Decision appealed by MASSA 2000 (Matter T13911 of 2012 lodged 7 June 2012)
Application also made by MASSA 2000 to suspend the decision under s.71(4) of IR Act

Appeal withdrawn by MASSA 2000 on 21 August 2012.

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s29 application for hearing of an industrial dispute

Australian Nursing Federation, Tasmanian Branch
(T13858 of 2011)

and

The Minister administering the State Service Act 2000
(Department of Health and Human Services)

DEPUTY PRESIDENT TIM ABEY HOBART, 7 June 2012

Industrial dispute – payment for public holiday accrual for day workers – principles of award construction – admissibility of certain documents relating to surrounding events – rostered day off – disadvantage of public holidays falling on RDOs - order

DECISION

[1] On 20 December 2011, the Australian Nursing Federation, Tasmanian Branch (ANF) (the applicant), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (Department of Health and Human Services [DHHS]) arising out of an alleged breach of Part VIII – CONSULTATION AND CHANGE: WORKLOAD MANAGEMENT: GRIEVANCE AND DISPUTE RESOLUTION - Clause 1 of the Nurses (Tasmanian Public Sector) Award 2005 (2005 Award).

[2] A hearing commenced at 144 Macquarie St, Hobart on 22 December 2011 and continued on 19, 25 January 2012 in Hobart and then on 13 and 14 March 2012 in Launceston before Deputy President Tim Abey.

[3] At the hearing Ms N Ellis appeared for the ANF with Ms L Grosser. On 13 and 14 March 2012 Mr J McKenna sought and was granted leave to appear for the ANF. Mr P Baker and Mr T Kleyn appeared for MASSA with Mr M Double and Ms E Jago. The matter in dispute concerns the application of clause 5.4.2, Appendix A, of the *Nurses and Midwives Heads of Agreement 2010* [HOA], which reads:

> *"Public Holidays – nurses rostered on duty on a public holiday will be paid a loading of 250% (with no additional day of leave).*
>
> *Nurses, whose rostered day off falls on a public holiday, will be paid a 100% penalty in recognition of the disadvantage of not benefitting from the day off. Alternatively, they may elect to 7.6 hours* (pro rata) *which when taken will be paid at ordinary time rate."*

[4] The dispute relates to the second part of the clause. The respondent contends that this applies only to shift workers, whereas the applicant submits that the clause applies to all nurses, whether they are shift workers or day workers.

[5] The area in contention relates to day workers, particularly part-time nurses who work on rotating or non-fixed rosters. For example, a nurse employed on a 0.6 EFT might be rostered to work three days each week, with the days actually worked being any day Monday to Friday. Similarly the days on which the nurse is not rostered to work could be any two days of the week, Monday to Friday. A variation of the same theme occurs with the renal nurses employed at the Launceston General Hospital (LGH,) save that in this case the roster may involve a Saturday shift.

[6] There is no dispute when a nurse (day worker or shift worker) works on a public holiday; they are paid a loading of 250%. Similarly there is no dispute if a part-time nurse works on a fixed roster (i.e the days worked and the days not worked are the same each week.) In this case public holidays are taken as they fall. If a public holiday falls on a day on which the part-time nurse is not rostered to work, no additional payment is made or leave accrued.

[7] However in the case of day workers working on a non-fixed roster, the applicant contends that in the event that a public holiday falls on a day on which a nurse is not rostered to work, then a 100% penalty is paid for the shift not worked, or an additional 7.6 hours (pro-rata) is accrued. The respondent's position is that this benefit is only available to shift workers.

Background.

[8] The 2007 Enterprise Agreement specified that it was intended to apply until 30/6/2010 and that the parties would commence negotiations for a replacement no later than 1 April 2010.

[9] The parties entered into a process known as 'interest based bargaining' (IBB,) which involved the appointment of an independent facilitator. Informal records of the IBB process were taken by the facilitator and were available to all parties in real time.[1] It would seem that the IBB process was generally successful in establishing consensus between the ANF and DHHS on a large number of issues. This consensus was recorded in the Nurses and Midwives Heads of Agreement (HOA) which was registered pursuant to s55 of the Act on 23 December 2010.[2]

[10] Shortly after the HOA commenced operation a dispute arose in relation to the application of clause 5.4.2. As a consequence the parties returned to the IBB process on 13 April 2011. Again, the independent facilitator took notes which were available to the parties in real time.[3]

[11] Following this meeting a draft fact sheet was prepared by the ANF and forwarded to DHHS and the independent facilitator. Following an exchange of emails a document titled the *Public Holiday Entitlements - Joint Fact Sheet* (joint fact sheet) was finalised and distributed on 14 April 2011.[4]

[12] Thus, on its face, the IBB process resulted in agreement as to the operation of the clause, and, according to the ANF, *"the very real risk of industrial action over the Easter period was averted."*[5]

---

[1] Exhibit A2
[2] T13746 of 2010
[3] Exhibit A3
[4] Exhibit A5
[5] Exhibit A1 para 17

[13] Also arising from these discussions was the formalisation of a process by which rotating/non-fixed roster nurses could elect either payment or accrual of hours for a public holiday not worked.[6]

[14] Notwithstanding the apparent resolution of this matter, the actual application of the clause remained in dispute, with the ANF maintaining that *"…since April 2011, the DHHS have applied cl 5.4.2 in a manner inconsistent with the joint fact sheet."*[7]

[15] On 22 November 2011 a letter signed by a number of LGH renal nurses was sent to Mr Kirwan, CEO of the Northern Area Health Service. [8] The correspondence reads in part:

> *"The nursing staff at the Northern Area Health Service Renal Unit located at LGH and Launceston Community Heath Centre Kings Meadows seek your assistance in resolving an ongoing dispute related to Public Holidays. We have made repeated attempts to resolve what we believe is the straight forward application of the new nurses Heads of Agreement related to Public Holidays. Despite a joint (ANF/DHHS) fact sheet supporting our view we have been repeatedly refused the pro-rata payment or accrual of hours for Public Holidays not worked.*
>
> *…*
>
> *The joint fact sheet (attached) dated 14th April 2011 clearly states that nurses (both day and shift workers) on rotating/non-fixed rosters are entitled to these allowances and we believe that the DHHS is in breach of the Heads of Agreement by not applying these entitlements to us.*
>
> *We seek your support in finding a speedy resolution to this matter."*

[16] In correspondence to Mr Kirwan dated 15 December 2011, Mr Double (Director Human Resources and Workplace Safety) advised:[9]

> *"I refer to the correspondence to you and Sue Strugnell referencing public holiday entitlements for the Renal unit and The Nurses and Midwives Heads of Agreement.*
>
> *It would appear that the nature of their roster is not usual and this has led to some questions around interpretation of entitlements around public holidays.*
>
> *After discussions with our employee relations team, the Public Sector Management Office and staff at Northern Area Health Service including Helen Bryan it would appear that the roster pattern does not satisfy the definition of shift worker. This means that they are not entitled to payment or leave accrual for public holidays that they are not rostered to work.*
>
> *Of course employees are entitled to payment of double time and a half for any public holidays that are worked."*

[17] In December 2011 the ANF provided DHHS with a draft flyer relating to *"Christmas Day Holiday Arrangements."* On 15 December 2011 Mr Double provided to the ANF a revised flyer with a suggested amendment, indicating that the entitlement to payment or

---

[6] Exhibit A6
[7] Exhibit A1 para 19
[8] Exhibit A7
[9] Exhibit A9

accrual of leave for an employee who did not work on a public holiday be limited to employees "…*on a 7 day rotating roster."* It would seem that the ANF did not accept this amendment. (See email exchange on 15 and 16 December 2011.)

[18] On 20 December 2011 the ANF lodged a s29 dispute notice with the Commission stating that the *"DHHS have now unilaterally withdrawn from the agreement."*

[19] A number of conciliation conferences were held in December 2011 and January 2012. However the dispute was not resolved and as a consequence the matter proceeded to formal hearing.

Hierarchy of Instruments

[20] The parties are agreed that the following summary reflects the hierarchy of industrial instruments.

[21] The terms of the HOA take precedence over any other pre-existing industrial instrument.

[22] However in accordance clause 1.7 Appendix A of the HOA, all current conditions of the *Nurses (Tasmanian Public Sector) Award 2005* and the *Nurses (Tasmanian Public Sector) Enterprise Agreement 2007* (2007 Agreement) continue unless mentioned otherwise. Further, clause 6 of the HOA provides that it is to read "*in conjunction with"* the 2005 Award and the 2007 Agreement. To the extent of any inconsistency, the HOA prevails over the 2005 Award and the 2007 Agreement.

[23] The 2007 Agreement also prevails over the 2005 Award to the extent of any inconsistency.

Principles of Award Construction.

[24] The principles governing the interpretation of awards (and registered industrial agreements) are found in *MASSA v ANF (T13586 of 2009.)*[10] These principles are set out below.

- *Terms of awards (and agreements) must be interpreted in light of their industrial context and purpose, including the commercial and legislative context in which they apply. (*Amcor Ltd v CFMEU *(2005) 222 CLR 241 at (2) and (13))*

- *The matter must be viewed broadly, and after consideration is given to every part of the award, the Court must endeavour to give it a meaning consistent with the general intention of the parties, to be gathered from the award as a whole. (*CFMEU v Master Builders Group Training Scheme (2007) 161 IR 86 at 91)

- *The relevant 'context' to be considered in interpreting the award extends to the origins of the particular clause. However, most often the immediate context, being the clause, section or part of the award in which the words to be interpreted appear, will be the clearest guide.* (Short v FW Hercus Pty Ltd *(1993) 40 FCR 511 at 517-19 (Burchett J, Drummond J agreeing).*

[10] Full Bench 4/2/2011

- *Whilst context and purpose of an award will be relevant, ultimately a Court or Tribunal's task is to give effect to the meaning of the award as expressed in its words, objectively (as opposed to subjectively) construed. (*Amcor*, supra, at (69), (70) and (77)-(114))*

- *Other cases in which Courts or Tribunals have interpreted similar words in different awards and agreements, must also be treated with caution. This is because Courts and Tribunals are required to give effect to the terms of an award in the manner intended by the framers of the document (determined objectively.) (Kucks v CSR Limited (1996) 66 IR 182 at 184 (Madgwick J)*

- *Further, it is not appropriate when undertaking that task, to look to evidence of prior negotiations or surrounding circumstances to contradict the language used by the parties. If the words used are susceptible to more than one meaning, only then will objective evidence of background facts be relevant to the interpretation of an award, to the extent it shows mutuality of intention. (AMWU v QANTAS Airways Ltd (2001) 106 IR 307 at (21) and (31)) The subjective evidence of a party's own particular intentions, is not admissible. (Harbour City Real Estate Pty Ltd v Cargill (no 3) (2009) 186 IR 260 at (61)-(62) (McKerracher J))*

- *It is forbidden to use subsequent conduct as an aid to the construction of an award or industrial agreement. (CFMEU v John Holland Pty Ltd (2010) FCAFC 90 at (94);* Short v Hercus Pty Ltd *(1993) 40 FCR 511 at 517.)*

- *Whilst some assistance might be obtained from the previous conduct of the parties to an award, particularly where the terms have been re-enacted, this is only so where it can be shown by clear evidence that the parties have conducted themselves according to a common understanding of the relevant provision, as opposed to common inadvertence. (ALHMWU v Prestige Property Services Pty Ltd (2006) 149 FCR 209 at (44); SDAEA v Woolworths Ltd (2006) 151 FCR 513 at (31))"*

- *"the history of any provision is relevant and the fact that the parties have re-stated a provision which they have treated as bearing the particular meaning is relevant to the construction of the provision in the new agreement/award (see* Short v FW Hercus Pty Ltd *(1993) 41 FCR 511 at 517);*

- *the beginning point of an award interpretation is to interpret the words in the context in which those words apply. Whilst it is so that frequently the immediate context is the clearest guide the Commission 'should not deny itself all other guidance in those cases where it can be seen that more is needed'. The context in which a document is to be interpreted may extend to the entire document with which there is an association. (Short v FW Hercus at 518)*

- *in constructing an award or agreement the search is for the meaning intended by the framers of the document bearing in mind that they were likely to be of practical bent; it is justifiable to read an award or agreement to give effect to its evident purposes.*

Meanings which avoid inconvenience or injustice may reasonably be strained for. (Kucks v CSR Ltd (1996) 66 IR 182 at 184)"

[25] Mr McKenna also referred to the following authorities:

- The meaning of an industrial agreement, like the meaning of a contract, is to be determined by what a reasonable person would have understood it to mean having regard not only by the text but also by surrounding circumstances known to the parties and the purpose and object of the transaction. *(Toll [FGCT Pty Ltd v Alphaform Pty Ltd [2004] 219 CLR 165 at 41.)*

- Evidence of surrounding circumstances is admissible to assist in the interpretation of the clause language where the clause is ambiguous or susceptible of more than one meaning.(*Codelfa Constructions Pty ltd v State Rail Authorities of NSW [1982] 149 CLR 337 at 352.)*

[26] The respondent did not take issue with the above authorities, but contended that *"…clause 5.4.2, interpreted properly based on the intention of the parties objectively ascertained, does not entitle day workers to 100% penalty or accrued leave."*[11]

Admissibility of Certain Documents.

[27] There was considerable debate as to the admissibility of certain documents as an aid to interpretation. The relevant principles as to admissibility can be summarised as follows:

- Evidence of surrounding circumstances is permissible where the clause is ambiguous or susceptible to more than one meaning.

- It is not appropriate to look to evidence to contradict the language used by the parties.

- Records of prior negotiations are only admissible to the extent that it is objective evidence of background facts and demonstrates a mutuality of intent.

- Subjective evidence of a party's own particular intentions is not admissible.

- It is forbidden to use subsequent conduct as an aid to construction.

[28] The following documents are considered in light of these principles.

Nurses and Midwifery EBA 2010; Informal record of negotiations.[12]

Joint Consultative Committee 13 March 2011.[13]

[29] I deal with these documents jointly in that they have similar characteristics.

[30] In both cases the record was prepared by the independent facilitator to the IBB process, and made available to the parties in real time.

---

[11] Respondent's submissions para 8.
[12] Exhibit A2
[13] Exhibit A3

[31] Mr McKenna submitted that these documents *"…establish objective background facts which were known to both parties and the subject matter of the agreement."*[14]

[32] The respondent submitted that reliance on the fact that the record was prepared by an independent facilitator does not establish the necessary degree of 'objectivity' or 'mutuality' for the following reasons:[15]

> *"a the minutes, even though prepared by an independent third party, only record what the parties purportedly said in the negotiation meetings. The fact that one party may express its opinion of the interpretation of a proposed clause in front of another party does not establish that the opposing party shared this view.*
>
> *b in that context, there is nothing within A2 and A3 that the Applicant has been able to identify that establishes such 'mutual' intention. The Respondent has certainly been unable to find anything of that nature."*

[33] An examination of the documents reveals terminology such as *options; issues to be explored; generation of principles; discussion of (topic); topics for further discussion; tentative agreement* and in some cases, *agreement.*

[34] The record was prepared and made available in real time and I am in no doubt was of considerable benefit to the parties. It must however be recognised that the subject matter in dispute is relatively technical in nature and the notes, in my view, understandably lack the precision that would be expected in a considered drafting exercise. I refer in particular to the interchange of certain terminology and the omission of reference to key issues. This is evident even in sections which purport to represent "*agreement."*

[35] I agree with the respondent's contention that the documents fail to establish to the extent necessary the element of "mutual intention."

[36] Accordingly I determine that these documents are inadmissible as an aid to interpretation.

Joint Fact Sheet.

[37] The Joint Fact Sheet was developed immediately after the facilitated negotiations on 13 April 2011.

[38] Initially the ANF prepared a draft and forwarded it to the DHHS and the independent facilitator. Mr Double responded by email on 14 April, which is reproduced below:[16]

> *"I have checked the content as well as Fiona, and we are happy with the content – just one change I have highlighted (just a reference to full time instead of full time or part-time)*
>
> *My only suggestion is to add a small bit at the front by way of summary of the issue, rather than just outlining the provisions. Something along the following lines:*

[14] Exhibit A1 para 45
[15] Respondent's submissions para 17
[16] Exhibit A4

- ***On 13 April DHHS and the ANF met, together with the independent facilitator that assisted the parties during the Heads of Agreement process, as part of the ongoing implementation.***

- ***The meeting was very positive and the parties were able to reach common ground over the interpretation of the public holiday entitlement clause in the Heads of Agreement, which had previously been in dispute.***

- ***Both parties feel that the agreed position was in line with the original intent and spirit of the Agreement that was voted on by nurses.***

- ***An outline of the agreed entitlements is outlined below for your information.***

- ***If you have any questions, please contact your supervisor or the ANF.***

In addition, I suggest it have both ANF and DHHS logo on it so it is very clear that it is a common position – I have attached a reworded version by way of example.

Matthew"

[39] The applicant acknowledged that this document was prepared after the drafting and registration of the HOA. However, it was submitted that the document was prepared on the basis that, *"Both parties feel that the agreed position was in line with the original intent and spirit of the Agreement that was voted on by nurses."* As such the applicant contended that the use of this document to assist in the interpretation of clause 5.4.2 is distinguishable against the prohibition of using subsequent conduct. The submission states:[17]

"Despite the fact that the joint fact sheet was created after the drafting of the HOA, it provides evidence of the mutual intention of the parties in reaching agreement. As such, it goes to the very core of what the Commission seeks to determine, the mutual intention of the parties."

[40] The respondent contends that the necessary "mutuality" is absent. The submission states:[18]

"Even if a subsequent communication was capable of impacting the interpretation of an agreement that was made months prior, it is clear that there was an absence of 'mutual intention' in the present case. Whilst the Applicant relies of the word 'day' appearing in the heading at the top of page 2 of Document 1 attached to the Application (the 'fact sheet'), the inclusion of the word 'day' was to cover those shift workers who work across a 7 day roster but who are not required to work afternoon or night shifts, as the Respondent had no intention, prior or subsequent to the making of the Agreement, to apply the 100% penalty for time in lieu entitlement at clause 5.4.2 of the Agreement to day workers. Accordingly the 'mutuality' required in order to allow the fact sheet into evidence is absent. So much is clear from Document 2 attached to the Application (email from Matthew Double to Neroli Ellis). Accordingly, it would not be safe to give such a document any weight in determining the proper intention of the Agreement."

[41] The applicant in reply noted that this was the first time that the respondent had claimed to understand that the reference to "'day" had this meaning, and was

[17] Exhibit A1 para 49
[18] Respondent's submissions Para 23

inconsistent with the position taken to date in discussions about the implementation of this clause. Secondly the applicant asserted *"…that the Respondent does not employ any nurses as shift workers to work only early shifts across a 7 day roster."*[19]

[42] On 1 May 2012 the Commission sent the following email to the respondent, with a copy to the applicant:

> *"I am now in receipt of submissions of the Applicant in Reply. This brings to an end formal hearing of this matter.*
>
> *I am not seeking to reopen the debate but I would seek clarification from the respondent as to one point raised in the ANF reply. I refer to para 14 in which the Applicant states:*
>
> 'Second, the Respondent simply does not employ any nurses as shift workers to work only early shifts across a 7 day roster. All shift workers rotate through early, afternoon and night shifts, when required.'
>
> *To my knowledge this is the first occasion that this contention has been made. As such the respondent is invited to confirm or otherwise the accuracy of this statement. In the absence of a response by 5pm on Tuesday 10 May I will accept the ANF contention as an accurate reflection of the position."*

[43] As no response was received, I accept the applicant's contention as an accurate representation of the position.

[44] Notwithstanding that the Joint Fact Sheet was prepared and distributed after the registration of the HOA, I am satisfied that the document does have the necessary 'mutuality of intent.' Indeed the words in the preamble that tend to put this question beyond doubt were suggested by the respondent and accepted by the applicant.

[45] Accordingly I find that the Joint Fact Sheet is admissible as an aid to interpretation of clause 5.4.2 of the HOA. The document, which featured both the State Government and ANF logos, is reproduced in full below:[20]

> ***"PUBLIC HOLIDAY ENTITLEMENTS***
> ***JOINT FACT SHEET***
>
> ***Public Holiday Payments/Accruals under the Nurses and Midwives Agreement***
>
> *On 13 April DHHS and the ANF met, together with the independent facilitator that assisted the parties during the Heads of Agreement process, as part of the ongoing implementation.*
>
> *The meeting was very positive and the parties were able to reach common ground on the application of the public holiday entitlement clause in the Heads of Agreement. Both parties feel that the agreed position was in line with the original intent and spirit of the Agreement that was voted on by nurses.*
>
> *An outline of the agreed entitlements is below for your information. If you have any questions please contact your supervisor or the ANF.*
>
> ***General principles applying to all nurses/midwives***

[19] Applicant in Reply para 14
[20] Exhibit A5

- *When a public holiday (PH) is worked all nurses (excluding those in receipt of a 20% loading) will receive **double time and a half for all worked hours**.*
- *There is **no entitlement to accrue hours in lieu of payment for a public holiday worked**.*
- *Overtime worked on a public holiday will be paid at double time and a half.*
- *An ADO will not be rostered on a public holiday.*
- *A day of single annual leave is not to be rostered on a public holiday.*

Nurses (casual and part time) in receipt of a 20% loading

For all hours worked on a public holiday, the 20% loading will be paid on their hourly rate. This 'loaded rate' is then multiplied by 1.7 x hours worked.

Nurses (day or shift worker) on a 'set roster'

(i.e. where set/fixed days/hours are rostered each fortnight)

Situation for a set roster	***Payment***
1. Public holiday shift worked on 'set day'	*Double time and a half*
*2. Public holiday shift rostered but **not worked** on 'set day' because of service closures*	*All rostered hours paid at ordinary flat rates*
*3. Saturday/Sunday public holiday rostered but **not** needed to be **worked** on 'set day' because of service closures*	*All rostered hours paid at ordinary flat rates*
4. Public holiday falling on non 'set day'	*No payment*

Nurses (day and shift workers) on rotating/non-fixed rosters

Situation for non-fixed roster	***Payment***
1. Public holiday shift rostered and worked	*Double time and a half*
2. Public holiday shift not rostered	*7.6 hours at flat rates OR accrual of hours (pro-rata)*

Part time staff will be paid (or can accrue) hours on a pro-rata basis calculated as 1/10th of hours worked during the pay fortnight in which the public holiday falls - up to 7.6 hours.

Other situations

Situation	***Payment***

Public holiday during annual leave	*Paid at flat rates for PH, annual leave credit not used*
PH during LWOP/Parental Leave	*No additional leave or payment*
Sick Leave on rostered (or set) PH	*Flat rate for rostered hours (if sick leave credit available)*

Election Process

- ***An eligible nurse will be able to elect payment or accrual of leave for a public holiday not worked.***
- *An election form is to be developed by the DHHS as soon as possible after Easter. There will be an opportunity to change election at any time with a written notice period of 4 weeks.*
- *However, during Easter an eligible nurse can request an accrual or payment by noting this on their timesheet.*
- *Retrospective treatment of PH payments made for Australia Day, Labour Day and Cup Day (North) may be converted to accrued leave as a one-off opportunity. Nurses who wish to take up this option will need to reimburse the DHHS for payment already made. This option will be available by completion of the relevant section of the election form circulated by DHHS.*

14 April 2011

Authorised: Neroli Ellis *Authorised: Alice Burchill*

Branch Secretary *Secretary*

Australian Nursing Federation (Tas Branch) *DHHS"*

Submissions

For the Applicant

[46] The Joint Fact Sheet sets out in clear language the interpretation sought by ANF in order to resolve this industrial dispute. The interpretation does not require the contradiction of language used by the parties.

[47] The industrial context for the introduction of 5.4.2 includes the desire to clarify the issues in relation to public holidays which were the subject of orders by Shelley DP on 30 October 2009.[21] At the time of drafting the HOA the Full Bench appeal[22] had been heard but not determined. The purpose of clause 5.4.2 was to remove inequality between shift workers and day workers and to recognise and address the disadvantage of not benefiting from the day off. It is submitted that this is evidenced from the express language of the provision.

[21] T12671 of 2006
[22] T13586 of 2009

[48] The first part of 5.4.2 provides a benefit for "*…nurses rostered on duty on a public holiday, being a loading of 250%."* It is non-contentious that this means that any nurse, other than a casual, who works on a public holiday will receive this loading. This relates to a nurse as defined in clause 1.2 of Appendix A, which reads:

> *"Reference to nurses includes midwives, mental health nurses, child and family health nurses and enrolled nurses."*

[49] There is no basis to distinguish between shift workers and day workers.

[50] The second part of 5.4.2 provides alternative benefits to *"…nurses whose rostered day off falls on a public holiday…in recognition for the disadvantage of not benefiting from the day off."* It is not stated that the benefit in this part of the clause is limited only to "shift workers." There is no basis to imply such a restriction nor is there any express or implied basis to exclude part-time day workers on a non-fixed roster from the scope of this clause.

[51] Limiting the second part of 5.4.2 in the manner suggested by the respondent would be inconsistent with the express object of recognising *"…the disadvantage of not benefiting from the day off."* The disadvantage to a day worker in not benefiting from the day off is no less significant than the disadvantage to a shift worker.

[52] The language of 5.4.2 supports the equal treatment of full-time and part-time nurses, implicit from the fact that the entitlement to accrue hours applies "*pro rata."*

[53] Where the HOA provides a benefit or makes a reference to a specific type of employee to the exclusion of others, the type of employee is identified. For example, Clause 5.5.4 provides *"Annual Leave for Shift Workers.*

[54] Both day workers and shift workers work to a roster. It is recognised that clause 2 Part V of the 2005 Award provides for a roster of rotating shifts. However this is unremarkable, given that the sub clause arises under the heading "*Shift Work."*

[55] Conversely the term *"rostered day off" arises* on a number of occasions in the 2005 Award. For example the definition of *"year of service"* in clause 7 Part 1 refers to "*a minimum of 365 days of employment including rostered days off, public holidays, paid annual leave and paid sick leave."* Here it is submitted that the term *"rostered day off"* is given the same meaning as in 5.4.2 of the HOA, meaning a day on which a nurse is not rostered (for work.) The same submission is made about the use of *"rostered day off"* in the definition of *"a year"* for sick leave purposes at Part VI, clause 4(g) and in relation to bereavement leave at Part VI, clause 5(a.)

For the Respondent.

[56] Clause 5.4.2, interpreted properly based on the intention of the parties objectively ascertained, does not entitle day workers to the 100% penalty or accrued leave. Accordingly, the application should be dismissed.

[57] It is clear that there is ambiguity and uncertainty concerning the construction of clause 5.4.2. The HOA is a very informal document that records, in summary form, key entitlements that were intended to be subsequently consolidated into the award and incorporated in a new enterprise agreement. The document is a summary of intent, and was never intended to represent the final position of the parties. Unfortunately to date, these steps have not been finalised.

[58] Clause 5.4.2 is uncertain. There is no reference at all to day workers or shift workers, yet there is reference to *"rostered days off"* which is a term applicable to shift workers only.

[59] Through clause 7 *Unintended Consequences,* the HOA acknowledges the ambiguity and uncertainty in its terms in light of its informality. For these reasons the Commission must refer to evidence of surrounding circumstances - in particular the industrial context at the time it was made, and the purpose of the document itself.

[60] The HOA was negotiated at a time when the parties were before the Commission in a context of a dispute about public holidays. Specifically, the dispute predominately concerned whether shift workers were entitled to have 11 or 11.5 days added to their annual leave in lieu of public holidays.

[61] Importantly, the dispute had no relevance to day workers whatsoever. From the submissions of the respondent in the appeal matter, there can be no doubt that this context was clear to both parties. It was within this context – a dispute about whether shift workers were entitled to additional days off in lieu of public holidays – that the HOA was negotiated.

[62] The outcome of the HOA was essentially a compromise between the parties' respective positions in the public holiday dispute proceeding.

[63] The reference in 5.4.2 to the 100% penalty or time in lieu being in *"recognition of the disadvantage of not benefiting from the day off"* supports the proposition that the clause was only intended to apply to shift workers. Day workers are entitled to observe public holidays without loss of pay whereas shift workers are not.

[64] The phrase *"rostered day off"* is a term that only applies to shift workers. This is apparent from the terms of the 2005 Award where the term is used in a number of areas. In some cases the term applies solely to shift workers. (Part V, clause 2(b) Shift work; Part VI clause 1(b)(ii) Annual Leave Exclusive of Public Holidays). In other cases, the clause is equivocal as to whether the term applies to day workers, shift workers or both. (Part 1 clause 7 definition of *"year of service;"* Part VI clause 4(g) Sick Leave; Part VI clause 5(a) Bereavement Leave.)

[65] There is nothing in the HOA or the 2007 Agreement which gives any further guidance as to the meaning of "*rostered day off."* Accordingly, given that the award clearly contemplates that phrase solely in the context of shift worker's entitlements, the term in clause 5.4.2 of the HOA should carry the same meaning.

Findings

[66] The starting point in determining the meaning of an industrial instrument, including a registered agreement must be the actual words used in the provision under consideration. However the provision should be interpreted in light of the industrial context and purpose in which it applies, and, where the clause is ambiguous or susceptible to more than one meaning, evidence of surrounding circumstances is admissible. It would seem that the parties, either explicitly or implicitly, believe that this is the position and hence evidence of surrounding circumstances should be taken into account, albeit the reliance on what is relevant differs.

[67] The Respondent contends that the HOA was negotiated in the context of the decision of Shelley DP and the subsequent appeal proceedings. This it was submitted, was a dispute about whether public holidays should be added to a shift worker's period of annual leave, and importantly, had nothing to do with day workers.

[68] There is considerable force in this submission. However it must be said that the parties to the HOA were not limited to the scope of the matter before the Full Bench. Indeed the outcome saw an increase in the penalty rate applicable for a shift worker working on a public holiday; a matter which was not before either the Deputy President or the Full Bench.

[69] The Applicant on the other hand, submitted that the purpose of clause 5.4.2 was to remove inequality between shift workers and day workers and to recognise and address the disadvantage of not benefiting from the day off. Similarly there is evidence which provides support for this contention. Apart from the text of the clause, I note subtle changes to the 2005 Award arising from Order No. 1 of 2012.[23] These changes are a consequence of the ongoing award consolidation process as envisaged in the HOA. I refer in particular the *Holidays with Pay* (Part VI clause 1) which no longer draws any distinction between shift workers and day workers. Whilst at a practical level this may not change anything, it does demonstrate beyond doubt that all employees (whether shift worker or day worker) are entitled to public holidays, but any employee may be required to work on a public holiday.[24]

[70] In terms of industrial context, I consider that whilst the contentions of both the respondent and the applicant above are persuasive, neither is determinative of the issue before the Commission.

[71] I turn now to the text of the clause.

[72] The first part is quite unambiguous. It quite clearly states that all nurses (whether day work or shift work,) are paid a loading of 250% if rostered on duty on a public holiday.

[73] The second part, which is in contention, also uses the expression "*Nurses*" and does not distinguish between day work and shift work. However the respondent contends that the term *"rostered day off"* is an expression only used in the context of a shift worker, and, it follows, that the second part of the clause must accordingly be limited to shift workers.

[74] The expression is used on a number of occasions in the 2005 Award. In two of those instances, the expression is explicitly limited to shift workers in that the subject matter of the clause in question is limited to shift workers. In other instances (year of service; Sick Leave, Bereavement Leave] the term is used in a manner which could apply equally to day workers and shift workers.

[75] I note in the first part of 5.4.2 there is reference to a *"nurse rostered on duty..."* This of course could include a day worker. If I am to accept the respondent's position, it would seem somewhat incongruous that if a day worker can be *"rostered on duty,"* then a day on which the day worker is not rostered to work, is something other than a "rostered day off."

[76] Accordingly I find that the expression "*rostered day off"* means a day on which a nurse is not rostered to work.

[77] I am prepared to accept the Applicant's contention concerning the expression *"in recognition of the disadvantage of not benefiting from the day off."* In the case of a part-time day worker on a non-fixed roster, where a public holiday falls is entirely a

[23] T13783 and 13831 of 2011.

[24] State Service Act 2000 s53.

function of the roster. Thus the disadvantage to a day worker when a public holiday falls on a day on which they are not rostered to work is exactly the same as a shift worker in the same circumstance.

[78] For the reasons outlined above, I find no basis upon which the second part of clause 5.4.2 can be limited to shift workers. Whilst I consider that this conclusion is reasonably open on the words used in the clause, I am strengthened in this view in that the construction is industrially sound and defensible. Whilst care must be exercised in considering merit considerations in a question of interpretation, it is equally true that a construction that may lead to an industrial nonsense should be avoided.

[79] If there were any lingering questions as to the proper construction of this clause, they would, in my view, be put to rest by the explicit wording of the Joint Fact Sheet. The respondent's submission as to the use of the expression *"day"* in the heading at the top of page 2[25]is not convincing and I am not prepared to accept it.

[80] I further conclude that this interpretation does not contradict the language used by the parties in drafting the HOA.

[81] I propose to issue the order sought by the applicant.

[82] There is one further matter. The respondent has suggested that the Commission should issue a recommendation that the parties develop a variation to the definition of shift worker within the award so as to meet the changing patterns of health care and patterns of work required to meet service demands.

[83] The subject matter and content of industrial instruments is, in the first instance at least, the province of the parties to determine. I would observe however, that it is highly desirable that awards remain contemporary in nature and capable of meeting current needs without resorting to contrivance and/or manipulation of unsuitable provisions.

[84] I note for example the renal nurses at the LGH work on a six day roster which includes a Saturday. Clause 1(a) of Part V limits the ordinary hours of work for day workers to Monday to Friday. In my view this means that any work on Saturday can only be considered an overtime shift. If I am correct on this then, apart from anything else, it has implications for payment on Recreation Leave and possibly other forms of leave. This is unsatisfactory and I recommend that the parties confer with a view to addressing this situation and perhaps others where it can be demonstrated that the Award is failing to meet the needs of the health service and the employees that work within it.

Order

Pursuant to section 31 of the *Industrial Relations Act 1984* I hereby order that the MASSA apply clause 5.4.2 of the *Nurses and Midwives Heads of Agreement 2010* in accordance with the document of 14 April 2011 titled "*Public Holidays Entitlements – Joint Fact Sheet"* with effect from 26 January 2011.

[25] Respondent's submissions para 23

Tim Abey
Deputy President

Appearances
Ms N Ellis for the ANF 22 December 2011, 19, 25 January, 13 and 14 March 2012
Ms L Grosser for the ANF 19, 25 January, 13 and 14 March 2012
Ms T Battaglini for the ANF 22 December 2011, 25 January 2012
Ms A Stanislaus-Large for the ANF 22 December 2011
Ms A Smallbon for the ANF 22 December 2011
Mr J McKenna for ANF 13 and 14 March 2012
Mr P Baker for MASSA 22 December 2011, 19 January, 13 and 14 March 2012
Mr M Double for MASSA 22 December 2011, 19, 25 January, 13 and 14 March 2012
Ms E Jago for MASSA 22 December 2011, 19, 25 January, 13 and 14 March 2012
Mr T Kleyn for MASSA 25 January 2012

Date and place of hearing:
2011
December 22
Hobart
2012
January 19, 25
Hobart
March 13 and 14
Launceston

<TIC0004/2012>