

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

**T. No 993 of 1987**

**IN THE MATTER OF** an  
application by the Tasmanian  
Confederation of Industries for  
interpretation of the Carriers  
Award

re payment of wages

**PRESIDENT**

**HOBART, 19 November 1987**

**TRANSCRIPT OF PROCEEDINGS**

PRESIDENT: I'll take appearances, thank you.

MR FITZGERALD: If the Commission please, I appear on behalf of the Tasmanian Confederation of Industries, **FITZGERALD, W.J.**

PRESIDENT: Thank you, Mr Fitzgerald.

MR LYNCH: If the Commission please, **LYNCH, J.T.** for the Transport Workers' Union of Australia, sir ...

PRESIDENT: Thank you, Mr Lynch.

MR LYNCH: ... Tasmanian Branch and probably later I'll say the appearance of **MR BARRY HANSCH** also for the same union.

PRESIDENT: Yes, very well. Thank you, Mr Lynch.

Yes, Mr Fitzgerald?

MR FITZGERALD: Yes, thank you, Mr President. This matter is before you pursuant to section 43 of the Industrial Relations Act 1984 in an attempt to resolve a problem in an interpretation involving clause ... particularly clause 30 ... sorry, generally clause 30 of the Carriers Award but particularly clause 30(c) of the Carriers Award.

The circumstances - just by way of background - emanated from a dispute between the Transport Workers' Union representing two particular employees, of a member our own organisation, the Tasmanian Confederation of Industries, and the member is Mr and Mrs A & J Tennant trading as Watkins Removals.

That matter came before Commissioner Watling on 8 September of this year and on subsequent occasions as matter T887 of 1984.

And the matter essentially involved an alleged underpayment by the employer relating particularly to the non-payment ... the alleged non-payment of overtime and the alleged non-payment of meal money.

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APPEARANCES - PRESIDENT - FITZGERALD

MR FITZGERALD:

Now in those hearings ... just by way of background, sir (and I don't want to dwell too much on this) in those proceedings Commissioner Watling indicated that he could not enforce, or the Commission could not take the role of enforcing, the provisions of the award, but nevertheless he assisted in conciliation conferences in an attempt to resolve the matter.

Despite what we saw as a reasonable offer to settle the matter which involved a precise calculation of the ... what we saw as an inadvertent underpayment by the employer, the offer was rejected by the TWU and subsequently a further claim was pursued and that claim was relating to (if I can call it) waiting time, and it's not so-called in the award, but for the purpose of the exercise I think that'll suffice for the moment.

And Mr Hansch, who was handling the matter at that time, referred particularly to clause 30(c) of the Carriers Award.

At that time our own organisation rejected the view of the TWU but nevertheless was prepared to stand by it's offer in terms of remedying or rectifying the situation as far the underpayment, particularly that relating to the overtime situation.

And we substantiated our position by correspondence which I initiated to the TWU, and I'd like once again, just in terms of background, sir, to present that as an exhibit just to give you some idea of our position in respect to the matter.

You got that letter, John?

MR LYNCH:

I've got that.

MR FITZGERALD:

Yes.

PRESIDENT:

Thank you. That will be Exhibit A.

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PRESIDENT - FITZGERALD - LYNCH

MR FITZGERALD: If the Commission pleases. Do you wish to have some time to quickly peruse that, sir?

PRESIDENT: Yes, perhaps I'd better read it, yes.

MR FITZGERALD: Thank you.

Just for the purposes of Mr Lynch's benefit, I won't be referring any further to that document. It's presented by way of .... at this stage.

PRESIDENT: Yes, thank you.

MR FITZGERALD: Thank you, Mr President. Our application ... if I can refer particularly to our proposed course of action which was either put the matter before the Commission as a private arbitration and be prepared to accept the view or failing that, to make application.

We didn't receive any particular response from the TWU, so accordingly we made application to this Commission pursuant to section 43.

That application I believe, sir, and I don't want to refer anymore than that, fully sets out our basic assertions, but we intend to expand on those assertions today by way of formal submission.

Mr President, I'm well aware of the guidelines issued by yourself in the first section 43 matter T30 of 1985 and they've been referred to on a number of occasions which I've appeared with monotonous regularity in respect to section 43 matters both successfully and unsuccessfully I'd say. But in any event I seem to be a regular participant with section 43 matters, particularly those relating to the hospitals award.

PRESIDENT: You're the expert, Mr Fitzgerald.

MR FITZGERALD: Well, I'm a regular participant, if I can put it that way, sir.

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MR FITZGERALD:

And I'm well aware of the earlier decision relating to the Launceston General Hospital, which I'll be making some significant reference to at a later time during my submissions.

But in respect of those guidelines, I just want to reiterate what I see as important guidelines and I think in my submission, sir, they have been, if you like, modified and added to from time to time with various interpretations.

But if I can summarise the most significant points made by you in matter T30 of 1985.

Firstly, there has to be a factual situation in existence and I think I've outlined that to you today.

Secondly, that concept of merit must be excluded and I'm sure Mr Lynch will be well aware of that as a guideline rule in respect to section 43 matters.

Thirdly, provided the words of the award can be read and construed in an intelligible way there can be no justification for attempting to read into those words a different meaning than that suggested by the ordinary English.

Fourthly, an award must be interpreted according to the words actually used.

Fifthly, it's not permissible to import into an award by implication a provision which the language does not express.

And that guideline was, if you like, re-enforced, I would submit, sir, by your adoption of a case, which I'll refer to in a moment in the matter T752, T796 and T802 of 1987.

And if I can refer to that matter or those matters simply from here on,

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MR FITZGERALD:

the Launceston General Hospital matter in the interests of brevity.

And there was a case, and you'll probably recall the submissions made ... or telling submissions, I would suggest, made by Mr Pearce on behalf of the Government and he referred to a case of Cranford-Webster versus McFarlane, which was reported in 1974, South Australian State Reports at 162 and refer to that particular case in the Launceston General Hospital decision.

And you quoted from the head note of that particular case, and I quote from that particular case:

"In interpreting a provision of an award .... a court of summary jurisdiction or the Supreme Court has power only to ascertain what is implicit in the immediate context or in the award generally. It has no power to supply by interpretation any omission in the award of which the intendment is not so implicit, for such an interpretation would be in the nature of a supplemental award."

So essentially, sir, and I'll be submitting later the position which the TWU seeks to hold would require, I would submit, some further words for the concept of waiting time to apply in respect to an inadvertent underpayment.

In essence, I see some marked similarities between the circumstances surrounding this matter coming before the Commission and the Launceston General Hospital case.

Now the circumstances are not identical or is the verbiage in the award ... the respective awards identical.

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MR FITZGERALD:

But in terms of the general concept enunciated by you in the Launceston General Hospital case ... and that general concept is that where an employer makes what is a bone fide payment, as distinct from no payment at all, waiting time has no application.

Now I think that is an overriding principle which equally has application to this case, but nevertheless I'd like to analyse clause 30 and particularly clause 30(c) of the Carriers Award in an attempt to substantiate the application of that general concept.

We've seen, Mr President, on previous occasions that I think it's permissible to (in terms of attempting to resolve an interpretative problem of a particular award) that it may be permissible to seek assistance from other provisions within an award, and I particularly look at clause 30 as a whole, and I think it's necessary to look at clause 30 as a whole.

But the clause, in my submission, lacks any degree of consistency whatsoever.

Now I just want to look at the various aspects of clause 30 and I will be submitting that in terms of (and I'm anticipating the TWU argument to some degree) gaining some comfort, particularly out of the words, 'as prescribed on pay day', which are taken from clause 30(c), I don't believe that the TWU can gain any comfort from either that sub-clause or any other sub-clause relating to clause 30.

Now if I refer to clause 30(a), you see the words, 'All wages and overtime' are used as a particular term.

Now, I go to clause 30(b) and it refers to, 'All earnings, including

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MR FITZGERALD:

overtime, which is a quite different term to, 'All wages and overtime' as in clause 30(a).

Clause 30(c), which is the offending provision (if I can call it that) refers to payment.



MR FITZGERALD:

And clause 30(e), to put another term into it, refers to all monies. So there is in clause 30 itself a difficulty in terms of consistency of terms.

Now I understand, not that I'm aware fully of the historic background of this particular award, but I understand in the old Industrial Board days, the award existed in what seemed to be not only an impractical form, but possibly an illegal form and the award simply referred to the Transport Workers 1983 Award, which is a Federal award and some time afterwards when the Industrial Board system was involved, the award was adopted in full.

So effectively, what we see as clause 30 is a direct mirror of what appears in the Transport Workers 1983 Award. So in other words, the local industrial organisations involved with the making of this award really had no scope or discretion in terms of clarifying or drafting of the award.

I would now like to take you to clause 30(c) particularly, Mr President, and particularly to the words, 'make payment to any employee as prescribed on pay day'.

I will come back to the definition, or what I see as the meaning of payment, later. But I would like to consider the words 'as prescribed on pay day'. Once again, I am anticipating with some degree of certainty the TWU argument in respect to the interpretation of clause 30(c), but I really pose the question, what does 'as prescribed' mean?

If there were some further explanation, further words to direct what 'as prescribed' mean, then I think it would have some sense attached to it, but to use the bald term 'as prescribed on pay day' really does nothing to assist us in

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MR FITZGERALD:

terms of whether clause 30(c) has any application in terms of an underpayment of wages.

Let me put to you the possible scenario, sir. It could be `as prescribed by an employer`. It doesn't say, `as prescribed by this award`. It could be as prescribed by some other particular clause of this award or possibly, even though I concede that it may be remote, some piece of legislation.

It could be, I would suggest, sir, as prescribed by any of the particular sub-clauses of clause 30. Let me look at the possible meaning of those words, or what it intends to mean. It could be clause 30(a) and it could be with reference particularly to all wages and overtime, but I am not absolutely certain on that proposition, sir.

It could be in terms of clause 30(a) by reference to the fact that it's in the employer's time. It could be, by reference again to clause 30(a), by reference that it's no later than Thursday of each week.

PRESIDENT:

Could it mean that if he paid the employee all wages and overtime due to him, but didn't enclose the wages in an envelope, that clause 30(c) could be invoked, because part of (a) says, and if you substitute the word `prescribed` for `says`:

"All wages shall be paid enclosed in an envelope."

Now, if he does not enclose them in an envelope, can they claim the benefit of (c)?

MR FITZGERALD:

That's a possible interpretation, sir, I would suggest not a very practical one but nevertheless, without any further definition to the words `as prescribed`, I think it is one which could apply, sir.

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MR FITZGERALD:

Or it could be, in terms by reference again to clause 30(a), the need to give precise details of calculations in the deductions. So there are, not only in terms of the award as a whole or whether it's prescribed by the employer or whatever, there really are some doubts as to what that in turn means.

It could also, of course, which I am sure Mr Lynch is going to submit, refer to clause 30(b) which states:

"All earnings, [once again, an inconsistent term with wages, in terms of clause 30(a)] including overtime, [and I am sure there'll be some emphasis placed on that particular aspect of it] ..."

But I will submit to you later, sir, that that has no bearing, particularly given the Launceston General Hospital case, in terms of whether this clause, particularly clause 30(c), has any application in respect of these instant circumstances.

Without any particular further addition to the words, 'as prescribed on pay day', it is my submission, sir, that these words are so vague that they are totally meaningless.

It would be necessary for some further words to give it some precise clarity in my submission.

For instance, if Mr Lynch, once again as I anticipate again he'll submit, wants to make some particular reference to clause 30(b), then I'd suggest that we'd need some words such as, 'as prescribed in sub-clause (b) hereof' for instance.

MR PRESIDENT:

Where would those words be inserted?  
'All earnings ...'

MR FITZGERALD:

No, I'd suggest that the words would be inserted after the words 'as

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MR FITZGERALD: prescribed. The words needed would be in sub-clause (b) hereof.

MR PRESIDENT: Oh I see what you mean. You mean include those words in sub-clause (c) ... in sub-paragraph (c).

MR FITZGERALD: That's right. Or it might be sub-clause (a), but without any definition it is, in my submission, meaningless.

It's not as I briefly overviewed the rules of interpretation ... it's not for this Commission to import some other meaning if the words don't express the actual ... or if the actual award doesn't express the meaning of what it's intended, sir.

The second major difficulty in respect to clause 30 as a whole is on the face of it both clause - in terms of waiting time (if I can call it that in the general sense, even though it's not called that as such) ...

And I think there's only one reference in terms of clause 30(d) to the concept of waiting, but inherent in clause 30(c) I would suggest that there is ... if an employer fails to make payment and therefore the employee must wait to receive payment. But on the face of it, both clause 30(c) and clause 30(d) could apply in the circumstances which the TWU hold to, particularly in the conference before Commissioner Watling. And I will come on to this concept of full payment at a later time, particularly with reference to the Launceston General Hospital case.

If in fact the employer fails to make the full payment, and I emphasise the word 'full', to an employee, does clause 30(c) have application and does clause 30(d) have application?

PRESIDENT: Or do both?

MR FITZGERALD: Or do both? That's precisely it, or

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MR FITZGERALD:

do one of the other? A bit of both, possibly. Ostensibly, both could apply. If you adopt the position of the TWU which they will put to you later. If you adopt the position which has been enunciated in the Launceston General Hospital case, I would submit that neither apply.

It's a nonsense of course for both to apply and in my submission, sir, neither applies, particularly where there has been a payment made by an employer in good faith, albeit that it was inadvertently incorrect, but also significantly there's been an acceptance by the employee in good faith, albeit mistaking them.

PRESIDENT:

You don't think, Mr Fitzgerald, that (c) contains an inbuilt penalty for an erroneous calculation? Whereas (d) refers to non-payment of wages. You will notice that in (a) it opens by saying, 'All wages and overtime', so clearly there is a distinction between wages and overtime.

MR FITZGERALD:

Yes.

PRESIDENT:

(d) refers to an employee kept waiting for his wages.

MR FITZGERALD:

Yes. I wouldn't agree with that proposition, sir. There would need to be some particular reference there - if we cast our mind back to the Launceston General Hospital - there would need to be, in my view, some reference to an underpayment situation and a rectification of that.

Also, and I will be submitting this later, sir, I think in terms of the clause there are some marked similarities with the Hospitals Award. Once again, if we cast our minds back, the offending provision in the Hospitals Award also included the term 'or wages', or similar, and 'overtime'. So, for that reason, I don't think that sort of proposition can hold water, sir.

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MR FITZGERALD:

Mr President, I would submit that the specific reference to overtime which I'm sure the TWU will significantly rely on, does nothing in my view to strengthen their position.

As I indicated in conversation with you, sir, I would indicate that the Launceston General matter had a similar provision in the Hospitals Award which also made specific reference to the words `overtime` or `including overtime`.

However in that matter, Mr President, in my submission, you quite rightly ruled that if payment was made by the employer in good faith, then prima facie waiting time was not appropriate.

In any event, I would submit that the words `including overtime` are really simply there just for the purposes of clarification.

And within the terms of clause 30(b) - although again I say there's inconsistency in terms - the concept of all earnings, I would submit, would include all earnings which are due and payable pursuant to the award, which could include base wages, allowances and any overtime, because it's an amount due and payable according to the award.

So the terminal earnings would be necessary to describe it, and in my view, the specific reference to the words `including overtime` is in fact superfluous.

PRESIDENT:

Would that include over-award payments as well?

MR FITZGERALD:

I'd like to think about that. But I think the award can only deal with all earnings in terms of what earnings are due and payable in accordance with the award.

An over-award payment of course has implications in respect of contract

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MR FITZGERALD:

of employment, so on the face of it, sir, I don't think it would include over-award payments. But in any event, I don't think it significantly either hinders or helps my argument.

PRESIDENT:

I just thought it might tend to explain use of the words 'all earnings'.

MR FITZGERALD:

It could possibly, but I really don't know the rationale because as I said, there are some marked inconsistencies within the clause itself.

But generally I'd say, sir, the TWU can gain no specific advantage by reference to the terms 'including overtime'.

In terms of the word 'payment' in clause 30(c), I would submit that there need be some reference to clause 30(a) or clause 30(b) to assist us, because payment without further definition is in my submission again so vague as to be meaningless.

'Payment' in terms of clause 30(a) (if there were some reference to it) could be taken to be payment of wages and overtime as stated in clause 30(a).

Payment within terms of clause 30(b) could mean all earnings including overtime if there was some reference to clause 30(b), but there's not.

Whichever meaning is attached to the word 'payment' it does in my submission, within the terms of the general principle and concept enunciated by you in the Launceston General Hospital matter, do our position no harm whatsoever.

In the instant circumstances, a payment (it was a payment of kind even though it may not have been the correct payment) on some occasions I'd say (and it was not in every week; it was on some occasions when

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MR FITZGERALD:

overtime was actually worked), a payment was made to the employee and was accepted in good faith.

Payment within the terms of the previous authorities (which have been adopted by you in the Launceston General matter) must mean, I would submit, a bona fide (and I use your words in that matter) payment of all moneys believed to be due under the award.

Mr President, I don't wish to dwell too much on these arguments because I think many have been raised by Mr Pearce. And I understand of course, Mr Lynch wasn't privy to those arguments. But I think generally, in some of these section 43 matters, argument from both sides does tend to go on a bit too long, and I will be concluding my submission very, very soon.

But I think Mr Pearce's submissions in that matter were very significant. And you obviously thought so because in many respects, you've adopted the authorities raised by him. But I'd like to produce an exhibit which referred to one of the cases which you also picked up in the Launceston General Hospital matter.

PRESIDENT:

Exhibit B.

MR FITZGERALD:

Maybe if I could refer, sir, particularly to the footnote. And if I read from that ... and you may recall that this particular case (which was re Commonwealth Works and Services Northern Territory Award 1961 Federal Law Reports at 336) was also ... Reference was made to that in the Launceston General Hospital case. And I'll read that footnote, because I think it's worth reading. It's headed:

"Waiting time - further exclusion. If the employer has paid to an employee on the regular pay day an amount

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MR FITZGERALD:

which was a bona fide payment of all moneys believed to be due to the employee under the award - even though it was not the precise sum representing the total amount of all such moneys then in fact due (as subsequently found) - then waiting time is not payable. This was a decision of the Commonwealth Industrial Court in 1960.

The employees had been paid their basic rate on pay day and a dispute had arisen about their entitlement to an allowance which they claimed for certain work performed during the previous pay period. A board of reference found that the men were entitled to the allowance. The Court [obviously on appeal in this case] held that in these circumstances the employer was not obliged to pay waiting time."

Now really, that case has not too many dissimilarities, except in terms of the context of the respective awards. But it doesn't have too many dissimilarities with the instant circumstances.

In that case there is an allowance which was obviously not paid in that particular pay period - a component of an all-up earning, if you like.

In the instant case, on some occasions overtime was not paid; if you like, again a component of an all-up earning.

By the way, sir, I forgot to mention, this exhibit is from a CCH publication, 'Australian Employment Guide'. And I will refer to the concept of waiting time, whether it's a compensation or penalty (on the second page of that exhibit), at the conclusion of my submissions, sir.

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MR FITZGERALD:

I'd like now, sir, in terms of probably the most telling authority in this jurisdiction - and that is your own decision in the Launceston General Hospital matter - referred to a number of statements which you made in that decision.

I don't wish to produce an exhibit at this stage, but I quote from page 16 of that decision.

In terms of reference for the record, that was a matter relating to the interpretation of the Hospitals Award, matters T.752, 796 and T.802 of 1987; and I quote from you, sir, from the top of page 16:

"There is, I believe, a very real distinction between receiving no pay packet at all on pay day and receiving a pay packet from which an adjustment has been omitted. However irritating and inconvenient this might be to the individual it cannot be held that an employee who does not receive a pay adjustment in his pay packet is therefore kept waiting for his or her pay. Clearly this is not the case. He may have to wait for an adjustment to his wages or salary but he is not kept waiting for his wages."

[The second paragraph which is (indeed I think) probably the most significant statement you made, sir.]

"Therefore, to qualify for "compensation" a fair rule-of-thumb test might be to regard an employee who, through no fault of his own, receives no pay packet or money of any kind on the regular pay day after having performed work or been on

MR FITZGERALD:

approved leave for which payment is prescribed under the terms of an award."

[Further you say:]

"It frequently happens that errors occur in the calculation of individual pay entitlements or deductions from pay for, say, income tax, insurance et cetera. In those circumstances an adjustment needs to be made as soon as practicable, but more often than not on the next pay day. In those circumstances waiting time does not arise."

I then go to read from ... in terms of finalising my submission, sir. There would be some need for further words or words similar to what occurred in the Launceston General Hospital matter. And I quote from the second paragraph of page 18 of that decision:

"If compensation is to be attracted in circumstances where an error occurs in calculation of pay, or where deductions are incorrect (for example too much or too little tax being deducted) then significant additions would need to be made to the words used in the award to establish the exact circumstances in which a form of compensation would become payable. For example, the present provision might need to be expanded to read: ..."

And I would submit, sir, this same sort of statement could be made in respect of this particular provision of the Carriers Award.

MR FITZGERALD:

And you go on to say in respect of the Hospitals Award:

"... an employee kept waiting for his wages on a normal payday, or for a pay adjustment resulting from an award change, [which are the new words which you've inserted] or for an adjustment to rectify an error, [once again, new words] shall, until payment is made, be entitled to be paid waiting time at the appropriate overtime rates".

Then those words or any similar words don't appear in either clause 30(c) or clause 30(d), whichever may apply, in terms of the Carriers Award.

As I believe I have proved to you this morning, sir, the Launceston General matter is just about in every respect on all fours with this matter, except with some slight differences in terms of the underpayment, and some slight differences which have no direct bearing on an ultimate result in terms of a similar result in the Launceston General matter, in terms of the verbiage of the award.

In terms of the precedent value, sir, I submit that a significant precedent has been set by you and that in this instance you are bound to follow that earlier decision. To decide otherwise, I would submit, sir, would my submission see a total reversal of a decision which, in my submission, was totally sound, both in logic and within the principles of interpretation enunciated there by you in matter T.30 of 1985.

A final point, sir, in respect to whether waiting time is to be regarded as compensation or penalties, I make reference to the second page of the exhibit. And I read from paragraph 31-080 headed "Waiting time - compensation or

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MR FITZGERALD:

penalty:

"The word `penalty` is frequently and colloquially used to describe the payment made to an employee kept waiting for his pay, but it had been said that the true purpose of the payment is to compensate him for having to wait for his pay (see Re Commonwealth Works and Services (N.T.) Award [that case has been referred to before as has the next one] ... Cranford-Webster v. McFarlane ..."

And once again, also referred to in the earlier Launceston General Hospital decision. Now quite clearly in this instance there was no need to be kept waiting for his wages. Both the employees who are the subject of this dispute were not kept waiting as enunciated by clause 30.

In summary, Mr President, in the instant circumstances there is quite clearly an ambiguity in respect to the expression and words used in terms of the lack of consistency within clause 30 itself, particularly that relating to clause 30(c).

Payment has been made, which on some occasions was incorrectly calculated, but nevertheless that payment was made in good faith by the employer and accepted in good faith by the employee.

They received a pay packet as against the proposition where no pay packet was received at all.

The employees received a substantial part of their wages, in respect to those days alleged to be the offending days by the TWU.

For all those reasons, Mr President, I would seek a retrospective declaration, because it's necessary in terms of this dispute, pursuant to

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FITZGERALD

MR FITZGERALD: section 43, and in respect to the circumstances enunciated by the Commission ... to the Commission, waiting time pursuant to clause 30(c) says clause 30(c) has no application in these current circumstances.

If the Commission pleases.

PRESIDENT: Yes. Before you resume your seat, Mr Fitzgerald, there are two matters I'd like to raise with you, and I didn't interrupt you at the time ...

MR FITZGERALD: Oh, thank you.

PRESIDENT: ... which is unusual for me, isn't it?

MR FITZGERALD: It is, yes.

PRESIDENT: But I thought you said that I ought to consider myself bound by the Launceston General Hospital's case.

I'd like to discuss that with you, because don't you agree that in interpreting an award the President is only concerned with what the particular award provision says? If clause 30 of this award was in precisely the same terms as the Launceston General Hospital, or the Hospitals Award, I don't imagine these proceedings would be continuing.

But am I not obliged to consider what clause 30 of this award says?

MR FITZGERALD: Yes. To answer that, sir, I would agree if it were in precisely the same terms, and I'd submit that ...

PRESIDENT: I would have dismissed it by now.

MR FITZGERALD: That's what I would have thought. Certainly I concede that it's not. There is, if you like, an additional waiting time clause there, but in terms of the general principle enunciated by you in the Launceston General case, I would submit that that has some binding effect in terms of determining this matter.

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PRESIDENT: Yes. You mean the reason?

MR FITZGERALD: I would concede that you can't necessarily ... it has to be horses for courses, of course. You can't simply take that decision and transfer it across to this. But simply in terms of the general concept, which you enunciated there is, I would suggest, a need to pay due regard to that earlier decision.

PRESIDENT: Yes. Whereas all courts and all persons will have cognisance of the President's interpretation ...

MR FITZGERALD: Yes.

PRESIDENT: ... in relation to that specific award.

MR FITZGERALD: Yes.

PRESIDENT: I'm not sure that the President himself ...

MR FITZGERALD: Yes. Public ...

PRESIDENT: ... is necessarily bound by an earlier decision. But if ...

MR FITZGERALD: No, I understand what you say. I think ...

PRESIDENT: ... the reasoning is ...

MR FITZGERALD: Yes.

PRESIDENT: ... if the logic behind it is sound then ...

MR FITZGERALD: I realise that in these section 43 matters the award itself must be the going factor.

PRESIDENT: That's right.

MR FITZGERALD: But nevertheless, my submission went to the general concept.

PRESIDENT: Yes.

MR FITZGERALD: And for that reason I think there is a need for you to look at that

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PRESIDENT - FITZGERALD

MR FITZGERALD: concept and give it equal application in these circumstances ...

PRESIDENT: Yes.

MR FITZGERALD: ... within the particular terms of this award.

PRESIDENT: Yes.

Now all I have to decide, is it ... is it all I have to decide?

Am I only asked to decide whether or not, in the circumstances outlined, sub-clause (d) has application?

MR FITZGERALD: The offending provision is (c). This is a little unclear and, I suppose, there was some supposition on my part in terms of ... and it's necessary to give some background to what occurred at the conference. The conference broke down on the assertion that clause 30 (and I understand it was clause 30(c) particularly) had application in the circumstances. And we asserted that it was not, particularly in view of the Launceston General Hospital case.

I believe in terms of the concept of waiting time and, as I submitted earlier, either or both clauses 30(c) and (d) could apply. I would ask for that reason that in terms of the general concept of a substantive payment being made, that your declaration relate to both sub-clause (c) and sub-clause (d). I think that's necessary in terms of the consistency of the matter, sir.

Even though the vehicle, if you like, to bring this matter before the Commission is sub-clause (c), to be totally logical about it there is a need to have the declaration relating to sub-clause (d) as well.

PRESIDENT: Yes. Because you're saying waiting time ... it might be argued that ...

MR FITZGERALD: Well, I use it as a convenient term.

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PRESIDENT - FITZGERALD



PRESIDENT: Yes. You see, it might be argued that (c) doesn't refer to waiting time at all.

MR FITZGERALD: Well, maybe sub-clause (d) doesn't either, there's a reference to the term waiting. Sub-clause (c) could be penalty payment for lack of payment on a particular day or something like that. But I believe the two concepts, or the two potential areas of coverage relate to the lack of a particular payment on the day - on a particular day, payday.

So for that reason I think both are similarly designed (if I can call it that way). As I say, I'm not sure which one applies.

PRESIDENT: You're not prepared to give me an indication of the circumstances in which either or both would apply?

MR FITZGERALD: I don't think I can. It is my submission of course that neither apply, because of the general concept of a payment being made. But in terms of ...

PRESIDENT: But the award maker must have intended that in some circumstances that would apply, otherwise why put them in?

MR FITZGERALD: Well, my submission there would be that where there is actually an employee who receives no payment whatsoever, that's what the award maker intended, in my submission.

PRESIDENT: Yes, yes.

Would that be necessary in order to attract payment under (c)?

MR FITZGERALD: Without further definition in terms of the words as prescribed, I really couldn't answer that, sir.

PRESIDENT: Yes.

MR FITZGERALD: I think it's extremely vague when you look at it carefully, and I couldn't

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PRESIDENT - FITZGERALD

MR FITZGERALD: answer it with any degree of certainty, sir.

PRESIDENT: And would reference to `each and every day thereof during which such default continues` (that's the second and third lines), would a day in those circumstances also include weekends and holidays?

MR FITZGERALD: Once again, I wouldn't like to speculate. Without further words, I don't see it as assisting us in any way.

PRESIDENT: It does give expression to something that I've been somewhat critical of from time to time, of the lack of care and attention given by the award maker or the parties or the people who draft these provisions ...

MR FITZGERALD: Well, I ...

PRESIDENT: They're probably understood at the time by those who were responsible for the agreement ...

MR FITZGERALD: Yes.

PRESIDENT: ... or determination, but the passing of time and different people coming into the industry ...

MR FITZGERALD: Look, I can only but agree.

PRESIDENT: ... they tend to be absolutely meaningless.

MR FITZGERALD: I can only but agree.

As I indicated earlier, it's my belief that this clause is a mirror of the Transport Workers 1983 Award which is effectively the Carriers Award in the Federal jurisdiction.

And I agree with your earlier comments that rather than come to these matters for an interpretation, which is difficult in many circumstances (I think we've got one here), the more preferable course of action would be to see an amendment

MR FITZGERALD:

to an award. But Mr .... may express a view on this. But in terms of amending this award I think we'd have some difficulty, certainly by agreement, because I would imagine there would be some need for Federal involvement from the TWU's point of view, because it (if you like) breaks what was alleged to be a nexus with the 1983 award, to some degree.

MR FITZGERALD:

And this is a problem particularly with the nexus of Federal awards, that there is seemingly a requirement to pick up holus-bolus, warts and all, the Federal awards, and that's not a desirable situation. But industrially I suppose we have to recognise the reality of that, sir.

PRESIDENT:

Yes, all right. Thank you, Mr Fitzgerald. Mr Lynch?

MR FITZGERALD:

Thank you, Mr President.

MR LYNCH:

Thank you, Mr President. If I can just make some adjustments to the lectern.

PRESIDENT:

We shall have to get another one.

MR LYNCH:

Thank you, Mr President.

The points outlined in respect of what gave rise to this need for interpretation have been outlined pretty substantially by Mr Fitzgerald. And having regard to guideline 1 of T.30 of 1985, I find that's very much in order.

And, sir, the facts of the Tennant dispute are basically agreed matters between the parties.

Mr Tennant had failed to pay overtime rates as specified by the Carriers Award to two employees: Messrs Tonner and Williams.

Having regard to the jurisdictional power of this Commission, the issue was dealt with by conciliation over 2 days.

The employer subsequently placed on transcript an offer to pay an amount in settlement of the claim. That offer subsequently remained open for 48 hours.

The union, for its part, had made a claim for late payment of wages as well as the outstanding back pay, and

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MR LYNCH:

allowed the offer to lapse because it did not include a late payment component, and was otherwise inadequate.

That's in fact substantiated by the exhibit from the employers.

I'd also flag at this stage, that I've got severe difficulties with putting sub-clause (d) into the equation, sir.

The whole matter is centred around (c), and I think the one to leave (d) aside would be the better way to go on this interpretation matter.

PRESIDENT:

Well then are you saying that (c) means a late payment?

MR LYNCH:

Yes, sir.

In terms of (d), I believe the situation there is when an employee for one reason or another doesn't get his wages on payday ... sorry, he gets his wages late on payday and he's kept waiting then for his wages.

That's the normal everyday application of that and I can give you a list of companies that historically pay a day late to transport workers employees, and they include an adjustment for that purpose.

Anyway that's the difficulty you have with including (d). It wasn't an issue and I don't want to see it put in issue now, sir.

PRESIDENT:

You're saying in the circumstances outlined by Mr Fitzgerald, and agreed to by you as being fact, your members would attract payment under (c) but not under (d)?

MR LYNCH:

That's right, sir. If we don't have a particular dispute about the pay being a quarter of an hour late ... we're talking about months late. The pay has still not been paid.

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PRESIDENT - LYNCH

MR LYNCH: For reasons for which I'll expand upon later, sir, it must be said that the union has previously dealt with Mr Tennant in another matter of underpayment of wages.

MR FITZGERALD: I don't see that as necessarily relevant, sir. I rejected that information being put before the Commission, and I ask for that to be withdrawn. It has no relevance in these proceedings.

MR LYNCH: I wish to expand on that ...

PRESIDENT: Perhaps if you would expand on it because you must understand, I'm not a scrap interested in the merits.

MR LYNCH: I understand that, sir.

What Mr Fitzgerald has placed many parts of his submissions around is the question of the bona fide of the employer.

I seek to establish ...

MR FITZGERALD: I object again ...

PRESIDENT: No, he said a `bone fide payment', and I don't know where he got that from either. You attributed it to me. It may have been in my decision, but I think it came from your exhibit.

MR FITZGERALD: The Northern Territory decision.

PRESIDENT: Yes, but I don't think I used that expression, although you attributed it to me.

MR LYNCH: I don't think it is there, sir, but it is certainly ... the question of bona fide ...

PRESIDENT: Yes, bona fide, yes.

MR LYNCH: ... and I do wish to refer to a case later on which regards the employer's intentions and where employer's intentions ought to be.

PRESIDENT: Oh yes, that's quite in order.

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PRESIDENT - LYNCH - FITZGERALD

PRESIDENT: I think Mr Fitzgerald thought you were going to talk merit.

MR FITZGERALD: Yes, that's right.

MR LYNCH: What I'm pointing out ... and as I say for reasons I'll expand upon later, I believe it's necessary to bring into account the fact that we have had difficulties with Mr Tennant ...

MR FITZGERALD: Well once again, if Mr Lynch wants to persist on that argument ... it goes solely to merit, and has no application in these proceedings.

PRESIDENT: I think he's right. If you can get around it somehow without interrupting your flow, all I want to know is: (you've told me the circumstances), you point to the relevant part of the award and say, "In those circumstances our member is entitled ...". Whether this particular employer is a constant offender or an occasional offender or never offended, I don't think it really makes any difference to my ultimate decision.

MR LYNCH: Well with respect, sir, I hope it will enable you to see that perhaps in some cases the mental element, if you like, of the employer has been taken into account and ...

PRESIDENT: The what?

MR LYNCH: The mental element of the employer, if you like.

The intentions of the employer have been taken into account and have been held relevant in the matter of underpayment of wages.

PRESIDENT: Yes. Well rather than you jump up and down and object all the time, if he wants to pursue this line and I believe that it goes to merit, I'll ignore it anyway.

MR FITZGERALD: Okay.

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PRESIDENT - FITZGERALD - LYNCH

PRESIDENT: But I don't want to unduly interfere with your presentation, Mr Lynch. You carry on.

MR LYNCH: I had some exhibits in that respect, but I'll forbear to put them on the table.

PRESIDENT: Well I mean you can put them up if you like at your ... They may assist you, they may not. Mr Fitzgerald has got a right of reply anyway.

MR LYNCH: That's right.

That's a matter that arose in January '86, sir, and there was a claim ...

PRESIDENT: Thank you. I'll note it as Exhibit C.

MR LYNCH: And as noted in the correspondence, sir, there was a claim by the union there for some underpayments.

In this case, sir, we are seeking, I think, somewhere in the region of \$1,700 for the employees in question. And of course that money has not yet been paid.

If I can turn now to the questions of interpretation of the payment of wages clause in the award, and taking those foregoing facts into the equation.

It is my submission that Mr Tennant has a duty under that clause to reimburse those employees for overtime worked and whatever else was initially agreed to. And I understand in that respect there was some meal allowances claimed as well, and that, in particular, sub-clause (c) has application in these circumstances.

PRESIDENT: Now can I stop you there?

MR LYNCH: Yes, sir.

PRESIDENT: Are you saying that the person or persons concerned worked overtime for



PRESIDENT: which no payment has been made at all?

MR LYNCH: That's what I'm saying, sir, yes.

PRESIDENT: Wouldn't you, in those circumstances, have the DLI prosecuting?

MR LYNCH: If I can just digress. There's two ways in which we historically deal with wage matters, sir. One is we discover the time and wages records; find an underpayment and ask the employer to pay. Nine times out of ten that goes through.

The other way: if the employer's still got resistance, we say, 'Well we can notify the Department of Labour and Industry'. As you well know, I suspect they are very undermanned and well behind time, and in most cases the matter drags on to the extent where they've run out of time under their particular act and there's no recovery for the employee.

We often refer matters to the DLI but we often find there's not sufficient follow through.

We find that it is a good tactic to tell the employer that he will be notified for breach of award, or brought before the Commission on an underpayment of wages question, breach of award.

We then find usually the employer goes running to the Chamber of Industries (or Confederation as it is now), and the Confederation pulls them into line, together with a threat of Industrial Commission appearance. And that works probably 95 times out of 100. Occasionally it doesn't, and that's why we're here today.

That's generally the way we address wage underpayments, and it is rife in the industry. Quite honestly, there are a lot of wage underpayments.

MR LYNCH:

It's my intention to argue, sir, that on your guidelines and on the normal rules of statutory interpretation, the award is clear in its terms generally, but there is no ambiguity or lack of intelligibility in clause 30, and that those provisions have effect that is consistent with the clear wording of that clause now here under consideration.

To discuss clause 30 under the light of those guidelines, what does the clause intend to provide for? What, if any, mischief does it seek to redress? Is it impossible or even difficult, as guideline 3 spells out, to construe in an intelligible way? Do the words used achieve what was intended by the award maker? Are there drafting mistakes? Do we need to address the history of the award? Is there any obvious ambiguity?

In relation to your last guideline, sir, 7 - I am of the opinion that that guideline has relevance only in respect to the submission made by the employer.

It is my view that the employer is seeking to imply into the Carriers Award provisions which are not expressed in the language used in the award. I certainly do not seek to do that, I rely on the words you used.

Mr President, clause 30 is very clear in its terms. Sub-clause (a) provides that all wages and overtime shall be paid in the employers, not later than Thursday of each week. There is provision there that the employer shall give to each employee in writing details of the amount of ordinary pay, overtime, penalty rates and allowances, and then the amount and nature of deductions made therefrom and the net amount etc.

Mr President, what could be clearer? The provisions are, without straining the English language, totally unambiguous in their terms.

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MR LYNCH:

The sub-clause clearly specifies all wages - that all wages includes overtime, is clearly spelt out. The time and method of payment could hardly be more clear. And there's an implication of course that wages includes penalty rates and allowances.

MR LYNCH:

But even if that was not enough as to what was contemplated by the award maker, sub-clause (b) also spells it out. It speaks of `all earnings including overtime shall be paid within 2 days of the expiration of the week in which they accrue`.

I believe that those sub-clauses, (a) and (b), are incapable of any different reading than that that appears in the very clear wording. Taken together, they specify that `an employee shall be paid all wages and overtime and penalty rates and allowances`, the words used in sub-clause (a), and in the unlikely event of doubt about those words, sub-clause (b) uses the catch-all phrase, `all earnings`, and in abundance of caution, once again includes overtime by using that specific phrase, `including overtime`.

PRESIDENT:

Is it also an authority to keep no more than 2 days` pay in hand?

MR LYNCH:

I think so, yes. I think that is clearly intended. In other awards that`s clearly spelt out. I think the Building Trades Award comes to mind, sir.

Those sub-clauses, Mr President, clearly, in my respectful submission, lay out very precisely the minimum standards for payment of wages in this award. I believe there are no difficulties in giving to those words their exact meaning. They are clear, they are unambiguous. They impose a responsibility on the employer and of course, that`s precisely what they seek to do.

Just to digress, sir, your question on `all earnings` and whether that includes over-award, I think I`d be in the similar position as Mr Fitzgerald. I believe that over-award payment would be a matter of common law, if you`re seeking recovery there. I think the award

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PRESIDENT - LYNCH

MR LYNCH:

can only speak to minimum rates provided.

Now turning to sub-clause (c), sir, the matter we've got today, in my view it cannot be read by itself. It fits logically into the structure of the whole clause and is there for a particular purpose. And what is that purpose?

I submit, sir, that (c) is meant to address just the sort of issue that came before this Commission in the Tennant case. The purpose of that sub-clause, to use a legalism, is to remedy a mischief. The mischief to be remedied in this particular instance is the reluctance, or in Tennant's case, really the refusal of an employer to pay wages as prescribed in sub-clauses (a) and (b).

They are the words used in the first line of the sub-clause (c); that is:

"If the employer fails to make payment to any employee as prescribed on pay day he shall pay to each such employee \$6.55 for each and every day thereof ..."

As prescribed, sir, it only makes sense when read in light of the provisions above. There is no other place in the award that prescribes how wages, including overtime etc. shall be paid. There is nothing else anywhere in the award, certainly not under the legislation and I don't accept Mr Fitzgerald's submission that it could be as prescribed by the employer. In fact, that's why awards exist.

So, there's nowhere else - there's no reason to look elsewhere for any sort of prescription as to how wages are paid. The prescribed method of payment of all wages or all earnings including overtime is quite clearly and sensibly in the provisions immediately above.

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MR LYNCH: It would require immense sophistry to suggest that `as prescribed` meant anything else than what is clearly available in the plain English reading of the clause as a whole.

PRESIDENT: Could I just interrupt you there? Then suppose, Mr Lynch, an employer genuinely believe that a particular provision - award provision - did not apply to certain circumstances ...

MR LYNCH: Yes, sir.

PRESIDENT: ... and for that reason, failed to make a payment that perhaps on interpretation or before a magistrate was found to be due, would the employer in those circumstances be subject to sub-clause(c)?

MR LYNCH: In my view, not, sir.

PRESIDENT: Provided he genuinely believe he was interpreting the award correctly?

MR LYNCH: In my view, not, sir, no.

PRESIDENT: The onus would be upon him to demonstrate that he did genuinely ...

MR LYNCH: Yes, and it's quite clearly picked up in the rest of sub-clause (c), after the word `unless` in the third line, sir. He's entitled to pay that penalty and it is a penalty, I submit, rather than a compensation:

"... unless he satisfactorily shows that such failure is due to some act on the part of the employee or to circumstances not under his control and which he could not reasonably have foreseen and which he took reasonable steps to avoid or overcome."

If you're not aware of something, a particular payment, well okay, and you have taken steps to check the award, but you've got a variation you don't know about. Well I certainly wouldn't be coming here for

MR LYNCH:

interpretation or trying to seek back payment of wages on that issue.

So, I submit, sir, that what's contemplated in sub-clause (c) is a penalty for an employer not paying all wages and all earnings on the due date. The small amount clearly cannot be described as compensation for not receiving payment as prescribed.

If it were truly compensation then the amount would need to be considerably more. If, for example, an employee received no wages and was forced to find another job with another employer, compensation would more logically be valued at about \$70 or \$80 a day, about the going rate for wages, if you like, and that would apply for the period the employee is out of pocket.

It's not compensation, sir. The \$6.55 specified in the .... represents, in my submission, a penalty, and that penalty comes into effect when wages are not paid as prescribed.

I am supported in this view by a decision of the Commonwealth Industrial Court, as it was then, in a decision in the matter of the Pastoral Industry Award reported at 1964, 6 Federal Law Reports at 164, and it's ...

PRESIDENT:

Is this about the shearer who finished up?

MR LYNCH:

Yes, that's right. There is not a lot of case law on it.

PRESIDENT:

No, I know.

MR LYNCH:

I've managed to dig out a bit and I've dug out some obiter dicta which I submit is a little bit more to the point than the headnotes submitted in the Australian Employment Legislation handout, and in that case, clause 44(f) of the award provided ... it was a Full Bench case.

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PRESIDENT - LYNCH

MR LYNCH:

Clause 44(f) of the case provided that:

"Waiting time was payable to employees who did not receive any payment within a maximum of 4 hours for work done in the event of course that it was found that waiting time was not payable."

But the employer paid some 6 days after the work cut out. The Full Bench found that the employer had to pay waiting time and inter alia considered the question of compensation or penalty.

And per Justice Dunphy at 169, sir, he talked about economic advantage accruing to both the employer and the employee if the job was done expeditiously. The employee, he says, has to have quick payment to enable him to move to another job if necessary and to provide for his wife and family while he does so.

And then to quote directly from Justice Dunphy:

"It is these and similar circumstances that the award maker had in mind when he provided that delayed payment should invoke a penalty. It was natural that such penalties should be related to the time involved and it is just as natural, I believe, that the penalty should be payable to the employee inconvenienced by the delay.

It is a normal incident of the law of contract that a penalty clause should provide for payment of a penalty to one party of the contract in prescribed circumstances.

I fail to see how the rate of \$4.82 per day can be



MR LYNCH:

described as compensation. It is clearly much less than a shearer would earn in a day and it would be no compensation if a worker were obliged by award provision to wait on the station for his cheque. Instead of compensation, this would indeed be a penalty on the worker."

In that view, sir, I believe that what we've got clearly in clause 30(c) is totally on line with the relevant clause in the Pastoral Industry Award in the intent.

That issue arose, as you know, in a Federal award and the matter, I submit, sir, is directly analogous to that which we're dealing with today.

The clause in question provides the penalty for late payment, as does the Carriers Award clause. That penalty provision was found to have real meaning in that matter before the Full Bench.

As to what "payment of wages" means, whilst my strong submission is that clause 30 allows for no other meaning than that wages comprises as written - ordinary time, overtime earnings, together with such penalty rates and allowances that apply, the meaning of an underpayment of that total amount has been judicially considered, and if it assists you, sir, I shall refer to another Full Bench matter, once again in the Commonwealth Industrial Court and reported at "[1960] 1 FEDERAL LAW REPORTS at 336 in the matter of the Commonwealth Works and Services Northern Territory Award". And the Chief Justice considered the meaning of "wages", and he held, or per obiter dicta, if you like, he held that there was an implication that wages and other monies due includes, for example, travel allowance, dirt money, other benefits.

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MR LYNCH:

He makes the point that a token payment is not a real payment, but rather the employee is paid if the payment made is of such a character that ordinary men would say that the employee was paid.

Chief Justice Spicer agreed with the interpretation proposed in the joint judgment of Justice Joske and Justice Eggleston, and I will just read that to you, sir, if you'll bear with me. It's half a page or so. This is the joint judgment, as I said, of Eggleston and Joske:

"If the contention that there must be payment in full is correct, waiting time becomes payable where the full amount is not paid, even though the employer has no knowledge that a special rate is payable, or that overtime has been worked, or where there is a bona fide dispute as to what or how much is payable, or there is reasonable ground for making an inquiry as to whether something is payable. This does not seem to be fair or reasonable. It is, however, sought to justify it on the basis that the employer is bound to know what is going on, and must manage its affairs in such a way that it does know. Such a doctrine carried to the limits to which it was pressed in this case would, we think, place an intolerable and impossible burden upon the employer and would greatly and unreasonably add to the costs of administering its affairs. Ordinarily if an employer acts reasonably in conducting his business in accordance with ordinary business methods, and takes those reasonable precautions which a business man usually

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MR LYNCH:

takes, no more is required of him.

The essence of the award, and the obligation of the employer under cl. 31 of the award, is that an employee is paid each pay day. There must be a physical act of payment and there must be payment in a real sense. A colourable payment is not a real payment. The obligation of the employer under cl. 31 is not satisfied by the making of a token payment, nor does the employer satisfy it by making an evasive payment. A payment is a real payment when the employer has bona fide endeavoured to pay the full amount which is believed to be due to the employee at the time of payment. It may be [and I think this is of relevance to the Launceston General Hospital] that the amount paid is not the full amount due because of an error by someone in the pay office, or because the circumstances under which a special rate or other benefit was earned have not come to the knowledge of the employer or that the employer is not reasonably satisfied without investigation, which he has not had sufficient opportunity to make that it was earned, or that the employer bona fide disputes a particular item claimed. If under such or similar circumstances the employer pays the employee the full amount which is believed to be payable, although it may turn out to be less than the full amount due, there has been a real payment and the employee has been 'paid' within the meaning of the award."

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LYNCH

MR LYNCH:

And equally, sir, in the case of Lloyd and Wilkinson, which is the New South Wales Arbitration Report 1909 at 988, the judge in that case was of the view that the employer must leave no stone unturned in his effort to pay correct wages.

Now I'm sympathetic to those judicially expressed views. It would be manifestly unfair to fix the employer with the penalty prescribed in the award if there's been an error in the pay office, or a genuine misunderstanding about the appropriate rate. I don't have an argument.

If the employer in the case that has led to this hearing had been, as the Full Bench describes it, bona fide in the matter, there would have been no claim for underpayment in the first place, or for that matter a late payment penalty.

The fact sub-clause (c) ... in fact sub-clause (c) addresses that issue. And that's the part that I read before, sir. There is a let out clause in sub-clause (c) where an employer has got reason to doubt what's been claimed and can make enquiries etc.

Where an employer, sir, has not acted in a bona fide manner, where there's been a history of wage underpayments, where the employer has misled this Commission and the union as to his true liabilities, and that happened in the case, then clearly the penalty should come into effect. It is precisely this sort of mischief that the clause seeks to address.

In this respect, sir, I'd refer you to another case where the intentions of the employer in a wage underpayment were considered by the Industrial Commission of New South Wales in court session and reported as No.949 of 1982.

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LYNCH

MR LYNCH:

In refusing leave to appeal (it was a matter involving the Bathurst Rugby Leagues Club) the Full Bench, Justices Kyle, Watson and Sweeney, concluded that there was some mental element involved in the employer's failure to pay all wages due, and that therefore not all reasonable and practical steps were taken by the employer to comply with the award. The employer thus remained in breach of the award.

Apparently there'd been some strike action and there was a bit of a pay back going on.

Mr President, it's my submission that the employer in the Tennant case had the intention of breaching the award if he can get away with it. To that extent he was not acting in a bona fide manner as contemplated in the cases I've cited.

He's clearly in breach of the award, that's agreed between the parties. And what remains of that case will be taken up by our legal advisers.

But in summary, sir, we've been addressing the meaning of clause 30 and in particular clause 30(c). I don't believe it's necessary to go to great lengths to distinguish this matter from the matter that was before you in the Hospitals Award. The issue was markedly different, and I think the position put forward by Justices Eggleston and Joske in the Northern Territory award covers that quite adequately. I don't have an argument with that at all.

And I believe in the Hospitals case there were very good mitigating reasons on the employer's side. But the respective award clauses between the two awards bear no resemblance to each other, and the relevant provisions of clause 30 of Carriers Award are incapable of alternate meanings than those I've suggested, sir.

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MR LYNCH:

I'd ask you to so interpret them, and by doing so to advance the remedy and suppression of mischief.

I would also point out that the position that's been raised by Mr Fitzgerald in respect of the employees accepting in good faith their wages, this was not the case. In fact one of the employees is here today. If necessary I will put him on the stand. He did ask for overtime, 'Where is my overtime?'.  
So at no stage was there a ready acceptance by the employee that he was paid according to the award.

And that, sir, is that. If you please.

PRESIDENT:

Do you have a view as to when this award interpretation should apply from, retrospectively or prospectively?

MR LYNCH:

In relation to the instant case I'd think, in my view, sir, you'd have to interpret the award according to its terms. It either means what it says, in my view, or it does not.

I think then, if you agree that the late payment of sub-clause (c) has effect, then I think we have to seriously sit down with the employer, with the Confederation and work out just where we will draw the line.

PRESIDENT:

You've very astutely avoided the question. Should I ...

MR LYNCH:

Maybe I didn't understand it, sir. I'm not usually that astute.

PRESIDENT:

Well, Mr Fitzgerald has taken a punt on it and asked me to interpret the award retrospectively. Now if I did that it would mean that ...

MR LYNCH:

I understand.

PRESIDENT:

... and I interpreted it in his favour, it would mean that the award

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PRESIDENT - LYNCH

PRESIDENT: has always meant what Mr Fitzgerald has said.

MR LYNCH: I think that's a very dangerous road to go down, sir.

PRESIDENT: On the other hand, if I interpret it prospectively against him, well I'm not sure what would happen in relation to, say, past occurrences.

MR LYNCH: That's right.

Well, it's not the first time we've claimed low payment of wages and, indeed, it is often part of the bargaining process trying to get employers to come to an agreement on a wage payment.

And under the Federal award provisions (and you may help me on this Barry), but I understand that Brambles and Hammond Palmer have made payments under the same clause. So I'd be reluctant to get too far off the track on the interpretation, sir.

PRESIDENT: But just bear this in mind. If you are not familiar with the Act; that once having interpreted this award all courts and all persons must take judicial notice of my interpretation, unless it is appealed, and then the result must be noted.

So I simply remind you that you have the right to reply to Mr Fitzgerald's request that the award be interpreted retrospectively.

MR LYNCH: No, sir.

If we're going to interpret it all it should be applied to the date of the application surely, or the date of the hearing would be even more proper I would suggest.

But I would like, obviously, a decision that the clause says just what it says. That'll do us. And we can then seek to negotiate with the employer on the outstanding matters.

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PRESIDENT - LYNCH

PRESIDENT: Yes, thank you. Now I understand your attitude.

Mr Fitzgerald?

MR FITZGERALD: Yes, I'll be very brief in reply, thank you, sir.

Mr President, many of the matters which Mr Lynch has raised today, including the exhibit of course that goes to merit, and you've indicated earlier that you'd pay no particular heed to that. But there is, in respect to the question of bona fide payment, Mr Lynch seeks to rely on some past record of the employer ... or says to be a past record. Once again I suggest that those comments be disregarded.

There is a mere assertion that there was a mental attitude of intent, if you like, by the employer. Once again, a question going to merit, one which we would deny quite strongly.

And for those reasons I just reassert our position in respect to any of those matters which go clearly to merit, particular that relating to the exhibit and the past history of the TWU's dealing with the employers should in fact be disregarded.

I think it's clear that in terms of the award the problem ... in terms of Mr Lynch's submissions, the problem relates to this term "as prescribed on payday". And he asserts that when this is as described in clause 30(c), he asserts that it must be taken in the context of clause 30(a) or clause 30(b). And there's simply no good reason to suggest that. If that was the case then there would be a particular reference, I would submit, or there should be, a particular reference to "as prescribed in clause clause 30(a) or clause 30(b)".

It blandly states "as prescribed on payday", and as such in terms of the



MR FITZGERALD: meaning which should be attributed to it, sir, I would once again submit that that it meaningless.

PRESIDENT: Are you familiar with the Acts Interpretation Act ...

MR FITZGERALD: Yes, I am, sir.

PRESIDENT: ... reference to `as prescribed`?

MR FITZGERALD: No, I'm not. No.

I'd be interested to read that, sir. But, no, I'm not familiar with that.

PRESIDENT: Can I have recourse to the Acts Interpretation Act?

MR FITZGERALD: Yes, I understand that.

PRESIDENT: I'm asking you the question, if I can.

MR FITZGERALD: Well, I would imagine, sir. I'm aware of the Act, of course. The Act of course has application, I would suggest, to any administrative tribunal and you must pay regard to it, I would submit, sir.

PRESIDENT: Am I acting administratively or judicially in section 43 proceedings?

MR FITZGERALD: Well, certainly there's a judicial flavour to these proceedings of course, but of course the Commissions such ... I would see it as an administrative tribunal in essence. But once again, I agree, yes, judicial ...

PRESIDENT: It's a heavy judicial bias, I believe, in interpretation matters ...

MR FITZGERALD: Well, quite clearly ...

PRESIDENT: ... and long-service leave.

MR FITZGERALD: Yes, there is quite clearly. And these matters in the Federal sphere are heard by the Federal Court. But yes, I would think it would be proper that you ... without knowing to what

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PRESIDENT - FITZGERALD

MR FITZGERALD: it relates or what it says in respect to 'as prescribed', particularly if it is favourable to my position I think you should pay particular heed to the Acts Interpretation Act.

PRESIDENT: And if it isn't, ignore it?

MR FITZGERALD: That's right.

PRESIDENT: Well, I can understand that submission.

MR HANSCH: I must remember that one.

MR FITZGERALD: Mr Lynch asserted that clause 30(c) surely must relate to appeal. Well, if that is the case should the employer be penalised for making what is seen to be a substantive payment?

I agree on the face of it, if no payment is made at all then a penalty payment should apply. But where in similar circumstances to the Launceston General Hospital case a substantive part of the weekly payment has been made, then a penalty should not apply.

In fact I think Mr Lynch referred to obiter dicta from one of their previous cases. I don't recall particularly which one it was, but it doesn't matter, but he took ...

PRESIDENT: It's the Northern Territory.

MR FITZGERALD: Northern Territory was it, thank you.

But it talks about the ordinary men, whether they in fact thought they'd been paid their wages.

Now Mr Lynch asserts in the circumstances, once again going to merit ... but it's hard to not reply to, but there was some complaint made on some occasions. But in the overall context, sir, I believe the employees in this case had some

MR FITZGERALD:

belief that the payment represented  
what should have been the true  
payment.

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FITZGERALD

MR FITZGERALD: Now obviously on some occasions (and I say some; it was not on all occasions), on some occasions that was not the correct payment.

PRESIDENT: And has the correct payment since been effected?

MR FITZGERALD: No, not at this time. There has been an offer to ...

PRESIDENT: Oh yes.

MR FITZGERALD: ... make that good, sir, but there's been a rejection on the basis of this further claim.

And I point out that in terms of the conference, it put us in an untenable position where we thought we were negotiating in respect to that particular claim only - the overtime claim.

And at a time when we thought the matter had been resolved the matter was raised by ... this further matter was raised by Mr Hansch, so we were under extreme difficulties in terms of negotiating the matter.

In terms ... as what I'd see as not particularly fair play in terms of trying to resolve the matter, sir.

So the problem, in my submission, sir, hinges around this definition or these words used, 'as prescribed on pay day'.

Quite clearly, a payment was made by the employer, all be it that on some occasions it was an incorrect payment.

For those reasons, sir, I believe that many of the submissions made by Mr Lynch fail to address the real crux of this issue and that's particularly related to the words, 'as prescribed'.

He says that he asserted that they ... it must refer to the clauses

MR FITZGERALD:

above. I would submit that that's a nonsense.

For that to occur there would be, in terms of clarity, there would be a need for further words to make reference to either clause 30(a) or 30(b) or any other clause within this award.

For those reasons, sir, I'd once again seek your interpretation as previously submitted in my substantive submission, sir.

If the Commission pleases.

PRESIDENT:

Thank you, Mr Fitzgerald.

I'm afraid I shall have to reserve my decision on this one. It's not easy. But just for point of clarification, are you saying that in relation to (c) provided the employer has made a payment... a substantive payment or substantial payment ...

MR FITZGERALD:

Yes.

PRESIDENT:

... that satisfies (c) ...?

MR FITZGERALD:

Yes. Put it another way, I don't believe that the penalty which is inherent and submitted by Mr Lynch can apply in circumstances where a substantive payment has been made.

PRESIDENT:

Do you have anything to say about the obligation put upon the employer to rely upon circumstances beyond his effective control?

MR FITZGERALD:

I don't think it assists us in any particular way. I would speculate and say that that would occur in respect to a no payment situation when, for instance, there is a breakdown in the computer facility or the payroll truck didn't turn up, whatever.

But I think that is in the context of no payment whatsoever and in terms of the instant circumstances a payment,

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PRESIDENT - FITZGERALD

MR FITZGERALD: a very substantive payment, had been made.

PRESIDENT: Could we take a hypothetical case of an employer having a serious cash flow problem and feels that he hasn't got sufficient funds to meet wages plus overtime on payday, and so he simply pays the award rate ...

MR FITZGERALD: Yes.

PRESIDENT: ... and part or perhaps none of the overtime.

MR FITZGERALD: Yes.

PRESIDENT: In those circumstances, do you think he would be excused from making any payment under (c)?

MR FITZGERALD: I can only speculate again ...

PRESIDENT: It is hypothetical, but ...

MR FITZGERALD: Yes, it is.

PRESIDENT: ... I'm simply putting your argument to the test that's all.

MR FITZGERALD: I think in the circumstances, that wouldn't be a reasonable usage of the proviso to clause 30(c).

Certainly my view is that it's not intended to cover those sort of circumstances.

PRESIDENT: So that would be one case where if he had a cash flow problem and he decided that rather than borrow or incur an interest debt, he would simply defer that payment until perhaps the next payday.

MR FITZGERALD: Yes.

PRESIDENT: Do do you think he would then have to pay the penalty?

MR FITZGERALD: Well ... oh, sorry, no. Well in terms of the submissions I made earlier in respect to whether it was

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PRESIDENT - FITZGERALD

MR FITZGERALD:

a bona fide payment, quite clearly in that situation he would knowingly pay an amount which was deficient in terms of the award.

But that I think is a very different situation to what currently applies, and in my submission, as I indicated earlier, we submit that a bona fide payment ... what the employer believed to be the correct payment was made.

In this instance I think it's clear ... the proposition which you proposed, sir, I think is quite totally different ...

PRESIDENT:

Yes.

MR FITZGERALD:

... in that there's ...

PRESIDENT:

Well now, Mr Lynch said that in those circumstances, if the employer genuinely believes that what he's paying is correct and he can satisfy the employer or the union or the appropriate tribunal, then that's the end of the matter.

I'm sure Mr Lynch said that.

MR FITZGERALD:

I can't recall that. I think ... I'm not sure whether there's ...

PRESIDENT:

Well we were discussing ... Mr Lynch was discussing the Northern Territory case ...

MR FITZGERALD:

Yes.

PRESIDENT:

... and led me to believe anyway that in those circumstances felt ... there was an exchange with Mr Lynch and I ...

MR FITZGERALD:

Yes.

PRESIDENT:

... where the employer genuinely believes that he's interpreted the award correctly or ...

MR FITZGERALD:

Oh I see, yes.

PRESIDENT:

... as Mr Lynch said that perhaps

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PRESIDENT - FITZGERALD

PRESIDENT: there's been an amendment to the award of which he's unaware.

MR FITZGERALD: Yes.

PRESIDENT: In those circumstances ...

MR FITZGERALD: Well in those circumstances where he believes ... where he's acting in a bona fide manner, yes, I think that clause could come into play, certainly.

PRESIDENT: Yes. Well it could or it wouldn't apply?

MR FITZGERALD: It could come into play if he's acting in a bona fide manner.

PRESIDENT: In other words, he could rely on special circumstances.

MR FITZGERALD: Yes. If he feels that (I would submit wrongly) but he feels that special circumstances included that cash flow problem which you propose, then I think clause 30(c) could come into play, yes.

PRESIDENT: Yes. You see, you haven't asked me to address myself to that, so I presume that you're not relying on that.

MR FITZGERALD: No, that's right, sir, yes. That's right, yes.

PRESIDENT: You're saying that he made a substantial payment ...

MR FITZGERALD: Yes, he made a substantial payment.

PRESIDENT: ... and therefore clause neither (c) nor (d) has any application?

MR FITZGERALD: Correct, yes, sir.

PRESIDENT: All right, thank you.

MR FITZGERALD: If the Commission pleases.

PRESIDENT: I'll reserve my decision. That concludes this hearing.

HEARING CONCLUDED

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PRESIDENT - FITZGERALD