

**TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T. No. 4700 of 1993

**IN THE MATTER OF** an application  
by the Health Services Union of  
Australia, Tasmania No. 1 Branch  
to vary the Welfare and Voluntary  
Agencies Award

re structural efficiency principle

COMMISSIONER GOZZI

HOBART, 10 December 1993  
continued from 16/11/93

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Before we start, I am sorry about having to relocate the meeting from last Monday. It was an unavoidable circumstance.

Could I have any changes in appearances, please.

**MS R. HARVEY:** Ms HARVEY R., appearing for the Health Services Union of Australia, Tasmanian No. 1 Branch. If the commission pleases.

COMMISSIONER GOZZI: Thank you, Ms Harvey.

**MR S. CLUES:** If the commission pleases, I appear on behalf of the Tasmanian Chamber of Commerce and Industry, CLUES S.

COMMISSIONER GOZZI: Thank you, Mr Clues.

The last time this matter was on it was brought forward substantially, if not wholly, by consent. I raised a number of issues with the parties at that time, and I attempted at the end of the proceedings to summarise those particular areas that caused me some concern, and I think it's fair to say that the sleep over allowance is the principal of those particular concerns.

Particularly I think with respect to sleep over I indicated that I needed to have some material put before me to enable me to make a judgment, having regard to the wage fixing principles.

Now, I am aware of how and why the sleep over allowance is used. I'm not totally familiar, you know, to the extent of the application of the sleep over allowance as a component of salary.

My view on that is whilst I understand why it's being done, it is probably not a sound way to try and remunerate people in the industry where the quantum of pay - wages - are particularly low.

However, rather than me going on about what I said last time in respect to sleep over, perhaps I'll ask you, Ms Harvey, to put what you want to put in respect of the application and see where we get to with it.

**MS HARVEY:** Thanks, Mr Commissioner. We did take on board the comments you made at the last hearing and, in fact, at this stage we would like to propose a slightly different way of processing the application that we previously had before you.

And, in that sense, I would seek leave to amend the application, and I have an amended orders here.

COMMISSIONER GOZZI: Thank you.

MS HARVEY: Mr Commissioner, if I could just take -

COMMISSIONER GOZZI: I think that's Exhibit HSUA.1.

MS HARVEY: If I can just take you to the changes it will become clear about how we intend processing this application.

COMMISSIONER GOZZI: Ms Harvey, just before you do that, does this exhibit replace -

MS HARVEY: S.1.

COMMISSIONER GOZZI: S.1?

MS HARVEY: Yes, it does.

COMMISSIONER GOZZI: Yes. Okay.

MS HARVEY: And it is, as I understand it, a consent variation to the previous application.

COMMISSIONER GOZZI: Okay.

MS HARVEY: So, if I can just go through the changes from S.1, rather than go through it in detail, because I understand in the previous hearing that was done.

First of all you will notice on the front it says, 'Other Matters', and in particular the clause annual leave and sleeping allowance are both in that heading of 'Other Matters' and I will come in a minute to how we intend, or propose, to actually process those.

COMMISSIONER GOZZI: Right.

MS HARVEY: Now if you then go on to the actual draft order which is dated the 6th of December on page 3 of HSUA.1, I'll just indicate the changes from the previous draft order that we provided.

First of all, obviously the date is different. We've also added the words in 1 where it says, 'remove from Clause 7 - Definitions, Division B', we've added the words, 'the definitions for a casual employee and part-time' for the purpose of clarity.

COMMISSIONER GOZZI: Right.

MS HARVEY: There is then some renumbering that has been done. It's on the top of page 4. It says, 'To amend clause 45'. The numbering has been changed to 2.

COMMISSIONER GOZZI: Hang on. Page 4, where?

MS HARVEY: At the top on the left-hand - it just indicates a second variation.

Really, all that has happened is, because we have taken out the sleep over and the annual leave, subsequently we have had to change the numbering of the variations that we sought.

So, that's in fact all the way through. There is a change to the number attached to each amendment.

COMMISSIONER GOZZI: Yes. So, page - I haven't got a page 4 with the - you are talking about (iv) on page 4, are you?

MS HARVEY: No. I was actually numbering through HSUA.1, but if we put aside the other matters, the first two pages, and go to 'Draft Order' it is actually numbered so I will use that numbering.

COMMISSIONER GOZZI: Yes, well there are three pages of HSUA.1, isn't there?

MS HARVEY: No.

COMMISSIONER GOZZI: Well, I have got three pages for HSUA.1, I believe.

MS HARVEY: Have you? You should also have attached to it a - 1,2,3, yes, you are quite correct. Sorry, Mr Commissioner.

COMMISSIONER GOZZI: Right. So we put those aside?

MS HARVEY: Put those aside for a minute and then come to the Draft Order, and actually I will refer to the numbering that's on the draft order. That will make it easier.

COMMISSIONER GOZZI: Right. Okay.

MS HARVEY: All that we have done is, because we have taken out the annual leave and the sleep in allowance, and we have also taken out the change to title subsequent to your comments in the previous hearing, we have had to then just renumber all the way through the variations.

So, I mean, I can go through and -

COMMISSIONER GOZZI: Yes, that draft order is in fact now what you want in the award?

MS HARVEY: That's correct.

COMMISSIONER GOZZI: And you have renumbered that.

MS HARVEY: Yes, we have renumbered that. The only other change of substance. So we have deleted the change that we were proposing to 'Title', we've deleted 'annual leave' and we have deleted 'sleep over'.

So if you then go to page 8 of the draft order.

COMMISSIONER GOZZI: Right.

MS HARVEY: In (ii) on the second line there it says, 'Per week shall be paid'. We have added the word, 'per hour', for the purpose of clarity.

COMMISSIONER GOZZI: Right.

MS HARVEY: And also in the final two words in (ii) 'with pay' has been added. So it reads, 'holidays with pay'.

And, similarly in (iii) the last two words of that paragraph is also, 'holidays with pay'.

Then the only other changes are just the numbering changes of the actual amendments ordering.

COMMISSIONER GOZZI: Fine.

MS HARVEY: So, I understand, Mr Commissioner, that in the previous hearing that you have already been through what's actually proposed, so I don't intend to do that again.

Rather, if I could refer now to HSUA.1, the first three pages of 'Other Matters'.

COMMISSIONER GOZZI: Right.

MS HARVEY: In relation to annual leave we actually ask that this matter be referred to the president under section 24 of the Act, and we understand that this is a full bench matter under section 55(1) of the Act.

COMMISSIONER GOZZI: 35(1).

MS HARVEY: 35(1)? I apologise.

In relation to sleep over, again we request that the matter be referred to the president under section 24 of the Act for the purpose of hearing it is a special case. And, in particular, we refer to the principles which say that:

Any claim for increase in wages and salaries or improvements in conditions in minimum rates awards which exceed those allowable under the October 1989 and the August 1991 State Wage Case decision will be processed as a special case before the Full

Bench of the Tasmanian Industrial Commission,  
unless the President otherwise decides.

COMMISSIONER GOZZI: Why would you want me to refer it as a special case?

MS HARVEY: Mr Commissioner, the reason that we believe it needs to be referred as a special case is that -

COMMISSIONER GOZZI: It will only come back to me, I would imagine. So, how does it alter the sorts of requirements in the context of looking at it on the merit?

MS HARVEY: Our understanding, Mr Commissioner, is that we need to acquire the special case status to be able to put an argument in relation to why the award should be varied in relation to a special case, and also that whilst we believe it is capable of being run as a work value, given the history of it, we think it is inappropriate, and that therefore it is appropriate that we get special case status and are able to argue under the principles on the reasons why we believe it should be varied in the manner that the parties wish it to so be.

COMMISSIONER GOZZI: We'll just go off the record for a minute.

OFF THE RECORD

COMMISSIONER GOZZI: Alright. Thanks, Ms Harvey.

MS HARVEY: Mr Commissioner, as I was saying, that we seek that the sleep over actually be referred to the president for the purpose of hearing it as a special case.

That's all the submissions I intend to make this morning, unless there are any questions that you have about the application?

COMMISSIONER GOZZI: No, no. Thank you, Ms Harvey, that's fine.

MS HARVEY: Thank you. If the commission pleases.

COMMISSIONER GOZZI: Mrs Dowd?

MRS DOWD: Mr Commissioner, the only thing I would like to actually say is on the draft order that's been presented, on page 1 of that draft order - the actual page is actually numbered as No. 1 - the 'part-time employee' in the definitions was actually removed from the original draft order, but Ms Harvey didn't realise that.

There is no part-time definition in clause 7.

COMMISSIONER GOZZI: Ah, right, yes, okay. So it is just remove -

MRS DOWD: It was actually removed last time, but Ros didn't realise that.

COMMISSIONER GOZZI: Okay. I'll cross that out. Thank you. Mr Clues?

MR CLUES: If the commission pleases, I appear somewhat this morning just as a watching brief on behalf of Mr Sertori.

I have had some discussions with him as late as yesterday and it's my understanding that the submissions that have been put to you by my colleagues this morning is an accurate reflection of where the parties find themselves today.

If the commission pleases.

COMMISSIONER GOZZI: Yes. Thank you. Thank you, Mr Clues.

MS HARVEY: Mr Commissioner, it just occurred to me that we have overlooked the issue of the operative date, and I suppose for the sake of completeness I should address it.

That we would seek the variation as I've set forward to you today to apply from the first full pay period following the date of decision.

COMMISSIONER GOZZI: Thanks, Ms Harvey. Mr Clues, any problem with that?

MR CLUES: No objection to that operative date.

COMMISSIONER GOZZI: Yes. Thank you.

Ms Harvey, just looking at it, I did raise last time and I am not sure whether it's been picked up or not, with respect to broken leave.

There is a provision which required the permission of the union, and I have some problem with that.

Has that been altered or is it still the same?

MS HARVEY: No, Mr Commissioner, it is still the same. We, the parties, want the application to proceed in the manner that we have indicated, and there is concern by our organisation in relation to the abuse of broken leave and we would seek to have the award varied in the manner indicated.

COMMISSIONER GOZZI: Well, I would have a problem with that. I don't see that there is a requirement for the union to be a party to the agreement if the employee wants to take broken leave. That is a matter between the employee and the employer and, as I said last time, in the event that the employee feels railroaded in respect to this particular provision, then the avenue is through the disputes procedure to the union.

I don't see it as being structurally efficient to have the union a party to the agreement for an employee to take broken leave.

I don't think it has got anything to do with the union at all. The only time that the union would be involved in that situation is if that provision is being abused.

And, I don't intend to endorse it.

MS HARVEY: Well, I thank you for your comments on that. If that is the case, Mr Commissioner, then we would seek leave - and this has been discussed with the employees - to delete that amendment from the application.

It is part of a consent matter, and if the commission feels that it is not in a position to make that variation, then we would seek leave to delete that proposed amendment from the application.

COMMISSIONER GOZZI: Yes. Broken leave has been a feature now in awards of this commission going as far back as the 4% second tier, and this is the most prescriptive provision I have come across.

I don't see any need for it. It is really a structurally inefficient provision in the award.

And if there is a concern out there that employees might abuse this particular provision, then really it is up to the union to make sure that its membership is aware that there are proper avenues to redress those particular concerns.

I don't think it is appropriate for that type of provision to go into the award. I just don't see a need for it.

In fact, I am not aware that a provision like that would be in any other award. There might be one or two. I don't know. But, in the main, the agreements going right back to the 4% second tier have been not only broken leave to be taken in more than one period, but in some cases in more periods than two.

And, in all the time that I have been on the bench, which is now getting on for 10 years, I have not had one dispute in respect of broken leave. Not one.



Now, if there was some history of disputation in this area in respect of this clause, or even in this industry - and I am sure that broken leave is in fact taken - I am almost positive of that.

I haven't come across one, as I say, industrial dispute in respect of this particular provision.

MS HARVEY: I hear what you are saying, Mr Commissioner, but I suppose what I am indicating to you is that this is a consent matter and if you are indicating that you're not in a position to endorse it, and I hear what you are saying, then I would seek leave to delete from the application 2(ii) on page 2 of HSUA.1 on the draft order.

COMMISSIONER GOZZI: Isn't it already in the award? I'm surprised -

MS HARVEY: There is a provision in the award to take broken leave in two periods. Not in any combination. And we do have a problem with this in the industry, and it has been the subject of disputation.

COMMISSIONER GOZZI: What's the problem? What sort of problems have you encountered?

MS HARVEY: Well I don't intend to actually make full submissions on it because, as I indicated to you, we intend to actually delete it, and we would give notice that we would intend to proceed with the matter via section 55 agreements with the appropriate employers.

COMMISSIONER GOZZI: Alright. Thank you, Ms Harvey. Mrs Dowd, any comment about that?

MRS DOWD: I have no comments at this stage.

COMMISSIONER GOZZI: Mr Clues?

MR CLUES: As a watching brief, I haven't got the foggiest idea what is going on. If the commission pleases.

MS HARVEY: Could I ask for an adjournment, Mr Commissioner, for 5 minutes so that I can talk to Mr Clues on this issue.

COMMISSIONER GOZZI: Yes, you certainly can.

SHORT ADJOURNMENT

COMMISSIONER GOZZI: Thank you.

MS HARVEY: Thank you, Mr Commissioner, for that brief adjournment to allow me time to give my colleague instructions.

COMMISSIONER GOZZI: I am sure he appreciates it.

MS HARVEY: As I was saying, we would seek leave to amend the application to delete 2(ii) and I understand that you are seeking confirmation from the employer that they consent.

COMMISSIONER GOZZI: Yes.

MR CLUES: The muddy waters have become very clear, Mr Commissioner.

COMMISSIONER GOZZI: I'm pleased, Mr Clues.

So, leave to withdraw this provision is granted.

MS HARVEY: Thank you.

COMMISSIONER GOZZI: Anything further?

MS HARVEY: No.

COMMISSIONER GOZZI: Alright. The variations as put forward will be endorsed operative from today's date and a decision and order will issue in due course, and the matter of annual leave and sleep over will be referred to the president and for him to consider whether or not it should go forward as a special case.

Thank you.

HEARING CONCLUDED