Fitzgerald wants to have one, I will argue that the casual employees that he refers to who were the subject of this application are, in fact, not casual employees as defined by the award at all.

PRESIDENT: Is that a matter that is before me?

MR BAKER: No, it is not.

PRESIDENT: No.

15 MR BAKER: But, you see, I think it becomes a bit of a red herring to start talking about casual employees versus full-time employees.

This issue arose as a result of the company themselves saying that they had misinterpreted clause 16(c)(2) as to how it applied to its own employees. They wrote a letter and said we have made a mistake, we want to correct it.

20 MR FITZGERALD: I just wonder, in fact, if that is permissible in that it does go to the merit. What the company thought or didn't think at the time about how the award should be interpreted is not relevant in terms of these proceedings.

So I would submit that that should not be considered by the commission.

25 MR BAKER: Well, with respect, if the company hadn't written the letter we wouldn't be here today, because in the original dispute proceedings - and on page 4 of those dispute proceedings I made the point - 'This dispute is not so much about the overtime which wasn't paid but, indeed, how it was calculated and the actual rate of the calculation'.

PRESIDENT: Yes, look, I appreciate that, Mr Baker, but we are sort of -

MR BAKER: And that is why we are here.

30 PRESIDENT: - and we have got to be careful that we don't go over the boundary lines, however artificial they might be, in these proceedings, given the fact that I was involved in the dispute matter.

MR BAKER: Yes; and, indeed, we are here because, you know, Mr Fitzgerald actually raised the issue about the section 43 application.

35 PRESIDENT: Yes. Tell me, I am concerned about the way this whole clause is drafted, because 16(a) refers simply to employees - payment for work on holidays - and sets out a rate of double-time and a half, and you go to (d) and although the word 'employees' has been used in (a), (b) then deals with casual employees, as defined, and then for some odd reason it seems to apply the double-time and a half, anyway. Is that  
40 right? Is that the way you read (d)?

MR BAKER: Yes, it does, and then it removes the 20% penalty in the proviso.

PRESIDENT: I haven't got to the proviso.

MR FITZGERALD: I am not sure that it relevant in terms of the construction, but, anyway.

5 PRESIDENT: Yes. So, I guess what that does is, really take away some of the force of your argument in relation to (c)(ii), which simply talks about employee.

MR BAKER: My argument is whether or not -

PRESIDENT: It covers everybody?

MR BAKER: Well, yes.

10 PRESIDENT: Yes. And then you see, (c)(i) talks about an employee including a casual employee, which makes it clear that in (c)(i) casual employees are going to be included, but it doesn't do that in (c)(ii). The whole construction of the thing is very confusing.

15 MR BAKER: Well, yes, it may be but I'm at a loss to understand why - I think we're actually confusing two things here. One is a clause in relation to whether or not an employee shall receive a benefit arising out of a clause and the other issue is whether or not the benefit that arises out of that clause applies to either a full-time or a casual employee.

PRESIDENT: That's what it's all about.

20 MR BAKER: I think actually - Mr Fitzgerald has alluded to it this morning, that perhaps his interpretation of the clause in so far as it bestows a benefit on an employee is not too dissimilar to my point of view. The difficulty that's between us is whether that application of the benefit applies equally to a casual employee and also a full-time employees. Does that -

PRESIDENT: That's it.

25 MR FITZGERALD: That sounds reasonable.

PRESIDENT: That's it and really, it gets down to whether or not the word, employee, in (c)(ii) includes casuals.

MR FITZGERALD: Well, I've got some submissions to make on that. I'm just wondering if it's appropriate I do that now, or later, Mr President?

30 PRESIDENT: Just before you do though, I'd like Mr Baker to reflect on that and determine whether there is anything more detailed that it might be possible to submit.

MR BAKER: Well, I think in so far as my application before you today - I think one could almost deem that it's complete, that my application has been satisfied.

35 PRESIDENT: And you are satisfied with your argument in respect to what an employee is, for the purpose of (c)(ii), because that is going to be the crux of it.

MR BAKER: No, no. That is a separate issue. The issue of whether or not it applies to an employee -

PRESIDENT: Well, I don't think there's any doubt that it applies to an employee. The issue in dispute seems to be, what is an employee for the purposes of this provision?

You're saying it includes casuals. Mr Fitzgerald is going to argue it doesn't include casuals and I'm asking you whether you think you've given me enough on that point.

MR BAKER: Well, my application doesn't go to that point.

PRESIDENT: Well, I raised that earlier.

5 MR BAKER: Yes.

PRESIDENT: Mr Fitzgerald strongly argued that a declaration from me on the bald effect of the provision will not solve the dispute.

MR BAKER: We are aware of that.

PRESIDENT: Well, what's the point of the application?

10 MR BAKER: The point of the application was twofold. One was, that prior to today's hearing, Mr Fitzgerald disagreed with the construction of our point of view as far as the interpretation of the clause was concerned and that's highlighted in the transcript of the dispute proceedings.

15 PRESIDENT: Yes. I shouldn't really rely on my memory, but the issue of what was an employee was before us in the section 29 matter.

MR BAKER: Well, it was an issue that arose as a consequence of the application but as I strongly pointed out to Mr Fitzgerald at the time, that it would open up a box of tricks that I wasn't too sure any of us wanted to get into and -

PRESIDENT: Well, we're into it.

20 MR BAKER: Yes, it appears we are into it and as I've already alluded to it, I don't believe these employees are casual employees by way of which the award is constructed.

PRESIDENT: Hang on, that's another issue again. We'll go off the record for a moment.

25 **OFF THE RECORD**

30 PRESIDENT: Thank you for that period of discussion. The position we've reached, for the record, is that this application will be adjourned pending further advice to me by the applicant, which we would hope occurs prior to - on or prior to next Friday, which is the 11th, that the employer representative will discuss the nature of the claim further with the employer and it may be possible to resolve this particular matter and the dispute application which precipitated it. If that's the case, so be it. Otherwise, this particular interpretation application will be listed at a time convenient for all the parties as soon as possible after Friday 11th.

I think that summarises the position, doesn't it?

35 MR FITZGERALD: It does, yes, sir.

MR BAKER: Yes, sir.

PRESIDENT: Yes. All right. Thank you. We'll adjourn sine die.

**HEARING ADJOURNED SINE DIE**

