IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No 2268 of 1989

IN THE MATTER OF an application by the Secretary for Labour for interpretation

re payment for period of leave

PRESIDENT

Hobart, 5 July 1990
Continued from 27 February 1990

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Well, you people have got a lot more knowledge of the history of this affair than I have. I understand that Mr Evans probably should proceed at this point. Is that the agreed position of all people?

MR NIELSEN: We have no problem with that, Mr President.

PRESIDENT: Yes. Thank you very much.

MR EVANS: It certainly would be the normal procedure, Mr President.

PRESIDENT: Are there any changes in appearances?

MS SHELLEY: Yes, Mr President, SHELLEY, P. appearing for the Federated Miscellaneous Workers Union. Mr O'Brien is the person who has been involved in this matter previously and, unfortunately, he is next door, and even Mr O'Brien can't be in two places at once.

PRESIDENT: Yes, we all suffer that problem.

MS SHELLEY: So I'm hoping that he will actually be finished in time to rescue me from this, so I will be seeking a short adjournment when it's my turn to see if he is then available.

PRESIDENT: Right. Thank you Ms Shelley. Mr Evans? Oh, I am sorry, Mr Edwards.

MR EDWARDS: If it please the Commission, I don't know whether Mr Clues was appearing with me before but, if not, the change of appearance would be **MR S. CLUES** appearing with me.

PRESIDENT: Thank you Mr Edwards. Your turn now Mr Evans.

MR EVANS: Thank you, Mr President. Mr President, I'd firstly like to briefly relate the history of this interpretation and, hopefully, it won't take as long as the actual interpretation itself has taken.

As we are all aware, the provision that I seek interpreted has already been the subject of interpretation by the former President in matter T.1837 of '89.

We are all equally aware that the former President's interpretation was appealed by the TCI, and that a Full Bench in matter 1985 of '89 ruled that an actual declaration had not been made and could not, therefore, be appealed and was dismissed.

The Bakery Employees and Salesmen's Federation then asked the Department of Labour and Industry (as we then were) to enforce the President's interpretation.

Now, while I and, I would suggest, everyone else is perfectly clear about what the former President intended, knowing what was intended and being able to enforce that view are two different positions.

This application which initially came before Acting President Robinson on 27 February of this year to interpret what has already been interpreted as a result, then, alternative from our point of view, would have been to either ignore the union's request to remedy an apparent breach of the award or to initiate proceedings in a Court of Petty Sessions, and I'm sure that the latter alternative would have almost certainly resulted in a like application from Mr Edwards.

At the initial proceedings before Acting President Robinson, Mr O'Brien for the Federated Miscellaneous Workers Union supported by both the Tasmanian Confederation of Industries and the Bakery Employees and Salesmen's Federation raised a threshold matter and sought to refer the matter back to the Full Bench.

It was argued that when the matter was previously before the Full Bench the respective advocates had not given sufficient attention to the former President's words at the top of page 6 of his decision, where he said:

> I reject the applicant's interpretation and declare that ...

Some other possible problems were also raised at that time that might flow from a fresh interpretation, but I don't intend to go into those at the moment.

The Acting President reserved his decision and after consulting with the members of the Full Bench declined to relist the matter and reiterated the view that the former President had not made a declaration and that therefore his decision could not be appealed, and that once the Full Bench had published its findings the matter became functus officio and could not be altered.

I understand a rough translation of that latin is: having discharged his office.

Mr President, that brings us up to date and we start all over again. Hopefully it won't be quite as drawn out.

Mr President, it cannot be argued that the former President interpreted clause 23(e) of the Bakers Award, albeit as far as the Full Bench was concerned, without making a declaration.

Therefore, it was tempting to simply submit that decision and ask that a declaration be made.

However, while there is certainly an interpretation extant, and while it is a useful document and source of reference for this application, it is to all intents and purposes null and void and thus a fresh stating of the facts, albeit previously stated facts, is required. If the Commission pleases, I'll do just that.

PRESIDENT: I think that's the only way to go, Mr Evans.

MR EVANS: Mr President, this application seeks your interpretation, encompassing a declaration of clause 23 - Payment for Period of Leave, specifically subclause (e)(i).

If I could read that, Mr President.

> Payment for Period of Leave
>
> (1) Employees other than those contained in Divisions B [which is shop assistants] and C [clerks] of this award, all employees before going on annual leave shall be paid the amount of wages they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.

Mr President, there remains a dispute as to the meaning of those words.

While it is not necessary for applications on behalf of the secretary to state a specific case, it seems appropriate in this instance and, as I've already mentioned, the simplest method is to do just that and simply restate the case described in T.1837 of 1989 relating to Mr Paul Oakenfall who was, and I don't know whether he still is, employed as a machine operator by Nu-Bake Bakery at 11 Hobart Road, Kings Meadows.

The agreed facts as to Mr Oakenfall's hours of work are as per this exhibit, Mr President, which I'll tender now.

PRESIDENT: Shall we call this, Exhibit E.1?

MR EVANS: Mr Oakenfall's hours were termed `a static roster', and as you will see he worked on a Sunday from 4.00 p.m. to 12.06 a.m., on a Monday 10.00 a.m. to 6.06 p.m., Tuesday 8.00 a.m. to 4.06 p.m., Wednesday 8.00 a.m. to 4.06 p.m. and Thursday 8.00 a.m. to 4.06 p.m.

Detailing the dispute, Mr President, is best achieved by actually having resort to the former President's interpretation. I have copies of that if everyone doesn't have one, but I would imagine most people do.

PRESIDENT: I think we'll take it ...

MR EVANS: Take it as read.

PRESIDENT: ... as available to all parties.

MR EVANS: I'd like to quote from the top of page 3 of the former President's decision. It reads:

> Under the terms of the award, for ordinary rostered work on a Sunday a premium of 50% is payable. Ordinary work done between the hours of 10.00 a.m. and 10.00 p.m. on Monday, 8.00 a.m. and 8.00 p.m. on Tuesday and Wednesday, and 8.00 a.m. to midnight on Thursday, carry no premium.
>
> A Mr. Oakenfall, on whose behalf this application has been made, has been paid regularly at ordinary rates from Monday to Thursday inclusive and ordinary rates plus 50% (or the equivalent of time and one half) for ordinary work done on a Sunday. This is in accordance with the award requirement.
>
> However recently, when on annual leave, he was only paid for 4 weeks at ordinary rates. Messrs. Nielsen and O'Brien, representing the Bakery Employees and Salesmen's Federation of Australia and the Federated Miscellaneous Workers Union respectively, argued that under the terms of the award Mr. Oakenfall should have been paid the prescribed 50% premium for Sunday while on annual leave. This was because Sunday was regularly worked during Mr Oakenfall's ordinary roster.
>
> Mr Edwards disputed this, and argued that "wages" did not include premiums or penalty additions.

In essence, Mr President, Mr Edwards maintained that the word `wages' wherever used in the award only related to an amount specified in clause 8, Division A, subclause (1)(e).

I reject that argument, Mr President, and submit that to only give the word `wages' the meaning attributed to it by Mr Edwards is too narrow a construction.

I would again like to quote from the former President, from the top of page 4 through to conclusion:

> I reject Mr Edwards' contention that in the context of this award "wages" means only the ordinary time rate of remuneration assigned to an employee's particular classification. I accept that the noun "wage" is the correct description to be applied to the monetary amounts assigned to a specified

classification. But within the framework of the award itself which makes provision for work done on all days of the week and at all times of the day, use of the word "wage" or "wages" to describe the minimum legal rate of remuneration for working ordinary hours on different days of the week, including the weekends, is equally appropriate given that this award applies to persons who regularly work Sundays as part of their ordinary working week.

I can discover no esoteric deficiency or grammatical flaw in the use of that terminology to describe the remuneration payable to an employee for working ordinary hours on a Sunday. As Sunday is ordinarily a non-working day for many workers, the legal [underlined] minimum payment for ordinary [underlined] time necessarily worked on that day is time-and-one-half or time plus 50%. Suffice it to say there can be found in the award no authority whatsoever for an employer to pay for ordinary work done [underlined] on a Sunday a lesser amount than 150% of the lowest rate payable for work done on week days - i.e. the weekly rate divided by 5 (or per hour the weekly rate divided by 38).

Having reached this conclusion, it is a relatively uncomplicated exercise to then apply subclause (e) of Clause 23 to the given set of facts.

Had Mr. Oakenfall continued to work his Sunday to Thursday roster instead of taking annual leave, he would have been paid the equivalent of 20% of the weekly rate for Monday to Thursday inclusive, and 30% of the weekly rate for Sunday. The aggregate becomes the amount he should have been paid for each Sunday to Thursday he was regarded as being on annual leave. [In addition he would have been entitled to be paid a flat amount of $231.10, being the present minimum wage set out in Clause 8. If, however, Mr Oakenfall took his leave prior to March 1989 the minimum wage add-on would have been something less.]

Although Mr. Edwards was able to draw some comfort from his argument regarding the meaning of "ordinary pay" (Particularly if resort is to be had to the Macquarie Dictionary), he was none the less unable to draw comfort from the terminology used by the award-maker in other parts of the award itself. I refer in particular to Clause 30 - Full Week's Wages to be Paid, and Clause 38 - Payment of Wages.

> I am firmly of the opinion that in cases of this kind it is important to consider the award as a whole [underlined] in order to test the probable intention of the award-maker against the overall infrastructure.
>
> In this case, having carried out that exercise I reject the applicant's interpretation and declare that as Mr Oakenfall had regularly worked on Sunday to Thursday, he was entitled to be paid the minimum rate of 150% of one fifth of the ordinary weekly rate for each Sunday he was regarded as being on paid annual leave. The remaining days of his leave would attract ordinary time rates only. The extra add-on relating to the minimum wage is mentioned only in passing, as there appeared to be no issue between the parties as to his entitlement in that regard.
>
> The award is interpreted accordingly with effect from 15 August 1988.

Mr President, in my view, the former President's interpretation of the provision in question was correct.

PRESIDENT: You're virtually adopting former President Koerbin's decision as your own.

MR EVANS: If you like, sir, yes. Certainly ensuring that his reasoning is read into this application.

PRESIDENT: Yes. I think I understand that.

MR EVANS: Mr President, it is also my submission that the interpretation turns on what is meant by the expression `ordinary time'. Unfortunately, the term is not defined generally or specifically for annual leave purposes.

Clause 9 of the Bakers Award prescribes ordinary hours of work and I won't take the Commission through the clause since it's agreed that Mr Oakenfall's hours of work fell within ordinary hours and did not attract a penalty, apart from the Sunday 50% shift premium.

However, if I could take the Commission to the relevant part of clause 12 - Saturday, Sunday and Holiday Work, specifically subclause (ii) which provides ... it's headed `Sunday Work' and I'll take out the reference to the change in date of application:

> Employees whose normal week of 38 hours is worked on Sunday to Thursday inclusive shall be paid a loading of 50% for all time worked on a Sunday.

(ii) Employees whose normal week of 38 hours is worked on Monday to Friday inclusive shall be paid at the rate of double time for all time worked on a Sunday.

Mr President, it's my view that clause 12 distinguishes between Sunday work in ordinary hours for a Sunday to Thursday worker and Sunday work performed by a Monday to Friday worker, which is clearly overtime and clearly would not be included in any annual leave payment. As such, I'd submit that the 50% premium can only be regarded as a shift premium or allowance.

Mr President in T.1837 of 1989 Mr Edwards attempted to establish that shift allowances are not normally included in ordinary pay for annual leave purposes. In support of that position, Mr Edwards quoted from an actual interpretation going to termination and annual leave payments and from transcripts to other matters.

In relation to that submission, I'd briefly make two points. Firstly, an interpretation of similar provisions from another award cannot automatically be applied and, secondly, quotations of comments made during proceedings taken from transcript can hardly be held out to be authoritative and are in fact obiter dictum.

Mr President, I mention this by way of a pre-emptive strike, as it were, and submit that this Commission has not previously ruled that shift allowances are automatically excluded from ordinary pay for annual leave purposes.

While on this point, Mr Nielsen in his submission in 1837 of 1989 referred to an extract from Industrial Law Review which relates to the 1971 annual leave case in the former Commonwealth Conciliation and Arbitration Commission.

I draw some comfort from that decision which indicated that shift work premiums, according to roster or projected roster, includes Saturday, Sunday or public holidays and should generally be included in payments for annual leave.

I tender the first three pages of the annual leave announcement and if I could draw the Commission's attention ...

PRESIDENT: We'll label this Exhibit E.2.

MR EVANS: Thank you.

... to the emphasised parts on pages 2 and 3 of that announcement.

PRESIDENT: I'm sorry, would you repeat that last bit again?

MR EVANS: If I could draw the Commission's attention to the emphasised parts of the announcement on pages 2 and 3.

Item 3 on page 2 reads:

> The items which we think should in the general run of cases be included in payment for Annual Leave are as follows.

And then over the page, at the top of page 3:

> Shift Work Premiums according to roster or projected roster including Saturday, Sunday or Public Holiday shifts.

I'd also tender an extract from CCH Labour Law Reporter, Volume II.

PRESIDENT: Exhibit E.3.

MR EVANS: If I can again quote the emphasised parts:

> Payment for leave period
>
> "Ordinary Pay"
>
> As the standard clause is worded by referring to the "ordinary time" the employee would have worked, this is taken to mean that overtime payments would not be included in the amount, but that shift allowances usually received by the employee would form part of the "ordinary pay" of the employee.

Mr President, to conclude and summarise, I'd submit that the interpretation turns not on a definition of wages (which in any event, in my view, is not solely limited to what is set out in clause 8, Division A, Wage Rates) but on the meaning of ordinary time for annual leave purposes).

It is my submission that an employee engaged as a machinist under the Bakers Award, working the hours described, is entitled to wages in respect of the ordinary time he would have worked had he not been on leave during the relevant period, and that that includes the 50% Sunday shift premium or allowance.

Mr President, from the Information and Inspections Services Section's point of view it doesn't really matter which way this clause is interpreted. By that I mean, we have no vested interest, we simply have a need to know for sure and, certainly, at the present time we believe we do, but we have nothing that we can act on.

Finally, Mr President, I would ask that should you agree with my submissions that your decision clearly embodies a declaration to give full effect to that decision and that the decision be given retrospective operation from 15 August 1988.

Normally I wouldn't ask for retrospective operation, however, because this interpretation was actually made on the ... originally made on 4 May 1989, and it was given effect from 15 August '88 relating to a particular employee's entitlement, to do otherwise, I believe, would deny Mr Oakenfall natural justice and would be unfair and prejudicial to employees in general.

If the Commission pleases, that's all I have to say at the moment.

PRESIDENT: Yes. Thank you very much Mr Evans.

MR NIELSEN: Mr President ...

PRESIDENT: Mr Nielsen?

MR NIELSEN: If the Commission would just bear with me for a little while, I think it is important that we give some consideration to the history of this case and, unfortunately, to the length of it.

Back in 1988 discussions took place between our association and the bakery company concerned.

PRESIDENT: Excuse me Mr Nielsen.

MR NIELSEN: Proceed, Mr Commissioner?

PRESIDENT: Yes, please.

MR NIELSEN: Repeating, Mr President, back in 1988 between our association - that is the Bakery Employees and Salesmen's Federation - and the company Nu-Bakery in Launceston, there were exchanges of letters, telephone calls, and actual discussions in regards to what the association saw as the correct interpretation of the particular issue before you this morning, Mr President.

And may I say that the thrust of those discussions then, and still are, is that Mr Oakenfall's way of life was, his 52 weeks of the year, 48 weeks were incurred working from the Sunday to Thursday. That was his ordinary working week - Sunday to Thursday - over a period of years and then ...

PRESIDENT: How many years, just for the record?

MR NIELSEN: I'm unable to say that. It was ... if I may seek some assistance from ...

MR ....: It would be a few years. About ... between 2 and 3 years he had been employed there full time.

MR NIELSEN: And that when he came to take his annual leave that was the completion of his 52 weeks - 48 weeks at the Sunday to Thursday, and then his 4 weeks' annual leave - and we say all through that was his ordinary working week.

Unfortunately, those discussions in 1988 failed to resolve the matter, although there was optimism and confidence at various times in those discussions in a relationship then, and still is quite a good relationship, that we would resolve the issue before us.

And it was my understanding that having failed, then we would go to a section 29, or what we refer to (no disrespect) to get a decision before the umpire, and ... just for one moment ...

It was on 31 January 1989 when the application was lodged and the hearing took place on Tuesday, 21 February, as I understand it, in Launceston in 1989. So there has been quite a distance of time as up to today.

And then just to briefly ... halfway through that section 29, the senior industrial advocate for the Tasmanian Chamber of Industries submitted an application or, correction, tabled an application seeking an interpretation, and then you realise what Mr Evans has referred to, the sequence of events with the appeal ... with the decision of that application by the then President Koerbin and then, ultimately, the appeal and the events that have taken place.

Now, we have endeavoured to try to bring this to finality, and you're aware of Mr Evans's submission here this morning, Mr President, and we believe that the President did clearly declare, or did clearly give a decision.

The question is, of course, on the word or the interpretation of whether it's a declaration and Mr Evans's application here this morning desires to finalise that position. I believe I'd leave it at that for the moment, Mr President.

PRESIDENT: Yes. Thank you Mr Nielsen. Ms Shelley?

MS SHELLEY: Yes. As foreshadowed earlier, Mr President, I'd like to request a brief adjournment so I can find out whether or not Mr O'Brien is available. I would suggest just 5 minutes?

PRESIDENT: Yes. Any objections?

MR EVANS: Mr President, I have no objections at all to a brief adjournment, but I would strenuously object to an

adjournment if Mr O'Brien isn't available to proceed. My attitude is that this has gone on long enough, and if we can't dispatch it today I'd be disappointed in the extreme.

PRESIDENT: Thank you. Mr Edwards?

MR EDWARDS: I'd echo those remarks, sir.

PRESIDENT: Well, you have no objection to a 5-minute adjournment, and we will so adjourn.

SHORT ADJOURNMENT

PRESIDENT: Mr O'Brien?

MR O'BRIEN: Thank you, and I seek to appear in this matter now with Ms Shelley.

PRESIDENT: I think you already were.

MR O'BRIEN: Was I announced in my absence? Thank you Mr President.

PRESIDENT: No, but you're on the original documentation.

MR O'BRIEN: I can't get away from it.

PRESIDENT: No. You're locked in.

MR O'BRIEN: Mr President, thank you for the courtesy of the adjournment. It certainly wasn't my wish to have these matters clashing. Indeed, my diary before I went away showed them on consecutive days not the same day, and I understand that this matter was previously listed for yesterday.

PRESIDENT: It was. That's the problem with people who go overseas for such long periods of time.

MR O'BRIEN: Yes. There was no problem when I went overseas, Mr President, so it must have been something that happened here; nothing to do with my trip.

Mr President, obviously some substantial submission has been presented in this matter and I would take it that you, Mr President, have as part of your information for the purpose of conducting these proceedings the transcript of matter T.1837 of 1988 and the decision of the then President in that matter dated 4 May 1989.

PRESIDENT: That's been fairly substantially covered - in particular, the decision.

MR O'BRIEN: The position that we take in this matter is simply that we see no reason why you, Mr President, ought to come down with a decision which is in some way at variance with that of the then President Mr Koerbin, on the basis of our understanding of the employer's position in this matter.

Now, we are unaware as to any change in their approach to this matter, and that matter was debated quite fully in those previous proceedings.

Our submissions appear on pages 27 through to page 35 and they are, essentially, submissions which were in response to the submissions presented by Mr Edwards at that time in his argument that wages meant wages in accordance with clause 8 of the award and nothing more, and that the annual leave provision, as we understood it ... as he understood it, I should say, where it said in subclause (e):

> All employees before going on annual leave shall be paid the amount of wages they would have received in respect of the ordinary time they would have worked had they not been on leave during that relevant period.

could only mean the wages as prescribed in clause 8, and that no other amounts were at that stage, or any stage, required to be paid under clause 23 for the period of annual leave.

It was our submission then and it is now that the phrase `the amount of wages' cannot be read down to such a limited meaning in the context of this award and in those submissions you will see that, for example, other clauses such as clause 38 use the term `wages' in a context which in our submission could not possibly mean only wages as prescribed in clause 8, but that the term `wages' is used in a more general term to include perhaps the concept `remuneration' which I used (you'll see in that transcript) to ... including the penalties and premiums that will be attracted for work having regard to the shift work provisions or weekend work provisions within the award. And I believe that if you have regard to the decision of the then President that that submission was embraced particularly on page 5 in the second full paragraph where it says:

> Although Mr. Edwards was able to draw some comfort from his argument regarding the meaning of "ordinary pay" (particularly if resort is to be had to the Macquarie Dictionary), he was none the less unable to draw comfort from the terminology used by the award-maker in other parts of the award itself.

I refer in particular to Clause 30 - Full Week's Wages to be Paid, and clause 38 - Payment of Wages.

And in that regard, sir, rather than take the time of the Commission unnecessarily I would refer the Commission to our submission in proceedings before the President, in particular on page 30 of the previous transcript.

The question in this matter, as I understand it, is with an employee whose ordinary hours ... ordinary time is rostered in such a way as to attract a rate of pay including a Sunday penalty - is that employee entitled to be paid that rate of pay for a period of annual leave?

Now, we say that on the face of the words in clause 20 ... sorry, clause 23, the words `shall be paid the amount of wages they would have received in respect of the ordinary time' is sufficiently broad to have the meaning `shall be paid the amount of wages' under clause 8 and under other relevant clauses, which in this case would be clause 12, and then it goes on `they would have ... had they not been on leave during the relevant period'.

And so the clause must, in our view, be taken to mean that if an employee is entitled to, on the normal roster, to be paid a Sunday penalty, for example, which as I understand it is the point in this matter, that that is the amount of wages that they would have received for their ordinary time and that therefore when they go on leave that they are entitled to be paid that amount of wages for that amount for ... as their base annual leave pay, without having regard to any other provision in the award ... and obviously you would ... I'm referring to clause 23(e)(ii)(b).

In other words that's in addition to any amounts which would fall due under 23(e)(i).

PRESIDENT: Had you had the opportunity to have a look at Mr Evans's exhibits?

MR O'BRIEN: I have had a brief opportunity, and firstly ...

PRESIDENT: Then you'll note his ...

MR O'BRIEN: (e)(iii) is ... uses the word `ordinary pay', but it does say that for the ...that term means ... `ordinary pay' means shift allowances or ... shift allowances would form part of the ordinary pay of the employee. It's the same concept but different words are used and we would ... I'm not sure as to how it was put in terms of the submission, but we would simply say that the phrase ... the description of ordinary pay could equally be applied to the phrase `ordinary ...' sorry, `amount of wages' as they appear in the award.

Secondly, the decision in the annual leave case, sir, is one which probably goes more to merit than to interpretation.

I think I understand from the document probably what is being put with regard to it. But I think for the purpose of these proceedings it may be informative that this matter would, as we understand the principles of interpretation, be determined having regard to the words within the award - within the context of the award - rather than seeking to have regard to principles which enunciate matters of merit. And Exhibit E.1 obviously is simply the statement of the hours worked.

So yes, we ... I have had opportunities to look at those things and we would support that concept.

This matter has been determined before. The reason it is before you, Mr President, now is there was some confusion about whether there was a declaration and therefore whether there was a right to appeal. It has been found that there was no declaration and therefore no right to appeal. That left the matter in limbo which was a matter which didn't please anyone when the matter was found to have that deficiency, because I think we were all aware that at some stage or other the matter would need to be determined because of the position of the parties with regard to the interpretation of the award, that being that there was no agreement between the parties as to how the award should be read.

And I guess it would be fair to say, Mr President, that this matter having previously been determined that you are looking down the barrel either way, as it were, of an appeal potentially. Whichever decision you find yourself coming to, certainly the employers have indicated that they are willing to appeal the decision which follows that which was found ... made by the President in 1989 and I guess it would be fair to say that my organisation and Mr Nielsen's organisation and perhaps (I'm not sure of the DLI's rights to appeal) would be equally distressed to find a different decision and would obviously have to consider our appeal rights.

Mr Edwards is suggesting that the solution is not to make a declaration and, let me say, that that's the worst solution in this matter because there would inevitably be further proceedings on this point ...

PRESIDENT: Even an award variation.

MR O'BRIEN: ... here or elsewhere. Even an award variation. Well, that's not exactly what I was referring to. That's a different concept. An award variation ...

PRESIDENT: It's a possibility though, isn't it?

MR O'BRIEN: ... is a possibility and I think if the Commission was contemplating that as a solution to this matter if it is needed, then we would seek the opportunity to address on that matter.

The Commission in these proceedings has previously been reluctant to take that course and we would simply seek to reserve our rights to make submissions on that point.

PRESIDENT: Actually I was really implying the possibility of one of the parties seeking to vary the award.

MR O'BRIEN: Well, I think our view on the variation of the award is that the parties are engaged in discussions on award restructuring which is the mechanism for dealing with the modernisation of awards and award terminology if there is a problem about it. We don't believe there's a problem in terms of understanding what the words mean. We think they are fairly clear and we think that ... we've heard the argument that the employers have observed it in a different way and my only comment about that is that I guess sometimes we like to read things in a way that's favourable to our own interest or interpretation.]

PRESIDENT: It's human nature.

MR O'BRIEN: It's our view that that's what those employers who've applied this award have done in the past and that this phrase has not received any attention in the past and perhaps the reason it didn't was that up until quite recently the Sunday penalty was something much less significant than the 50% loading which, I might say, is about half the normal standard. But perhaps it wasn't considered quite as important on either side of the fence as it is now and therefore I guess that the cost implications and the remuneration implications on either side of the fence make this a much more important question to be determined.

There isn't a lot that I can add. We are in the position of having heard a submission from Mr Edwards on this matter and I'm making the presumption that he hasn't changed his mind ...

PRESIDENT: That's always dangerous.

MR O'BRIEN: ... about how the award should be read.

We are in difficulty ... I understand Mr Edwards argues that he's got the right to respond because he's the employer and we're all taking a different point of view. I think we're quite happy with that provided he accepts that we've got a right to reply to any new material.

MR EDWARDS: ....

MR O'BRIEN: And the Commission ... and when I say `new material' (I hear the interjection) I mean something which hasn't previously been put in these protracted proceedings.

Mr Edwards is known to be ...

PRESIDENT: We already appear to have heard something that hasn't been put which came from Mr Evans.

MR O'BRIEN: Yes, well, I indeed have the opportunity to put something to that now. I don't ... unless Mr Edwards is prepared to adjourn and put his submission to me privately, which I don't think anyone of us would like, I would seek to reserve our position with regard to any matters which were not addressed in the previous proceedings so that we have an opportunity to put a view on any matters not hitherto presented.

It would be normal in proceedings where our submissions were preceding the employers, that we'd been the ones to lodge the application. These proceedings are different in that the department has a right to apply. We don't believe that either the employers or the employer organisation ought to be put in some difficult situation because of that and I'm sure that if Mr Edwards were proceeding with submission now and awaiting ours, he would be putting exactly the same submission to you about responding to any new material.

PRESIDENT: Yes, well, in general I have the view that, particularly in circumstances such as this where it is different to the normal process, that the parties should be given the opportunity to respond to new material. And we won't follow blindly the rule of one right of reply or no right of reply unless you're an applicant.

MR O'BRIEN: Well, if the Commission pleases, I won't seek to take up the time of the Commission further this morning and reserve the rights accordingly.

PRESIDENT: Well, you may have to but we'll see what happens. Yes, thanks Mr O'Brien. Mr Edwards?

MR EDWARDS: It's almost tempting, Mr President, to ask for a somewhat extended adjournment to prepare one's response but, given the length of time, it probably wouldn't be a wise submission to put and therefore I don't put it.

PRESIDENT: Well, not after your objection or half objection to the first request for an adjournment.

MR .... : Oh, I think that was Mr Evans.

MR EDWARDS: I was agreeing with his comments about the amount of time this case has taken thus far. And I think as

Mr O'Brien has probably foreshadowed, this may well not be the end of the matter.

Mr President, we've heard what has fallen from the Division of Labour and Industry and also from the unions that have spoken on the application by the Division of Labour and Industry. Suffice to say, the employers do not agree with the interpretation of the provision of subclause (e) of clause 23 that has been advanced thus far. Anyone that has read the history of this matter would hardly be surprised by such a pronouncement.

The employer in this case contends that on a proper construction of subclause (e) of clause 23, that is, the payment for period of annual leave, the loading for ordinary time work on a Sunday should not be included in calculating the pay due to an employee proceeding on annual leave.

As you will no doubt be aware, Mr President, this particular case has had a long and chequered history before the Commission. As Mr Nielsen has already said, it commenced with a dispute notification by the Bakery Employees' and Salesmen's Federation way back in 1988 and a substantial number of proceedings have occurred since then, which everyone else has already covered so I don't intend to go back through the detail of them.

Now, I would say though, sir, that some 18 months later we're again before the Commission seeking to have this issue resolved. Hopefully, these proceedings will be the last in this long saga and probably will be if you decide in our favour.

The provision which it is sought to unravel states so far as is relevant, and I quote from subclause (e) of clause 23.

> All employees, before going on annual leave, shall be paid the amount of wages they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.

In our submission this provision requires that an employee before going on leave is paid an amount of money, which in the case of this particular provision is called `wages', that he would otherwise have received.

What is at issue, despite the submissions of the other parties, is what the term `wages' means within this award and within the commonly accepted usage of that term, particularly in the context of awards of the Tasmanian Industrial Commission.

In our view, the award is quite clear in the way in which it treats the term `wages'. In that regard, Mr President, I refer you to clause 8 - Wage Rates, of the award, Division A, Subdivision 1 - Wages.

And then it goes on to a preamble which says, and again I quote:

> The wages set out hereunder shall be the minimum rates payable to adult employees therein named.

And it goes on and stipulates various sums of money for various classification of employee.

At that point, sir, I just make one observation that I asked the Commission to bear in mind in its deliberations on this particular application for interpretation, that the document that we are all so freely quoting from, with great expertise, is designed to be read by employers in the field. They are the ones required, at law, to apply the provisions of the term to their dealings with their employees.

You have an employer in this instance faced with a clause in the award which is quite unambiguous in the terminology it uses. It uses the term `wages'. You then go to clause 23; you find precisely the same term. It is hardly surprising that an employer would believe that whoever the fool was that drafted the award would use the term consistently. I use the term `fool' in inverted commas, sir. It is not meant as any disrespect to anyone. I've probably had as much to do with drafting this award as any other person.

PRESIDENT: I hope you did.

MR EDWARDS: So I take the criticism myself as I'm sure everyone else probably does.

I ask the Commission to note that the terminology used to describe the amounts of money spelt out in clause 8 is identical in every respect with the terminology to describe that amount of money an employee is to receive prior to proceeding on annual leave. That is, the term `wages'.

In our view this is no mere coincidence. We say that clearly the draftsperson who drew the award meant the two money amounts to be interchangeable. They refer to exactly the same thing.

In our submission, where a specific term within an award can be clearly defined by its existence in any other place in that award, it should be applied throughout the award in a consistent manner.

The Commission have dealt with the question of applying consistent meanings to terms within awards a number of times in the past and I refer, sir, to your predecessor the then President, Mr Koerbin, in interpretation matters before the Commission.

The one I want to refer to in this regard, sir, notwithstanding that it is recorded in a transcript, I, at the time (I couldn't find a copy of the decision this morning which is why I'm resorting to this method of putting it before the Commission) at the time I was putting a submission to the President on an interpretation in respect of the Shipbuilders Award and I quoted from the President's decision in matter T No. 91 of 1985, which is dated 27 June, and was an interpretation of the Hospitals Award relating to annual leave payments for shift workers.

The President said in that decision, on page 9:

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

In other words, sir, to paraphrase that, I would say that the President was saying, terms should be given consistent meanings. It is not appropriate to have the same term given different meanings in different clauses in the award. To do so makes a nonsense of the use of the term in the first place and makes the award unintelligible.

The President made the same observation on page 5 of T.1837 of '89, which was the original decision in this matter, where he said, at the bottom of the page:

> I am firmly of the opinion that in cases of this kind it is important to consider the award as a whole in order to test the probable intention of the award-maker against the overall infrastructure.

And in that instance the President was using that terminology against my case and in making a finding against me. And I'll be demonstrating to the Commission later in my submission why that conclusion ... or why using those words against me was invalid or incorrect.

Clearly the term `wages' appearing in clause 8 refers to the sums of money specifically set out in that clause and should therefore be assigned that same meaning when used in subclause (e) of clause 23 in relation to calculation of payment for annual leave.

The same term appears, as the President rightly records in his decision (or the then President rightly records in his decision) in other places in the Bakers Award. And in our

view its usage in those other clauses is synonymous with the meaning we assign to that term drawn from clause 8, and this is the little bit where the previous President and myself part company somewhat.

The President, for example, referred to clause 30 of the award, which is, `Full Week's Wages to be Paid'.

That clause, sir, says:

> Except as provided in Clause 27 - Contract of Employment, any employee not engaged as a casual or part-time employee, shall, notwithstanding anything contained in Section 49 of the Industrial Relations Act 1984, be paid for each week that he is ready, willing and available for work, the weekly wage prescribed for a week of 38 hours and in addition thereto such overtime or other penalty rates, if any, that may have occurred during the relevant period.

I think it's appropriate, sir, that we have a look at what that clause really does mean.

In our view, upon a proper construction of that clause, it is evident that on a weekly basis an employee, providing they are ready, willing and available, is entitled to receive his weekly wages, which I've already defined and I don't intend to go to it again just at the moment.

Secondly, he's allowed to receive any overtime, if any, that's occurred during the relevant period.

And additionally, again, as a third component, he is entitled to receive other penalty rates.

In our view they are three separate and distinct things that an employee is entitled to receive upon being ready, willing and available.

It is our view that those three terms are mutually exclusive. And further we would add that, in our submission, the Sunday penalty in clause 12 is appropriately categorised as a penalty rate for work in ordinary time on a Sunday. And that view is consistent with those that have been expressed this morning, particularly by Mr Evans, where he indicated that the loading, or the 50% extra payable on a Sunday, was in the form of a penalty or shift loading. And it is that term that we believe is referred to in clause 30.

When the terminology of clause 30 is then contrasted with the wording the subject of these proceedings the difference is absolutely crystal clear and, in our view, totally

unambiguous. Clause 30 uses the term `wages' in exactly the same way as, we submit, it is used in clause 8 and clause 23.

And it goes further and stipulates two additional categories of payment that are to be made in the circumstances described in clause 30. They are overtime and penalty rates which, as I've already said, in our view, would include the penalty rate paid for ordinary time work on a Sunday.

Clause 30 therefore very clearly says that the term `weekly wage', which is used, does not include those by itself. These additions to the wages are clearly absent in subclause (e) of clause 23 and in our view it cannot reasonably be contended that such additions to wages can be read into the unambiguous term `wages'.

If the Division of Labour and Industry and the unions' arguments are true that the Sunday penalty rate is included in the term `wages', why would it be necessary to provide for the additions in clause 30 to that term? In our submission those additions are there precisely because they cannot reasonably be imported into the term `wages', and the draftsman did not include those terms in the word `wages'.

Mr President, I was saying that in our submission the additions to the wages to which I have referred are there precisely because they cannot reasonably be imported into the term `wages' and the draftsman did not include those terms in the word `wages' as used throughout the award. That is why in clause 30 he has provided them as add-ons to the term `wages'.

In our submission, Mr President, the terminology of clause 30 directly supports the employer's contention that the term `wages' does not include overtime or other penalty rates such as the Sunday penalty rate, which is of course directly inconsistent with the finding of the then President, Mr Koerbin, when he claims that I could find no comfort in clause 30.

I took that as a challenge, Mr President, and indeed I found considerable comfort in clause 30. I think it's almost determinative of this particular matter.

PRESIDENT: Are you going to retract your statement that the draftsman was a fool?

MR EDWARDS: The President had no role to play in the drafting of this particular award, sir.

In our view, this position applied to clause 23 of subclause (e) which is the subject matter of these proceedings. It is consistent with the origins of annual leave loadings into awards. And it's interesting that Mr Evans should table his

Exhibit E.2 - the `Announcement' Full Bench of the then Commonwealth Conciliation and Arbitration Commission which was made on 7 June '72. I had given some thought to perhaps tabling that myself, but the reason I elected not to in the end was because as Mr O'Brien has said, it goes beyond the bounds of what we're allowed to do in interpretations and it starts transgressing into merit.

But what I would say is that the quotations by Mr Evans from his Exhibit E.2 were somewhat selective. I take the Commission to the second page of the exhibit and in particular to point No. 2 where it says:

> Generally speaking it is not our intention to require employers who are already paying an annual leave bonus to pay both the bonus and the amounts which we suggest.

`Bonus', of course, sir, is the annual leave loading.

And I draw the Commission's attention to clause 23(e)(i), where clearly amount equivalent to the minimum wage is paid as a loading to employees under this award.

What Mr Evans has done by giving us Exhibit E.2 is said the Full Bench says these things in item 3 ought be included, but they say in 2 before they say that, that it shouldn't be included where there is an annual leave bonus being paid.

Again, sir, that directly supports our contention and that is consistent with the origins of annual leave loadings of course.

Again I note the existence of the annual leave loading in this award and simply record its existence is consistent with our submission, that penalty rates and overtime are not relevant to the calculation of payments during annual leave as to include such payments would double-count against the existence of the annual leave loading.

Now, that's a merit argument and I freely admit that, and I've only made it because Mr Evans has introduced Exhibit E.2 which needed to be somewhat controverted.

Now, as I say, it's merit, but nevertheless it is directly supportive of our contention when you take it back to the origins of the whole thing it says where an annual leave loading is paid you do not also pay shift or penalty rates.

This Commission has previously given its opinion on how the word `wages' is to be treated when there is no definition of the term within the award. In that regard I refer the Commission to T.368 of '86 - a decision of the then President of the Commission, Mr Koerbin, on an interpretation matter on

30 May 1986 in relation to the Fire Brigades Award, and for everyone's interest I'll table a copy of that.

PRESIDENT: Shall we mark this TCI ...

MR EDWARDS: It's unusual not being able to use my own initials, sir.

PRESIDENT: Yes, sorry about that, but ...

MR EDWARDS: Yes, TCI.1.

MR O'BRIEN : It could be T.1.

MR EDWARDS: `T' for Terry, yes, there's merit in that I suppose.

Mr President, I take you to page 8 of that decision where the President observes the following halfway through the last paragraph.

> In the absence of any award definition of "wages", the amount payable should be calculated on the basis of one week at the employee's classified rate excluding overtime, shift or other like penalties.

Quite clear, unambiguous. The President is saying that the term `wages' means that in the absence of an award definition.

Without people wishing to jump up and say, well, you're taking something out of another award and trying to apply it in this award, I readily concede that. But, nevertheless, the circumstances are wellnigh identical. You have the use of the word `wages', no definition thereof, and an interpretation by the President, or an opinion, if you like, of what that term should mean.

The matter being interpreted at that time was the termination of service clause in the Fire Brigades Award where the award provided that an employee dismissed other than for misconduct or neglect of duty shall be paid ... the wages shall be paid up to the time of dismissal only.

The President found it necessary to express an opinion on what that term meant. I like his opinion, to be frank, and I quote it now with approval.

PRESIDENT: Yes, the wordings though are a little different, aren't they, in the termination clause in the Fire Brigades and the annual leave clause in the Bakers.

MR EDWARDS: Except to the extent where they use the same term `wages'. And we're left ...

PRESIDENT: They don't qualify it, though, by saying `in respect to the ordinary time they would have worked'. I know this goes right ... it's the salient point.

MR EDWARDS: It's the crux of the matter. In our opinion the interpretation turns on the question of the amount of money Mr Oakenfall should have been paid. And, yes, that's got to be done with reference to the ordinary time he would have worked. But then you've got to say, `What has he got to be paid for the ordinary time he would have worked?'. The answer from the clause in the award is he is to be paid his wages. So it's that term that we need to determine. And I, therefore, as I say, quote with approval from the President's interpretation.

It is our submission that the parties coming before this Commission, Mr President ... I'm being distracted, it's all right.

PRESIDENT: No you're not.

MR EDWARDS: ... are entitled to expect and in fact, I suggest, even demand consistency of approach by the Commission otherwise they cannot approach the Commission confidently, which is an element which is absolutely fundamental to an authority with such wide-ranging arbitral powers.

I do not for one moment suggest that the Commission is or should be bound by precedent in the same way as the judiciary are bound to sluggishly follow precedent. However, where the Commission have previously given a meaning to a particular word, term or phrase, it should be reasonably expected by the parties that that word or phrase should be given a consistent meaning wherever it appears. And that's the more so within the context of an award of course.

Mr President, we believe that on the words used in the award, in various places, the term `wages' can only be given one non-controversial meaning. And that is that the term `wages' is the reference to the amount of money set out in clause 8, Division A, subclause 1 - Wages.

The President, also in his decision (the then President) referred to clause 39 - Payment of Wages, and suggested that that clause should give me no comfort. And, indeed, to some extent he is probably right, it doesn't give me much comfort nor do I think it necessarily assists any of the parties in coming to a reasoned conclusion to this interpretation. It says, `Wages shall be paid no later than Thursday in each week'. Again, it doesn't tell us what the term `wages' means.

The President suggested, I believe, or it may have been Mr O'Brien, in fact, suggested on transcript in the original matter that to take my interpretation of the term `wages' is to make a nonsense of clause 38, because that would mean

people could not necessarily expect to be paid any other payment on payday. To some extent that's what the award would seem to say. I don't believe that necessarily is in any way fatal to my argument.

I've already dealt with the provisions of clause 30 of the award and how that does support my argument. And every other place in the award where the term `wages' is used is supportive of the case that I'm advancing.

I take the Commission to other divisions in clause 8. The same terminology is consistently used throughout the award. Shop Assistants, subdivision 1 - Wages: to be paid the wage assigned. Clerks: to be paid the wage assigned, subdivision 1 - Wages.

I remind the Commission again that the document we are trying to put some meaning into is designed allegedly to be read by employers in the field, in their day-to-day dealings with their employees. They are faced with a Commission, or seemingly from their point of view, anyway, the Commission saying in clause 8, wages means `X'. We're then asked to believe that where that term is used in clause 23, wages no longer means `X', it now means `Y'.

That, sir, is an unreasonabe burden to place upon any employer. It is unreasonable in the extreme to suggest that the term can have different meanings when used throughout the same award. In our view, the only reasonable interpretation of the word `wages' available to the Commission is the one we have placed upon it.

We've no quarrel with Exhibit E.1. I think it's essentially a reprint of an exhibit I placed before the then President in the earlier proceedings, Mr President. I've already dealt with the question of the annual leave cases of 1971 and the only thing I'd like to add is that, of course, at that time annual leave loadings were the exception rather than the rule. In fact, the Full Bench of the then Commonwealth Conciliation and Arbitration Commission as, I think, you'd be very well aware, sir, ruled against the inclusion on a common rule basis of annual leave loadings into awards which is the reason for the qualification they've made at point 2.

Exhibit E.3 is interesting reading and nothing more, in my opinion. It defines the words `ordinary pay' and does not go behind the word `wages', which is the subject of these proceedings nor does it assist us in any way in what that term may mean in respect of the Bakers Award.

Mr Evans himself has told us that going to other instruments to try and support the terminology in one award or other is interesting and indeed that's all it is and I've already made that same observation in respect of my own exhibit, TCI.1.

In respect of the other submissions made, particularly by Mr Evans who is really the only person that's really gone directly to the merit of this matter today, I note that in response to your words, and I will say they're your words, not his, sir, that he has, in essence, adopted the Koerbin decision and has really done that by reading it in toto, virtually into the transcript.

He says that my interpretation is too narrow. I don't believe it is narrow when applied to the award as a whole and the doctrine of generous construction which is the one that says you must apply a consistent meaning to the term throughout the award. My interpretation is not only too narrow, it is absolutely correct.

I don't and can't agree with Mr Evans that this interpretation turns on the term `ordinary time'. The interpretation must turn on the word `wages' because what we're trying to determine is what sum of money Mr Oakenfall would have received. That sum of money is described in the award by the term `wages' and it is that that we must go behind. There is no dispute as to what his ordinary time was. They're shown in Exhibit E.1 in these proceedings and were in fact just as clearly shown in the previous proceedings.

The dispute is what should be paid for an employee going on annual leave when he's not required to work on that Sunday. Mr Evans, to try and add additional weight to his argument, tells us that the Division of Labour and Industry has no vested interest in the outcome of these proceedings. An interesting submission .... I don't really believe it's of much value. Vested interest or no, the matters put by the parties must be able to be scrutinised and found to be accurate.

In respect of Mr Evans's request that there be a retrospective declaration, I must, with due respect, oppose that, as I would in the normal course of events. To give meanings to words after the event is unfair in the extreme to those same people I was talking about before, the employers in the field, and we would ask that the Commission make whatever ruling it does, effective from the date of its interpretation or declaration, if indeed you do determine to make a declaration, and that it should apply prospectively.

Mr Nielsen dealt predominantly with the delays in the case, and I have some sympathy with his view, that the matter has taken an inordinately lengthy period of time. I guess I, more than most other people, am aware of that, having been the one that had their appeal rejected on a technical ground.

PRESIDENT: You're virtually running it now.

MR EDWARDS: In essence, that is about correct, sir, and that's why I've taken the view that essentially this is a hearing de novo but previous parties have introduced (a) the decision; Mr O'Brien has asked you to note the previous transcript so it would be unwise of me to ignore the previous proceedings.

Mr O'Brien, when talking in respect of clause 38 of the award, quite interestingly introduced a new word to describe the whole thing and that was the word `remuneration'. He couldn't find comfort in the word `wages' so he broadened it out and now said it is remuneration and he said, `That includes penalty or premiums. Shift work, for example. Weekend work.' Of course it does but it does not necessarily make that term interchangeable with the word `wages' within the meaning of this award.

Mr O'Brien then told us that the term in the award is sufficiently broad to mean .... you could include clause 8 and the relevant payments from clause 12. `Sufficiently broad' means obviously it's not that clear to Mr O'Brien that it means that. He's tried to eke it out a little further to make it stretch a little bit further to cover clause 12, and in my view that is not an available construction.

Mr O'Brien then confused me. He went on to clause 23(e)(ii) of the award and indicated that the amounts arising from that provision ought be an addition but I ... It was 23(e)(i), Mr O'Brien's acknowledged that. I was hoping there wasn't a claim for another 17.1/2% as well.

MR O'BRIEN: No.

MR EDWARDS: I knew it had taken a long time .... probably not even at 17.1/2% yet.

Whilst I understand the context in which you have now used the term `award variation' I must express some alarm, as I think Mr O'Brien was doing, that the remedy to this matter could be by the Commission varying the award. I know you have now clarified that, but I would say that I don't really believe the Commission should vary an award to overcome a difficulty in construction because what you're doing is asking someone to perhaps retrospectively observe something different to what they'd previously been observing.

PRESIDENT: No. I was really suggesting that one of the parties could make application to clarify the award.

MR EDWARDS: Indeed, and I think Mr O'Brien put that in its correct perspective when he said that that could well be a matter to be examined by the parties as part of our ongoing

structural efficiency negotiations. It's certainly on my agenda.

In respect of Mr O'Brien's almost flippant submission that the 50% loading in this award is half of the norm for work on a Sunday, I would submit that that's a matter for Rod Marsh - straight through to the keeper, sir.

PRESIDENT: I would have expected nothing less.

MR EDWARDS: A straight bat, sir. Always a straight bat.

Mr President, we believe that on the submissions we've put before you this morning, when coupled with submissions previously made before the then President, Mr Koerbin, in the previous proceedings, we've demonstrated very clearly that the term `wages' as used in clause 23(e) can only mean one thing - and that is the rate expressed in clause 8 and nothing else, and that that contention is supported by the award as a whole. To put any other meaning on the term `wages' in subclause (e) of clause 23 is to be inconsistent with the use of the word, make a nonsense of the award, and I don't think interpretations should be used in that way. If it please the Commission.

PRESIDENT: Yes, thank you Mr Edwards.

MR EDWARDS: I don't think there should be any rights of reply.

MR O'BRIEN: He never does.

MR EVANS: Mr President, I've read everything that's been said and written about wages and I guess I could throw in and argue my point of view in relation to them, but I really believe that everything that I'd want to say has been already said by Mr O'Brien in previous proceedings. Those comments are in the various transcripts that are around and I don't think it would serve any purpose for me to go into it again here and now.

I would just make one point. Mr Edwards said awards ought to use consistency in their terminology. I agree entirely. But it's very much a fact of life that many of the awards with the Tasmanian industrial Commission, and indeed awards of other jurisdictions, aren't entirely consistent in their use of words.

And I think I'd leave it by simply saying that I would still maintain that to give the word `wages' the construction that Mr Edwards is applying to it now and simply say the wages that someone is entitled to pursuant to clause 8 is all that that person is entitled to, pursuant to their entitlement under clause 23(e)(i), is to give it too narrow a construction.

PRESIDENT: Thank you Mr Evans. Mr O'Brien?

MR O'BRIEN: Very briefly, there was one matter that Mr Edwards introduced which was new from the last proceedings, and that was commentary on part of the decision, which was on page 5, where he referred to clause 30 and put a submission that you had to look into clause 30 and that, in fact, clause 30 was helpful to his argument and not to ...

MR EDWARDS: Comfort.

MR O'BRIEN: ... the argument as presented by the President. And that's as I understood the submission.

MR EDWARDS: Comfort.

MR O'BRIEN: Comfort, yes.

MR EDWARDS: The same thing that I said on the first ....

MR O'BRIEN: With respect to that submission, I think Mr Edwards has misunderstood the President's decision because, if you'll see in that paragraph on page 5, the President has set out the headings of those clauses and then underlined the word `wages'. And the meaning that I've drawn from that is that you look at the word in the context of those phrases to get an understanding that `wages' means something broader than `wages' as contained in clause 8.

And I would invite the Commission to look at another variation on it in clause 32, which is the contrary ... gives you the contrary view, if you go into the terminology. I think it's still clause 42, that is the wages ... sorry ...

MR EDWARDS: 43.

MR O'BRIEN: 43 now, sorry.

The ... I'm looking at an old print. What's it called now? `Time and Wages Book'. And there it talks about wages and allowances, and allowances are something quite different from weekend penalties. And so in that context you could argue, well, wages means, again, something broader than wages in accordance with clause 8. And I simply put that to clarify what I think the original decision meant and so that there is nothing inconsistent with the reading of clause 30 with the view that was put by the President then.

With regard to the matter that Mr Edwards surprised ... said he was surprised with and that was my use of the term `remuneration'. I'll draw his attention to his own words in the previous transcript where I used the same words last time

and he used the same submission. So I think he's read the transcript and regurgitated it.

I would agree with him that I incorrectly drew the Commission's attention to clause 23(e)(ii) and say that the leave loading aspect is contained in 23(e)(i). And so I withdraw that submission and simply reassert that we would be most anxious to see this matter determined and that an instrument issue which does not have problems, if any party is aggrieved with it, with regard to any other proceedings.

And further, we have had a problem in the past, might I say, Mr President, when decisions have issued in interpretation proceedings; there is a deadline for us to seek, I think, the declaration in the form of an order, but we've received the decision after that deadline has expired and, in fact, in one case we were only aware of the decision by reading the monthly summaries. So ... and I would simply make the suggestion ...

PRESIDENT: We'll try and make sure that sort of thing doesn't happen.

MR O'BRIEN: Yes.

PRESIDENT: It would have been an ...

MR O'BRIEN: And as a general comment, because ... and I've mentioned it in other proceedings, but I thought you, Mr President, would possibly not be aware of the problems which had occurred previously and I draw it to your attention now.

PRESIDENT: We normally observe the practice of notifying the parties to proceedings when a decision is handed down.

MR O'BRIEN: Yes. That hasn't always been the case, Mr President.

PRESIDENT: No. Well, we certainly will do that.

Well, gentlemen, Ms Shelley, thanks very much for providing me with such a huge mess because really I am being asked to conduct an appeal and hear this matter de novo, as you've also said, and it means I'm going to have to go through all the transcript, previous decisions, plus this transcript, so I wouldn't like to give you any sort of idea that a decision might be quickly forthcoming.

However, the matter is concluded. I reserve my decision.

HEARING CONCLUDED