

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3515 of 1991

IN THE MATTER OF an application
by the Australasian Meat Industry
Employees Union, Tasmanian Branch
to vary the Meat Trades Award

re include a minimum hours
provision of 7.6 hours and casual,
intermittent or part time
employees

COMMISSIONER GOZZI

HOBART, 5 March 1992

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Appearances in those matters please.

MR J.E. SWALLOW: SWALLOW, J.E., AMIEU.

COMMISSIONER GOZZI: Thank you Mr Swallow.

MR T.J. EDWARDS: If it pleases the commission, EDWARDS, T.J. and with me Mr M.D. FLYNN. We appear for MATFA and TCI.

COMMISSIONER GOZZI: Thank you Mr Edwards.

MR EDWARDS: Whilst on my feet commissioner, perhaps if I could flag for the attention of the commission, that there is a preliminary matter that we would seek to raise with the commission in respect of the claim for the minimum 7.6-hour day. That same preliminary point doesn't extend to the other claim.

COMMISSIONER GOZZI: Yes. Both the matters relate to the meat trades award don't they? One is for the minimum hours provision which is 3515.

MR EDWARDS: Yes sir.

COMMISSIONER GOZZI: And the other one, casual, intermittent or part time employees is 3516. Seeing that 3515 is the first one on the list Mr Edwards, you had better let me know what your preliminary point is.

MR EDWARDS: Yes commissioner and perhaps before I do start making a formal submission on that, I can indicate for the sake of the record, that I have advised the commission in advance of our intention to raise this threshold question.

COMMISSIONER GOZZI: Yes, I appreciate that advice Mr Edwards.

MR EDWARDS: I have also taken the opportunity of advising Mr Swallow of our intention in this regard as well so no ambushes are intended.

Commissioner, we seek leave of the commission to place before you a preliminary question in respect to the ongoing participation of the commission as currently constituted in respect of application T3515. The matter we seek to put before you sir, is a question as to whether or not in the context of comments made by yourself in transcript in matter T3509 of 1991 on 25th of October 1991, you should continue to sit on this particular application. Matter T3509 commissioner, was an application by the AMIEU to vary the Meat Trades Award. It took the form of an application for a special case status to be granted to that application.

You may recall sir that during those proceedings, Mr Swallow

made several observations about the manner in which the second structural efficiency trade offs had been implemented and paid some regard to the practice of shorter days during the Monday to Friday period to compensate for the advent of ordinary time work on a Saturday in supermarkets which are precluded from offering a full days work on the Saturday because of the interaction with the Shop Trading Hours legislation.

I would like to tender a copy of the transcript of matter T3509 of 1991 commissioner because I will be referring to it.

COMMISSIONER GOZZI: Exhibit TC11.

MR EDWARDS: I wish to take the commission to page 15 of that particular transcript where towards the conclusion of the proceedings commissioner, you were moved to make a number of observations and I take you sir to the fourth and fifth paragraphs of page 15 and I will read them:

I am concerned further what you say about the application of the measures put into place to get the second 3% increase. If there's no consultation on implementation, if hours are being staggered the way they appear to be, well then obviously that gives me a real concern. I haven't had the benefit of any discussions with you in respect of what's happening with regard to the application of hours provisions, but certainly I'm prepared to go on record now and say it was never my intention that supermarket employees be worked 4 hours or 6 hours on a Tuesday or 4 hours on a Wednesday. My intention was that they'd work their normal spread of hours and that Saturday arrangement would be worked in the context of the penalties that are attributable to those ordinary hours on that day.

I mean I had a view that we would be working ordinary hours Monday to Friday for some roster system to be put into place. But, certainly, I didn't see that there would be time off on a Tuesday, or a 4-hour day on a Wednesday, and if that happened arbitrarily without any consultation, well that is unforgivable. I'm not sure how much of this special case application revolves around the problems with respect to what happened in the second SEP, and the application of those things in the second SEP.

The concern we now express commissioner is the application of those remarks to the current application by the AMIEU to achieve a minimum working day of 7.6 hours. On a careful reading of the two paragraphs to which I have taken the commission, we submit that it possible for the conclusion to

be drawn that the matter has been to some extent, been prejudged by the commission specifically going on the record with observations that I am instructed by my clients to feel prejudice what may otherwise be a fair and impartial hearing. I hasten to add commissioner, that we do not allege any bias on the part of the commission but we do allege that you have taken a public stand on the subject matter of this application which is of such a preconceived nature as to call into question whether or not justice can be both done and seen to be done, more importantly, in this matter and it is the question of seeing to be done that is exercising our mind commissioner.

In our submission, an objective assessment of the two passages in transcript which I have taken the commission, would lead a reasonable impartial observer to conclude that the matter and issue before you today has been prejudged to an extent so that the commission, in the interests of ensuring that justice is seen to be done, should disqualify itself from further proceedings in respect of this application. Again I observe that this submission can not and should not be construed as an attack on the integrity of the commission as I personally hold the commission, as currently constituted, in the highest regard and I have never in the past and will never in the future, question the integrity of the commission, nor do I now. It is merely a question of whether justice in this case can not only be done but be seen to be done.

The issue sir to encapsulate it succinctly is whether those observations in transcript could be construed to prejudice an impartial hearing in this application or be seen to have that effect. Certainly my instructions are that in this case, the comments do tend to prejudge the issue in question in this application to a greater or lesser extent and we therefore submit that the commission, as currently constituted, should refrain from hearing this matter and refer the matter back to the president for a reassignment. This course, I repeat again, is in no way a sleight of your integrity nor that of the commission as a whole but we fear that the result, if the commission doesn't follow this course, could be that the ultimate decision of the commission if it happens to coincide with the observation in transcript, could call into question whether or not a fair hearing was provided on the question.

There is precedent for this type of application commissioner both in respect to this commission and the Australian Commission. In that regard sir, I believe - and I don't have any documentary evidence to this effect because I understand transcript hasn't yet issued - but the state government asked the deputy president to disqualify himself from further hearing of a matter in which he had directed an application to be made and then in fact gone further and made comments as to the format application should take and then commenced to a

hearing stage in respect of that application having in the mind of the applicant for the commission to stand aside, prejudged to some extent the issue and called into question whether or not a free, fair hearing was possible.

I further understand that in a slightly matter, Commissioner Watling disqualified himself from further proceeding in respect of a matter by the HSUA in respect of an application where his associate had been the original applicant and had then moved herself from the position of being employed by the HSUA to become the associate to Commissioner Watling and I do say that that is a slightly different circumstance.

The precedent of which I am aware in the Australian Commission revolves around Commissioner Gough in matter C1699 of 1979 where Commissioner Gough issued a decision at Melbourne on the 27th January 1981 - '81, I'm sorry. In that matter Commissioner Gough made a number of observations about how the question of equal pay should be implemented into awards which were being created in respect of the Municipality of Clarence. The employers in that instance put to Commissioner Gough in transcript on the 31st March 1981 that he should refrain from further hearing the matter because the comments he had made in transcript did, on their face, tend to prejudice the outcome of the proceedings in that it would appear that there had been an element of prejudging the issue.

I don't intend to take the commission in detail to that precedent but I will table it so that the commission can, should it feel inclined, study it at its leisure.

COMMISSIONER GOZZI: Exhibit TCI2.

MR EDWARDS: There are in fact two exhibits commissioner, the first being the decision of Commissioner Gough dated the 27th January 1981, the second being transcript of proceedings before Commissioner Gough on the 31st day of March 1981.

COMMISSIONER GOZZI: Mark that exhibit TCI3.

MR EDWARDS: Thank you sir. I do no more commissioner than to refer the commission to page 30 of the second of those exhibits, TCI3, wherein Commissioner Gough at the end of proceedings, took the view that because of the nature of the questions raised by the Municipal Association of Tasmania, that he should stand aside and in that matter he referred the file back to his deputy president which was Deputy President Isaac and asked him to reassign the matter and it is that course that we would recommend to the commission in these proceedings, if it pleases the commission.

COMMISSIONER GOZZI: Mr Swallow.

MR SWALLOW: I find it a little bit incredible to say the least of the stand by Mr Edwards. The precedents that he mentioned have, in the union's view, differences like chalk and cheese and have no relevance at all to this particular case. After all, you've been involved in this case - in fact all of the meat industry cases - for a number of years and the comments that were made on transcript were in relation to a decision that was handed down by you and all you were obviously attempting to do is to indicate what the intention of that decision were - that's as I understand it. You've done more - you've done no more and no less than that.

COMMISSIONER GOZZI: I would have thought that was exactly what I intended to be the case.

MR SWALLOW: Yes.

COMMISSIONER GOZZI: That's given there was a dispute about the issue at the time.

MR SWALLOW: Yes, there was a dispute and your position is not only to make a decision, it's to resolve disputes and we had a potential walk-out of all Coles supermarkets because of the interpretation of your decision made and forwarded to the company by Mr Edwards. It's quite obvious that all you were attempting to do is to indicate the intentions of your decision, no more and no less.

COMMISSIONER GOZZI: What's the outcome of the interpretation, didn't that matter go to interpretation?

MR EDWARDS: Because Mr Swallow probably didn't remain to those proceedings perhaps I could advice the commission.

MR SWALLOW: Well there's no decision been made yet.

MR EDWARDS: That's correct. In fact the President has indicated he will hold his decision in that matter - he has indicated this off the record - but has said that he will hold his decision in that matter until after these proceedings on the basis that he didn't want to be interpreting a matter that could change as a result of proceedings before the commission, so it's as it were, sir, but the hearing has been run and concluded.

COMMISSIONER GOZZI: Yes.

MR SWALLOW: See I - just - just a little bit further, Mr Commissioner, I argued before the President, Mr Westwood, that this application was in prior to - a month or so prior to the application by Mr Edwards for the - and therefore this should go ahead prior to that - that's what I argued - and it's quite obvious that Mr Edwards - Mr Westwood's picked it up and he won't be handing down a decision in relation to the matter

until after this has been determined, because this might be another - another caper of Mr Edwards to - to delay the matter and - and hopefully get a decision from Mr Westwood which I - frankly I don't think he will.

COMMISSIONER GOZZI: Mr Edwards?

MR EDWARDS: Yes, commissioner, a couple of comments if I might. Firstly, I want to place on the record that I have no reason to disbelieve at all, in fact I agree wholeheartedly, that the intention of what you did in the transcript to which I have referred is do no more than express what you perceived to be the intention of the provision that had been inserted into the award as part of the structural efficiency negotiations and conclusions.

However, those comments that you do make do not accord with the provision that was put into the award and were at that stage, and are now, the subject of an application before this commission to achieve the very end that you have outlined in transcript. To that extent we feel that the issue made to some extent have been prejudged and we are particularly concerned that not only should justice be done, as I'm sure it would, and I have no reason to question that justice would be done, but that justice would also be seen to be done.

In respect of Mr Swallow's observation that this is another tactic to delay these proceedings and await President Westwood's interpretation, I refute that. I do so on the basis that president Westwood has told the parties that he will not be releasing that decision until after finalisation of Mr Swallow's application in T.3515, and therefore to simply delay this matter would be foolhardy. Because all it will do is delay the interpretation, and I have no intention of doing that.

Additionally, I comment that my clients have been precluded from implementing some of the gains in the structural efficiency exercise as a result of these application and discussions with Mr Swallow. And it is certainly in the best interest of my clients, and therefore in my best interest, to have this matter resolved as expeditiously as possible. I have no intention of delaying this matter, but there are perceptions and I believe it is fair that they should be addressed. If it please the commission.

COMMISSIONER GOZZI: Yes, thank you, Mr Edwards. Let me say, I find it absolutely incredible that the metal industry employers have adopted the approach that they have. I have been intimately involved with the structural efficiency exercises and the provisions that resulted as a consequence of that exercise.

At the time I made those observations and the transcript that I've been referred to, there was a pending dispute, and it seemed to me logical to provide some guidance to the parties in respect of a matter which I had previously determined; and because of that determination had, of course, full knowledge of what the classification intended should apply in supermarkets.

I reiterate that my intention in that exercise was not for hours to be worked in the way they were finally endeavoured to be worked in certain supermarkets, and if an error did occur it occurred because the drafting of that clause allowed that interpretation - prima facie interpretation - to take place. There can be no doubt in the minds of the parties at the bar table that the provision that went into that award was intended to be applied in the manner that it is being attempted to be applied in - as.

There is no doubt that on the way through in proceedings, whether its's these proceedings or other proceedings, the commission often makes observations to the parties, both on the record and off the record to attempt either to conciliate a dispute or provide some guidance, to facilitate resolution of matters that are before the commission.

In the instant case, my comments are not designed in any way to prejudge a future application in respect of hours. My comments were simply designed to provide some guidance to the parties as to what the intention of the commission was in respect of a particular decision that it took.

I recognise, of course, that the hours issue in supermarkets is a contentious issue. I recognise that my comments in transcript could be taken to have prejudged the situation, and in the circumstances I intend to refer these files to the president for reassignment. These proceedings are concluded.

HEARING CONCLUDED