IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. NO. 124 OF 1985

IN THE MATTER OF an application by the Hospital Employees' Federation of Australia, Tasmanian Branch No. 2, for interpretation of the Hospitals Award

re definition of shift worker

PRESIDENT

LAUNCESTON, 5 June 1985

TRANSCRIPT OF PROCEEDINGS

(RESUMPTION)

PRESIDENT: Are there any alterations to appearances previously announced?

MR SIMMONDS: If the Commission pleases, **J. SIMMONDS** still representing the No. 2 Branch of the H.E.F. but with me, **M.S. HALL.**

PRESIDENT: Thank you Mr Simmonds.

MR IMLACH: If the Commission pleases, **PETER IMLACH.** I appear on behalf of the Hospital Employees' Federation of Australia, Tasmanian Branch No. 1, in place of Gregory Bennett.

MS FAWDRY: If the Commission pleases, my name is **MARCIA FAWDRY.** I appear for the R.A.N.F. in place of Mr Gordon Grant.

MR SERTORI: If the Commission pleases, my name is **SERTORI, M.C.** I appear for the Tasmanian Chamber of Industries in lieu of Mr Mike Fruin.

PRESIDENT: Thank you Mr Sertori. Before inviting further submissions, I wonder if any party would wish to object to, or otherwise comment upon, the reconstructed section of the transcript.

MR SIMMONDS: If the Commission pleases, I have no comment, in fact I think you have done an admirable job in the circumstances.

Can I just say that I did have a suspicion that perhaps the Chamber of Industries was responsible for it but I am assured they are not.

PRESIDENT: Thank you Mr Simmonds.

MR SERTORI: Mr President, I suppose I should respond to that assertion; I can assure you the Chamber of Industries had no such involvement. I have no objection sir and, again, I would join Mr Simmonds in congratulating you on formulating that precis.

PRESIDENT: I think you should congratulate my clerk, Mr Sertori.

MR SERTORI: In that case, I do, sir.

PRESIDENT: Are you in a position to respond to the applicant's case, Mr Sertori?

MR SERTORI: Yes I am, Mr President. In fact before I proceed to make a submission on the specific matter of interpretation of the Hospitals' Award, there are two preliminary matters I seek to raise.

One matter is to seek clarification and the other to simply make comment on.

When this matter was first heard on 23 May, 1985 there were a few comments made affecting the T.C.I. that I would briefly seek to clarify, particularly as the applicant gave this authority the impression that the T.C.I. had adopted a position of impertinence to the authority.

In fact, it seems perhaps it was a day when the proverbial bucket was thrown over the T.C.I. It would seem that Mr Simmonds was of the impression that seeking an adjournment was part of an action on our behalf to delay the process of discussions on the 38-hour week introduction to the Hospitals' Award. It is of some significance that we have offered to continue discussions with the H.E.F. No. 1 and No. 2 Branches and the R.A.N.F. on the 38-hour week claim whilst the present matter of interpretation is being determined. That offer was flatly rejected.

Secondly, reference was made to meetings set and postponed with particular reference to a meeting of the parties scheduled for 13 March, 1985 which was postponed. I would point out that it was postponed because neither Mr Simmonds nor Mr Grant turned up. It was after that meeting that the T.C.I. was notified of their unavailability.

There are other points of relevance, needless to say. The T.C.I. is

MR SERTORI: certainly not guilty of impertinence to this authority nor is it guilty of creating unnecessary delays over the discussion of the 38-hour week within the Hospitals' Award.

I might also add that on verbal notice from the Registry we were advised on the Friday preceding the hearing that the hearing of the 23rd would take place at 10.30 a.m. In attempting to organize ourselves, we then discovered the written notice in fact cited the time as 2.00 p.m.

It is not my intention to become embroiled in a slanging-match. However, I make the simple observation that if parties are going to come before this authority to cast stones, then `Let he who is without sin cast the first stone.'

I then come to the second preliminary point. This is where I seek some clarification through you sir.

The application for this matter before us, made by the H.E.F. No. 2 Branch, apart from making reference to the relevant section of the Industrial Relations Act 1984, simply lists clauses of the Hospitals' Award in relation to day workers and shift workers. The transcript of proceedings and the President's precis of proceedings of 23 May, 1985, reveal a reference of sorts by Mr Simmonds to a hypothetical group of cleaners and a hypothetical establishment where cleaning work is performed over seven days of the week. In fact that seems interfused through the submission.

What is not revealed from the record is the specific subject which the exercise of interpretation is to address. If we are to determine whether an employee is a shift worker or a day worker, what is our factual example? If it is a cleaner, which cleaner is it? Where is this cleaner employed? What are the circumstances under which he or she is employed? Without a subject, can we proceed to

MR SERTORI: address an interpretation of the award?

My question then, Mr President, is "What is the subject the applicant is asking you to address on the question of interpretation?"

So, before I proceed with any submission, I would ask that I could clarify that point.

PRESIDENT: Mr Simmonds, do you wish to respond to the last point? It was of some minor concern to me in earlier proceedings that we didn't have a factual situation to which we could apply our minds.

MR SIMMONDS: I think I responded to that in the course of the other proceedings and made the point that there was a dispute on the general issue between us and the Chamber of Industries. I am surprised in fact that the Chamber of Industries doesn't understand what the dispute is about, given that that has been the reason there has been no point in further discussions on the 38-hour week because, as I explained, the issue concerned the definition of day workers. We can't seek to debate or discuss with any point the 38-hour week for day workers in private hospitals until such time as we have identified just who those day workers are.

I appreciate the difficulty that Mr Sertori might be in personally over this because he was not involved in that discussion, nor was he involved in the dispute between the unions and the Chamber of Industries about this specific matter. However, there is no doubt that there was a dispute and that the dispute was on the general proposition as to what constituted a day worker and what constituted a shift worker in accordance with the submissions I put before last week.

If Mr Sertori is saying to you that that is not the Chamber's position then, so he should. However, it was certainly my understanding and I

MR SIMMONDS: believe it was the understanding of the other unions party to the proceedings here, that the Chamber did have a position and they had specific instructions as to what the position they should be taking should be. That, briefly stated, is the reverse of the interpretation that I put to you at the last proceedings.

I appreciate the difficulties that that might present Mr Sertori personally, but it shouldn't pose any difficulties for the Chamber of Industries because the dispute is a general one. There was nothing hypothetical about the example that I gave, if that is in fact being challenged. The reference was to cleaners at the St Vincent's Hospital in Launceston. I was of the view that there wasn't a requirement from the Chamber of Industries to raise that matter at the previous proceedings. I think they probably saw some desirability in retaining anonymity, but there was certainly nothing hypothetical about that argument. It was an argument based on fact, but Mr Sertori has sought clarification and I give him and you, Mr President, the clarification in respect of the place,although I think it probably isn't different from what I said last time. Frankly, the general issue is an issue that is very much alive and has been very much alive between the parties in the course of the 38-hour week negotiations. We have found that we cannot proceed any further in those negotiations because of the diametrically opposite position of both sides as to what constitutes a day worker and what constitutes a shift worker.

PRESIDENT: Mr Sertori, you have heard Mr Simmonds; it seems to me that the Commission can proceed on this interpretation. My task, as I apprehend the submissions before me, is to determine whether cleaners, working the hours and the days indicated by Mr Simmonds, are in fact shift workers or day workers. I

PRESIDENT: ought to indicate that we are talking about cleaners employed at St. Vincent's Hospital. I think there is sufficient factual material before me to allow me to interpret the award in the manner in which I believe it ought to be interpreted.

That being the case, Mr Sertori, I think it is now your privilege, or prerogative, or responsibility to respond to what has already been put. I take it you have had the transcript for some few days?

MR SERTORI: Yes, Mr President. I am certainly in a position to proceed. I might add that I am familiar with the background that brought this matter before you for a question of interpretation. I raised that preliminary point simply because given the ground rules that you have laid down on the matter of interpretation at another time, it wasn't clear from transcript if the subject had been addressed. That is now clarified.

Mr President, essentially what you are being asked by the applicant to agree with is the proposition that under the Hospitals' Award, where a given category of work is performed over seven days of the week at a given establishment (for example, cleaners at St. Vincent's Hospital), any employee performing such category of work (being cleaner) is automatically a shift worker regardless of the hours they work, the days they work and regardless of what the award otherwise says they are.

Mr Simmonds' submission bases itself on the generality of work and the generality of rosters and, indeed, de facto rosters (whatever that might be).

No attempt has been made to address the specific issue of the employee despite the fact that the clauses in the award refer to the specific individual. It would be our

MR SERTORI: submission, therefore, to address such a specific.

We are then to determine whether a given employee is a day worker or a shift worker and by way of procedure we should firstly explore the concept of a day worker.

The day worker is, after all, the only employee who can work his ordinary hours without some form of penalty imposed. It is from that point that we move outside the issue of ordinary hours of a day worker and penalties that may apply if they get overtime, or whatever.

Whilst the concept of a shift worker in the Hospitals' Award may be seen to suffer some generalities and ambiguity, the concept of a day worker is clear and precise. Within that framework, we submit the specific prevails over the general and as we will show, the day worker definition prevails over the shift worker definitions in this exercise.

In contrast, Mr Simmonds' argument is based on the converse relationship. It is the nature of this award that whilst a shift worker may be many things he is significantly, by definition, anyone other than a day worker.

As the relevant clauses are identical in both Sections I and III of this award, I will base my submission (as the applicant has done) on the clauses of Section I. Obviously our arguments then apply in both Sections of the award.

Clause 37 (i) of Part II, Section I, defines a day worker thus:

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

That definition is certainly clear and precise.

MR SERTORI: The ordinary hours of such an employee are set out in clause 1, `Hours´, which provides for both full-time and part-time day workers. Depending on the classification, a daily span of eight or seven and a half hours per day from 7.00 a.m. to 5.30 p.m. applies Monday to Friday, for 40 or 37.1/2 hours per week. Work outside that span of hours is the subject of penalty addition.

So, clearly, an employee such as a cleaner at St. Vincent´s who works eight hours per day between the hours of 7.00 a.m. and 5.30 p.m., Monday to Friday of each week is without question a day worker and in being such a day worker, this employee and any employee defined as a day worker is specifically excluded from being a shift worker under the award definitions. Now, in this latter context I note the first part of the definition of clause 37 (j) which reads:

> "A `shift worker´ is an employee whose ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays and notwithstanding includes all employees who are not day workers."

Now, for the moment ignoring the verbiage for a shift worker, clearly if one is defined as a day worker then one is logically, by definition, excluded in any way from being defined as a shift worker.

At this point it must be noted that in contrast we have Mr Simmonds´ assertion that an employee working eight ordinary hours per day, Monday to Friday inclusive, between 7.00 a.m. and 5.30 p.m. week after week, by some strange logic is a shift worker.

Now that I have clarified what a day worker is, let us look at what a

MR SERTORI: shift worker is under this award.

Both clause 4, `Shift Work´ and clause 37 (j) provide definitions of a shift worker.

Whilst generally the verbiage is the same in both cases, there exist two notable exceptions. Clause 4, `Shift Work´ carries the following definition of a shift worker:

> "`Shift Worker´ includes an employee whose ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays."

Now, for the purpose of the exercise the remaining proviso need not be noted; namely the question of annual leave.

Clause 37 (j), in addressing the same subject, (a clause which was added to the award after the inclusion of clause 4 as a definition) omits the word `includes´, which appears as the third word in the clause 4 definition, substitutes the word `is´ and adds the verbiage, `and notwithstanding includes all employees who are not dayworkers´.

The substitution of the word `is´ for the word `includes´ is, we submit, a drafting error and therefore in both definitions the word should be `includes´.

If it pleases the Commission, at this point of my submission I will not explore that argument as to why the word should be `includes´ on both occasions because I feel it will be a simpler task to explain my logic following a closer examination of the definition of a shift worker.

The added proviso of clause 37 (j) does, we submit (and I repeat), add further clarification to the definition of a shift worker and obviously both definitions should be

MR SERTORI: read in conjunction with one another to achieve an intelligible meaning based on the English language usage.

At this point let us recall what Mr Simmonds has said about the definition of a shift worker. Mr Simmonds has projected an image that if there is a roster that provides for a category of work (being cleaning) to be performed over seven days of the week, then any employee performing such a category of work (being a cleaner) is a shift worker regardless of the hours he works.

In essence, that says that you create a roster and in turn you create a shift worker.

This of course assumes that the roster is an all-embracing concept. Now, we contend that such a concept is quite absurd and in fact suggest that you determine whether the employee in the first instance is a shift worker and, if so, a roster for his shift work must then be provided.

Mr Simmonds has contended that the difference in approach to this subject, that I have just outlined, is a `chicken and the egg´ syndrome. That claim we frankly reject.

It is Mr Simmonds´ argument that creates a most absurd interpretation which we submit runs against the broad concept of shift workers and day workers and flouts the intelligent use of the English language.

Let us then recall the shift worker definition in clause 4. "`Shift Worker´ includes an employee whose ordinary weekly hours of work are performed in accordance with a roster which regularly includes Saturdays and Sundays."

So what do we have? We have an individual employee classification in this award (cleaner in the example at hand) who works his or her ordinary weekly hours of work in accordance

MR SERTORI: with his or her own roster which regularly includes work on Saturdays and Sundays. If this individual employee does not work ordinary hours regularly on Saturdays and Sundays then, by definition, the employee may not be a shift worker.

Therefore, following from clause 37 (j) where it adds the words, "and notwithstanding includes all employees who are not dayworkers", this employee who does not work ordinary hours regularly on a Saturday or Sunday is going to be something else. If this same employee's ordinary hours are then worked Monday to Friday, eight hours per week between the span of 7.00 a.m. and 5.30 p.m. (as is the case with cleaners Monday to Friday at St. Vincent's), then the employee is, as we submitted earlier, a day worker.

Then of course we can have an employee who works ordinary hours outside the span of hours for a day worker, who does not work regularly on Saturdays and Sundays. If we look further at clause 4, `Shift Work', we have a definition of an afternoon shift and a night shift which reads:

> "`Afternoon Shift' means a shift terminating after 6.00 p.m. and at or before midnight."
>
> "`Night Shift' means a shift commencing at or after 4.00 p.m. and before 6.00 a.m."

An employee who works his or her ordinary hours in a given day, but outside the span of hours for a day worker (such that they either terminate their shift after 6.00 p.m. and at or before midnight, or commence their shift at or after 4.00 p.m. and before 6.00 a.m.) is clearly an afternoon or night shift worker.

If the definitions of a shift worker provide that a shift worker includes and/or is, one who works ordinary hours to his roster which regularly

MR SERTORI: includes work on Saturdays and Sundays, one cannot be an afternoon or night shift worker unless one regularly works ordinary hours on Saturdays and Sundays. However, if an employee works his ordinary hours outside the span of hours for a day worker and does not regularly work his ordinary hours over a weekend, by definition he could be neither a day worker nor a shift worker which, we submit, is potentially the absurdity of the award.

This position is created whether the employee rotates or otherwise. This of course depends on whether we have regard to the word `includes´ or the word `is´ in the shift work definitions.

MR SERTORI: If we follow clause 4 only, where the word `includes´ is used, i.e. "`Shift Worker´ includes ..." et cetera, this position therefore allows that a shift worker (whilst including an employee working ordinary weekly hours of work in accordance with a roster which regularly includes Saturdays and Sundays) could include something else. It could include an afternoon and night shift worker, permanent or rotating, whose ordinary working hours are not in accordance with the roster, regularly including working on Saturdays and Sundays but still in accordance with the roster.

It cannot include of course a day worker, which is supported by the meaning of the added proviso to the definition of clause 37(j) which specifically excludes day workers.

Of course clause 37(j), a sub-clause added to the award after clause 4, uses the word `is´ instead of `includes´, thus limiting the scope of the definition.

If the word `is´ prevails, then only the absurdity I illustrated prevails. This absurdity is that there could be no such thing as afternoon or night shift workers unless they regularly work ordinary hours over Saturdays and Sundays. Yet they cannot be day workers as their ordinary hours are worked outside the span of ordinary hours for day workers.

Clearly, such an employee could not be defined if the word `is´ prevails. That, I put, surely is an absurdity.

Obviously clause 37(j) should at least be rewritten in respect of the word `is´ becoming the word `includes´.

Mr Simmonds´ submission assumes that you can get around this drafting problem by defining a shift worker as

MR SERTORI: any person performing a class of work where that work is performed over seven days of the week.

On that proposition where work is performed over five days of the week, namely Monday to Friday and a worker works his ordinary hours outside the day worker's span of hours so he is not a day worker - what is he?

Most importantly with this concept, you can also negate the existence of a day worker even though one exists. In fact Descartes might turn in his grave to hear the new philosophy, `I exist therefore I am not'.

I therefore repeat, the only commonsense interpretation of the shift worker definitions of clauses 4 and 37(j) is in reading both together, to exlude the word `is' in clause 37(j) and therefore leave the word `includes' of clause 4 to prevail.

To do otherwise negates common sense.

Whether the `notwithstanding' proviso of clause 37(j) is regarded or not, it does not alter the meaning of the shift worker definition but it does help to promote the clear dichotomy between a shift worker and a day worker.

On that basis, the definition of a shift worker in conjunction with clause 4(c), `Rosters' allows for a shift worker who is a night shift worker whose 40 ordinary hours can be spread over the seven days of the week, not necessarily including Saturday and Sunday. It can include an afternoon shift worker and, unless agreement exists to do otherwise, any such employee who will rotate from afternoon to night shift and who presumably, may at times be a day worker.

The shift worker also includes employees who regularly work the ordinary hours on Saturdays and Sundays. There can then be part-time

MR SERTORI: shift workers who might only work weekends or night and afternoon shifts.

If we then take the example Mr Simmonds touched on, where cleaning work is performed over seven days of the week, where no afternoon or night shift is worked and some employees work eight hours a day between 7 a.m. and 5.30 p.m. Monday to Friday 40 hours per week and other employees work eight hours on a Saturday and eight hours on a Sunday, then we have the following:

The full-time employees Monday to Friday are clearly day workers, fully satisfying the day worker definition. By definition they therefore cannot be - by any stretch of the imagination - shift workers.

Employees engaged permanently on Saturdays and Sundays work their eight ordinary hours on each day and because they regularly work on Saturdays and Sundays within the structure of ordinary hours, must be part-time shift workers and work to a roster as such.

What is clear beyond all doubt under the Hospitals' Award, is that whatever one does in defining a shift worker, one thing is paramount - that any employee who fulfills a day worker's definition cannot ever be a shift worker whilst he fulfills that definition. That is supported by the day worker's definition and by the shift worker's definition and, I put it, by common sense.

Coming back to Mr Simmonds' submission, what he has created or I should say, wanted to create, is simply a day worker who has a 20 minute crib break, which in no way is possible under this award or most awards for that matter.

The reality of most establishments under this award is that a great many categories of work are in fact

MR SERTORI: performed over seven days of the week, similar to the situation at St Vincent´s Hospital.

Within that context, some employees are engaged as part-time shift workers working only Saturdays and Sundays. In some cases some may work afternoon and night shifts, some rotate and some no doubt do not. There are also employees in such classes of work who work Monday to Friday 40 hours per week, eight hours per day between 7 a.m. and 5.30 p.m. and are thus day workers.

If, Mr President, you are somehow persuaded by Mr Simmonds´ interpretation of day work and shift work, then there will be an enormous number of employees who are no longer day workers. Indeed not only will the shift work definition be in need of redrafting to accommodate that position, but you will also have to substantially redraft the day worker´s clause, because wherever work is performed over seven days of the week, the clause in its present form (day worker clause) would no longer apply even though there will be large numbers of employees working precisely in line with that definition.

I would also suggest that such an interpretation would then be totally at odds with the whole concept of the day worker in any award. What we will have is a `Clayton´s clause´ - the day worker you are having when you are not having a day worker. Put simply, the proposition Mr Simmonds has put is absurd and creates a totally unintelligible position.

In summary of that we say that at all times an employee working Monday to Friday inclusive, eight hours a day between 7 a.m. and 5.30 p.m. each day, 40 hours per week, is a day worker and in working such a pattern can never be anything but a day worker. Indeed he certainly cannot be a shift worker as the applicant

MR SERTORI: proposes. Even the shift work definition uses words specifically excluding day workers.

A shift worker works to his roster. It may include an employee who works ordinary hours regularly on Saturdays and Sundays. It may include an afternoon and night shift worker who may work in fact Monday to Friday inclusive. In fact ordinary hours can be worked over any consecutive days of the week providing a two day break is had. Such employees will rotate from one shift to another or, by agreement of employees, not rotate.

To determine whether an employee is a shift worker or a day worker it is necessary to look at the work performed by the individual employee and not the generality of the work of the establishment.

That, to my mind Mr President, is straightforward. It does not require one to resort to absurdities, such as the day workers who are somehow also shift workers and de facto rosters, which sound like some new social reform.

Briefly, two points remain. The first is the transcript tabled by Mr Simmonds of an attempt to interpret the Public Hospitals' Award on a subject allegedly similar.

I note no decision was made on that matter and indeed the controlling authority, through negotiation, weakened its position subsequently.

However, how that is relevant to our exercise I do not know, unless that document has been tendered as one to address a question on merit - which I understand is not to be part of this exercise.

Secondly, in making your decision Mr President, you are open to amend the award and we have suggested some changes in that regard. You can suggest that perhaps the matter go to merit under another section of the

MR SERTORI: Act and you can set an operative date for your decision - either prospectively or retrospectively.

If you were for some reason persuaded by Mr Simmonds' submission (and given an interpretation would prevail) then contrary to overwhelming practice, the effect of such a decision retrospectively would be of much significance because for each relevant day, an employee involved would be entitled to at least half an hour's overtime at double time, the cost of which I would suggest, would be somewhat enormous.

Section 36 of the Act relating to the question of specific matters that one must have regard to in the making of awards or agreements, I submit is relevant on this occasion.

I would put to you that the economic impact on establishments of such an operative date can only be described as offensive to the public interest and an unnecessary impact on the economic circumstances.

So that it is very clear sir, for the example of St. Vincent's (the cleaners working Monday to Friday, 8 hours per day, 40 hours per week, and part-time cleaners working permanently Saturdays and Sundays), we say that in that example the cleaners working Monday to Friday at 8 hours per day, between the span of 7 a.m. and 5.30 p.m. are none other than day workers.

The part-time employees working permanently on weekends are part-time shift workers.

It is for the reasons that we have previously outlined, that we see no other interpretation.

I thank you sir.

PRESIDENT: Yes.

PRESIDENT: Mr Sertori, if I could take your final point up with you.

I take it that it is consistent with your submission that a part-time individual, who only works certain hours on Saturdays and Sundays, could only be a shift worker in those circumstances. Why could not that person be a part-time day worker? Non-shift worker if you wish.

MR SERTORI: Because sir, the ordinary hours of a day worker can only be worked within the span Monday to Friday and within the span of hours Monday to Friday - 7 a.m. to 5.30 p.m.

Work on a Saturday and a Sunday would not be the ordinary time of a day worker. In fact, is it not overtime or some time described as Saturday or Sunday overtime work?

The fact is that the part-timers in question are working ordinary hours on the Saturday and Sunday.

PRESIDENT: Yes, well that is my point. Perhaps I did not make myself clear.

The fact that they are working 6 (I have forgotten how many) hours each Saturday and each Sunday, does not by itself mean that they are shift workers, does it?

Why could not the hospital engage people to work regularly on Saturdays and Sundays and pay them the appropriate loaded casual rate?

MR SERTORI: A casual employee sir?

PRESIDENT: Well I said casual.

MR SERTORI: Well there is a number of options ...

PRESIDENT: Because they are only working weekends.

MR SERTORI: There are a number of options available to the employer under the award, given that you have employees who are day workers working Monday to Friday.

MR SERTORI: If you require an employee simply to fill 8 hours per day on a Saturday and Sunday, then that leaves you with little alternative but to look at employing part-time employees for that Saturday and Sunday work and when employed as such, by definition, they become shift workers.

PRESIDENT: Yes.

Would it be your submission then that you could have part-time shift workers working only Saturdays and Sundays, if there was not already in existence a system of shift work operating Monday to Friday?

MR SERTORI: Well that sir, is an option is it not, of this concept of shift work under this award. One could have shift work contained Monday to Friday and one could have shift work that regularly covers Saturdays and Sundays as part-time with one of those employees as a part-time shift worker who entertains the regular work of Saturdays and Sundays. It is one of the options of shift work.

PRESIDENT: Yes.

I think I understand what you are putting to me, but I am not ...

MR SERTORI: I would submit that the unusual aspect is that if one were to view other awards one would not necessarily find a definition of a shift worker that specifically requires work on Saturdays and Sundays. That is perhaps the unusual aspect of this form of definition which creates such things as part-timers who are shift workers working Saturdays and Sundays.

PRESIDENT: Yes.

You see you could have a day worker who came in regularly on Saturdays and Sundays to carry out maintenance work.

MR SERTORI: Sir, he would be working overtime.

MR SERTORI: He would have, presumably, completed his commitment of 40 hours work per week Monday to Friday and what he is then working is outside his ordinary hours - additional time which would be overtime.

We are only dealing with the issue of working ordinary time over Saturdays and Sundays.

PRESIDENT: Then if one of the day work cleaners agrees to work some extra time on Saturdays and Sundays, that person would remain a day worker in your submission?

MR SERTORI: He would, provided that that is additional to his commitment to ordinary hours Monday to Friday. If in fact he is working ordinary hours over Saturday and Sunday, then he is no longer a day worker.

PRESIDENT: When you say ordinary hours Mr Sertori, you mean as part of his rostered 40 - his required 40 per week?

MR SERTORI: Of 8 hours per day.

PRESIDENT: Yes.

MR SERTORI: Yes.

Now whether or not he works those, he should be paid on that structure or within that framework, that constitutes his ordinary hours.

Now if he proceeds outside either that span of hours in the day, or the spread of days in the week (namely Saturday or Sunday) then he is working outside his ordinary hours. Then it is accounted for under the clauses of overtime et cetera.

If he was to work his 40 hours per week, ordinary hours, other than in an ordinary arrangement of Monday to Friday, then he is no longer a day worker.

PRESIDENT: Yes.

PRESIDENT: If we could come back to these people who work only Saturdays and Sundays. Surely you must be accepting that this is the continuation of a process that has been going on all of the week, in order that these people can be described as part-time shift workers.

MR SERTORI: I accept that.

PRESIDENT: Yes.

If it is a continuation of a process, presumably the process is shift work.

MR SERTORI: That assumes that you define a shift worker by the generality of work. Is not `shift worker´ determined by what the individual does? - By the work of that individual and the roster of that individual, not by the collection of work and a roster that relates to that collection.

Is not a roster an individual thing of that employee, not a generality of all employees?

PRESIDENT: That is your submission?

MR SERTORI: Yes, Mr President.

PRESIDENT: Yes.

Mr Sertori, if we could take the hypothetical case of a hospital, wherein shifts are worked over the 7 days of the week and 24 hours of the day, so you have 3 x 8-hour shifts, multiplied by 7 days. By agreement some employees only work afternoon shifts - Monday to Friday - and some employees only work day shifts - Monday to Friday - or day work. I should say, only work their hours Monday to Friday. Would those hypothetical employees all be shift workers or would they be day workers?

MR SERTORI: Well I am not frightened to use the words `shift work´. Anybody who works a pattern of hours is working a shift. The shift work concept that is emerging for the purpose of interpretation is one whereby the

MR SERTORI: shift work requires a penalty of sorts to be paid.

Now if there are people working permanent afternoon shifts then they are going to attract a certain penalty for doing so and then they will be afternoon shift workers.

If people are going to work a permanent day shift, Monday to Friday, of 8 hours, between the span of 7 a.m. and 5.30 they are, by definition, day workers but they are still working a shift day in the general sense of the word.

PRESIDENT: Because there is a process of shift work in operation in that establishment - would that be the test?

MR SERTORI: I accept that there is a process of shift work but that does not necessarily mean that every given employee is a shift worker. What we have to do is come back to what the individual is actually doing.

Now in that context where there is shift work worked 7 days a week, 24 hours a day, there are conceivably people within that structure who will be afternoon and night shift - permanent or rotating. At times there will be people working Monday to Friday, 8 hours per day, between that span of 7 a.m. and 5.30. At the point they do that they are day workers.

Is it not conceivable that within that structure, you could be in one period of time an afternoon shift worker; in another period of time a night shift worker; and in another period of time a day shift worker; but then working on a day shift you would by definition be a day worker without penalty.

PRESDIENT: Not entitled to additional ...

MR SERTORI: Benefits? No sir.

PRESIDENT: ... recreation leave. I see.

MR SIMMONDS: One of those things that it talks about is the need for rosters to rotate, unless all the employees concerned desire otherwise.

So there is another indication there as to what the roster should look like. It should not only, in my submission, include more than Saturday and Sunday, but it should also rotate, unless all of the employees concerned desire otherwise.

It is not enough to say that one goes to the definition of day worker and then applies the day worker hours and everyone else is a shift worker automatically, because the provisions of clause 4 apply to people regardless of the provisions of clause 37.

It is to clause 4 that we must primarily look in determining whether a person is or is not a shift worker.

Clearly, if they are by virtue of that definition, shift workers, then they are not day workers and the provisions of clause 1 do not apply.

That I believe is the construction of the award and it is the way in which the award must be read.

The real difficulty that Mr Sertori has in mounting his case, starts to come out when we consider some of those matters that you raised with him towards the end. What is the position of someone who is not working on a roster and is working Monday to Friday where there is no one else doing that work on Saturday and Sunday?

Mr Sertori says that you do not take any account of that work. So you have a person who is working Monday to Friday and is working on an afternoon shift (or what would otherwise be an afternoon shift). If Mr Sertori is correct and these people are not day workers, then how

MR SIMMONDS: do they get to be shift workers? Certainly not by the provisions of clause 4. They must get there by the provisions of clause 37, because it says that any person who is not a day worker is a shift worker.

Why are they not day workers on Mr Sertori's submission? Because Mr Sertori is saying that anyone whose ordinary hours of work are 8 hours (he then enters something else which I will come back to), Monday to Friday, is a day worker.

The other bit that he enters is where he strikes his difficulty, because he says that if their 8 hours is within the spread of hours 7 a.m. to 5.30 p.m. then they must be day workers.

However, that is not what the award says. In fact the award explicitly makes provision for the case of a day worker who works outside that spread of hours. It makes two provisions - the first provision is in the second proviso to clause 1 (a) (i), where it says :

> "PROVIDED FURTHER that work performed by day workers other than by agreement as prescribed above prior to 7.00 a.m. and after 5.30 p.m. shall be paid for at overtime rates but shall be deemed, for the purposes of this sub-clause, to be part of the employees ordinary hours of work where his ordinary hours of work within the period 7.00 a.m. to 5.30 p.m. in any week, have been less than 37.1/2 or 40 whichever is applicable."

Now that is what the award says. It clearly comprehends the possibility that a day worker will not be working

MR SIMMONDS: the ordinary hours of his employment (or her employment) between the hours of 7 a.m. and 5.30 p.m.

They can clearly be working their ordinary hours outside that time, because the award not only specifically mentions it, it says how they shall be paid. It says also that those hours that they have worked outside the spread of hours, to the extent that they do not add up to 40 or 37.1/2 in a week, shall be counted as ordinary time for the purposes of the clause.

Now that being so and if these people who work Monday to Friday in all other respects are day workers, then they do not become shift workers because they are working after 6 o'clock or after 5 o'clock. They are still day workers, if Mr Sertori's submission is correct.

There is nothing in there that makes them shift workers, because they clearly come within the definition that he is seeking to put before you. So someone who works, for example, as a cleaner between 3 p.m. and 11 p.m., but only works Monday to Friday, does not become a shift worker in Mr Sertori's argument for the reasons that Mr Sertori gives. They must remain as day workers, because they are not (in Mr Sertori's submission) on a roster which regularly includes Saturdays and Sundays.

They are only working Monday to Friday and they must therefore be paid in accordance with clause 1 (a) - not a shift allowance. That is, be paid overtime for all of those hours after 5.30 p.m. It just does not flow from his argument. It does not produce absurdities, it produces that result that may be absurd from the point of view of the employer who has to pay those rates.

I put it to you that that is not the correct interpretation of the award.

MR SIMMONDS: The correct interpretation of the award is to ask whether those people are working on a roster which regularly includes Saturdays and Sundays and if they are then clause 4 and all that flows from it applies.

Now I do not wish to go over the concept of a de facto roster any more, but the reality is that the employers have got a choice. They can accept that if the work extends over the 7 days of the week, then all of the employees doing that work must be treated as shift workers in accordance with clause 4. Alternatively, if the work does not extend over the 7 days of the week, then they are day workers and must be paid for all work outside the spread of hours in accordance with the award, unless there is an agreement to the contrary.

The only other alternative (it is not the alternative that Mr Sertori puts) is that when there is no piece of paper up and they are not rotating with others on weekends, then those who work outside the spread of hours cannot be treated as shift workers. They must be treated as day workers working outside the spread of hours and be treated and paid in accordance with clause 1 (a) (i) and the second proviso.

That is the only alternative.

On the question of the casuals, I think Mr Sertori gave you a somewhat misleading answer. The employer does not have a lot of scope. It is not possible, in my submission, for him or her to employ casuals on the weekends other than on a relief basis.

If you go to clause 37, a casual employee is defined there on page 31.

PRESIDENT: Sub-clause (u) is it?

MR SIMMONDS: Correct, yes.

> "A `casual employee´ is a person who either" (and it is a fairly limited range of options) "(i) relieves a full-time or part-time employee, or (ii) is engaged temporarily for specific duties for a period not exceeding 8 weeks."

So the casual relieves someone on a weekend (and that employee could be a shift worker) otherwise he is on duties that do not go beyond the 8 weeks.

PRESIDENT: If the employee who is said to be a shift worker because he regularly works on weekends, is for some reason absent, he could be replaced by a casual who would be a day worker.

MR SIMMONDS: By a casual. That is correct, yes, or who would be - goodness knows.

I mean, I do not think that matter is before us today and I do not know where that leads us. The question would be whether they are working ordinary time as a casual, because clause 3, `Casual Employees´ says:

> "A casual employee (as defined) for working ordinary time shall be paid per hour ..."

and so on.

PRESIDENT: Well what is the ordinary time for casuals?

MR SIMMONDS: I do not know. As I say I do not know that that helps us in this matter, because it clearly depends on whether that person whom they are relieving is a shift worker or a day worker working outside the spread of hours.

PRESIDENT: Well I think you then go to the definition of a full-time employee. I think the answer is to be found there.

MR SIMMONDS: There are a couple of other matters that Mr Sertori put to you. It was his argument that you create the roster and in turn you create the shift worker. He said that what you should do first is determine whether a person is a shift worker and then create the roster.

I think that is how I understand him.

PRESIDENT: Well that was the note that I had.

MR SIMMONDS: In fact, the definition itself talks about a roster. He denies that it is a `chicken and the egg´ situation. I put it to you that it is and you cannot escape it. The shift worker is someone whose work is performed in accordance with a roster and so you cannot go about it the way that Mr Sertori would seek to go. Of course that is central to his argument.

If you assume that the two are not intertwined and that somehow the definition of a shift worker derives from something else other than the existence of a roster, or other than an examination of the work that is done, then you have got to go and say, "Well anyone who works between Monday and Friday is a day worker and anyone who works on weekends (and presumably outside the spread of hours, although I challenge that argument) is a shift worker."

All it takes, is for the employer to introduce a non-rotating roster (which I submit is what has happened in these cases) and say to the people who are not rotating but working Monday to Friday : "You are no longer on a roster. We have taken you off that roster, having just created it." They then say to those people who are on the weekend, "You are shift workers." Then they set the whole thing up to suit themselves.

I think that is clearly not what the award intends. The award (and I believe the words of the award are quite clear, frankly) says that if

MR SIMMONDS: there is a person working in accordance with a roster which regularly includes Saturdays and Sundays, he is therefore a shift worker. The questions of rosters and so on do come into it. It is not enough just to say "Well is there a roster or is there not?" You cannot rely simply on the existence of a piece of paper, because the piece of paper may not exist.

The employer may be breaching the award by not providing the roster, but that does not mean that the people are not shift workers. Yet that is what Mr Sertori's submission is; that because this piece of paper is not up there, therefore they are not shift workers. Take away the roster and you have not got shift workers.

So if someone walks into the hospital and takes down the piece of paper that has been pinned up and which lists the names of the people, when they work and when they are required to work, those people suddenly cease being shift workers and become something else.

I do not believe that that really is a serious submission. It cannot be. Yet that was what the submission was, that one must find the roster before one finds the shift worker.

The comment was made that the interpretation that we were seeking to place on the award was contrary to the overwhelming practice. There is no evidence of that. It is my assertion equally that that is just not true. I think I gave some figures, but if I did not I give them now.

There were some 27 people working in a "day work" properly shift work situation at St. Vincent's Hospital, whom we believe, were wrongly categorized. There are 6 at St. Luke's. There may be others.

MR SIMMONDS: All I am seeking to do (and frankly I do not think this has got any relevance) is rebut the point. Maybe it is a majority but it is certainly not overwhelming practice.

Of course I make the point, that even if it is true as far as this award goes, this award comes from another award and that is the Hospital Employees' (Public Hospitals) Award, where the definition of shift worker is precisely the same. That is, the definition of shift worker within the `shift work' clause is precisely the same. I would have to say that the overwhelming number of employees covered by this sort of clause are not being treated in the way in which Mr Sertori suggests.

As to the cost of half an hour's overtime being an enormous cost - well be that as it may. I would have to put it to you, that it is not of itself offensive to the public interest, if the interpretation that we are seeking to have placed on the award is put on the award; that that be paid. Because clearly the employer has an obligation to comply with the award. If the award (as I put to you last time) says what we submit it says (and incidentally what a number of employers accept that it says) then the employers who have not been applying the award correctly have been in breach of the law.

I do not believe it is offensive for those employers to then pay the back pay that they should be paying. In fact I would submit that it is quite the reverse. For the employers to escape their liabilities because of their wrong approach would be offensive to the public interest. It is in the public interest that the law of the land be upheld and the award is the law of the land.

However, I do not make any more of it than that. I think I did not press the question of retrospectivity too

MR SIMMONDS: strongly on the first occasion and I certainly do not press it too strongly now, but I make these comments more because I did not want it to be thought that I accepted what Mr Sertori was saying on the matter. In fact I think the reverse is the case.

I think that concludes my reply. I could go right back over the case but I do not think any good purpose can be served by that.

I certainly do not want to become involved in a slanging-match either, but I do just wish to correct the record. There was never any position put by me (I thought) about the meeting on the 13 March. In fact I think I admitted that that was called off and delayed at our request.

The particular reference was to a meeting on the 24 April, which was called off. Certainly, if I made some play of the meeting of the 13 March, Mr Sertori is quite correct, but it was the meeting of the 24 April that was called off, because at that stage Mr Fitzgerald claimed he had not finalized the position of the Chamber of Industries regarding the day worker and shift worker.

Then I was subsequently advised by him that the Chamber of Industries, under instructions, would not accept our interpretation. He then (as Mr Sertori stated) said that they were prepared to continue discussions and were not seeking to create the delays in the discussions. Of course the discussions would have been pointless, given that what we were seeking to do was to have flow on to people covered by this award, what had happened and is still happening in the public sector. That is, the 38-hour week for day workers.

We could not negotiate until we could determine just who the day workers were. It is as simple as that.

MR SIMMONDS: Now Mr Sertori said that it was not the intention of the Chamber of Industries to delay that 38-hour week matter, but whether it was the intention or not that was the effect of it.

As to the question of the T.C.I.'s impertinence to this authority, they were seeking a full week adjournment of the matter, or at least it amounted to that. However, their presence here today shows that maybe they were being a bit half-hearted in that approach for a full week adjournment anyhow.

Sir, I do not believe it is going to be easy for you to determine this matter.

PRESIDENT: Well we agree on one thing Mr Simmonds.

MR SIMMONDS: I am sure. It is very simple to me, but equally the position is not clear. I admitted that there was some ambiguity in the matter before, but Mr Sertori of course is arguing that there is no ambiguity, it is as clear as crystal. It is my submission that there is some ambiguity there. I believe that the authorities are there for you to go to the intention of the award makers when that ambiguity exists.

As I said on the last occasion, you are in a unique position in this respect. You are able to go to the intention of the award makers, because the clauses here are a direct flow-on from the clauses in the Hospital Employees' (Public Hospitals) Principal Award, in which you (in earlier days and with a different hat) have played some considerable part. I think your own intentions were not unimportant in the clause that finally came out.

PRESIDENT: I accept no responsibility whatever for the proviso to (j) however.

MR SIMMONDS: I have already made the submission that I think that does not have any particular bearing on this case because of the overriding words in clause 4, from which the shift work conditions are derived. For the purposes of clause 4 the definition is the one that is there.

PRESIDENT: One could only speculate as to what payment might be attracted in the case where an employee is working part of a shift roster, but for some reason or another he works 9 Saturdays and 10 Sundays in a leave year. He is not a shift worker for the purposes of annual leave.

MR SIMMONDS: So he would not get the extra week's leave.

PRESIDENT: It is a curious clause - a curious proviso.

MR SIMMONDS: Well it is not on its own. I mean, there are other awards with that sort of restriction in them. It is quite arbitrary and it does not have any `shading in' provision, that is the problem with it.

Mind you I would point out that it says "rostered to work", it does not require them to work. They have got to be rostered to work on not less than 10 Saturdays and 10 Sundays.

PRESIDENT: However, they would be shift workers for the purposes of payment, not shift workers for the purposes of ...

MR SIMMONDS: The additional week's annual leave.

PRESIDENT: Yes. Notwithstanding that they might be part of a roster that for one reason or another did not include them on 20 weekends and probably did not include many others.

MR SIMMONDS: It would have to include at least some.

PRESIDENT: Yes, but it may not include all for a total of ...

MR SIMMONDS: Well they would all have to work on weekends, unless all the employees concerned desired otherwise. That being the case it would be possible that they did not, in the process of rotation, pick up 10 Saturdays and 10 Sundays in a year. That could happen. It has not in my experience.

If the Commission pleases.

PRESIDENT: Yes, thank you.

MR IMLACH: If the Commission pleases Mr President ...

PRESIDENT: Mr Imlach you are not an applicant are you?

MR IMLACH: No, Mr President.

PRESIDENT: Then you do not have a right of reply Mr Imlach.

I will reserve my decision gentlemen.

DECISION RESERVED