

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 4612 and 4625 of 1993

IN THE MATTER OF applications by
the Tasmanian Chamber of Commerce
and Industry Limited and the
Health Services Union of
Australia, Tasmania No. 1 Branch
to vary the Nursing Homes Award

re Clause 11 - Annual Leave;
Clause 23 - Holidays with Pay

COMMISSIONER WATLING

HOBART, 19 October 1993

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER WATLING: I'll take appearances, please.

MR P.E. TARGETT: Thank you, Mr Commissioner. TARGETT, P.E. I appear on behalf of the Tasmanian Chamber of Commerce and Industry.

COMMISSIONER WATLING: Good. Thank you.

MR C. STRINGER: If the commission pleases, CRAIG STRINGER and I appear for the Health Services Union of Australia, Tasmania No.1 Branch. If the commission pleases.

COMMISSIONER WATLING: Good. Thank you. Now can I just say we've got two applications this morning. I take it that you're both appearing in both of them. Should I join them or are we poles apart on the contents?

MR TARGETT: Mr Commissioner, I ask that both matters be joined.

COMMISSIONER WATLING: Righto.

MR TARGETT: Certainly we're not poles apart on the content, in fact, I think we should hopefully be identical.

COMMISSIONER WATLING: Right. Is that your view, Mr Stringer?

MR STRINGER: That's correct, Mr Commissioner.

COMMISSIONER WATLING: Righto. The matters will be joined then.

MR TARGETT: Mr Commissioner, as a - I'd first give a brief bit of background as to the purposes of these applications and then look at the actual applications themselves and the purposes for them.

Going back into 1992, there were matters before the commission - and I believe the 'T' numbers were 3926 and 3987 of 1992 and they related to the Nursing Homes Award and the restructuring of that particular award following its making earlier to that date.

At the time of the conclusion of those matters in December 1992, there were three fundamental issues about which we had not been able to reach agreement and those matters were firstly as to whether half day cup day should remain in the award in the holidays with pay clause; secondly, the number of holidays with pay that a part-timer on a rotating roster should have added to their annual leave; and thirdly, the amount to be paid to employees when they go on the additional days that may be added to their annual leave in lieu of holidays with pay.

At the time of - in December 1992 at the time of finalising the Nursing Homes Award, as I said, we were unable to finalise that matter because in fact it was to be referred to a full bench. Due to the time prior to the setting of a date for the hearing of those matters before a full bench, there were some problems experienced by the people using the award in the field, both the employers and the employees. So discussions took place between ourselves and the Health Services Union of Australia to see what could be done to solve the particular problems that were being experienced in the field in the actual application of this particular award and it was decided and agreed between the parties that we should lodge an application to vary the Nursing Homes Award in relation to two particular clauses so as to make it more workable for those in the field and in doing so, the employers still reserved their rights to have those three fundamental issues arbitrated at a later date before a full bench.

As a subsequent of - subsequent to that agreement being reached, the -

COMMISSIONER WATLING: Could I just make the comment on reserving your right. The matter's already been listed before a full bench so I suppose the question is not so much of reserving your right because it's already there; the question will be whether the parties see this only as an interim measure until such time as the full bench hear and determine the matter.

MR TARGETT: Yes, I agree with you, Mr Commissioner. The question of reserving our rights, I guess, by way of proper explanation is the position I adopted in the negotiations with the union -

COMMISSIONER WATLING: Oh, right.

MR TARGETT: When the application was received - sorry, the notification was received about the full bench hearing and the date that was set down, I spoke to the union and said, 'Well I believe we should still - well following discussions with the union - I believe we should still process the applications we've lodged and ask for the full bench matter to be postponed to enable this particular issue to be cleared up and we would still, as the employers, be able to proceed with the arbitration on those matters at a later date, and quite clearly, in response to the issue that you raise, the employers' view is that they - at the appropriate stage, in consultation with the commission; dates, et cetera - be proceeding to have those matters arbitrated, and the purposes of the applications before you today are to make variations to the award purely and simply so that those people in the field are able to properly utilise the award, reflecting the agreed position which isn't clear because of the way the award

clause still stands.

Because the matter being referred to a full bench back in December 1992, it was believed appropriate that the two clauses, the subject of today's proceedings, shouldn't be varied until such time as it was heard by the full bench, but it has certainly created some particular difficulties in the field and we want to fix that up.

COMMISSIONER WATLING: Right. Now, I've been appointed as a member of that full bench.

MR TARGETT: Yes, sir.

COMMISSIONER WATLING: When the time comes to deal with that matter, we won't - I put it in the form of a question, we won't be hearing a submission from the parties at that time that we've already agreed to a certain course of action in this award and therefore the full bench shouldn't do anything about it?

MR TARGETT: Well certainly from my perspective, and that's one of the reasons I want to make it quite clear, that the employer still believes it appropriate to have those three matters arbitrated before a full bench at an appropriate time subsequent to these proceedings, and the issues - those three issues, other than the fact that they are included in the draft orders that are currently before you, I don't intend to address the merit or otherwise of those particular issues in the proceedings today, because I believe it inappropriate to do so when it would be a matter subsequent - subject - to a full bench proceeding at a later date.

COMMISSIONER WATLING: So do you see this amendment then as a short term solution?

MR TARGETT: In relation to the three issues which would be determined by a full bench, yes it is an interim step. In relation to the other issues contained within the variations we seek, then they are not a short term step. And I would certainly when we have a look at the draft orders be quite clear on those issues that I believe are short term with the balance of the clauses being long term.

COMMISSIONER WATLING: And by short term I'm talking about until such time as the full bench deals with the referral of matters that the fact that I've referred to it.

MR TARGETT: That's correct, yes. With that background in mind, Mr Commissioner, perhaps we'd - I'd commence to look at the actual variations that we have put forward in the draft variations provided with the applications, and my understanding is - and if I firstly look at clause 11 and clause 23 - my understanding both applications are in

identical terms - the draft variations with both application are in identical terms as I understand it.

So on that basis in fact we are putting forward a consent matter to the commission in these proceedings.

In relation - if I firstly refer to clause 11: the variation we seek in the award is relating only to clause 11 subclause (c) - Holidays with Pay - and we restricted it to - we restricted to that particular subclause because that was the only subclause which did not receive attention in the original proceedings because, as I've already explained, the matter to go before a full bench, so in fact subclause (c) is, except for changes to clause numbers, it is the same subclause that existed prior to the award restructuring process that was undertaken and there were agreements reached between the parties which - during the award restructuring process - which in fact weren't put into place because of the delay in that particular issue.

And probably the most fundamental agreed position which hasn't yet been reflected in the award goes to the question of people who are working on a roster and are required to work on a holiday with pay - the agreement that has been reached and was reached last year is, those people could either get an additional day added to their annual leave, or, be paid the appropriate rate of pay for a holiday with pay and in which case they wouldn't have an additional day added and which option was chosen was to be by agreement between the employer and the employee.

That was the agreed position from both the union and the employers perspective, and certainly the people in the field have been wanting to utilise that particular facility and there have been difficulties because of the wording in the award don't actually reflect that position and we wanted to clear that up.

In redrafting the award another area that we wanted to - well, in saying that, we wanted to ensure that that applied to part-timers on rotating rosters, part-timers on non rotating rosters, et cetera, so we had to make a number of changes to make that facility available to the various classes of people that work on a roster in that particular cases - full timers as well.

The main variations to the clause, in my view, are roman numeral (iii), and that is the issue which - the first paragraph in roman numeral (iii) - that is the issue which would go before a full bench in relation to one part or one of the three issues that I was talking about earlier, and that is the question of how many days does a part timer get added to their annual leave in lieu of holidays with pay.

So that particular paragraph in roman numeral (iii) - that's paragraph 1 - would be the fundamental issue we would be arguing before a full bench - one of the three.

The - if I refer back to roman numeral (ii), the last paragraph -

COMMISSIONER WATLING: And when -

MR TARGETT: Sorry.

COMMISSIONER WATLING: - when you say a day there, in (iii), are you talking about the normal day?

MR TARGETT: Yes, the normal -

COMMISSIONER WATLING: For the part timer?

MR TARGETT: Yes, that is correct.

COMMISSIONER WATLING: So, for example, if they worked 5 hours a day -

MR TARGETT: That's a 5 hour day.

COMMISSIONER WATLING: - it's a 5 hour added to their annual leave.

MR TARGETT: A day of 5 hours, yes.

COMMISSIONER WATLING: Yes.

MR TARGETT: That's correct.

COMMISSIONER WATLING: Right.

MR TARGETT: If I move back to roman numeral (ii), the last paragraph in roman numeral (ii) is the first appearance of the clause relating to whether a person gets a day added to their annual leave or whether they're paid the appropriate holiday rate.

Well certainly from my perspective, and that's one of the reasons I want to make it quite clear, that the employer still believes it appropriate to have those three matters arbitrated before a full bench at an appropriate time subsequent to these proceedings, and the issues - those three issues, other than the fact that they are included in the draft orders that are currently before you, I don't intend to address the merit or otherwise of those particular issues in the proceedings today, because I believe it inappropriate to do so when it would be a matter subsequent - subject - to a full bench proceeding at a later date.

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MR TARGETT: If I move back to roman numeral (ii), the last paragraph in roman numeral (ii) is the first appearance of the clause relating to whether a person gets a day added to their annual leave or whether they're paid the appropriate holiday rate.

And perhaps for the sake of completeness, the last matter, just to reiterate, that would be argued before a full bench, is in clause 11 which we've already gone over, clause 11, subclause (c) roman numeral (iii) -

COMMISSIONER WATLING: First paragraph.

MR TARGETT: - the first paragraph. So except for those items that I've just mentioned, everything else in these variations we see as being the long term variations.

COMMISSIONER WATLING: Right. So that means when the matter comes on before the full bench you're going to have to certainly clarify the precise nature of the matter that you want arbitrated because the actual clause in toto has now been referred to the - to the president for hearing by a full bench?

MR TARGETT: Yes. And as probably the initial statement, I guess, of - in those proceedings, I would be honing on just those issues that I've now pointed out as being matters for arbitration.

COMMISSIONER WATLING: Right.

MR TARGETT: To the exclusion of all else contained in those clause - in those clauses.

Mr Commissioner, the clause 11 and clause 23 variations as I've put to you are in, I understand, a consent variation by - between ourselves and the HSUA for the purposes of clarifying issues which were the subject of agreement and creating problems for the operators in the field and for no other purpose. And the only reason that we hadn't originally changed those matters was because of the referral to the full bench, but with the delays it was creating problems and we just wanted to get it sorted out for the - for the operators.

The last matter which I believe needs to be addressed - and this refers to the application by the HSUA - they included in their application a draft variation to clause 36. This particular variation is not included in my application but I would say at the beginning that the variation sought is a consent variation - we do agree to it, and the only change to clause 36 sought, is in subclause (c), line three, after the

word 'damaged', insert a comma. That's the only variation sought. This matter was in fact discussed during the award restructuring negotiations that that comma should be there. Without the comma being there it does in fact substantially change -

COMMISSIONER WATLING: Sure does.

MR TARGETT: - the intent of that particular subclause -

COMMISSIONER WATLING: I think I raised that during the course of the original hearing didn't I?

MR TARGETT: Yes, you did. And whilst the employers would be delighted to keep it the way it was, I have reluctantly agreed to come to this commission with a consent variation to insert that comma to show the good spirit with which the employers approach the negotiations with the union in relation to this particular award. So I would ask that that also be varied by consent.

Mr Commissioner, subject to any questions which you may have on the issues that I've raised I would put to you that the variations sought are in fact a reflection of agreed matters raised during the award restructuring process. It is to clarify the issues for the operators in the field. It is not a new matter being brought to you in that context. The variations sought are, in our submission, consistent with the award restructuring process and form part of that process and we would ask that the variations be inserted in the manner sought with an operative date of the first full pay period on or after the date of decision. If the commission pleases.

COMMISSIONER WATLING: Thank you. Right, well we'll see what the HSUA Tasmania No.1 Branch has to say. Mr Stringer?

MR STRINGER: Thank you, Mr Commissioner. All I have to put before you is to say that Mr Targett has done a wonderful job explaining to you why we came before you with these draft variations this morning and to point out that he is correct - that we have agreed on these matters and we would look forward to having the decision as soon as possible to have the award clarified so that these people operating in the field can be clear in the way in which it is operated. If the commission pleases.

COMMISSIONER WATLING: Right. Now you're fully mindful of the fact that there are still issues going to go to the full bench?

MR STRINGER: Yes, Mr Commissioner, we are still aware of that.

COMMISSIONER WATLING: Yes, and - and it won't be used - if I consent to these variations, it won't be used as an argument that consent variation has been made to those clauses in the award and therefore the full bench shouldn't proceed with the original application?

See what I'm concerned about - and I'll have to be honest with you - as a member that's already been allocated a position on a full bench to hear these matters, that someone jumps up when that hearing comes on and says, look, a member of this bench, this full bench, has varied by consent that clause in the award and therefore the full bench shouldn't proceed. Now if that was going to happen then I'd be reluctant to vary this award by consent.

MR TARGETT: I'd withdraw my consent.

MR STRINGER: Mr Commissioner, if I can clarify that situation for you, my understanding has been with Mr Targett during negotiations, that this was only an interim issue and that he had - using the term - reserved his rights to take the matter to a full bench at any time.

COMMISSIONER WATLING: Yes, well it's already been allocated to a full bench, in fact it was going to come on for hearing but at the request of the applicant in this matter - the original applicant - it's not proceeding to enable this to take place.

Right, well on that basis then, I accept the view that, you know, this is an interim thing, especially in relation to the matters that are going to a full bench and we won't hear argument at that time that the - the award has recently been varied by consent and therefore the full bench having to deal with it, because it's an important issue because I don't want to be seen to be overriding or pre-empting a matter that's already before a full bench even though the matter hasn't come on for hearing. So that's the only reason I - I ask.

Well I can indicate to the parties that the variations as sought will be made and I'll hand down a written decision in due course, but it will clearly identify the matters that have to be determined by a full bench and therefore I'm not in a position of either endorsing them or rejecting them because it will be argued out at a later date at another place.

But the - I will pick up the agreed variations on the interim basis and I am satisfied that some of those matters were the subject of an agreement in the original proceedings but - the original proceedings, I'm talking about the restructuring of the Nursing Homes Award that are now just coming to fruition because of the delay of in the full bench matter.

Right, thank you for your participation. Matter closed.

HEARING CONCLUDED

19.10.93

12