

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T No 2382 of 1990

**IN THE MATTER OF** an application by  
the Amalgamated Metal Workers' Union  
for interpretation of the Mining  
(Lead-Zinc) Award

re contract of employment and  
overtime

PRESIDENT

Hobart, 8 June 1990

**TRANSCRIPT OF PROCEEDINGS**

PRESIDENT: Can I take appearances please?

MR HARDING: Sir, **HARDING D.**, appearing on behalf of the Amalgamated Metal Workers' Union.

PRESIDENT: Thanks Mr Harding.

MR HAYES: If it please the Commission, my name is **HAYES**, I appear for the AWU.

PRESIDENT: Thank you Mr Hayes.

MR EVETTS: Sir, **ROBERT EVETTS**, appearing for Pasmenco Mining, Rosebery.

PRESIDENT: Thank you Mr Evetts.

Well, Mr Harding.

MR HARDING: Thank you, sir.

Well, basically what I wish to do in the first instance is run through the happenings that occurred in Rosebery in relation to the stand-down of not just members of my union, but members of other unions. And I'm not going to debate the numbers of how many there were or how many there weren't, but quite obviously it was several people who were stood down on this particular shift.

Now, what happened and occurred on that day of Tuesday 6 March 1990, one of the motors in the cage broke down - that's the cage that delivers people into the underground tunnels where they work down the shaft - so quite obviously people couldn't go to work that particular day.

Now, the people lined up for work and were there for half a shift until it was decided that, no, they wouldn't be able to transport the people underground and something would have to be done with them.

Now, a decision was taken that options would be put in front of the workers and they'd be offered 4 hours' pay, which they'd filled in

that 4 hours' time, or ... not 'or', they did get that, and 4 hours' unpaid leave. Now ... or, also annual leave.

Now, quite obviously the interpretation of the award, and it has been the interpretation of the award for many, many years, and just to give you a bit of background of my knowledge of it, I worked at Rosebery for 28 years and was a member of the old Wages Board system for 14 years in that time, so I have a fair understanding of what the award is and what it means and what traditionally happened in that area.

When people went to work for a shift and there was no work available for that shift they would be paid for the shift.

That occurred on overtime as well as on ordinary time.

Now, quite obviously people never got stood aside in those days on ordinary days, but on overtime quite frequently that would occur.

People would line up for work and, for instance, if you were in a group of people - and take my example, I was a boilermaker - and you were working with four miners, three of those miners didn't front up on night shift, say, for instance, on Saturday, they'd call that work off.

Now, at that point in time there would be no alternative work to offer to the tradespeople, so the only alternative was to go home and you'd be paid for the shift.

Now, with a background of that, I'd just like to go to the award and basically what were seeking from you, Mr President, is the interpretation of the award, and I assume you have a copy of it?

PRESIDENT:

Yes.

MR HARDING:

And I'd like to take you to clause 13 - Contract of Employment. It's on page 33 on my copy, but I've only dragged an old one out this morning.

PRESIDENT:

Yes, mine too.

MR HARDING:

But in subclause (c) of that, it goes on and it says:

Subclause (a) above shall not affect the right of the employer to dismiss an employee without notice for misconduct and in such cases the wages shall be paid up to the time of the dismissal only; or to deduct payment for any day [any day - and I emphasise, any day] the employee cannot be usefully employed because of any strike or through any breakdown in machinery or any stoppage of work by any cause for which the employer cannot reasonably be held responsible.

Quite obviously what we're talking about in that clause is the breakdown of machinery, whereby the cage broke down and couldn't deliver the people to the workforce.

Now, that's quite specific in what it says in 'for any day', not part of a day. And I'd like to emphasise that, that particular part of that clause.

Now, the next clause I'd like to refer to is clause 32, that's on page 51 of your award. And that refers quite specifically to subclause (a):

After beginning his shift an employee shall not be paid for less than a shift unless he leaves of his own accord or is discharged for insubordination.

Now, quite obviously these people are not in that position of insubordination, but they were in a position where they couldn't complete their shift because of a mechanical breakdown.

Now, it's obvious to me that with that clause that takes into account the happenings that occurred on this occasion with the breakdown.

Through no fault of their own the employees couldn't be gainfully employed and that could be debated, I guess, in relation to the union I represent, being the Metal Workers, that they could have been gainfully employed elsewhere and, normally, traditionally are.

And basically that's all we're putting to you is that a shift consists of 8 hours; the people shall not be paid for less than a shift once they've commenced work, and I guess basically all we're asking for is the interpretation.

I don't know whether the Pasminco Mines want to run any argument contrary to that what I've put, but if they do, no doubt I'll have to get up and debate it again with them.

But that's basically my interpretation of it.

I would expect that maybe the Commission might find it that way also.

And let me say that's the interpretation that has applied in that particular mine for at least 28 years that I know of ... sorry, almost 30, now that I've been left for almost 2 years.

So we'll just put that to you, Mr President, and ask you to give your ruling on your interpretation of that particular clause that we talk about.

Thank you.

PRESIDENT: Thank you. I'd expect that you probably will have a right of reply, so there may be some questions that I'd want to put to you at that point.

MR HARDING: Thanks Mr President.

PRESIDENT: And we can talk about other things that fall ...

MR HARDING: Thank you.

PRESIDENT: ... from the other parties. Thank you. Mr Hayes?

MR HAYES: Regrettably, Mr President, I don't have specific instructions on this matter, but permit me to say that on behalf of the AWU we would fully support the position as put by my friend on behalf of the AMWU.

If it please the Commission. Thanks.

PRESIDENT: Yes. Thank you.

Mr Evetts?

MR EVETTS: Thank you, Mr President.

Well, I do want to make a few comments and I don't have the same sort of history as Mr Harding, but I do have a position to put.

I agree with Mr Harding on the details that he's outlined in the letter, that they are correct.

I am not going to go into details of a particular day, but to me the claim does revolve around the interpretation of clause 13(c), which is Contract of Employment, and clause 32 - Payment for a Shift.

Just to put it clearly, there's no doubt that under clause 13 the company has the right to stand down employees under certain circumstances.

As the Commission is aware, sir, there are normally, or has been over a period of time, four tests applicable for interpretations, and they've been developed through the Commission over a period of years.

The four tests are that firstly there is a literal test; secondly there's an intent; thirdly a case history; and fourthly, custom and practice.

The literal test of clause 13(c) concerns the definition, as I would see it, of 'a day'. And looking at the Oxford Dictionary, a day has quite a large variety of definitions, but basically it refers to 'a distinctive period of time'. That is the one that seems to be repeated through that, 'a distinctive period of time'.

In this particular case we have a distinctive period of time, that period of time is 4 hours.

After the 4-hour period a number of underground workers were stood down, and they were paid for the time worked. So I think that one covers that area.

The second test is one of intent ...

PRESIDENT:

Just before you go on from there, Mr Evetts, do you rely on the fact that a day for these ... for the operations of the mine at Rosebery could mean 4 hours?

MR EVETTS:

The stand-down clause, clause 13(c), refers to the second ... after the first clause of (c), refers to 'or deduct payment for any day the employee cannot be usefully employed'.

I'm trying to point out that the definition of a day does not necessarily mean 8 hours. And a distinctive period of time in the circumstances applicable to a breakdown, that employee couldn't be

usefully employed because of a breakdown of machinery which was outside the reasonable ... reasonable ... or the employer could not reasonably be held responsible for, that's what I'm trying to ....

PRESIDENT: Yes, I understand that, but the first part of your argument seems to revolve around the definition of a day.

MR EVETTS: Yes.

PRESIDENT: I would have to say that from my own point of view, despite what Oxford says in one of a number of definitions of a day, which it has, that a day in the mine at Rosebery would be the working day, the normal working day, which I would like you to comment on, as to whether or not the normal working day would be construed as 4 hours.

MR EVETTS: It certainly wouldn't, Mr President. The normal working day would be an 8-hour day. And in fact there's a clause in the award which stipulates that work will start and finish at the whistle or the workplace where those people are.

PRESIDENT: Yes.

MR EVETTS: And it's normally for 8 hours.

But what I'm trying to say ...

PRESIDENT: But doesn't that ... if in the terms of the award a day is normally 8 hours, how could you then rely on Oxford Dictionary to reduce it to four?

MR EVETTS: In this circumstance, sir, there was a problem which is also defined in the award. The stand-down clause is not in dispute today, and therefore I'm trying to put forward the company's position as to why they went along on that form of action for the day.



PRESIDENT:

Yes.

PRESIDENT:

I can understand your approach but I really am concerned about your asking me to accept that a day could be construed to be 4 hours unless that was the normal working day for the people under consideration.

MR EVETTS:

Yes. I understand also what you're asking me. I'm saying that because of the circumstances there seems to be two clauses that possibly counteract each other in these circumstances.

PRESIDENT:

No doubt you'll draw them out for me as we go along.

MR EVETTS:

I'll certainly try.

PRESIDENT:

Thank you.

MR EVETTS:

The second test is the test of intent. In this circumstance, Mr President, what I can say is that there was no malicious intent on the part of the company to evade any payment for the workers. The intent was to follow clause 13(c), which again covers the position that payment for any day the employee cannot be usefully employed because of any strike or through any breakdown in machinery or any stoppage of work by any cause to which the employer cannot reasonably be held responsible.

Clearly, in this case, there was a breakdown of an important piece of machinery which was namely the winder. Obviously the employer could not reasonably be held responsible for that and, again, I'd stress that payment was made for part of the shift, the 4-hour period.

The third test covers the previous case history and unfortunately I don't have the knowledge of Mr Harding in this area of 28 years ...

MR HARDING:

I'll tell you that later.

MR EVETTS:

However, over recent years at Rosebery, talking to people who have been there for, again, quite a period of time, the case history doesn't really assist or support, or otherwise, the matter that's before us today.

Stand-downs have not occurred for a number of years. In fact, the last one was somewhere in the order of the early 1980s and it was associated with a stoppage of work at Rosebery. So I don't really have anything in that area to support or contradict this matter.

The fourth test is the custom and practice and again recent history at Rosebery, going back at least until the early '80s, late '70s, doesn't really support or contradict the case before us today.

So I think we have to come back and examine the wording of clause 13(c) to try and give us a better understanding of the company's actions.

Employees may be stood down and payment deducted whenever they cannot be usefully employed because of strikes, stoppage of work, breakdown in machinery or any other cause which the employer cannot be reasonably be held responsible.

In this case a breakdown in machinery was the cause and, as we all know, machinery is a ... is of a fickle sort of nature.

All major companies - and in particular large companies like mining companies, manufacturing companies - they have a large variety of machinery on site ranging in complexity from very small motors up to large loaders and in this case a very complex piece of equipment which is the winder.

And the winder is the key to the entire operation at Rosebery. Without the winder, men and materials can't be moved underground. Likewise, ore et cetera can't be lifted to the surface.

So it's an extremely serious situation to be in without the winder.

Now, machinery as we all know unfortunately breaks down at all sorts of times of day or night and for all sorts of reasons.

In most cases employees can be moved onto other work or the machine can be fixed fairly quickly, or the particular piece of machinery doesn't have the impact on the operation as the case of the winder did.

So in this case the winder was a critical piece of machinery and employees were stood down and paid for that time that they were stood down.

As past history, or recent past history, proves that this is a very isolated occurrence and was applied due to the critical nature of that particular piece of machinery. Over the years other machinery at Rosebery, as in any other large company, would have broken down or frequently failed and this hasn't had the same sort of impact on the operation and employees haven't been treated in the same sort of manner. As I mentioned before, we can't think of a stand-down occurrence of this nature for quite a lot of ... a lot of time.

PRESIDENT: So you haven't had to use 13(c) ...

MR EVETTS: That's correct, sir.

PRESIDENT: ... in your memory ...

MR EVETTS: Yes.

PRESIDENT: ... and certainly not since 1980.

MR EVETTS: That was the early '80s and that was a stoppage of work.

PRESIDENT: Yes.

MR EVETTS: It ...

PRESIDENT: But there have been a number of breakdowns, naturally where you've been able to redeploy?

MR EVETTS: Yes. It appears to me, sir, to be unreasonable to expect that a breakdown of this nature could only happen at the start of a shift or at the finish of a shift. As I've tried to point out, machinery breaks down whenever it feels like it for whatever reason, and I would submit that in these circumstances it was reasonable on the part of the company to pay for the time that they were actually at work.

I'd now like to turn to clause 32 which is ...

PRESIDENT: Just before you do go to clause 32, when was the winder finally operative? At what stage? Was it during the course of the remaining part of that, dare I use the word 'shift', or was it some time after? Were any other employees stood down as a result - other shifts?

MR EVETTS: It was some time after, sir. Apparently the afternoon shift was also affected, but they were verbally informed at the beginning of the shift that they obviously couldn't go to work. They couldn't go underground. So afternoon shift was also affected, but the only people we're talking about today are the day shift.

PRESIDENT: Clause 32.

MR EVETTS: Clause 32 - Payment for a shift. Clause 32 is in two subclauses.

After beginning his shift an employee should not be paid for less than a shift unless he leaves of his own accord or he is discharged for insubordination.

Subclause (b) reads:

In the event of any employee meeting with an accident during a shift or being required to attend to one who was met with an accident, he shall be deemed to have rendered duty during the whole of the shift and be paid accordingly.

This appears to apply for the normal course of events over a normal 8-hour working day. It specifies that an employee will not be paid for a shift if he leaves of his own accord or he's discharged for insubordination.

This, Mr President, is also covered in the first part of clause 13(c) which gives the employer the right to dismiss without notice for misconduct.

Subclause (b) of clause 32 carries on to quantify payment for a shift due to an accident to the particular employee himself or when assisting in an accident to another person.

These are situations where it is perfectly reasonable for an employer to pay for that shift. I don't think anybody would have any difficulty with that whatsoever.

However, it appears absolutely unreasonable and I say unreasonable to say that clause 32 can be used in this matter before us today.

Firstly, clause 13 in total defines how the employer may act concerning payment to an employee in a stand-down situation and, secondly, clause 32, if taken literally, could be used to claim for payment for 1) coming to work late and leaving early. That is not working the full 8 hours as per the contract of employment. Secondly, going out on strike and, thirdly, attending stop-work meetings.

All these could occur after initially starting a shift.

Clause 32 cannot reasonably be seen as a catch-all for payment just because an employee has commenced his shift. It should in all reasonableness be seen as a clause which is applicable in the case of normal working or an accident situation as it clearly states in the award at the moment but not where, out of the ordinary events occur, because they are covered by other clauses in the award.

In conclusion, Mr President, we would like to see a clear interpretation of these claims.

The company has acted reasonably with good intent towards its employees. However, it may be appropriate to have the direction necessary from the Commission or even as far as an award variation to clear up these things.

I'd just like to finish with a comment on Mr Harding's submission, a concern where he was talking about people being stood down on overtime shifts etcetera, in his experience as a boilermaker. I think he used the case of turning up for work with a group of miners, some of the miners for whatever reason, blew that shift and so the overtime was cancelled.

I think that's going out and away from what we're talking about today. That is not a stand-down situation in

my point of view. That would be a normal thing to happen on an overtime situation where there was no work and as Mr Harding quite correctly points out, if he turned up for that shift on an overtime basis, he's not being stood down. What in fact is happening, the overtime is being cancelled but Mr Harding is paid for that shift. That is the normal practice. It's not to do with a stand-down situation.

So, I'd just like to clear up that matter, sir, and with that I'll finish my submission.

PRESIDENT: Yes, thank you, Mr Evetts. If I understand your submission, you're saying that clause 32 is irrelevant in this issue?

MR EVETTS: I think so, sir.

PRESIDENT: And that the whole thing revolves around the words 'payment for any day'?

MR EVETTS: Yes.

PRESIDENT: And that then goes back to your definition of a day, which was my first question to you.

MR EVETTS: I would like that to be seen in context. Again, I quite freely admit that in the hours clause in the award, a day is 8 hours and is defined as such. I'm trying to put it into perspective in a stand-down situation where something critical happens and I'd like you to look at it in that frame if you would and, yes, clause 32, I really can't see that as being the catch-all that is being looked on by Mr Harding.

PRESIDENT: Well, that's your submission?

MR EVETTS: Yes, sir.

PRESIDENT: I understand it in that sense but then that really does put it all back on the definition of a day. We've

got no case history that we can go on. We've got some custom and practice which we haven't yet heard about in detail.

MR HARDING:  
Pres.

I've got quite a bit on that. It's the definition of the day, that's the key, or appears to be to me at the moment.

So I don't want to allow this hearing to become so formalised that people aren't allowed to correct or make additional submissions.

So if you feel there's something that needs to be put at any time do so, in accordance with normal decorum and good order.

MR EVETTS:

Right. Thank you sir.

PRESIDENT:

Right. Thank you. Mr Harding?

MR HARDING:

Thank you Mr President.

If we're going to talk about what a day is constituted, I'd like to refer to page 41, clause 25 of the award, Hours; and in subclause (b) surface workers - that's on page 41 ...

PRESIDENT:

Thank you.

MR HARDING:

Subclause (b) surface workers, who are the people I'm talking about and I represent are, yet they work underground on a permanent basis, but they're still classed as surface workers.

And on the third line of that it's quite specific in what it says:

... 8 consecutive hours  
each day from Monday to  
Friday ...

That constitutes a week's work for a surface worker.

Now, it's quite specific in the eight consecutive hours there, Mr President.



Now, that's basically all I'd like to say on that. But to go to clause 32 again and relate the history of it - it's got quite an amusing history actually on how stand-downs did occur, and they have occurred on many, many occasions only they weren't stand-downs.

The past history of the mine has been that when the cage has broken down ... and it's broken down on many, many occasions and not just the one that Mr Evetts quoted, and I don't take anything against him there because he hasn't got the background history that I have of the place.

But on many, many occasions the cage has broken down and people have had to be, let me not say stood down, but the history of it was that the miners would come out from underground along with the tradespeople.

The tradespeople would go into the milling section or one of the workshops and work.

The miners would come outside and they'd stand around and then the shift boss would order 500 shovels from the store. And quite obviously the options was in front of the miners, they'd shovel around and clean up the yard or go home. So they didn't have to stand them down they just went home.

There was no way they were going to run round the mine with all these shovels.

And it used to amuse me every time you'd see it. They'd come out and down to the store they'd go, and the req. would go in for these five or 400 shovels, or whatever it would be. The next thing, out the gate would go the miners - away they'd go home.

PRESIDENT:

You're not suggesting Mr Evetts should use this ploy are you?

MR HARDING:

Well, I think they've lost the tactics they used to have and they didn't have to use the stand-down clause at all, there was no need for it - all they did was order the shovels.

And naturally enough the miners aren't that stupid, they're not going to go round and bash shovels around the place all day, and quite obviously on their wages they can afford to go home too. But the people I talk about, the lowly paid people around the place, is that they were used in alternative employment.

And in this instance that I talk about, our people could have quite gainfully been employed - and I talk about the tradespeople - is that what's been happening down there over the last couple of years is that when people are out of the mine they're used in the milling section, because they've reduced their work force quite significantly and people can be gainfully employed either in the mill section or the mine section, in whichever is needed at the time.

And my understanding of what's been going on in the last couple of years, people have been coming out from the underground section, off the night shift for instance, all the tradespeople have been going into the mill and working the day shift, say, on overtime once a week.

I understand that's cut out to a certain degree now, but that had been going on.

So there was no reason whatsoever those people couldn't be gainfully employed.

Now, quite obviously someone's decided that the test should be run and I've no problems with that being run. The test case should be run whether this clause is correct or not

correct, that after the beginning of the shift they shall be paid for the full shift - whether you are injured, whether you are stood down.

No-one debates what a strike is or a stop work meeting, obviously you don't get paid for them. They've never been debated. You lose your money.

If you are late for work you lose your money. You get paid for the time you work.

MR HARDING:

But it was through no fault of the employee and he's there willing and able and capable of doing a day's work. And I believe that the clauses have been put there, they're traditional clauses that have been in this particular award for many, many years and I'd hate to not be here when they're changed.

And quite obviously there's an intent to change this award the same as there is with every award in the country. Some of the things are obsolete and quite rightly so they should be changed. But at present this particular clause and my understanding of it and the traditional way it's worked over the past 30 years is what I've outlined to you today.

I'm yet to be convinced that it's anything different. I'm yet to be convinced that clause 25, for instance, is ... 8 hours is not a day. My understanding is 8 hours is a day unless it's agreed by the employees and the employers on that site. And that does happen from time to time that they agree, that they will work flexitime type of arrangements.

And I don't have any problems with that but this specific case we talk about here today that was not so. The people were there and they were willing to work. Therefore, we

believe they should be paid for that particular shift.

And I'd also like to make note, Mr President, we're not here arguing that the people were stood down on the next shift. Quite obviously they were stood down at the start of the shift, therefore they didn't report for work. Obviously they don't get paid.

And that's basically where we're at. I understand Mr Hayes has got a lot of background on stand-down clauses and that type of thing and he'd like to have some input into the discussions this morning.

PRESIDENT:

Yes. Before you sit down, Mr Harding, if we rely on subclause (c) of 13 and say that the company has the right to deduct payment for any day the employee cannot usefully ... sorry, cannot be usefully employed because of any strike or through any breakdown in machinery or stoppage of work, what do you say about the argument that they weren't able to be used for that day even though they hadn't commenced?

MR HARDING:

They had commenced. They were there for half a day prior.

PRESIDENT:

I'm sorry.

MR HARDING:

They'd already worked half a day.

PRESIDENT:

I apologise. I misunderstood that.

MR HARDING:

They'd worked half a day and they were stood down for the other half a day. Now, quite obviously the people who couldn't be used for the day on the afternoon shift were not here to argue that. I was asked to run that case and I said, 'No way, I can't win it' because in my mind it is a waste of time running something you can't win or hasn't got a chance of being won.

And in my interpretation of that when I spoke to the troops around on that site was, I said, 'Look, you won't win it so it's a waste of time putting it up'. It's not the interpretation of the award and it's not the intent of the award.

And basically that intent that I outlined is what's traditionally happened. And if we want to go into the case history of it, well, there's that 30 years' history that I can give you the background of.

PRESIDENT:

Just so I get this clear, because I hadn't picked it up from your application - I obviously missed it during your opening submission - they had performed 4 hours' work.

MR HARDING:

They had been at work for 4 hours. In that time maybe they hadn't worked but they were there on the job ready to work.

PRESIDENT:

Yes, but the winder was inoperable at what would have been the time of the commencement of their shift.

MR HARDING:

That's a possibility. I think it was. My understanding of it was. But the decision was taken that it would be fixed in an hour or whatever.

And that's always been the case that's been used and sometimes it has been fixed in that time and obviously they go to work at 9 o'clock, for instance, and they can still get a shift in.

But you've got to understand what happens in the mine. If you can't get at least 5 hours' work in they can't get their shift in because they need to go in, bog out, bore out and then load up and fire in that shift. And it takes about 5 hours of work to do that.

Now, obviously if you get to dinner time there's no sense in that shift

going to work because they can't do a shift of work.

Now, that's what's happened in this case. I'd say that the company have looked at it and taken the decision that, 'Yeah, we'll keep them here until 'X' time with the hope that we can get them underground, get that round out and that'll make room for the next shift coming on on afternoon'.

There's no way you can go to work as a miner halfway through a shift because you can't do half a shift of work.

PRESIDENT: You're relying then on (c)(i) to a certain extent which requires ... that is, of 13.

MR HARDING: Sorry.

PRESIDENT: 13(c)(i) on the top of page 34 where you're saying that the company has to notify ...

MR HARDING: Yes.

PRESIDENT: ... of the stand-down and the notification was given during the course of the day, therefore it's not a full day.

MR HARDING: That's right. And that's the intent of that too, is the notification.

Now, that obviously ... the reason why that clause was put in there, and I can distinctly remember when it was put in, it was about 1974, I think, or 5. That was put there because of the situation where we had a running battle with the company at the time and there was strikes and we used to run rolling strikes and things like that, pull them any time.

PRESIDENT: I seem to remember that.

MR HARDING: Yes, we had a bit of a rough time there for a while. And that was put in there so they could specifically

... at the end of the shift they could go to the people coming on the next shift and say, 'No, you're not required'.

Now, tactically, they may have been right. I mean, that's been accepted. It's an accepted fact and I accept it because of what I say about the afternoon shift. We accept our people don't get paid for that and I haven't come to argue that point because they've been stood down for a shift, even though I could put forward an argument I believe that could possibly win that argument just for the metal workers who could have been gainfully employed in another area of the mine. But I haven't been given those directions to go down that path so ...

PRESIDENT: Well, that's more a merit argument than ...

MR HARDING: Yes.

PRESIDENT: ... than an interpretive ...

MR HARDING: Yes ...

PRESIDENT: ... problem.

MR HARDING: ... that's right, and basically what we've come for is the interpretation of what the day consists of and can people be stood aside or stood down halfway through a shift or ... let's take an example, and I suppose if you've got a guy working on a lathe and he's doing some big job on it and the lathe breaks down at 2 o'clock in the afternoon, do you come up to him and say look, we've got to send you home for the rest of the day while we get someone to fix your lathe up. That could be another alternative I suppose to look at that could happen.

Now, obviously we don't want to get into those type of arguments. That's where we stand on it, so ...

PRESIDENT: Thank you. Thank you Mr Harding.

MR HARDING:

Mr Hayes might ...

PRESIDENT:

Before you do, Mr Hayes, do you want to respond to any of those particular issues now, Mr Evetts, or would you prefer to wait until Mr Hayes has ...

MR EVETTS:

I think I'll wait until Mr Hayes has made his submission, sir, thank you.

PRESIDENT:

Okay. Thank you. Mr Hayes.

MR HAYES:

Firstly, Mr President, I apologise. I didn't come prepared to go into the debate, but ... and therefore I'm not in a position to burden you with case references in relation to stand-down provisions.

But, needless to say, a provision of stand-down appears in some awards and obviously doesn't appear in many other awards, both of this Commission and of the Federal Commission.

The reason why, ordinarily they're used very infrequently. To insert a stand-down provision is normally to be used on a specific occasion and a temporary occasion at that, and the employer ordinarily is required to demonstrate that there's a substantial need, normally under economic circumstances, as to why a stand-down provision should be introduced into an award to cover a specific circumstance.

However, in respect to this award the stand-down provision permits the employer to set aside the contract of employment under a specific range of circumstances and operates ad infinitum.

Without that provision, the employer would not be entitled to set aside the contract of employment, saving except where an employee refused to accept duty ... given duties.



What we say then is that because this clause allows an employer to do something which he would not be ordinarily entitled to under common law, it must be read as definitive; it must be read as incapable of being interpreted one way or another; it must be read in accordance with the words that it's expressed in.

Similarly, the document itself, being an award of this Commission, is a legal instrument as is constituted by a State Act, and therefore to come before it to seek an interpretation really puts this Commission in a judicial role. It then can really only interpret, as any court would do, under the principles of statutory interpretation.

Concepts of reasonableness are intent. They're things that go to the formation of an instrument such as an award - a clause should be reasonable therefore it goes in. But once that clause is there and is to be interpreted, it's to be interpreted on the document itself.

We would submit, Mr President, there is no consistency, therefore, between clauses 32 and clause 13.

Unless a clause in an award comes into being under specific circumstances or does not apply under specific circumstances, each of those clauses acts jointly as it affects the conditions of employment of the workers employed under that award.

Now, unless clause 32 was written in such a way that payment of shift may be somewhat different under given circumstances, it must be read that that is the circumstances ... or, sorry, it must be read as being that the payment of shift will apply as indicated under paragraph (a) of clause 32, and will apply under all circumstances.

We would also say that in relation to clause 13, one can't be so liberal to take a view as to what a day is by reference to any other authority as to other than what's contained in the award itself.

Certainly a day is mentioned in terms of clause 25 as a ... 8 hours' pay on days Monday to Friday ... or 8 hours' continual service from Mondays to Fridays. A day certainly then appears to be a full shift and then that implies under clause 32 that the shift payment shall be for the whole shift of that any one day.

I have seen in a number of circumstances where stand-down clauses have been introduced, or where there has been either periods of great uncertainty through sporadic industrial activity within the industry, that employers have inserted into awards clauses very similar to what is in clause 13, but go so far as to put that 'shall be covered being stood down for a day or any part thereof'.

Now, that would be specific. It would allow the company in this circumstance to do what they have done, to pay for half a day, if that's the period where the breakdown occurred.

But as clause 13 is not qualified by those words and reference is only to the day, that either the person under this circumstance, rightly or wrongly that is, can be stood down for the day or his contract of employment cannot be stood down at all.

It does very much go to a number of interpretative decisions which have been made by the High Court and, as I say, I didn't come prepared to address you on those things but, certainly, it then would invoke considerations of whether there was work available for a whole day or

part of a day and matters of that nature.

But the simple fact is, there is no reference to part of a day. The reference is to a full day and reading all sections of the award co-jointly, a day can only be interpreted as being one day of full shift.

So clause 13 cannot stand aside from that. It only will permit the employer to set aside the contract of employment under given circumstance. Without that exception, the employer is not even entitled to set aside a contract of employment.

So there's qualifications on the employer's ability to be able to do that and under that clause 13, the employee is not entitled at law to go in excess of that discretion he's been given under clause 13(b). If it please the Commission.

PRESIDENT:

Thank you Mr Hayes. Mr Evetts?

MR EVETTS:

Thank you Mr President. Mr Hayes, in his submission to you, sir, has clearly talked about reasonableness and intent along with his feelings concerning in particular clause 13(c) and the contract of employment. I'd like to just resubmit that in the area of reasonableness and intent, I believe the company acted in that fashion.

The intent was not to deny anybody payment or evade payment for that particular occurrence and, as Mr Harding already pointed out, the people involved, although they had actually turned up for work, weren't working at the time - they in fact were lined up and over that period of time that they were waiting to go underground maybe the winder could have been repaired in half an hour. If that was the case they would have gone to work.

They were in fact available but not working and, again ...

PRESIDENT:

If I could just stop you there, I think what Mr Hayes was saying was that reasonableness and intent were in the minds of the award makers. Once the words are there, we must try and interpret those words. I accept what you're saying that the company was acting with good intention in what it considered to be a reasonable manner.

I don't argue with you on that, but my job here today is to try and work out what those words in the award actually mean. So I think you may be a little at cross-purposes with what Mr Hayes was submitting.

MR EVETTS:

I don't believe so, you see. I understand Mr Hayes's submission and I know the task that you've got in front of you and I'm in the same position. I think we are all trying to look at the words and the intent behind those words in the way that they were formulated by people sitting around a table in a reasonable fashion and working it out.

I believe that that's the decision that we will arrive at today. I'm trying to set the picture as far as the company is concerned just to make sure that people understand that there was no malicious feelings about why these people were not paid for an interpretation of a full day or part of a day.

As I've tried to say, under the stand-down situation, a distinct period of time which we have the people there lined up for the 4 hours so we paid them for the 4 hours or give them the option of the day.

Mr Hayes's submission concerning clause 32, that it should apply under all circumstances, I still can't really buy that one. It could be or

can be interpreted in a way that is absolutely unreasonable and I believe the people that did put that into the award in the first place would not have liked to have seen some sort of catch-all for payment to apply in the circumstances that clearly don't apply.

PRESIDENT: Are you asking me to interpret 32 as well?

MR EVETTS: In the submission from the AMWU the claim is for the payment for the 4 hours but they have asked ... this is an application for an interpretation, namely Mining (Lead-Zinc) Award 13(c) and 32(a).

PRESIDENT: Quite.

MR EVETTS: In my opinion there are things in 32(a) that just can't apply in these circumstances.

I'd like to wind up with that, sir.

Again, we leave it to you to make the final choice. I've tried to put a picture over to you and there may be some necessity further down the track to change that particular clause in clause 13, to change that and by all means include 'or part of a day' as Mr Hayes has pointed out. He's absolutely correct. In a large number of awards that I'm familiar with, the day has been clarified further to include part of a day and I think in this situation, and bearing in mind that it is a fairly isolated occurrence, that would be an ideal solution to the whole problem. Mr Harding shouldn't really have any qualms about the company's intentions. He used an example to do with the lathe - one of those pieces of machinery whereby it may break down a couple of hours before the end of the shift and the company would stand somebody down.

I don't personally believe that that would be the case in those sort of

situations. There would normally be other work to put that person onto and I think I went into that in the body of my main submission.

So I'd like to leave it at that, sir.

PRESIDENT:

Okay. Thank you very much.

Just before we conclude the hearing, perhaps I should ... we'll go off record for a second and have a brief discussion.

OFF RECORD

PRESIDENT:

Yes, well, thank you very much for that discussion, gentlemen. I shall adjourn ... sorry, I shall close the hearing and reduce my reasons to writing which will be issued in due course.

HEARING CONCLUDED