

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No 628 of 1986

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

re `Cup Day`

PRESIDENT

HOBART, 18 February 1987

TRANSCRIPT OF PROCEEDINGS

(CONTINUATION)

MR FITZGERALD: In my submission it is necessary to specifically designate the race meeting as a cup meeting to come within the definition of Cup Day within the award. The race meeting being a `cup`, should be distinguishable from any other meeting within the racing club's yearly calendar of events.

In Tasmania of course the most recognized of the `cups` are of course the Hobart and the Launceston Cup but as you can see by the notice in the Gazette there appears a Devonport and I am told by my colleagues that there is also a Burnie Cup.

PRESIDENT: Well then why couldn't people in Ulverstone enjoy the Devonport Cup?

MR FITZGERALD: Because it's outside the municipality, sir, I would suggest.

PRESIDENT: But it's only a hop, step and a jump away isn't it.

MR FITZGERALD: It is, sir, but you will notice that ...

PRESIDENT: I mean, they could have Launceston Cup - that would only be a little over an hour's run.

MR FITZGERALD: I agree that they are in close proximity but if you look at the notice in the Gazette in respect to Ulverstone trotting meeting it applies to the Ulverstone Municipality only and that would exclude of course any outlying areas.

PRESIDENT: Devonport, yes.

MR FITZGERALD: Yes. But ...

PRESIDENT: Would that be why they've gazetted it, because they can't enjoy the Devonport Cup?

MR FITZGERALD: The Ulverstone employees?

PRESIDENT: Yes. Is that why the mid-week meeting has been gazetted because ...

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MR FITZGERALD: It's mere supposition, sir. I can't say whether that is the reason or not, but what I'll be submitting, sir, is that it is not a 'cup meeting' and that would be necessary to come within the word 'cup' as described in the award.

PRESIDENT: Does 'cup' not really refer to the trophy?

MR FITZGERALD: No, it doesn't; it is a specific event.

PRESIDENT: It's a gala ...

MR FITZGERALD: Yes, that's right; as you indicate. I believe it's distinguishable from any other event run by the club and that certainly is the case in the case of the Hobart and Launceston Cup particularly and as I indicated, I have sought specific instructions in respect to the Hobart Cup. It is a specific, as you describe it, gala event.

You will probably notice also in the exhibit which was produced (the Tasmanian Government Gazette) that in each of the ... I'll just refer to them by number, sir, on page 1954, look at the Ulverstone Trotting Club mid-week meeting, there's no reference whatsoever to a cup. Then the ...

PRESIDENT: What number is that?

MR FITZGERALD: That's 321. Then we go to number 322 where it refers to the Devonport Cup Race Meeting - specifically 'cup' and over the page at 1955, if we go to number 325, the Launceston one, it once again refers to 'Launceston Cup' and then we go to 327 and it once again refers to 'Hobart Cup Day Meeting'.

In all instances apart from Ulverstone, there is a reference to a cup meeting and they are specifically designated as such.

As I indicated, sir, apart from the

MR FITZGERALD:

fact that it has been gazetted as a bank holiday, Ulverstone Club mid-week meeting doesn't bear any particular, special relevance or status.

In my submission, to suggest that a mid-week trotting meeting is a cup day meeting within the terms of the award is, in my submission, beyond the wildest stretch of the imagination.

In summary, Mr President, I would urge you to reject the arguments of the applicant union, and it's supported by Mr Heapy, particularly those based on merit. It may be more appropriate that an application be brought before this Commission to further define what is in fact encompassed by the meaning of 'cup day'.

It is my submission, sir, that Ulverstone trotting day as such is not a 'cup day'.

For the record, as Mr Holden has already indicated, the nursing homes which I represent, of which there are in fact 3 in the Ulverstone area, have never recognized the day. They have acted in good faith in that the Department of Labour and Industry which had a role of advising at that time in written form have advised that there is no application of that particular day to the private sector.

It is my submission, sir, that you should make the only declaration open to you and that is to declare that Ulverstone Trotting Club mid-week meeting is not a holiday described within the award as 'cup day'. If the Commission pleases.

PRESIDENT:

Yes. Mr Fitzgerald, if you could go back to Exhibit A, it would seem that the Secretary for Labour would of course disagree with you because the preamble ...

MR FITZGERALD:

That's in respect of the public

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MR FITZGERALD: sector though, sir.

PRESIDENT: Yes, I understand that. I quite accept that, but he makes reference there in clause 8, section C Part II of the Hospitals Award ...

MR FITZGERALD: Relating to public hospitals.

PRESIDENT: Yes:

"... provides an entitlement to a `Cup Day` (half day)."

You've got cup day in quotes.

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

`Such a holiday` and then goes on to nominate Ulverstone Trotting Club Mid-Week Meeting.

MR FITZGERALD: Yes.

PRESIDENT: Well now, it's unlikely that the Secretary for Labour or the Bank Holidays Act would prescribe that this is in substitution ... or this is a cup day for public servants but it's not a cup day for private employees.

MR FITZGERALD: That the Bank Holidays Act would do that?

PRESIDENT: Well I'll read it again:

"The Secretary for Labour and Industry advises that the provision for a half holiday on Cup Day is applicable only in those areas for which such a holiday has been declared under the Bank Holidays Act 1919.

In accordance with this

PRESIDENT: ruling the following areas receive a half day holiday on the appropriate dates: Ulverstone Trotting Club Mid-Week Meeting."

The subject matter is cup day.

MR FITZGERALD: I understand that, sir. The advice and ruling, I would suggest, sir, relates to the public sector only.

Now, I have a, back in 1983, not that I produced it as an exhibit because I understand once again it is an argument going to merit, but there is an opinion addressed to one of our members, in fact Mount St Vincent Nursing Home, and I can read it, sir. It is an opinion from the Department of Labour and Industry as a result of a query from Mr Prenter who is the Secretary Manager of Mount St Vincent Nursing Home, and it reads (this is dated 7 January, 1983):

"Dear Sir,

Hospitals Award

I refer to your letter of 5 January, 1983 and advise that the half day holiday for the Ulverstone Trotting Meeting is not an award holiday and therefore not applicable to your employees."

PRESIDENT: Who was that ... ?

MR FITZGERALD: That was signed by C.H. Johnston for the Secretary for Labour, from the Burnie office of the Secretary for Labour.

PRESIDENT: Yes. It does get confusing, doesn't it?

You see, reference by - it was actually Mr Ireland who was signing for Doctor Sparrow, who was signing for ...

MR HEAPY: Sir, can I just clarify one thing ...

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PRESIDENT - FITZGERALD - HEAPY

PRESIDENT: Just a moment please; let me finish, if you don't mind.

Reference in Exhibit A to clause 8, section C Part II of the Hospitals Award is this very award. It's not the Public Hospitals Award because it was this very award ...

MR FITZGERALD: It relates to ...

PRESIDENT: ... that the Public Hospitals took its conditions of service from.

MR FITZGERALD: It relates I think to the public hospitals' section, sir. If I can just ...

MR HEAPY: Sir, may I assist here in another way?

When you look at section 11 of the Bank Holidays Act, it says quite clearly (this is the old wording):

"When in any Wages Board determination ... "

Now that seems to me to imply not just the public but the private sector.

MR FITZGERALD: I disagree most violently, sir.

MR HEAPY: Well that's what the award ...

PRESIDENT: Well at that stage, Mr Fitzgerald, it could only have been the private sector.

MR HEAPY: Yes.

MR HOLDEN: If I could help the Commission, I have before me Part II, Conditions, No. 1 of '82 from the Government Gazette 26 May '82 and if one looks at the document it can be seen that section 1 is 'Staff employed in private hospitals'. Section 2 relates to employees of public hospitals with the emphasis on section 2. Section 3, which is really what is in the exhibit and which I pressed in the beginning,

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PRESIDENT - FITZGERALD - HEAPY - HOLDEN

MR HOLDEN:

refers to 'Employees in establishments providing care for aged persons'. The Hospitals Act as applicable to the private sector, not the public sector.

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MR FITZGERALD: Well, the Hospitals Award as it exists and I think there's been something that now exists in the private sector but there is a specific section relating to employees in public hospitals and that's what I would submit, sir, that that advice has been given in view of. It's advice in respect to the public sector only, not in respect to the private sector.

PRESIDENT: I don't doubt that for one moment. I'm sorry if we're at cross purposes. I've no doubt at all that Mr Ireland was transmitting something to the public hospitals, but he is referring to clause 8, section C, Part II of that Hospitals Award, not the Public Hospitals Award ...

MR FITZGERALD: No.

PRESIDENT: ... because that was the parent award for conditions of employment that didn't appear in the Public Hospitals Award and believe you me, I know what I'm talking about, I used to do that award.

MR FITZGERALD: Yes. I understand you were involved there, sir.

PRESIDENT: I could never understand why employees in public hospitals had to look at a private industry award to ascertain their conditions.

Now, in November 1985 or October '85, Commissioner King, at the request of parties and by agreement translated all of these conditions into the Public Hospitals Award.

MR FITZGERALD: I understand that, sir.

PRESIDENT: Yes. And so, Mr Ireland, if he was given to sending these things out regularly would no longer have to say, 'clause 8, section C of Part II of the Hospitals Award'. He'd simply refer to the appropriate provision in the Public Hospitals.

MR FITZGERALD: Yes, I understand that, sir.

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PRESIDENT - FITZGERALD

PRESIDENT: In short, a direct lift from this award.

MR FITZGERALD: I understand that, sir, but I would rise very simply on the application of the Bank Holidays Act, or the non-application of the Act to the private sector.

PRESIDENT: I don't think there's any doubt about that. I would certainly agree with you, that the Bank Holidays Act can only have application in those areas in the statute itself.

MR FITZGERALD: Yes.

PRESIDENT: But could you help me, Mr Fitzgerald?

MR FITZGERALD: I'll try to.

PRESIDENT: What do you suppose the draftsman intended when, if you like we'll stay with clause 13, section III when he framed the holiday provision and commenced by using the words, 'All employees ...'? There's no limitation.

MR FITZGERALD: There's no limitation, I agree, sir. I suppose (and once again it is mere supposition) it could be all employees who have or are within areas where there is entitlements to such a day as 'Cup Day' and ...

PRESIDENT: Well, that's reading something into it that isn't there.

MR FITZGERALD: As we are all aware, this award does have some gross deficiencies and I'm anxious (as my counterparts on my right are just as anxious) to clear it up, but I would suggest there is an inconsistency there.

But an employee surely cannot have an entitlement to a half day for a Cup Day if a cup, as such, doesn't fall within the particular area.

PRESIDENT: Unless someone agrees that, 'We will observe Devonport Cup or Burnie Cup'.

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PRESIDENT - FITZGERALD

MR FITZGERALD: Possibly.

PRESIDENT: Because it does say, `They shall enjoy these days without deduction from their weekly wages`.

MR FITZGERALD: Yes.

PRESIDENT: Well now, it doesn't go on to say that employees in the private nursing home in Launceston, for example, shall have both Launceston Cup and Hobart Cup. They are both cup days.

MR FITZGERALD: I agree, yes.

PRESIDENT: Could it not be argued that they could enjoy both?

MR FITZGERALD: It could be argued that, possibly. Yes.

MR HOLDEN: We promise not to do that.

MR FITZGERALD: In the absence of definition, that possibility does arise, yes.

PRESIDENT: Yes. And you're saying, turn the argument on its head and say that in the absence of definition where there is no local Cup Day, then they don't get it?

MR FITZGERALD: I would suggest that has a great deal of rationale attached to that, sir, in that how can you give a Cup Day holiday when there's no cup in that particular locality and that's what I'm saying in respect to the Ulverstone area.

PRESIDENT: Unless they enjoy Launceston Cup or the gala cup days. You've already argued that a cup day means a gala cup day. It doesn't say in the locality, does it?

MR FITZGERALD: No, it doesn't. No, there's no definition whatsoever, sir.

PRESIDENT: So could one argue that, very well, they shall have Launceston or Hobart Cups?

MR FITZGERALD: That could be argued, sir, yes.

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PRESIDENT - FITZGERALD - HOLDEN

MR FITZGERALD: As I opened my submission earlier, what I suggest would be the proper course because of the lack of any precise definition would be an application to vary the award.

PRESIDENT: I couldn't agree with you more. I couldn't agree with you more, but I've been saying that for quite some time and my pleas seem to be falling on deaf ears.

MR FITZGERALD: Well, admittedly I think in Mr Holden's defence, that the written plea which appeared in your last decision came subsequent to the application.

But it's my view, as I indicated in my primary submission, there should be an application to amend the award to make the definition of Cup Day more specifically and that obviously would be an application to include the Ulverstone trotting day, which Mr Holden contends is awarded in lieu of 'Cup Day'. But I would contend that there is no proof to this Commission - put forward to this Commission today of that contention, sir.

PRESIDENT: You don't have any first-hand experience with the framing of these provisions, Mr Fitzgerald?

MR FITZGERALD: With these particular provisions?

PRESIDENT: Yes.

MR FITZGERALD: No. It was well before my time.

PRESIDENT: It seems to me somewhat strange that the award maker would consciously nominate 11 or 11.1/2 days and then with the intention of withholding at least one of those nominated days from groups of people without making reference to it.

MR FITZGERALD: I have to concede that, sir, but the 11.1/2 days refers to the Show Day and clarification of the Show Day.

As I indicated earlier in interjecting when you were making a

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PRESIDENT - FITZGERALD

MR FITZGERALD:

point, I believe the 11.1/2 days is nonsensical in any event as it could in fact be 10.1/2, as we've already seen.

I believe that that provision went into private awards by the Deputy President to clarify the Show Day situation and as this becomes very apparent, it is not soundly based because of the possibility of having 10.1/2 rather than 11.1/2, or 10 or 11 and the confusion is obviously highlighted by looking at the provision relating to private hospitals where it refers to 11, not 11.1/2 days.

PRESIDENT:

Someone can't count.

MR FITZGERALD:

Possibly. But as to that intent of the draftsman there, I assume the intent was, in respect to the 11 days anyway, to ensure that they didn't receive anything additional, particularly in respect to Show Day - anything more than the 11 days anyway. The clarification was, in my view, only in respect to Show Day.

PRESIDENT:

Mr Fitzgerald, would you be addressing operative date?

MR FITZGERALD:

In the event, sir, that you so decide that it is intended that the mid-week meeting is encompassed within the definition of 'Cup Day', as the day has in fact passed I would submit, sir, that any declaration should be made prospectively rather than retrospectively.

Mr Holden indicated that there was some delay on our part. If there was some delay it was unintended. The delay wasn't great. I did indicate that we were prepared to accept the umpire's decision - being your decision - in respect to it. There were delays which occurred because of the Christmas period, but in any event, if the homes were required to make payment for such a day, particularly as they are all funded on what is called deficit

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PRESIDENT - FITZGERALD

MR FITZGERALD:

funding, they would be unable to recover that past cost.

So, it would be my submission, sir, that any declaration, if considered appropriate by you, should be made prospectively, rather than retrospectively, sir.

PRESIDENT:

Thank you, Mr Fitzgerald. Mr Holden, do you wish to exercise your right of reply.

MR HOLDEN:

If I could have just one moment, sir.

MR HOLDEN:

Before I commence I am just having a quick look back through awards of this Hospitals Award, and certainly we do in the past seem to have had some rather strange drafting errors.

I go back as far as No. 1 of '80, 'Part II, Conditions', which gives everyone 11.1/2 public holidays under the clause (d) 'Show Day', but then somehow or other, in No. 1 of '82, Part II, we have lost half a day. But we fortunately regain it again by No. 4 of '82 ...

PRESIDENT:

Would that be the fault of one of the Deputy Chairmen of Industrial Boards as he then was, Mr Holden?

MR HOLDEN:

No, it has got Mr Pamplin's name on it. It is most interesting. It appears that somebody did lop off half a day at one stage by accident, but they saw the light and returned it.

Thank you very much, Mr President. I reject the submission of Mr Fitzgerald that the application is misdirected. I think it is clear from reading the Tasmanian Government Gazette and the particular reference I made to the Swansea area, when assisting Mr Fitzgerald in respect of a couple of matters, that the Bank Holidays Act is aimed at being as equitable as possible. Whether it achieves that or not is another matter.

I also reiterate comments about our application being made subsequent to your decision in 530 of 1986, and whilst I would like to be of some assistance in redrafting this award, all I can say is that we can't wait until that occurs, in terms of the interpretations which are necessary, because the redrafting of that award is going to be a long and laborious process.

I reject particularly the comments by Mr Fitzgerald that the Ulverstone mid-week trotting meeting isn't a day

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PRESIDENT - HOLDEN

MR HOLDEN:

of any significance.

The very fact that it is a Bank Holiday makes it a day of significance. Because it has got a different name, I don't think that is that much of particular significance.

It has been stated that there is no proof that it is observed basically in lieu of the Devonport Cup Day. Well, one could say that there is no proof that anything is observed in lieu of another particular day, unless there is a written agreement to that effect.

I think the facts of life tend to speak for themselves, and of course that is what interpretations come down to, that the President of the Commission is charged with the responsibility of interpreting the award, and also I think in being fair.

I submit the Ulverstone mid-week trotting meeting is a particularly relevant day. I also take up of course your point that it could be argued that we could nominate a cup day which the people in the Ulverstone area can take, whether it is Devonport, whether it is Hobart, whether it is Launceston or Burnie.

I realize we can only nominate one, because that would take us to the 11.1/2, and therefore we couldn't possibly go over the 11.1/2.

I think you have - well I know you have correctly identified why Exhibit A refers to the Hospitals Award as opposed to the Public Hospitals Award; because the Hospitals Award was the award which had effect in these areas at that time in terms of conditions.

I think a letter signed by a district officer from the Department of Labour and Industry in Burnie (Mr Johnston) certainly does not carry the weight that Exhibit A carries, because

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MR HOLDEN:

Exhibit A specifically says the advice is from the Secretary for Labour and Industry.

Now Mr Johnston certainly didn't have and doesn't have seniority over the Secretary for Labour and Industry and the Secretary for Labour and Industry's interpretation or advice have got to be taken as carrying more weight than Mr Johnston's.

It would also seem to me that on the interpretation that Mr Fitzgerald is attempting to put onto this matter, that he is in effect suggesting we seek a variation to the award which will really have the effect of cluttering up the award because we are going to have to nominate all of the 47 or 49 (or whatever there are) municipalities in the State of Tasmania, and we are going to have to nominate specific days against each and every one of them. And I suggest that that can do nothing to help anyone.

I think when one looks at the fact that the award states 'all employees should enjoy 11.1/2 public holidays' that the facts speak for themselves, and we seek that the Commission interpret the matter in that way, and of course it is in the Commission's hands as to the issuing of orders, but we most certainly would in this instance be seeking a declaration to the effect that payment should be made for those people who worked on the Ulverstone mid-week trotting day meeting of 1987.

We feel it would be most objectionable to those people if they were to be excluded.

It is clear that they have been unfairly excluded since 1983. They should have received the benefit from then, having regard to the Department of Labour and Industry's interpretation as issued by the Secretary for Labour through his

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MR HOLDEN: advice to the Acting Director-General of Health Services.

It would therefore, in our view, be most unfair to put a prospective date on an interpretation granting them the benefit of the Ulverstone mid-week trotting meeting day as a half-day cup holiday. Thank you.

PRESIDENT: Thank you, Mr Holden.

MR HEAPY: Only to support Mr Holden's final submission.

PRESIDENT: Yes, thank you. I will reserve my decision.

HEARING CONCLUDED