

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No 628 of 1986

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

re `Cup Day`

PRESIDENT

HOBART, 18 February 1987

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: I'll take appearances, thank you.

MR HOLDEN: I appear on behalf of the Hospital Employees' Federation of Australia Tasmania No. 2 Branch, **HOLDEN, D.**

PRESIDENT: Thank you, Mr Holden.

MR HEAPY: On behalf of the Royal Australian Nursing Federation, Tasmanian Branch, **HEAPY, D.**

PRESIDENT: Thank you, Mr Heapy.

MR FITZGERALD: If the Commission pleases, I appear on behalf of the Tasmanian Chamber of Industries, **FITZGERALD, W.J.**

PRESIDENT: Thank you, Mr Fitzgerald.

Yes, Mr Holden.

MR HOLDEN: Thank you, Mr President. The application which has been lodged on behalf of the Hospital Employees' Federation by the secretary appears to have a minor deficiency in that on the attachment headed 'Hospitals Award', it refers, firstly, to 'Section 1' and then goes on to 'Section 2' Where it says 'Section 2', it should in actual fact read 'Section 3'.

PRESIDENT: I'd already picked that up, Mr Holden.

MR HOLDEN: I see.

Before proceeding, I should say that having read the application and perused the award in some depth since then, it would seem to me that there is a difference between section 1 and III of this award, in that whilst the clauses are generally like for like and I'll deal firstly with clause 13 in section III, subsection (d) which concludes with the words:

"... therefore making a total of 11.1/2 paid public holidays per year."

As compared to clause 8 in Section 1

MR HOLDEN: sub-clause (d) which concludes with the words:

"... therefore making a total of 11 paid public holidays per year."

It would seem to me that our application in terms of section 1 may not be very well spelt out and in fact it would seem to me we shouldn't pursue it in respect of section 1 at this stage. We should seek an award variation in respect of clause 8, subsection (d) of section 1 if we wish to enjoy the half day Cup holiday in respect of that section.

PRESIDENT: Do you think that would be the way to go, Mr Holden, or do you think it is simply a drafting error?

MR HOLDEN: I'm inclined to think it's a drafting error, but having read your guidelines in T.30 of 1985, I understood those to say that drafting errors can only be varied by other methods than through interpretations.

PRESIDENT: Well, that generally speaking is correct, Mr Holden, but if there is an obvious error, then I think if you read section 43 of the Act it's open to the Commission to correct that error. Of course the Commission would not vary an award on the basis of merit, but I guess we can all add up.

I haven't added them up, but if one adds up those holidays nominated in section 8 and they come to 11.1/2 ...

MR FITZGERALD: Of course that's not always the case though, Mr President, because when Anzac Day falls on a Saturday it could in fact be 10.1/2.

PRESIDENT: Then, perhaps there's a deficiency in section III is there? - `Therefore making 10.1/2 or 11.1/2`.

MR HOLDEN: Excuse me. Section? Sorry, I won't get into that argument.

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PRESIDENT - HOLDEN - FITZGERALD

MR HOLDEN: However, I am quite prepared to leave that aspect of it in the Commission's hands and state that notwithstanding that difference, our claim in respect of section III still stands up in terms of the 11.1/2 public holidays.

PRESIDENT: Yes. Just while we are on that, would there be any real reason for reference to 11 only paid holidays being included in section 1 applicable to private hospitals, Mr Fitzgerald and 11.1/2 in that section referring to employees ... ?

MR FITZGERALD: I can't think of any good reason.

PRESIDENT: It may well be that it's simply a printer's error.

MR FITZGERALD: It could be. But once again the clause of which I think you're probably aware, exists in many other awards of this Commission. It doesn't, in my view, have a great deal of a valid basis in any event because the situation I mentioned a moment ago of Anzac Day falling on a Saturday or a Sunday where it could in fact be 10 days. So, I'm not happy with that sort of provision being in any sort of award because I think it's nonsensical.

MR HOLDEN: If I may, Mr President, I really think it's been an oversight on the part of the drafters of the award, rather than the printers because reference to the Public Hospitals Award also makes reference to 11, whereas in actual fact there really is a clear intent that there should be 11.1/2 when the non-Anzac Day provision, which Mr Fitzgerald alludes to (when Anzac Day falls through the week) people in the Public Hospitals Award do indeed receive 11.1/2 public holidays even though the award does make reference to only 11.

So it seems to me that maybe section (c) has been varied at a different time to section 1 in the Hospitals Award and of course different to the

MR HOLDEN: variation in the Public Hospitals Award and someone in doing the drafting of section (c) has picked up the 11.1/2, whereas they have failed to pick it up in the others.

PRESIDENT: That may very well be the reason, Mr Holden. However, having noted that, if you would now proceed to prosecute your application.

MR HOLDEN: Thank you very much, Mr President.

The matter is before the Commission as the two parties, namely the H.E.F. No. 1 and the Tasmanian Chamber of Industries representing nursing homes in the Ulverstone area, cannot agree on this matter of interpretation of the meaning of clause 13, section III Part II of the Hospitals Award.

The specific clause in the award appears in the copy I have, Part II Conditions, No. 2 of 1984 at page 55 and it is, in essence, a standard clause covering public holidays and which includes a half-day holiday for Cup Day. In fact it states Cup Day followed in brackets by 1/2 day. The final three lines of that sub-clause also contain the words - to make it clearer I'll read the whole of sub-clause (a):

"All employees other than shiftworkers, casual employees and part-time employees engaged to work less than 20 hours per week shall be entitled to the following holidays without deductions from their weekly wages - Christmas Day, Boxing Day, New Year's Day, Australia Day, Cup Day (half day) Hobart Regatta Day (South of Oatlands) Eight Hours' Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Show Day (as defined) and the first Monday in November in those districts where Hobart

MR HOLDEN:

Regatta Day is not observed, and any and such other day that may be observed in the locality in lieu of any of the aforementioned holidays."

I think that aspect has some importance - 'in lieu of any of the aforementioned holidays if it is observed in the locality.' And it will be my submission that the Ulverstone mid-week trotting meeting is observed in the Ulverstone area.

It is interesting that almost the same clause does appear in section 1 Part II and it would of course be picked up then by section 2 Part III by the general conditions clause, subject of course to the point that we have previously made about the 11 or 11.1/2 days.

The same clause appears in the Hospital Employees (Public Hospitals) Award as clause 12.AE. at page 64 of the award I have, which is No. 1 of 1986 (Consolidated) and it's well known and accepted that a nexus exists between these two awards as conceded by my friend, Mr Fitzgerald, in the case which became known as T.10 of '86 and I now seek to tender a copy of one page of the transcript of that matter in which Mr ...

MR FITZGERALD:

Well, to prevent that occurring, sir. If Mr Holden is just attempting to establish a nexus, we would concede at this stage that there is a nexus between the public sector and private sector awards in the hospital area.

PRESIDENT:

Was that the purpose of the exhibit, Mr Holden?

MR HOLDEN:

Just to establish that there is in fact such a nexus.

PRESIDENT:

Does that mean that the private sector employees enjoy all the public sector holidays, like, Easter Tuesday too, Mr Fitzgerald?

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PRESIDENT - HOLDEN - FITZGERALD

MR FITZGERALD: No, not necessarily, sir. We are talking about a general nexus. It's not a precise nexus by any means. I think in respect to the public holidays and particularly in respect to the holiday in dispute, it'll become clear that in respect to this interpretation that in our view it's not a holiday which is a Cup Day as such. It's other than a Cup Day.

PRESIDENT: Yes.

MR FITZGERALD: So, I think if I could leave my answer to that by my submissions later, sir, it'll become very clear what the position is.

PRESIDENT: You accept that, generally speaking, that there has been an established nexus certainly as to wage rates.

MR FITZGERALD: Yes. Certainly, as to wage rates and generally as to conditions but not a precise nexus as such, sir.

PRESIDENT: Does that satisfy you, Mr Holden?

MR HOLDEN:

I'm not totally sure because it can be interpreted to mean a number of things and rather than tender the exhibit I'll now go on to state that of course that nexus was recognized by the Full Bench in T.10 of 1985 when they, in quoting Mr Fitzgerald on page 18 of their decision stated:

"He further submitted that in view of the established nexus between `public` and `private` sector nursing salaries this case was of prime importance ..."

Having established that I would now seek to tender as an exhibit a circular of the Department of Health Services.

PRESIDENT:

We will mark this one Exhibit A.

MR HOLDEN:

It is, as can be seen, a circular from the Department of Health over the signature of the then Acting Director-General of Health Services and it's classified as `Industrial Circular No. 90,` dated `14th January 1983,` and the subject is the `Cup Day` half day holiday.

It commences with the following:

"Clause 8, Section C," (which I think may be an error, I think it should read Section 3), "Part II of the Hospitals Award provides an entitlement to a `Cup Day` (half day)."

In effect this is a circular about the matter that is currently before this Commission.

It goes on to say:

"The Secretary for Labour and Industry advises that the provision for a half holiday on Cup Day is applicable only in those areas for which such a holiday has been declared under the Bank Holidays Act ..."

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PRESIDENT - HOLDEN

MR HOLDEN:

In effect the Acting Director-General of Health Services is saying that he consulted the authority which were vested with the authority to give interpretations and in fact enforce awards way back in 1982, and that authority provided advice. Acting on that advice the Director-General of Health Services then said:

"In accordance with this ruling the following areas receive a half day holiday on the appropriate dates:"

It lists Hobart then Launceston, and then it goes on and states:

"Ulverstone Trotting Club
Mid-Week Meeting - Wednesday,
5th January 1983".

It's therefore clear that in accordance with that circular employees covered by the Hospitals Award ... And if one looks at the Hospitals Award - I realize that the Director is addressing himself to section C or 3 - 'employees in establishments providing care for aged persons'. We also have in that award section 2 'Employees of Public Hospitals.' And we have already established that there are 11.1/2 days public holidays granted in the public area.

Based on the fact that the Secretary for Labour and Industry was the person under the Industrial Relations Act who provided advice and interpretations of the award, it would seem to me that as this Commission picked up the awards of the previous authority that this Commission has some responsibility in interpreting awards to follow previous interpretations that were given under the previous Act.

Whilst I realize that that may not be a legally binding responsibility, it is most certainly one which should hold a strong moral persuasion.

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HOLDEN

MR HOLDEN: It is not my intention, on this issue, to provide an argument as to merit, again having read the previous comments.

PRESIDENT: That will save us all some time, Mr Holden.

MR HOLDEN: However, I would like to look to T.30 of 1985, at page 8 ...

PRESIDENT: We're talking about social trainers, are we?

MR HOLDEN: Yes. It seems to me that what I have done is made an error in the statement I wrote down, as I did this in a very great hurry and didn't have time to prepare and I really don't see the relevance of the matter I'm talking about on page 8 of that transcript.

However, I have now woken up to what I have done. Instead of T.30 I should be looking at T.530 of '86.

PRESIDENT: At page 8?

MR HOLDEN: 8 - the last paragraph.

PRESIDENT: I don't know why my clerk happens to have all these references here, but she does.

...

MR HOLDEN: The paragraph commences:

"It is clear therefore that the award maker, in prescribing a fixed 20% loading for part-time and casual employees who are excluded from annual leave, public holidays and sick leave intended that ... "

And those words I believe are important, 'intended that' because I think the clear import of the words of clause 13, subsection (d) which refer to 11.1/2 days holiday show that it was intended that under normal circumstances employees would

MR HOLDEN:

enjoy 11.1/2 days holiday.

It then goes on:

"... mutatis mutandis, each class of employee (full-time, part-time or casual) should be treated as similarly as possible."

And again the question of similar treatment is what the existence of the Industrial Relations Commission is all about, that equity and justice is dispensed on an even-handed basis to all employees and to all employers.

The current situation is that in the Ulverstone area, public hospital employees are receiving 11.1/2 days holiday, as are many other employees. In fact it is generally recognized in the area as a holiday and that aspect of the matter is taken up in the last 3 lines of sub-clause (a) of clause 13, section III which makes the reference:

"... or such other day as may be observed in the locality in lieu of any of the aforementioned holidays."

And it is my submission that this Commission has the right to determine that 'Ulverstone Mid-Week Trotting Meeting' is a holiday observed in the locality. It may well be observed in lieu of Anzac Day if necessary but if it's observed it is observed and the reason it's observed in this case is it is effectively in lieu of Cup Day and I think the Director-General's circular should go a long way towards proving that. It certainly applies in public hospitals; it certainly applies in places like the library, the police, local government, councils, shops ...

PRESIDENT:

You're saying that public hospital employees enjoy the day in Ulverstone - that's at the Ulverstone District

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PRESIDENT - HOLDEN

PRESIDENT: Hospital?

MR HOLDEN: Yes.

PRESIDENT: Well then, who doesn't get it?

MR HOLDEN: People in private nursing homes ...

PRESIDENT: I see.

MR HOLDEN: I can't name them; I'm sure Mr Fitzgerald can but there are, I think, to the best of my knowledge, 2 private nursing homes in the area who do not give their employees the holiday even though the award talks of 11.1/2 holidays and the entitlement to have days in lieu.

I really don't wish to go into the matter any further than that. I think it's quite plain on those facts. I would ask that under section 43(1)(a) of the Act the Commission makes a retrospective ruling in this matter.

As you are well aware that the matter was brought before the Commission in a hurry, primarily because of delays in answering correspondence by the Chamber of Industries which was conceded in discussions that they had had not realized that the holiday was to fall shortly after Christmas. I think they were of the view that it fell at a much later stage.

MR HOLDEN:

So, in effect, the only answer we got came about as a result of my contacting the Chamber of Industry, and asking them to speed up their replies. I must admit, at that stage, in our deluded state, we were of the view that there would not be an argument about it and it would be conceded. However, we were soon disabused of that situation and we tried to get it before the Commission (as I think you'll recall) - it may have been 22/23 December. And it was impossible to bring it on before the appropriate date, for reasons which I understand.

I would therefore request that, in making a decision, that the Commission should state that people in the area, covered by this section of the award, (that's section III and section I if you are prepared to include that in your decision) should receive the benefit of the penalty payment which would have applied to them on that day because, of course, the nursing homes would work on that day as normal, but those people who would have worked, had it have been a holiday, would of course have received penalty rates; at present they haven't. And I think justice and equity demands that they should receive the penalty rate.

PRESIDENT:

Are you able to assist me Mr Holden, by producing or informing me authoritatively, that the (what's it called?) the Ulverstone mid-week trotting meeting was, in fact, observed this year? Was it gazetted again?

MR HOLDEN:

Yes, I am. I do have with me a copy of the Government Gazette.

PRESIDENT:

If you would give me ...

MR FITZGERALD:

If it will assist, actually Mr President I do intend to use an exhibit of that gazette which every party will have a copy of, so ...

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PRESIDENT - HOLDEN - FITZGERALD

MR HOLDEN: I believe that Mr Heapy will submit it, however, for the Commission's benefit it is the Tasmanian Government Gazette of Wednesday, 17 December, 1986, No. 18909 appearing at pages 1954 and 1955, the matter of cup days and, in fact, the Ulverstone mid-week trotting meeting are addressed.

PRESIDENT: Yes. Does it stipulate the areas, the locations?

MR HOLDEN: Yes, it's quite explicit ...

PRESIDENT: It would be convenient to, in fact, have that tendered now. Whoever tenders it it will be Exhibit B. because I would like to examine it now.

MR HOLDEN: If you look to the page 1954, the right-hand column, the second entry headed No. 231, it states that a bank holiday is proclaimed and is to occur on Tuesday, 6 January, 1987, but it is restricted, purely and simply, to the Municipality of Ulverstone on the occasion of the `Ulverstone Trotting Club Mid-Week Meeting`. It's interesting to look through the other entries. For example, the `Hobart Cup Day Meeting` is mentioned on page 1955, the top entry in the right-hand column which lists a large number of areas which shall be subject to that holiday. In the left-hand column, the second entry, No. 325, it goes to the granting of a holiday on the occasion of the `Launceston Cup`. And, again, there are a large number of municipalities which are specified. It's ...

PRESIDENT: But what about the Bass Strait Islands, Mr Holden? How do they fare?

MR HOLDEN: To be quite honest, I have to say I don't know, except that there is a Bank Holiday provided in entry 324.

PRESIDENT: Yes.

MR HOLDEN: Tuesday, 10 March, which talks of

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PRESIDENT - HOLDEN

MR HOLDEN: King Island. And I would assume they probably observe a half-day holiday there.

PRESIDENT: They may have that in addition to the Launceston Show.

MR HOLDEN: Oh, sorry. No, that would be a ... well, I have not been involved in the past as you well know, and if the King Island people are enjoying Launceston Show Day, I'd be interested to know what happens on ...

PRESIDENT: On the King Island Show Day.

MR HOLDEN: ... on the annual show day of the King Island Show. I must admit I'm unable to give you an answer at this point in time as to that matter.

However, the system of the award and the proper interpretation of the award is that I believe employees are entitled to 11.1/2 days public holiday. I think that's quite clear. I think it's clear in the drafting.

There is provision in the clause to observe days in lieu of nominated days. That appears in sub-clause (a). And it therefore seems clear to me that the holiday should be granted to the employees in the area and it should be, most certainly, granted to apply retrospectively to this year. We're not going to worry about the fact that we believe it should have applied back from 1983 when it came into vogue in the public hospitals' area. And, of course, we'd probably be prevented from pursuing that under the Act anyway. Whilst the interpretive powers may go quite widely, I think there's probably a limit on that sort of retrospectivity.

Thank you.

PRESIDENT: Yes, thank you, Mr Holden.

Mr Heapy.

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PRESIDENT - HOLDEN

MR HEAPY:

If the Commission pleases.

Thank you, Mr President.

Mr President, the R.A.N.F. Tasmanian Branch's interpretation of the Hospitals Award, Part II, 'CONDITIONS', section 1, 'Staff Employed in Private Hospitals', clause 8, sub-clause (a), lists the holidays:

"All employees, other than shift workers, et cetera... "

It's already been explained by Mr Holden. I don't know if you want me to go through it again.

PRESIDENT:

Well, you realize that that's not before me at the moment.

MR HEAPY:

What I want to touch on is the section on the Bank Holidays Act, sir.

PRESIDENT:

Yes, all right, well you carry on.

MR HEAPY:

If you want me to go right through it I shall.

PRESIDENT:

No, you're referring to public holidays - the public hospitals.

MR HEAPY:

As listed in the award.

PRESIDENT:

Yes.

MR HEAPY:

And at the bottom of the award:

"... or such other day as may be observed in the locality in lieu of ..."

And I think that's the operative word.

"... in any of the aforementioned holidays."

Now, if you look at section 11 of the Bank Holidays Act, which I quote, it says:-

"When in ... "

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PRESIDENT - HEAPY

MR HEAPY:

And of course it's been changed because of the transitory provisions of the Industrial Relations Act of course.

"When in any Tasmanian Industrial Commission determination or industrial agreement or in any agreement relating to work made either before or after the commencement of this Act, reference is made to a public holiday or a bank holiday, such reference shall be deemed to relate to the day on which such holidays are to be observed."

We go on to subsection 2, I quote. It says:-

"Where in any Tasmanian Industrial Commission determination or industrial agreement or in any agreement relating to work made either before or after the commencement of this Act, any references made to ..."

And I quote the words quite specifically.

"... a day observed in lieu of ..."

... and it goes on.

"... or in substitution for any bank holiday (whether such bank holiday is therein referred to as a holiday) or a public holiday or, in fact, a bank holiday or a day on which the bank holiday, whether such holiday therein referred to as a holiday, public holiday or bank holiday is generally or publicly observed either throughout the State or in any locality, such reference shall be read and construed

MR HEAPY:

as reference to the day on which such bank holiday is publicly observed."

What I'm getting to there, sir, is that in accordance with the last part of clause 13, wherein it says:-

"... in lieu of any of the aforementioned holidays."

I believe the Bank Holidays Act is quite specific, and bearing in mind (there's already been discussion about the gazettal of this specific Ulverstone trotting club mid-week meeting). I believe, on behalf of the Royal Australian Nursing Federation, that employees in the area of the Ulverstone area should enjoy this holiday in lieu of the cup day elsewhere specified in the award.

PRESIDENT:

Mr Heapy, what is the position in relation to the, say, the Smithton Hospital and some of those smaller district hospitals? Do they enjoy a cup day? The award is quite clear. It says:-

"... all employees covered by those sections ... "

It doesn't limit it.

MR HEAPY:

No, sir, it doesn't.

MR HEAPY: I haven't got a copy of the gazettal of the Burnie Cup Day, sir, in front of me.

PRESIDENT: There is a Burnie Cup, is there?

MR HEAPY: There is a Burnie Cup Day which is recognized. So, I'm unable to inform the Commission of that.

PRESIDENT: Well, what I'm really asking you, is it possible that it's not only people in Ulverstone employed in private nursing establishments or homes that care for the aged who are not enjoying 11.1/2 public holidays?

MR HEAPY: That could be well so, sir. I'm unaware of that situation at this stage.

I'll just go through the Cup Days as I understand it, in relation to the submission by Mr Holden in respect to the public sector area and I quote New Year's Day, Ulverstone Trotting Day, Devonport Cup (and it's quite specific - Devonport municipality and that is gazetted each year in accordance with the Bank Holidays Act under the award) Mount Lyell Picnic Day (for that area) Australia Day, Hobart Cup Day for those areas south of Oatlands (which is nominated in clause 13) 8 Hour Day, King Island Show Day, Good Friday, Easter Monday, and Bank Holiday (just for the public sector) on the Tuesday (so that's an exclusion in respect to the private sector), Anzac Day (that's the one - whether or not it falls on a Saturday or Sunday, so I won't bore you with that one).

PRESIDENT: Some awards give the next working day.

MR HEAPY: Yes. Then you've got Campbell Town Show Day (and that's Campbell Town and Ross municipalities), Queen's Birthday (which is Monday 8 June), Circular Head Show Day (which is usually the first Monday in September), Burnie Show Day (Friday 2 October).

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PRESIDENT - HEAPY

MR HEAPY: This is for the purposes of 1987, sir, by the way.

PRESIDENT: Yes. Thank you.

MR HEAPY: Launceston Show Day, (8 October), Flinders Show Day, (Friday 6 October), Hobart Show Day (Thursday 22 October), Recreation Day (which is the one that is in lieu of for the north - 2 November), Devonport Show Day (Friday 27 November), Christmas Day (Friday 25 December), Boxing Day (Saturday 26 December) and a Bank Holiday in lieu of Boxing Day (Monday 28 December).

PRESIDENT: Did you read the Ulverstone mid-week trotting club?

MR HEAPY: Yes. Second one, sir.

PRESIDENT: Second one, was it?

MR HEAPY: Yes. New Year's Day, Ulverstone Trotting Day Tuesday 6 January.

PRESIDENT: 6 January.

MR HEAPY: For purposes of 1987.

That would be our interpretation on ...

PRESIDENT: And where did you get that information from?

MR HEAPY: Tasmanian Public Service Association.

PRESIDENT: Is that an authoritative document?

MR HEAPY: Well, as far as I'm aware, sir. Of course when this document was produced, it was produced prior to the gazetting, which I've now checked and all those days have been verified in the gazette but I didn't bring all that information with me. I could make it available to the Commission.

PRESIDENT: I thought you may have obtained that information from the Department of Labour and Industry or somewhere else.

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PRESIDENT - HEAPY

MR HEAPY: No. The previous organization I was with used to prepare it for members' information, sir.

PRESIDENT: Yes. For the planner.

MR HEAPY: With the planner to make sure that everyone knew when the holidays were. That would be our submission, sir.

PRESIDENT: Yes, thank you. What do you say about operative date?

MR HEAPY: We would agree with the operative date submitted by the H.E.F. No. 2, sir, bearing in mind the day is past.

PRESIDENT: Yes. Very well, thank you. Now, Mr Fitzgerald.

MR FITZGERALD: Yes. I wonder if I just may borrow the rostrum for one moment please.

Yes, thank you, Mr President. We seem to have a habit, as you've noted in previous decisions - section 43 decisions - of appearing before you in respect of this award.

I hope that the warning in the last decision in respect of this award is heeded, but it seems that there needs to be some redrafting of the award generally and it's something which the Chamber would be very interested in getting involved with for the future.

I believe that this application before you, sir, is one which, in my submission, is totally misdirected as the application - not only the application itself but the submissions made by both Mr Holden and Mr Heapy were those based - well, ones based solely on merit and it seeks to extend a number of public holidays available to employees in the Ulverstone area, subject to the award.

I believe, sir, that the application would have been more appropriately handled by an application to vary the

MR FITZGERALD:

award, rather than a section 43 application.

However, submissions have been made and there is an obligation on me to rebut those submissions and I will do so.

The application itself - in looking at the application - seeks recognition that employees in the Ulverstone area should receive the same number of public holidays as employees in the other areas of the State.

In my submission, this aspect of the application goes solely and exclusively to merit and would, in my submission as I indicated earlier, be more aptly handled by an application to vary the award, rather than a section 43 application.

My views are echoed by yourself in decision T.530 of 1986 - a recently published decision which we referred to earlier, where you said in that decision - that was the one of course relating to payment of part-time and casual employees under this award. You said and I quote you:

"My own view is that interpretations achieve little because they are not based upon merit. This award is notorious for its loose drafting. These defects should be remedied by agreement or by application to vary. Interpretations frequently create disputes but rarely settle them."

And I echo your views there, sir. I believe that the application before you is one which I think is a classic case encompassed in that statement, but nevertheless it's proceeding this way and as I indicated, will attempt to rebut those submissions of the applicant unions.

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FITZGERALD

MR FITZGERALD:

I'd like, before proceeding with the principal part of my submission, refer to some of the statements made, particularly by Mr Holden, but also by Mr Heapy.

I would like to refer particularly to Exhibit A. in the first instance, which was a memorandum, or the hospital circular. That of course relates to - the public sector has no application whatsoever to the private sector. Mr Holden in his submission relies on the nexus and quotes me from a previous submission made in T. No. 10 of 1985.

However, it is my submission that any submissions by Mr Holden going to nexus is one based solely on merit, not on the construction of the award itself.

I'd like also to refer to the award and particularly the significance placed on the last part of the subject clause in dispute and I quote that:

"... or such other day as may be observed in the locality in lieu of any of the aforementioned holidays."

Now that seems to go hand-in-hand with the reference made by Mr Heapy, to the Bank Holidays Act, where there seems to be almost - section 11 where he quoted in full. I assume you have that with you, sir. It seems to be almost a direct take from the Bank Holidays Act. Now, Mr Holden is suggesting that - and as Mr Heapy - it seemed to be a bald assertion that Ulverstone mid-week trotting day is awarded in lieu of Cup Day.

Now, I would submit, sir, that there is no basis for that assertion whatsoever.

PRESIDENT:

Then what is `Cup Day`?

MR FITZGERALD:

`Cup Day` is, in my submission,

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PRESIDENT - FITZGERALD

MR FITZGERALD:

sir, those days are recognized as a true `Cup Day`, so named, which would include, to my knowledge, the Hobart, Launceston and Devonport Cups. I was unaware that there was a Burnie cup day.

Now, I think it will become very clear, sir, in my submissions later, that it is very hard to construe a mid-week trotting meeting in the same vein as you would construe a Cup meeting and I'll talk about that later, sir.

PRESIDENT:

It's a gala horse race though, isn't it?

MR FITZGERALD:

A Cup Day - the `Cup`?

Well, I would see it - and I have sought advice from one of my members, being the Tasmanian Racing Club - and they indicate that `Cup Day` is their special premier event of the year - of the racing calendar year.

It is distinguishable from any other racing meetings which is conducted during that year and it will be my submission later, sir, that the Ulverstone mid-week trotting club meeting is not distinguishable from any other meeting that club holds during that year and I would like to make more submissions on that point later, sir, but what I dispute is the interpretation of those words and the intent of the Bank Holidays Act - those words, `or such other day as may be observed in the locality in lieu of any of the aforementioned holidays`.

Now, what I believe that is intending to cover, is the situation which has been mooted for this year, for instance, where the Boxing Day falls on a Saturday and it seems that that will not be observed on the next available Monday or on that day and

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MR FITZGERALD:

there will be awarded a day in lieu -
the day preceding Australia Day.

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MR FITZGERALD:

Now that is my interpretation of that particular clause of the award. There is no basis whatsoever to suggest that Ulverstone Trotting Day is awarded in lieu of Cup Day. And that, I don't believe, is a proper construction of the clause.

I'll make further submissions on that later, sir, but in the first instance I would dispute very strongly that that is what the intent of that particular part of the clause is as coupled with the provisions of the Bank Holidays Act.

Mr Holden also indicated that there's some obligation on this Commission in its new role, under section 43, to follow previous rulings of the Secretary for Labour.

I would submit, sir, that there is no obligation whatsoever to follow those previous rulings. It is a new section within the Act. There are new ground rules set, and I would suggest, sir, that it's for the Commission to make decisions in respect to the relative submissions which are put to it in this instance.

PRESIDENT:

I don't think the Secretary for Labour had the power to interpret awards specifically vested in him, did he?

MR FITZGERALD:

I don't think there was a specific power. Certainly there was some acceptance as an informal process, but no, there was no specific power as there is in you by virtue of section 43.

In any event, sir, Mr Holden refers to the advice of the Secretary for Labour in respect of the Bank Holidays Act in Exhibit A. I would submit, sir, that there is no obligation on you, sir, to follow any advice which the Secretary for Labour may have given in respect of this circular.

The other aspect which I would very

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MR FITZGERALD:

strongly dispute is that it is generally recognized in the Ulverstone area that (or generally observed) the mid-week trotting venue is generally observed by the bulk of the population. It may have been the wrong words which I am using, but it was inferred by Mr Holden that it is generally recognized.

Now I would point out very strongly that the Bank Holidays Act in the first instance only applies to the public sector and to banking institutions. This award of this Commission is the only award which specifies Cup Day as a half-day holiday.

Now every other award in every other industry in this State, in the private sector, makes no reference.

Now in some instances industry does in fact observe the holiday, but without any proof and to make a bald assertion that it is generally observed is, I believe, totally baseless, sir. My instructions are that a large proportion of the private sector in fact do not observe that holiday in the Ulverstone area.

In any event, sir, the onus is on the applicant to produce some tangible proof and in the absence thereof, sir, I would suggest that that statement of Mr Holden's has no basis, sir.

The other point which I'd like to, before getting on to my primary submission, sir, is in relation to the queries which you raise about other areas of this State. And it seems that there are other areas which in fact do not receive the benefit of that half day. And I could name a few and that could be the area of Swansea.

It is clear from the Tasmanian Government Gazette, which was produced as an exhibit, that in

MR FITZGERALD:

respect to Launceston and Hobart Cup Days that that day does not extend to that area. There are other areas which you raised; the Circular Head Municipality. It is my view that they would not also receive the benefit of a Cup Day.

So what I'm saying, sir, it's not automatic that employees receive as stated in this section of the award the 11.1/2 public holidays. If there is no `Cup` conducted in that area then why should an employee receive the benefit of a holiday?

PRESIDENT:

I have an impression, rightly or wrongly, Mr Fitzgerald, (and I'm sure you'll say the wrong impression) that in this day and age the nominated public holidays that appear in Federal and State awards are regarded as additional leisure days. In short, in addition to 4 weeks' annual leave, all employees receive so many so-called public holidays as additional leisure.

Am I right or wrong in that belief?

MR FITZGERALD:

That could be the case, but in respect to a Cup Day the specific purpose why that is granted, I would suggest, sir, would be to allow employees to in fact attend that cup meeting. I would suggest it's not specifically for leisure purposes.

Nevertheless, obviously every person, every employee doesn't go to that particular race meeting, but I would certainly feel it's a wrong impression in respect to Cup Day.

PRESIDENT:

Well, you see when we work out a loading for casual employees we include a component for public holidays - nominated public holidays - and presumably we include Cup Day in that loading.

MR FITZGERALD:

I assume that would be the case, sir, but the loading ... and I know it's been referred to in the matter T. 530. I'm unsure as to whether that

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MR FITZGERALD: is precisely calculated and whether that half day is in fact taken into account, but I assume it would be taken into account.

PRESIDENT: Yes.

The whole thing is something of a mess, isn't it?

MR FITZGERALD: Yes, I believe it is, sir. Yes.

Yes, I think the statements made by you in respect to the award are certainly, in my view, very valid, sir.

So Mr Heapy (just going back further, sir) submitted that Ulverstone Trotting Day is awarded in lieu of Cup Day. Now I assume in lieu of Hobart or Launceston Cup Day, or Burnie or Devonport Cup Day.

Now without any proof supporting that assertion I would submit, sir, that that has no basis whatsoever. And the true interpretation of the last part of the clause in dispute relates to situations which I referred to earlier where, say, for instance, it's decided that Boxing Day this year will not be observed, but will be observed on the day prior to Australia Day the following year. And that's what I believe the intent of that clause is, sir. And there's nothing to suggest in any way that Ulverstone Trotting Day is awarded in lieu of the Cup Day observed in other areas.

PRESIDENT: But, it could be.

MR FITZGERALD: It could be, but without any proof, sir, I would suggest it's not.

PRESIDENT: Have you any idea why it's gazetted as a holiday then?

MR FITZGERALD: I do not know, sir, no.

PRESIDENT: It must be regarded as something special or ...

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MR FITZGERALD: Well by the title, sir, I don't think it depicts anything particularly special.

MR HOLDEN: Mr President, can I just say something? It relates to what we're talking about - substitution. And it relates to what Mr Fitzgerald said about Swansea.

If you look at the Government Gazette that has been tendered (the one which has been previously referred to, December 17) there is a specific item there which shows that (and it's number 323 on page 1954, if you have that page) ... Do you have that one?

PRESIDENT: Yes.

MR HOLDEN: 323. You will see there that there is a bank holiday granted there on the 10th, which includes Oatlands and Swansea. Right? Now that's a full day in actual fact, as I see it.

If you go over to 327, which is the Hobart Cup Day, and you read that very carefully - and you do have to read it carefully because it sets out all the suburbs. It starts, `Hobart and suburbs ...' and it ends up `... Lauderdale - Half-day from 11.00 a.m., Wednesday 4 February 1987'. That is including all those who get the half-day Cup Day for the Hobart Cup on 4 February.

Then it goes on and says, `South of and including Oatlands and Swansea (but not including the abovementioned) ...' So in that specific instance it's specifically excluding Oatlands and Swansea and they're giving them another day, 6 days later ...

PRESIDENT: They are giving them a whole day in fact.

MR HOLDEN: Yes.

Now it would seem to me that on all normal interpretations the mid-week trotting meeting is doing the same in

MR HOLDEN:

the Devonport thing.

I'm sorry to interrupt, but ...

PRESIDENT:

You picked a bad example, Mr Fitzgerald.

MR FITZGERALD:

I did, sir, but I did mention other examples and there's the area of Circular Head, for instance, which I mentioned, which there is (to my knowledge anyway) no particular race meeting which is conducted there and it appears that they would not receive the benefit of such a holiday.

If I could proceed with the remainder of my submission, sir, and I don't think I'll be long.

MR FITZGERALD:

The applicant union submitted that Ulverstone mid-week trotting day is a day which is gazetted pursuant to the Bank Holidays Act as a Bank Holiday for the Municipality of Ulverstone, and as a day which is enjoyed as a Bank Holiday by employees in the health industry in the public sector and therefore in view of the nexus which exists between the public and private health industry awards of this Commission there should also be an entitlement to employees subject the Hospitals Award in the private sector.

That position, sir, in my submission, lacks total validity for the following reasons:

Firstly, the Bank Holidays Act. The basis on which the Ulverstone trotting mid-week meeting is proclaimed applies only to the public sector and bank employees in the private sector.

Effectively the gazettal of the Ulverstone mid-week trotting meeting has no legal consequence or effect for employees in the private health sector.

Secondly, to argue that because employees in the public sector receive an entitlement to that day, pursuant to that gazettal under the Bank Holidays Act, therefore by virtue of the nexus so then should private sector employees enjoy the holiday, that submission, sir, is one not based on the construction of the award, but one based solely on merit. And I think we have all learnt enough lessons by now in this Commission to understand that this Commission will not entertain merit.

Obviously it is open for us to argue that not much cognizance will be taken by you of the merit argument.

But in my submission, the nexus

MR FITZGERALD: argument is one based solely on merit, not on the construction of the award.

PRESIDENT: Wouldn't all holidays nominated in private industry awards have as their genesis the Bank Holidays Act? Christmas Day, Boxing Day ...

MR FITZGERALD: The bulk of them would, sir, but there are exceptions. Of course the ...

PRESIDENT: Mount Lyell picnic might be one, but ...

MR FITZGERALD: The Easter Tuesday of course is another one which is not enjoyed by private sector employees.

PRESIDENT: That's a State employees' holiday - a State Service holiday.

MR FITZGERALD: That's right, but employees in banks receive the benefit of Easter Tuesday.

PRESIDENT: Yes. No, I was following your argument - or trying to - and you were suggesting that the 'Cup Day' holiday as gazetted only applies to public servants and bank employees.

MR FITZGERALD: That's correct, sir.

PRESIDENT: And I was wondering why you would limit it to ... If that argument is sound, why not say Christmas Day, Boxing Day, 26 January, the first Monday in November, 25 April, they are all nominated in the Bank Holidays Act.

MR FITZGERALD: Yes, but there are exceptions of course, sir, but in any event that Act has no application to the private sector, apart from the banking sector.

PRESIDENT: Yes. Well then, are you saying that it is simply fortuitous that the same named days happen to appear in private sector awards in the 'Holidays' clause?

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MR FITZGERALD: Yes, well obviously there is some recognition granted there, granted to what is named in the Bank Holidays Act, but not exclusively because of the ...

PRESIDENT: Well let's assume that Boxing Day is substituted; will that have any effect in the private sector awards that already give the 26th?

MR FITZGERALD: Well this award, for instance, yes it will, because there is that clause at the end of the clause which I talked about, the substitution clause in lieu of ... So rather than the Boxing Day ... The one I speak about of course is ... or such other day as may be observed in the locality in lieu of any of the aforementioned holidays.

In the private sector and the hospital sector the Boxing Day normally granted will not be observed on that day, it appears, and will be observed the day prior to Australia Day the following year.

PRESIDENT: But only because a proclamation has been made under the Bank Holidays Act, which you say applies to public servants.

MR FITZGERALD: Yes, it does, but I would suggest, sir, that it is ridiculous to suggest that the private sector are going to adopt a totally different day for Boxing Day than the public sector.

And this clause, it does have its genesis in the Bank Holidays Act, but that doesn't necessarily mean that there is a strict legal application of the Bank Holidays Act.

So effectively what I am saying, sir, is the provision which Mr Heapy referred to in the Bank Holidays Act is effectively repeated in awards of this Commission. And that's how the genesis of those holidays - namely the Bank Holidays Act - comes into force, sir, I would suggest.

MR FITZGERALD:

In my submission, sir, the applicant and Mr Heapy in support have relied totally on merit arguments. They have not in any way attempted to dissect and analyse the provisions of the award, for to do so I would suggest, does their case great damage.

Clause 13 of section III, Part 2 of the award, specifies a list of those public holidays, and I won't bore the Commission by reading them into the record. They have already been done so on a number of occasions.

But this list of course is generally understood to be included in most awards of this Commission with one significant suggestion, that being Cup Day.

Cup Day is described in the award simply as 'Cup Day (half-day)'.

For your information, sir, there has been some dispute as to when the half day in fact, or how the half day does operate, and for the benefit of ... or in the private sector, as part of the 38-hour week agreement for employees, the half day has in fact been clarified and it appears in agreements of this Commission where it states that it means one half of the ordinary rostered shift on that day; so there is no particular reference to the time limit which is specified by the gazettal notice in the public sector. And that's to clear it up for everyone's purposes.

PRESIDENT:

Is it, or is it to cater for shift workers?

MR FITZGERALD:

No, it's to clarify the intent of the offset (if we can call it an offset) at that time was to in fact clarify the meaning of Cup Day in the private sector - when it should operate.

There was a great deal of difficulty as to what time it did operate. The 11 a.m. was the time allocated, or 11 a.m. seems to be the time allocated

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MR FITZGERALD:

in most notices in the Gazette in the public sector. But in my view, once again there is no binding effect of that Bank Holidays Act in the private sector, so rather than argue about what time it should apply from, there was agreement to in fact clarify it, sir.

And once the 38-hour week provision extends to other employees, if it in fact does so, that provision will in fact be inserted into the award as to what the half day does mean.

However, there is an absence, a distinct absence, of what 'Cup Day' means, and it must, in the absence of any definition, relate to a cup meeting, or in other words a race meeting which has some special significance or status, or has been specifically designated as a cup meeting.

And I would submit ... My instructions from our member, the Tasmanian Racing Club indicate that it is the premier event of that particular club in that racing calendar.

I've sought instructions in respect of Ulverstone Trotting Day, the mid-week trotting day, the one in dispute - and there is no special significance attached to that day. It is just another event in the Ulverstone Trotting Club's calendar.