IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No 189 OF 1985

IN THE MATTER OF an application by the Tasmanian Chamber of Industries for interpretation of the Shipbuilders Award

re ordinary rate of wage

PRESIDENT

HOBART, 20 August 1985

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Appearances please gentlemen.

MR EDWARDS: If it please the Commission, **EDWARDS, T.J.** I appear for the Tasmanian Chamber of Industries on behalf of Connels Australia Pty Ltd.

PRESIDENT: Thank you Mr Edwards.

MR ADAMS: If it please the Commission, **ADAMS, G.D.** on behalf of the Amalgamated Metal Workers' Union.

PRESIDENT: Thank you Mr Adams.

MR CURRY: If the Commission pleases, **CURRY, N.A.** and **CORNWALL, M.** on behalf of the Building Workers Industrial Union, Tasmania Branch.

PRESIDENT: Thank you Mr Curry.

Gentlemen, before inviting the applicant to address the application I wonder if the parties to this matter understand the procedure regarding interpretations generally. If not, I would be prepared to outline the major ground rules to be observed.

Mr Curry, I don't think you have appeared in interpretation matters.

MR CURRY: Mr President, I would appreciate an outline of it because I haven't appeared in this before. I am aware Mr President of the principles that you have outlined in T. No. 30 of 1985. I assume it is those to which you refer in which case I will indicate to the Commission that I do have a copy of those and I am cognizant of their content.

PRESIDENT: Yes, well I was going to refer to them and I will refer to them for the benefit of your friends on your right and also to T. 91.

Gentlemen, I will read you extracts from two decisions of the Commission that address the ground rules to be observed in matters of this kind which you ought to know are quite different from the kind of disputed

PRESIDENT: matters that no doubt you are quite familiar with.

The matters of interpretation ordinarily involve bringing to bear a judicial mind to the points at issue. One would expect these disputed matters to go before a magistrate. However, the Parliament has seen fit to give this responsibility to the President and in that capacity I have made it known that generally speaking I propose to follow the well settled principles of interpretation of industrial awards as distinct from statutes laid down from time to time by other tribunals having judicial capacity to interpret awards of this kind.

There are some very well established rules of construction some of which I will now read to you. I am going to read from the first interpretation that the Commission is required to consider this year, and in its decision the Commission said this:

> "This is the first application to come before the Commission for interpretation pursuant to Section 43 of the Act. It is appropriate therefore to make some preliminary observations regarding the manner in which questions of interpretation should be addressed by applicants and the Commission.
>
> First: Construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts. It is futile to attempt such an exercise in any other way."

For those of you who may be taking notes, don't worry I will give you copies of this.

"Second: It must be

PRESIDENT: understood that in presenting an argument in support of or in opposition to a disputed construction relating to an award provision it is not permissable to seek determination of the matter on merit; that is, on the basis of what one party or the Commission believes the provision in question should mean.

Third: Provided the words used are, in the general context of the award and its application to those covered by its terms, capable of being construed in an intelligible way, there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage.

Fourth: An award must be interpreted according to the words actually used. Even if it appears that the exact words used do not achieve what was intended, the words can only have attributed to them their true meaning.

Fifth: If a drafting mistake has been made in not properly expressing the intention of the award maker, then the remedy lies in varying the award to accord with the decision given.

Sixth: Where genuine ambiguity exists, resort may be had to the judgement accompanying the award as an aid to discovering its true meaning.

Seventh: It is not permissable to import into an award by implication a provision which its language does not express. The award being a document which is to

PRESIDENT:

> be read and understood by persons not skilled in law, or versed in subtleties of interpretation, any omission or imperfection of expression should be repaired by amendment rather than by implying into it provisions which are not clearly expressed by its language."

Later the Commission said:

> "Speaking generally, unless the drafting is such as to lead to no other conclusion the rules to be followed should not ipso facto become the absolute authority for construing a provision in such a way as to confer extreme advantage or disadvantage on an employee. One should also be satisfied that the result is not otherwise out of step with the general provisions of the award as a whole."

The Commission then went on to give an example.

Gentlemen I have copies of this which I will now circulate. You may wish to consider them before we proceed. If not, we will continue this hearing. My concern is not so much for you Mr Edwards but for your friends who might find a hearing of this kind somewhat different to what they expected or what they have been accustomed to.

MR ADAMS: Sir, Mr Curry and myself believe that the hearing should continue.

PRESIDENT: Very well. If I find either side transgressing the ground rules you will be pulled up and if you are pulled up you will know why. I didn't make the rules gentlemen, I simply have to follow them. Thank you Mr Edwards.

MR EDWARDS: Thank you Mr President. Might I say from the outset I think you have

MR EDWARDS: stolen a little bit of the thunder that I intended to impart to yourself and the parties this morning.

PRESIDENT: You've been upstaged a little have you?

MR EDWARDS: I have a little Mr President.

PRESIDENT: Never mind.

MR EDWARDS: I thank you for that, however, I do intend to proceed with what I had prepared anyway so if it sounds a little repetitious to what we have just been over I apologize for that.

Mr President, this application for an interpretation is brought under section 43 of the Act following difference in understanding arising between my client, Connels Australia Pty Ltd and the A.M.W.U. as to the correct construction to be given to sub-clause (f) of clause 7 Section I Part II of the Shipbuilders Award.

Sub-clause (f) appears on page 6 of the award in Print 1 of 1981. I will quote it for the sake of the record:

> "(f) Penalty rates for overtime shall be calculated on the ordinary rate of wage."

For our client's part, Mr President, we will be contending that that sub-clause means that penalty rates will be computed excluding extraneous payments that form part of the loaded hourly rate prescribed in clause 1, Section I, Part I of the Shipbuilders Award.

In preparing our submissions in relation to this matter Mr President, I have paid regard to the guidelines you announciated as part of T.30 of 1985 on 20 February 1985. I believe, however, that there is a further cardinal rule in addition to those contained in T.30 of '85, that being the rule of generous construction. I believe it is that rule that you have later referred to in T.91.

MR EDWARDS: That rule is explained in the C.C.H. Australian Labor Law Reporter Volume 2 at paragraph 30-275, which deals with the interpretation of awards principally by the Federal Court or as you have indicated by judicial authorities. That paragraph says, and I would like to quote it into the transcript if I may:

> "Despite the fact that awards are statutory instruments to be interpreted in light of the general principles relevant to the interpretation of such documents, the tribunals usually take a generous rather than a literal approach. Tribunals will strive to give that interpretation to the terms of an award that will accord with the intention of the parties as gathered from a consideration of the entire award. This generous approach to interpretation has been acted upon for a great many years. The classic declaration of that attitude was expressed by Street, J. in G.O.A. Bond and Co. Ltd. in liquidation versus McKenzie 1929 28AR499 at pages 503 and 504."

C.C.H. then quotes Justice Street as follows:

> "Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relations as such and they have to be obeyed to the same extent as any other statutory enactment but at the same time it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry and they frequently

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> result, as this award in fact did, from an agreement between the parties couched in terms intelligible to themselves but often framed without that careful attention to the form and draftsmanship which one expects to find in an act of parliament.
>
> I think, therefore, in construing an award one must be careful to avoid a too literal adherence to the strict technical meaning of words and must view the matter broadly and, after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intentions of the parties to be gathered from the whole award."

That is the end of the quote from Commissioner McKenzie. It is also the end of the quote that I wisht o make from C.C.H.

I submit therefore Mr President that in addition to the seven criteria laid down by yourself in T.30 of 1985, one may also resort to the rule of generous application in giving to a term its proper intended meaning. It is this doctrine that I believe you were referring to in your reasons for decision in matter T.91 of 1985 dated 27 June 1985, an interpretation of the Hospitals Award regarding annual leave payments for shift workers where, on page 9, you made the following observation and I quote:

> "One should also be satisfied that the result is not otherwise out of step with the general provisions of the award as a whole."

Later on the same page, four lines from the bottom of the second

MR EDWARDS: paragraph you said as part of the example you gave, and I quote:

> "It would be obvious to any fair minded person that unless the intention of the award maker permitted no other conclusion, the interpretation would not sit comfortably within the framework of the award and would therefore be regarded as suspect."

You also sir, in transcript of that matter, said the following on page 33 and I would like to quote that too if I may:

> "PRESIDENT: I suppose I ought to have included among those guidelines an eighth observation which is probably self evident anyway, that where there is some difficulty being experienced in ascertaining the true meaning it is permissable to consider the whole of the award in context in order to arrive at the intention of the award maker but I am sure most practitioners would be aware of that anyway."

MR EDWARDS: Mr President, both the C.C.H. extract that I have quoted and your own comments made in relation to T.91 of 1985 and T.30 of 1985, lead to the inescapable conclusion that in giving the correct interpretation to an award provision regard should be had to the award as a whole, so as to adequately interpret the intention of the award maker in making that award and to ensure the interpretation is compatible with the thrust of the award as a whole.

I submit quite strongly, Mr President, that such an approach should likewise prevail in the matter the subject of this interpretation. By that I mean that the intention of each component making up the wage rate in Part I, should be viewed to ascertain the intent of the award maker as a whole.

I say that because the words expressed in sub-clause (f) of clause 7, by themselves have no real meaning when they appear without definition. The term `ordinary rate of wage´ means many things to many people. I will be dealing with that a little later on, if I may.

Clearly it is beyond dispute or ambiguous interpretation, that an employee required by his employer to work outside of the hours 7.15 a.m. and 5.15 p.m. Monday to Friday, or in excess of 8 consecutive hours in any day, is entitled to be paid at the rate of double time.

What you are requested to determine or interpret, Mr President, is what rate is to be utilized in computing that double time rate for the purposes of overtime. That is, what constitutes the ordinary rate of wage for that purpose.

It is our submission that such rate is the addition of the basic wage and margin as prescribed in clauses 1 and 2 of section 2, Part I of the Shipbuilders Award.

MR EDWARDS: In our submission that is the ordinary rate of wage and it is that I will now attempt to demonstrate.

I understand that Mr Adams and probably Mr Currie, intend to argue that the proper rates to be used, in their view, is the hourly rate prescribed in clause 1, section 1, Part I of the Shipbuilders Award.

In order to more clearly interpret the intent of the draughtsman, I submit it is pertinent to break down the wage rate in clause 1, section 1, into each of its several component parts and analyse each as it its applicability to overtime addition. This, I believe, is possible according to the doctrine of generous construction that I have already canvassed.

Turning now to the make-up of the hourly rate of, I believe it is currently $9.4573, prescribed in clause 1, section 1, you will note that the award provides :

> "The minimum rate of wage thatmay be paid by employers to employees engaged in the dunnaging of ships duringm ordinary working hours prescribed in sub-clause (a), clause 2 hours, section 1, Part II, shall be $9.4573 per hour.
>
> Such hourly rate is inclusive of payments for pro rata entitlements for annual leave, sick leave and tool allowance, but is exclusive of overtime penalty rates, meal allowances and special rates prescribed in clause 1, special rates, section 1, Part II.
>
> Such hourly rate is computed on the basis of the calculation of the value and is inclusive of pro rata entitlements to the following :

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20 days annual leave; 10 days sick leave; 11 days public holidays; 8 days for following the job; and tool allowance of $7.60 per week."

The award then goes on to set out a formula which enables the calculation to be made and provides for a couple of additions to be made to such prescribed hourly rate. Those being related to annual leave loading and to a disability allowance.

It is inescapable therefore, in our view, that it was the intention of the draughtsman to provide recompense to these itinerant workers during the defined ordinary hours at the rate of 20 days annual leave; 10 days sick leave; 11 public holidays; 8 days follow thejob, with a defined tool allowance.

These adjustments being addition to the wage rate prescribed for classification A - Shipright, clause 2, section 2, Part I.

In my submission that is merely a restatement of the award provision and is not able to be converted in any way.

Just as clearly is that the application of double time to a rate containing compensation for such matters, is not in accord with the intention of the draughtsman, as it would then lead to allowance for annual leave at the rate of 40 days per annum and sick leave at 20 days per annum. It would allow for public holidays at the rate of 22 per annum, rather than 11, and would allow for 16 days follow the job, as well as the tool allowance which would currently fall at the rate of $15.20 per week, whilst working overtime. That would be in addition to the payment normally made for those items during ordinary hours.

The unambiguous statement of the parties in framing this provision is that compensation for those

MR EDWARDS: matters be at the same rate as that for weekly hire employees.

I interpose to suggest that that is the State standard provisions. I say, presumably, they have aligned those with those applicable to a shipwright on weekly hire in section 2 of the award upon whose wage rate this hourly rate is computed.

Bearing that in mind and adopting the concept of generous construction, I believe one should view the intention of the award draughtsman in comparing the position of a weekly hire employee with the itinerant employee, who has his wages and conditions aligned with that weekly employee.

I believe we should do that to see just what the intention in relation to annual leave, sick leave, public holidays and tool allowance really was.

A weekly hire employee proceeding on overtime receives payment of time and one half and double time depending on circumstance, based upon his ordinary rate of wage. The same term appears again. Therefore such payments would not take into account payments or provisions for annual leave, sick leave, public holidays or tool allowance. In fact the working of overtime has no bearing whatsoever on the accrual of or payment for, any of those provisions for weekly hire employees.

In fact the annual leave clause for weekly hire employees in section 2 - that is clause 11, section 2, Part II - provides :

> "That an employee receives 28 consecutive days annual leave after 12 months continuous service. Such leave to be paid in respect of the ordinary time that would have been worked had the employee not been on leave."

MR EDWARDS: Now I emphasize `ordinary time´, no adjustment is made for `overtime´.

That was clause 11 of section 2, Mr President.

PRESIDENT: Thank you.

MR EDWARDS: Nowhere does the award provide that a weekly hire employee who works overtime receives additional annual leave, or accrues annual leave at an accelerated rate, or receives any additional annual leave payment.

The same applies for sick leave, in that a weekly hire employee accrues sick leave at the rate of 10 days per annum and does not accrue an additional entitlement merely by the working of overtime or by any other means. Nor is the sick leave thereby paid at a high rate.

The award provides, Mr President, for 11 public holidays for full-time weekly employees. These are not added to by the working of overtime. That is, weekly employees do not receive 22 days as paid public holidays simply because they work overtime. Nor are public holidays paid at a higher rate because of overtime worked.

The tool allowance provision for weekly hire employees in section 2, specially excludes that amount being taken into account in the computation of overtime and other penalty rates.

That intention is clearly stipulated in clause 14 of section 2, Part II of the award - which is found on page 20 of No.1 of 1981.

PRESIDENT: Page 20 is it?

MR EDWARDS: Page 20, clause 14, the title being `Tools´.

PRESIDENT: Which would not be the easiest award to follow would it?

MR EDWARDS: We are on all fours on that, Mr President.

MR EDWARDS: If I could just read that clause, sir:

> "Employees shall provide all hand tools including auger bits up to 1" diameter, twist drills up to 1/2" diameter and shall be paid a tool allowance of $10.50 per week which sum shall not be taken into account in the computation of overtime and other penalty rates."

That intention is also reflected in the tool allowance for apprentices. At the risk of confusing everyone further, that is found in clause 4, section 2, Part I - Wage Rates.

That is found on page 4 of No. 3 od 1984.

PRESIDENT: At the bottom?

PRESIDENT: The second last pragraph, Mr President. It says :

> "Wage rates for apprentices shall be adjusted to the nearest 10 cents. In addition to the rate prescribed herein there shall be addred a tool allowance of $10.50 poer week, which sum shall not be taken into account in the computation of overtime or any other penalty rates."

Clearly therefore Mr President, it is the intention of the parties to this award, that tool allowances not be subject to penalty additions. This attitude of the parties to the award is clearly reflected in the minutes of a meeting of the Shipbuilders Industrial Board held on the 7 March, 1984 and identified as A. No. 17 of 1984.

I will tender a copy of those minutes as an exhibit.

PRESIDENT: Exhibit E.1.

MR EDWARDS: If I could take the Commission to the bottom of the front page. This is a meeting of the Shipbuilders Industrial Board, held before Deputy Chairman of Industrial Boards, Mr A Robinson (as he then was), and attended by myself, Mr Lucas, Mr Currie and Mr Midgley.

The Board agreed to several variations to the award. If I could take you to number 3 :

> "By adding after the word "week" in theparagraph following the table in Clause 4 (Apprentices), Section II, Part I the following words:-
>
> "which sum shall not be taken into account in the computation of overtime or any other penalty rates." "

That was an agreed matter inserted into the award by the parties to that award at that time, which was the Board. It clearly, in my view, reflects the intention of the parties, that tool allowances should not be subject to premium or penalty additions.

The attitude of the State authority in Tasmania on the question of tool allowances being subject to penalty addition has been clearly expounded.

The first occasion where that was done was by the Chairman of Industrial Boards, Mr Pamplin, on the 14 December, 1979, when presiding over a section 31 Common Rule hearing under the Industrial Realtions Act 1975, where he made the following strong observations on page 14, in the 4th and 5th paragrpahs. I will tender a copy, if I may, Mr President.

PRESIDENT: Exhibit E.2.

MR EDWARDS: For ease of reference, Mr President, I have not included the entire decision, to have done so would have been a bit of over-kill, in my view.

MR EDWARDS: I have included the front page which identifies the document as CR No.8 of 1979, dated 14 December, 1979, and reads :

> "COMMON RULE AWARD - MADE PURSUANT TO THE PROVISIONS OF SECTION 31 OF THE INDUSTRIAL RELATIONS ACT 1975 IN THE MATTER OF APPLICATIONS TO VARY MARGINS FOR TRADESMEN CONTAINED IN INDUSTRIAL BOARD AWARDS."

I have included page number 14 and I would like to quote from the 4th and 5th paragrpahs :

> "In addition to considering margins, I have had regard for what was submitted during the hearing and the decision of the Metal Industry Full Bench in relation to the granting of a tool allowance of $4.00 per week for tradesmen; such allowance being for all purposes of the award.
>
> With the greatest respect I find myself at variance with the decision of the Full Bench because I believe that to apply an allowance in such a manner runs contraryto the well established basis upon which tool allowances should be prescribed in awards, but now that it has been introduced in the circumstances where tools ordinarily required by the employees in the performance of their work as tradesmen are not provided by the employer, I believe it is industrially just that the same figure be passed on, as a flat amount to Awards of this Authority, but certainly not for all purposes."

That was the State standard rate for a tool allowance that is prescribed in section 1 of this award.

MR EDWARDS: It being aligned by a decision of the Deputy Chairman of Industrial Boards, in 1981.

PRESIDENT: That was flowing from the Common Rule application was it?

MR EDWARDS: That is right and it has continued to follow those Common Rule awards and National Wage case increases that have been variously handed down by the previous Industrial Boards Authority and of course by the 2.6% handed down by this Commission earlier this year.

Mr Pamplin, again considered this question in No. CR1 of 1982 in similar circumstances in a decision dated 18 March, 1982. Likewise I would like to table a copy of the relevant pages of that determination.

PRESIDENT: Exhibit E.3.

MR EDWARDS: That document is given the number of No. CR1 of 1982 :

> "IN THE MATTER of an application by the Tasmanian Trades and Labor Council for a Tradesmens Test Case in light of the decision handed down by the Australian Conciliation and Arbitration Commission on 18th December, 1981 relating to the Metal Industry.
>
> DECISION PURSUANT TO SECTION 31 (8) OF THE ACT."

I would like to direct the Commission's attention to page 24 of that determination, where Mr Pamplin says in the third paragraph :

> "As I have previously stated I cannot accept, even remotely, that the insertion of a tool allowance in an award included any intention that it be for all purposes. Nothing has been put on this occasion which would persuade me otherwise and to suggest

MR EDWARDS:

> that a tool allowance should be increased by virtue of overtime hours that are worked or penalty rates that are attracted during the course of employment, is contrary to the well established basis upon which such allowances are prescribed."

I have simply included the back page of that decision to enable people to ascertain who made the decision and the date of it.

Whilst this exploration may seem at first glance to be encroaching upon the field of merit, I submit that it is imperative in ascertaining precisely what the real intention of the draughtsman was. I believe this has been done. Clearly the intention of the draughtsman was not to provide for annual leave, sick leave, public holidays, follow the job allowance and tool allowance at double the normal rate, because to have done so would have been to completely negate the stated basis of the hourly rate in clause 1, section 1, Part I. It would also be totally out of pace with accepted industrial custom and practice. In fact, I believe Mr President, it would make a nosense of the stated intention in clause 1, section 1, Part I, to provide for certain matter for itinerant workers that they would not otherwise have been entitled to.

I submitted earlier, Mr President, that the doctrine of general construction shouldbe utilized and in so doing quoted from C.C.H. - an extract from Justice Street - and I would like to just repeat part of that quote at this point, if I may.

I think Justice Street said :

> "I think therefore in construing an award one must always be careful to avoid a too literal adherance to the strict technical meaning of

MR EDWARDS:

> words and must view the matter broadly and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award."

If one accepts that approach in the instant case, I believe there are a couple of inescapable conclusions that must be drawn. The first being that the award allows compensation of itinerant workers at the rate of 20 working working days annual leave; 10 working days sick leave; 11 paid public holidays; 8 days follow the job allowance; and a tool allowance currently prescribed at $7.60 per week.

The award allows for weekly hire employees 28 consecutive days or more appropriately put in these circumstances I believe, 20 working days annual leave; 10 working days sick leave; 11 paid public holidays per year; and a tool allowance at the rate of $10.50, which is not subject to premium or penalty addition.

The third conclusion that I believe should be drawn, is that a weekly hire employee does not have any of those entitlements increase by reason of the working of overtime. In fact, in the case of the tool allowance it is specifically excluded from penalty addition.

MR EDWARDS: A fourth observation that should be drawn, in my view, is that the general intention of the award maker was that such matters not be subject to penalty addition. If it were to be so, it would have been so for all.

Mr President, I turn now to the term in the award which we are here to debate, by way of interpretation, that term being `ordinary rate of wage´.

It would be my submission that the term `ordinary rate of wage´ means many things to many people, depending on what they want it to mean. But stripped down to its barest essentials, it must surely, in common industrial usage, mean the rate of wage applicable to an employee´s ordinary or regular hours of work which does not and cannot include items of an extraneous or compensatory nature - that is, items such as overtime payments, shift payments, annual leave allowances or provisions therefore, sick leave allowances or provisions therefore, follow the job loadings et cetera.

You, Mr President, in T.91 of 1985 quoted from the Macquarie Dictionary, which you described as the latest lexicon and which is said to contain Australian English. I have drawn the following from page 79 of transcript ...

PRESIDENT: I thought you would.

MR EDWARDS: It would hardly have been fair of me not to, Mr President, if you went to the trouble of quoting it. I will quote it again:

> "That ordinary pay means remuneration for an employee´s normal weekly number of hours fixed under the terms of his employment but excluding any amount payable to him for shift work, overtime or other penalties."

MR EDWARDS: I have yet to convince the Chamber of the merit of purchasing that lexicon but I am sure that I will eventually, Mr President.

Whilst it can be said that we agree wholeheartedly with that construction of the term `ordinary pay´, I believe, not unnaturally, that it does not and cannot encompass all of the possible exclusions from what is stated to be `ordinary pay´.

I would therefore contend that once analysed, that definition of the term in fact is saying that `ordinary pay is the basic essential wages rates payable to an employee for ordinary work, but excluding shift overtime or any other extraneous payment´, in this case those extraneous payments being made up by annual leave, sick leave, public holidays, follow the job loading and tool allowance.

To determine otherwise is, in our submission, to make a mockery of the draftsman´s stated intentions throughout the entirety of the award, to provide State standard provisions for these itinerant workers for annual leave, sick leave et cetera.

It was certainly never his intention to double existing standards during overtime, as evidenced by the provisions that currently apply for weekly hire employees, and that is the intention of the award as a whole.

It is our submission that without an appropriate definition in the award of the term `ordinary rate of wage´ or `ordinary rate´ or `ordinary pay´ or `ordinary time rate´ as it is variously described in a number of places, it is necessary to obtain the draftsman´s attention in order to properly understand precisely what he he trying to say.

I believe that we have demonstrated beyond any doubt that that intention was not to provide in this award for annual leave of 40 days per annum,

MR EDWARDS: sick leave of 20 days per annum et cetera, or 22 public holidays, or 16 days follow the job, but merely to provide appropriate recompense by way of standards to itinerant workers who would not otherwise have enjoyed the benefits of their weekly-hire brothers.

We therefore submit that in determining what the term `ordinary rate of wage´ means, one should pose the question, as I have tried to do this morning: What did the draftsman intend those words to mean?

We say his intention was to exclude from the wage, in clause 1, Section I, Part II, all extraneous matters inapplicable to the calculation of overtime payments.

I have nothing further to add at this stage, Mr President. I believe the inescapable conclusion is that it was never the intention of the draftsman to provide for a doubling of standards for these itinerant workers. The overall intention and the concept of the entire award deals with annual leave being at `x´ numbers of days per annum and sick leave being at `y´ number of days per annum et cetera.

I believe that the term used in clause 7, which we are here to view, the term `ordinary rate of wage´ in fact was put in the award specifically so that the interpretation that is currently being placed on this matter by the unions was not possible, in that the term `ordinary rate of wage´ must surely mean exclusion of all extraneous matters.

PRESIDENT: Mr Edwards, this is not a first award. I presume it has been in operation for some time.

It begs the obvious question: Why has this matter just come before the Commission?

MR EDWARDS: In the absence of having a crystal

MR EDWARDS: ball and being able to read other people's minds, I don't know, Mr President. Certainly the company for whom I appear today has always paid the overtime provisions in accordance with the way I have just acquainted the Commission that I believe they should be. I don't know what is done in other places. It could well be that other employers have misinterpreted the award in the same manner as the trade unions have.

I don't know the answer to that question, Mr President.

PRESIDENT: Before you resume your seat, I will take you back to what I will loosely call `guideline 1' and that is that construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts
futile to attempt such an exercise in any other way.

Now, can you give me some specific facts so that I can interpret the award in relation to that factual situation? Do we have a shipwright or a number of shipwrights?

MR EDWARDS: We do sir. We have shipwrights employed by Conaust Australia.

We have that company which does employ people on the dunnaging of ships in accordance with the wage rates prescribed in clause 1, Section I, Part I. They are required, from time to time, to perform that work outside of the ordinary hours prescribed in clause 2 of Section I, of Part II of the Award, which is found on page 5 of No. 1 of 1981 and which allows for:

> "Ordinary working hours for day workers shall be 40 per week to be worked in 5 days of 8 consecutive hours each, exclusive of meal time, between the hours 7.15 a.m. and 5.15 p.m., Monday to Friday inclusive."

PRESIDENT: No 38-hour week there yet, Mr Edwards?

MR EDWARDS: I am sure my friends from the trade union movement will be about to acquaint you with the fact that some discussions have taken place on that subject, Mr President, but at the moment they are in a state of flux, as it were.

PRESIDENT: So the devisor is still 40, then?

MR EDWARDS: That is correct, Mr President, although it could well be that depending on the outcome of this interpretation, we may be able to solve two questions in one a little later on down the track, in that should you not find in our favour, we may be able to do a trade off with the trade union movement for a 38-hour week for a more appropriate wording in the award.

So yes, sir, there are employees who do perform this work on overtime. Conaust Australia pay the overtime, utilizing classification (a) of clause 2, Section II, which is ...

PRESIDENT: I take it that is not in dispute, that the shipwright classification is the base rate from which ... ?

MR EDWARDS: Yes sir. If I can take you back to clause 1 of Section I of the wage rates section for a moment, in the formula there for calculation it states:

> "For the purposes of calculation, the following formula shall apply:
>
> 1/40th of 52 over 42.2 of the weekly wage for classification (a), clause 2, Margins."

PRESIDENT: Thank you.

MR EDWARDS: Which clearly makes the shipwright the appropriate classification.

As I say, Conaust Australia, in paying overtime, utilized

MR EDWARDS: classification (a) in conjunction with the basic wage, believing that to be the intention of the award as to ordinary rate of wage.

PRESIDENT: For the purposes of overtime, it is the aggregate of classification (a), plus the basic wage, divided by 40 and multiplied by 2 that determines the rate for double time.

MR EDWARDS: For double time, in accordance with clause 7 of Section I. That is correct, Mr President.

So that is the factual situation we do have. The trade union movement has advised us that it does have a slightly different interpretation of how that overtime should be calculated and it is that matter which brings us before you this morning.

PRESIDENT: Thank you, Mr Edwards. Mr Adams?

MR ADAMS: Thank you, Mr President. As this is my first interpretation hearing, I would hope that the Commission would bear with me if I do `go off the rails´, so to speak now being acquainted with these guidelines and I will have to address myself to them.

With your first guideline, you talk about specific facts. The specific facts from our point of view are that the employees whom we are talking about, covered under this award, under Section I, Part I, are employees who are engaged in the dunnaging of ships. They are a casual employee; they are not people on weekly hire.

We believe that the casual rate of wage, or rate of pay, that applies to these people is there for a specific reason - that they are casual employees and it covers, as Mr Edwards has already outlined, the amount of wage does cover annual leave, sick leave, public holidays and such. But it still doesn´t take away from the fact that these people

MR ADAMS: are casual employees; they are not on weekly hire; they don't have the security of weekly hire people; they are people who could be unemployed for quite a period of time. We believe that the rate has been constructed to take in all these considerations and that in the computing of overtime, as in Section VI of Part II of the award, that the rate shall be paid at double time.

We also believe that if we take Mr Edwards' comments that the computing of rate of wage should be just on the basic wage and the margin of classification (a) in Section II, Part I of the award, then there would be no need for separate sections of the award in the initial drafting of the award.

If that was a drafting mistake, then that is something that we have to accept, and so do the employers, but that is our argument that Section I is there for a certain range of employees and Section II is also there for a certain range of employees. Even though they are under the one award, we don't believe that they should be combined.

I would ask you, sir, in what Mr Edwards has said that the overtime payment for these employees should be computed on the basic wage and margin, that would therefore compute to a lower overtime payment and, as I am not aware, would you be able to advise us of any awards where an overtime payment is lower than the ordinary rate of pay because, in theory, that is what would happen.

If the interpretation was that the payment for overtime was to be worked on the basic wage and margin.

PRESIDENT: Do you want me to tell you some awards?

MR ADAMS: I am unaware of them?

PRESIDENT: They are State awards, inherited by this Commission, that prescribe a

PRESIDENT: lesser rate for overtime than would otherwise be the case were the weekly rate simply be divided by 40.

As it happens, My clerk was having difficulty in reconciling the rates and it wasn't until the calculations were done that it was discovered that the overtime rate (I am talking about casual-type people, not weekly) - the time and a half and double time rate which is, incidently, spelled out in the awards. Mr Edwards may be able to recite them to you.

It spells them out at different rates. In other words, the ordinary hourly rate is `x' dollars and cents per hour for working overtime, time and a half and double time - it is not 5 percent more or a hundred percent more.

You have asked me - I have told you. You have learnt a lesson that you never ask a question unless you have got a rough idea as to what the answer is going to be.

MR ADAMS: I asked the question because I was unaware, sir.

PRESIDENT: But that has nothing whatever to do with this case. I am only concerned with what this award says, so you can take some comfort from that. I don't care what another award says, but you have asked me and I have told you.

MR ADAMS: Thank you. We don't believe that to conform to the guidelines for interpretation that we are trying to read anything into the award that is not there at the moment.

We believe that it is spelled out quite clearly that the ordinary rate of wage would be `x' amount of dollars and that under the overtime clause in Part II, that that rate will be paid at double time and in clause (f), the penalty rate shall be calculated on the ordinary rate of wage which we believe at the moment,

MR ADAMS: as Mr Edwards has quoted, is $9.457 cents. We believe that would give an overtime payment of $18.914 per hour.

Also, sir, if at this stage I might be able to hand up an exhibit which is an interpretation I got from the Department of Labour and Industry on this question. You will note that the figures are outdated because at that time the Commission hadn't altered the Ship Building Award, so it is prior to that.

PRESIDENT: Exhibit A.1.

MR ADAMS: I would like to read this into the transcript, sir.

IKt is from the Department of Labour and Industry and is addressed to the State Secretary, The Amalgamated Metals Foundry and Shipwrights Union.

> "The Shipbuilders Award
> Re: Shipwrights
>
> I wish to confirm that the ordinary ratge for shipwrights in Clause 1, Part I of the Award is $9.2201 per hour.
>
> Clause 7, Part II provides, inter alia, for double time to be paid for work performed outside of ordinary hours or in excess of eight hours per day.
>
> It further provides that penalty rates for overtime shall be calculated on the ordinary rate of wage, i.e. $18.4402 per hour.
>
> Yours faithfully,
>
> (G. Urquhart)
> Secretary for Labour

Before going into a dispute situation over this question, we decided that would be the best way to go to get an interpretation and from that interpretation we then claimed on the employer that that is what he should be paying. Subsequently, that is why we are here.

MR ADAMS: Also, another employer who does employ shipwrights on the waterfront is Purdon & Featherstone. They pay at double time and it is double the full hourly rate. Our members, who have been employed by Purdon & Featherstone at various times, have been told by that firm that they believe that that is the correct interpretation of the award and that is why now they are being employed by Conaust at some periods of time, they believe there is a muck up there somewhere.

There is not a great deal more that I can add. The only thing is that I reaffirm that it is not our intent to read anything into the award that is not there. We believe the award is quite clear; there is no ambiguity as far as we are concerned and we believe that the payment should be as read in the award.

PRESIDENT: Thank you Mr Adams. Would you assume from Exhibit A.1 that if an employer did not in fact pay twice the ordinary weekly rate of 9.45735 cents per hour, the Department of Labour and Industry would prosecute him for breach?

MR ADAMS: I would believe so, that if the Department of Labour and Industry was informed that that was the position ...

PRESIDENT: Well, they have said so.

MR ADAMS: ... they would obviously prosecute.

PRESIDENT: That puts the Commission in a somewhat difficult situation whereby if this interpretation goes against you, I will either have to vary the award or tell the Department of Labour and Industry that they are wrong.

Frankly, I am surprised that the Department of Labour and Industry would set about the task of interpreting awards when they, on a previous occasion, saw fit to include in a letter of this kind a suggestion

PRESIDENT: that any question of interpretation ought now be brought to the Commission.

You have opened a can of worms, Mr Adams.

PRESIDENT: Are you going to add to my difficulties Mr Curry?

MR CURRY: With your permission Mr President.

PRESIDENT: No you won't have my permission to add to my difficulties.

MR CURRY: Difficulties? No, I won't add to your difficulties. I'm sorry. I've got a cold and my hearing is not too good. I will probably get myself into a lot of trouble Mr President because it is the first time that I have been to such a hearing but I am very concerned with the facts. Now we must remember that ... and I have had dealings with Bergman and Featherstone and other people since 1952 ... It is a casual industry and naturally it is in the waterfront industry.

When this award, and we came into this rate, it was a decision of a ... rate. It wasn't what the Trade Union movement wanted because it wasn't enough at the time. It was quite clear and precise in understanding and this is what I want to get through to everybody and it has been carried out by Berson and Featherstone - I think they have been in industry for about 70 to 80 years right back if you want to follow it through - they paid exactly what the A.M.W.S.U. has asked this particular firm for and always have done and that was there interpretation of the award.

This is where I will get into trouble. The basis of us asking for the rate we got was the conditions of the waterside workers who work in the holds along side us. I don't know if Mr Edwards is aware of it but he didn't mention any of this in his submission. I checked with the waterside workers this morning. They are on a 35 hour week, not 40. Mr Edwards was right to mention that. Their rate of pay if $9.65. So even with the rate that we speak about ... Let's have a look at the question of dunnaging.

MR CURRIE: You can get nine hours work a month. A vessel comes in, it can come into Risdon or anywhere at all, we have other people working on dunnaging in State determinations and E.Z. is one where our people perform the work. But on the shipbuilding one where there used to be a terrific lot of people on dunnage I think we had about 100 members there at one stage, now it is just a casual business where sometimes a ship's carpenter does it. I think everyone is well aware that waterside workers have got constitutional coverage to do the work. They've got award coverage to do it and they don't in this port but they do in some other ports.

The way Mr Edwards put his case where it looks like it is a permanent job where you are working all the time, you're working 48 weeks in the year - no one is. You are talking days when you speak about our people in particular who work in this particular industry, the ... industry.

You cannot talk about and argue properly about a person who is in building ships and vessels who is on his 48 weeks a year less his public holidays and has his four weeks annual leave and try and compare like with like and start arguing the point when we are talking about a casual person who may get three or four days per month sometimes. If he has a fortnights break it is a miracle.

I don't want to repeat any of what Mr Adams said. As a matter of fact Mr Edwards hasn't even spoken to us about it and we have both sat on the board ever since he came in the position he holds at the Chamber or whatever they call themselves these days. We would have pointed out what we are doing now that (I don't know how to be polite) it is just a smart way to try and cut these people and cut their wages. To me, with the casual nature of the industry, they are grossly underpaid even with the interpretation of the D.L.I.

PRESIDENT: Thank you Mr Currie. Mr Currie, I let you go. You were in fact transgressing but this is an award that I am not familiar with and we can, none of us, ever have too much information about an award. For that I thank you.

It seems to me Mr Currie, you've been brutally frank about all of this that in the event your members or Mr Adams' members feel themselves aggrieved by comparing their basic rates or their take home pay with the rates paid to waterside workers working along side them they may very well seek relief via the anomalies conference of this Commission which I am sure you by now understand is off and running and is there to resolve issues of anomaly or inequity.

It seems to me, before hearing Mr Edwards in reply, that what I am being asked to do today doesn't really go to what is right or what is fair so far as the rate of pay for the work is concerned. That is a matter that needs to be determined on merit by the person to whom this award is signed.

What I have to decide of course is whether or not on the actual provisions set out in this award Mr Edwards is entitled to interpret the award in the manner that he has or whether Mr Adams and it seems with him Mr ... and of course yourself Mr Currie, are entitled to interpret the award in the way that they have done. I think they are the issues.

My task is to examine the words to the extent that I feel that I am able to have regard for the exhibits tendered on both sides and come to a conclusion. That conclusion will have no regard whatever for the fact that a shipwright engaged in dunnaging might be working alongside a waterside worker who is receiving much more pay for the same work. That is a matter to be addressed at another time in response to an application in that regard.

MH - 20.08.85 PRESIDENT

MR PRESIDENT: I thought I would just make that clear gentlemen because were I sitting where you are sitting I would be feeling somewhat uncomfortable at this kind of proceeding. You haven't had to go through it and endure it before. And I guess you weren't 100 per cent sure of what was going to happen today.

Mr Edwards.

MR EDWARDS: Thank you Mr President. I have got very little to put in reply frankly. Firstly, dealing with Exhibit A.1 if I may, I would tend to term that, rather than an interpretation an opinion expressed by the Secretary for Labour that frankly holds no more water than an opinion expressed by myself or Joe Bloggs down the street. I don't believe the Industrial Relations Act gives the Secretary for Labour an interpretative function. That function is quite rightly in my belief given to yourself as President and that this is merely another opinion.

I have already explained why I disagree with what is contained in that letter. I have explained what my thoughts are on the term "ordinary rate". I have explained what I believe the doctrine of generous construction does for the awards. Therefore I have no further comments to make in relation to that letter.

PRESIDENT: Assume that you have obtained such a letter from the D.L.I. ...

MR EDWARDS: I would have undoubtedly have tendered it as another opinion which supported my own. I make no bones about that nor would I hide that fact from anybody. I'd put up everything I could.

PRESIDENT: You are honest if nothing else Mr Edwards.

MR EDWARDS: I believe I am a few other things as well Mr President.

PRESIDENT: Well I'm sure Mr Currie would agree.

MR EDWARDS: I suppose I left myself open for that. Mr Adams has submitted to you Mr President that another company do interpret the award in a different manner; that they say their interpretation is correct. Again, that is another opinion. I indicated earlier that in my believe it is possible for other employers to misinterpret awards, as I believe has been done by the Trade Union movement on this occasion.

The award must be interpreted by yourself Mr President in accordance with the words that are in it and, as I have submitted, in accordance with the doctrine of generous construction. For that reason I have no further comments to make except I would agree with Mr Currie that these people do not work a full year. I never for one moment suggested that they did. I was very careful during my submission to always say that the compensation for annual leave, sick leave etc. is "at the rate of", not, "is a full 20 days or is a full 10 days"; it is at the rate of 20 days, it is at the rate of 10 days. For that reason they are adequately compensated at the same level as virtually all other employees covered by awards of this jurisdiction in the private sector. For that reason I believe that doctrine of generous construction will undoubtedly persuade you Mr President to decide in our favour.

I guess it would be pertinent before you ask the question as you undoubtedly intend to as to whether or not we would be requesting that the interpretation be prospective or retrospective. As the applicant, it would be my request that any interpretation you hand down be prospective.

PRESIDENT: I was going to ask you another question Mr Edwards. And again, before asking the question in fairness to your friends who possibly

PRESIDENT: don't have the Act with them and in particular Section 43, they ought to be aware that in the event I find that the award draftsman has been deficient in properly expressing what I believe the intent of the award is, it is open to me pursuant to Section 43 (1) (b) to do something differently. And that says that first I must under:

> "(a) declare, retrospectively or prospectively, how the award should be interpreted; and
>
> (b) where that declaration so requires, by order, vary any provision of the award for the purpose of remedying any defect in it or of giving full effect to it."

Mr Edwards you haven't asked me to do that.

MR EDWARDS: I will now sir. If you do find that the draftsman has been a little careless (perhaps may be the appropriate terminology) in his drafting of the award and that in order to give proper effect to the award you believe that there is, in fact, some variation to the wording that is necessary, I believe that should be done. Whether you do it yourself or whether you instruct the parties to make an application to review the matter is obviously a matter within your discretion. But if you believe it would be appropriate to remedy the wording defect, if there is one in the award, then I would support that.

PRESIDENT: Yes.

MR EDWARDS: Prospectively, I might add.

PRESIDENT: I will allow Mr Adams and Mr Currie to address that point Mr Edwards. You can have an address in reply if you wish because I feel sure that they probably don't fully understand that that could mean in the event I found in Mr Edwards' favour and chose

PRESIDENT: to vary the award accordingly, you have not, because of the nature of these proceedings, been given an opportunity to be heard on the merits although Mr Currie certainly got into that hallowed area. But I am afraid I have a complete blank in that regard. I haven't taken any notes on that.

Now Mr Adams are you in some difficulty in this? If you are I will help you.

MR ADAMS: With retrospectivity sir, or prospectivity I believe from what you are saying that if you find in Mr Edwards' favour and there is a case there to vary the award to that way of thinking - yes I am slightly in a bit of difficulty.

PRESIDENT: Can I summarize for you because I think Mr Edwards has considered your situation somewhat because he has indicated that it is within my discretion to either vary the award if I find in his favour, I may not, and that of course is the end of the matter.

MR ADAMS: That's right.

PRESIDENT: If I were to do that of course my decision is appealable. You understand that. Alternatively, you would then have to, if you didn't agree with it anyway but chose not to appeal but rather to bring evidence on merit, persuade the Commissioner to whom this award is assigned that on balance the variation that I made as a consequence of these proceedings was in need of further amendment.

Now it is contained within the guidelines namely that if there is perceived some defect in the drafting then perhaps the correct way to go about it is making an application to vary the award. That way both sides get to put their respective cases without being constrained within a set of guidelines like this. Certainly, they would be constrained to put their case within the wage

PRESIDENT: fixing guidelines but if I find in Mr Edwards' favour and decide that maybe there should be some extra words added to put it beyond doubt that he was right and you were wrong, then I just vary the award and that is it. Do you see what I mean?

MR ADAMS: Yes. I suppose sir, that is a bride we are going to have to cross when we come to it and if we come to it.

PRESIDENT: Well I think that perhaps you really ought to be telling me that if I find in Mr Edwards' favour I ought not vary the award at this stage.

MR ADAMS: That is what we would be seeking sir, yes.

PRESIDENT: That is what I thought you said.

Yes Mr Currie.

MR CURRIE: We would be of the same opinion as Mr Adams that the award should not be varied. But one thing that has been drummed into me over the years in this particular industry by the employers and on many occasions by Mr Edwards, is that because of the nature of the industry and a vessel coming in, they have got to get the rates in as soon as the vessel sails, especially overseas vessels, for the employer to get reimbursement. If you alter awards or if you made it retrospective there is no way of getting money back or collecting money and there has always been a great difficulty and every time we have met on a particular board there has been a worry about getting it done as quickly as possible so that if work does come in the money can be recouped by the employer.

I hope you don't, but if you do vary the award, that is to me although I might be outside the guidelines, I think it is very important. Fancy me putting the employers' case. I honestly think the award should stand as is and that custom and practice should prevail.

PRESIDENT: Thank you Mr Currie. Mr Edwards, in case you thought you were being torpedoed you probably were but you understand the position.

MR EDWARDS: I certainly do and I don't disagree with you at all Mr President. I believe it probably is more appropriate in these circumstances that the matter be considered on merit at a later time once your interpretation of the meaning of the award is made clear.

I would also just like to thank Mr Currie for putting those very eloquent submissions in relation to the effect of retrospectivity in this particular award which is basically double charge out rates. I thank him for that. I won't repeat them. I have nothing further to add.

PRESIDENT: Well gentlemen that concludes this hearing. My decision is reserved. You will be advised of the outcome as soon as possible.

HEARING CONCLUDED