

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

**T. No. 356 of 1986**

**IN THE MATTER OF** an application  
by the Tasmanian Public Service  
Association for interpretation  
of the General Conditions of  
Service Award

**re** overtime penalty payments  
(Clause 10B, 3.4(a)(iii)).

PRESIDENT

**HOBART, 17 April 1986**

**TRANSCRIPT OF PROCEEDINGS**

PRESIDENT: I'll have appearances, thank you.

MR PHILP: If the Commission pleases, **GREG PHILP** for the Tasmanian Public Service Association.

PRESIDENT: Thank you, Mr Philp.

MS FAWDRY: If the Commission pleases, **MARCIA FAWDRY** for the Royal Australian Nursing Federation, Tasmanian Branch.

PRESIDENT: Thank you, Ms Fawdry.

MR LINNELL: If the Commission pleases, **IAN LINNELL** for Hospital Employees' Federation of Australia, Tasmanian No. 1 Branch.

PRESIDENT: Thank you, Mr Linnell.

MR PEARCE: If it please the Commission, **PEARCE, A.**, together with **MR WILLINGHAM, C.** on behalf of the Minister for Public Administration.

PRESIDENT: Thank you, Mr Pearce.

Now Mr Philp, it is your application.

MR PHILP: Good, thank you, Mr President.

Perhaps we might, it's warm for me, if it isn't ...

PRESIDENT: By all means.

MR PHILP: Thank you, sir. And although not entirely relevant to the case, I'm sure you'd be pleased to know that there is soon to be a celebration dinner for the "Hay Market Massacre" in Chicago of 1886 for the 40-hour week.

PRESIDENT: Thank you. It saves me asking you to bring us up to date on those little snippets from the past. It's nice to know that we are back to the norm, Mr Philp.

MR PHILP: Yes, well we shall try. Before I proceed, sir, I have got a number of exhibits which I think will be helpful in this particular case and I think I've got enough for ...

MR PHILP:

salary rate for all time so worked."

There is a proviso attached to that:

"PROVIDED THAT an officer who holds a position which regularly requires him to work on public holidays shall, where mutually agreeable, be paid, in addition to any paid time-off in lieu granted, at the rate of time and a half of his ordinary rate for the first eight hours worked during his normal spread of hours, and thereafter in accordance with the overtime rates set forth in sub-paragraph (a) hereof. Provided that no officer shall receive in the aggregate more than the equivalent of double time and a half of his ordinary rate."

I believe the key words in relation to that situation is that a day worker working overtime on a public holiday is entitled to payment of full overtime at the rate of double time and a half. That means that if an employee's normal hourly rate is \$10 per hour, two and a half times that rate is \$25 per hour. I don't believe any other interpretation of the clause is possible.

Sir, we are here today and I believe an interpretation of the award is required because the Director of Industrial Relations circularized all heads of agency on 26 February. That's Exhibit P.2. And I'll read into the transcript:

"All Heads of Agencies

PAYMENT FOR WORK ON PUBLIC HOLIDAYS

It has recently been drawn to my attention that one or more employee organizations have been advancing the proposition that payment for

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work performed on public holidays should be at the rate of triple time and one half, or alternatively double time and one half in addition to the ordinary salary prescribed for the day.

I am not aware of any Agency or State Authority paying the rate promoted by the employee organizations. However, under the circumstances, it may be timely to advise that payment to employees for work performed on public holidays should be at the rate of double time and one half, such payment to be inclusive of the ordinary salary prescribed for the day.

Our advice is reinforced by the decision dated 31st March 1976 of the Public Service Board in matter P24 of 1974, which led to the making of the "Public Service" (it's actually Public Service (Conditions of Service Miscellaneous Provisions)) "... Principal Award."

And following that circular, you'd be aware sir, that the Association lodged for an interpretation of the award on 13 March and this is the hearing that we are at today.

The circular suggests that for overtime worked on public holidays the payment should be at the rate of double time and one half and to be inclusive of the ordinary salary prescribed for the day. I can find no authority for this interpretation.

I believe that the interpretation placed on the award by the employers' representative completely cuts across the guidelines issued by yourself with regard to interpretations and in particular guideline number 4 that states:

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MR PHILP:

"An award must be interpreted according to the words actually used."

Guideline 7:

"It is not permissible to import into an award by implication a provision which its language does not express."

Guideline number 3:

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

I believe that clearly the interpretation put on the award by the Director of Industrial Relations cuts across those guidelines.

I'd like to turn to the background to the award provision because I think that may explain some of the confusion in this area.

Prior to the introduction of the Public Service Conditions of Service (Miscellaneous Provisions) Principal Award, the overtime provisions in the Public Service were covered by Regulation 80 of the Public Service Regulations, 1950.

Exhibit P.3 is an extract from the Public Service Regulations as at that time and as you can see from that exhibit (and once again I apologize for the poor quality of the photocopying) sub-regulation (1A):

"Where payment for overtime is allowed to an officer under sub-regulation (1), that payment shall, subject

MR PHILP:

to sub-regulation (1B), be made at the rate of time and a half for all overtime worked from Monday to Friday in any week, and double time for all overtime worked on any Saturday, Sunday, or Public Service holiday."

We, as you'd be aware sir, the Association lodged an application to improve those overtime provisions and we sought an overtime in our claim which was P24 of 1974, we sought an overtime rate of double time and one half for all duty performed on public holidays.

This was accepted by the Public Service Board in its decision and they said in its decision they will allow double time and one half for all overtime work performed on public and Public Service holidays by non-shift workers.

PRESIDENT:

I was waiting for that. By non-shift workers?

MR PHILP:

By non-shift workers. This was subsequently confirmed in the implementation of the award instruction issued after the award. Now that implementation of award instruction is Exhibit P.4 and it may be worthwhile to look at a few of those; that instruction.

It must be pointed out, of course, that this is the instruction that is issued for the first time following the implementation of an award. Previously the overtime provisions were covered in the regulations and this is the first instruction.

I think the important part is on page 2, Overtime:

"(c) The rates of payment for overtime have been varied and separated into two categories covering "shift workers" and "other than shift workers". The rates as provided in

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MR PHILP:

Clause 4(4)(a) and (b), have been varied as follows:-

(i) for the category "other than shift workers" - from time and one half for all work performed on Monday to Friday to time and one half for the first three hours and double time thereafter; for work performed on a public holiday from double time to double time and one half; while the rate for overtime worked on a Saturday or Sunday remains unchanged at double time."

And it goes on. I've included the whole parts of the implementation instruction relating to overtime and you will see from that that there is no indication in that instruction that there should be any deduction for the normal payment for the public holiday.

And, as I say, this is the instruction that goes out to all agencies following the inclusion into an award of the overtime provisions.

Subsequently the Miscellaneous Provisions Award was amended by A.412 of 1976 which was an application lodged by the H.E.F. No. 1 and I don't think there's any, there's no exhibits to that regard but this related to day workers regularly rostered to work on public holidays and it, in effect, inserted the proviso that's currently in the award and is on page 2 of Exhibit P.1.

That proviso once again:

"...an officer who holds a position which regularly requires him to work on public holidays shall, where mutually agreeable, be paid, in addition to any paid time-off in lieu granted, at the rate of time and a half of his ordinary rate for the

MR PHILP:

first eight hours worked during his normal spread of hours, and thereafter in accordance with the overtime rates set forth in subparagraph (a) hereof. Provided that no officer shall receive in the aggregate more than the equivalent of double time and a half of his ordinary rate."

That followed, as you'd be well aware sir, that successful claims in the Hospital Employees (Public Hospitals) Award and three nursing awards. The provision related to day workers regularly required to perform their usual work on public holidays and it provided that such employees could elect to take time off in lieu together with a penalty payment of time and a half provided that in the aggregate the overtime penalty was no greater than two and a half times the ordinary rate.

This was amendment No. 9 to the Public Service Conditions of Service (Miscellaneous Provisions) Award. So it was a subsequent amendment made to the award on application and its effect was really to say, "All right, well there's a lot of people that work, a lot of day workers that work overtime on public holidays, they should have some benefit of some extra recreation and the penalties shall still be two and a half but that two and a half can be taken as one day time off in lieu and one and a half as a penalty".

Once again, there is no inclusion in that proviso and no inclusion in the decision on that particular matter which says that this is to be offset by the normal penalty for work on a public holiday.

Sir, as I mentioned, I've got a number of examples of awards from other jurisdictions and I'm sure you'll realize once we've had a look at these examples that it is not an

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MR PHILP:

attempt to argue for greater benefits on merit, it's simply an attempt to show how what I believe this particular problem has been dealt with in other awards and other jurisdictions.

The list of these other awards is not exhaustive and was obtained for the purpose of this exhibit in a relatively short time and just selects a number of awards from a number of different jurisdictions. It clearly shows that there are a number of different provisions in relation to payment for overtime worked on public holidays but what is more important...

PRESIDENT:

Yes Mr Willingham?

MR WILLINGHAM:

Mr President, may I just excuse myself and interrupt Mr Philp in mid flow, but I would submit to you that the tendering and the canvassing of this particular exhibit of the T.P.S.A. does indeed contravene the guidelines for interpretation that you set.

I can't see the relevance of the provisions of awards of other tribunals in other States as being meaningful in the resolution of this particular matter.

PRESIDENT:

What do you say to that, Mr Philp?

MR PHILP:

I think it is relevant because I think what it shows is how other tribunals have really overcome this problem. And I think Mr Willingham may not have read some of the awards that we are about to table because I think they do not necessarily assist us in the sense of what the rate should be but they do assist us in the sense of how the award should be clearly expressed so that reasonable people can interpret the award in a reasonable manner.

So I believe that the exhibits should be acceptable.

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PRESIDENT - PHILP - WILLINGHAM

PRESIDENT: I would ordinarily uphold the objection but if these awards that you wish to tender do no more than spell out in clear terms what double time or double time and a half means, they may serve as some guide and for that reason I am prepared to allow you to proceed Mr Philp. But if at any stage it appears that you are overstepping the bounds of the ground rules then I'm sure Mr Willingham will again rise and you may not be so lucky next time.

MR PHILP: Thank you, sir.

The first of these is the Clerks (South Australia) Award and it says there, and I think this is a good example:

"(f) `Double time and a half`  
on public holidays shall  
mean:

(i) for an employee engaged  
on a contract of hiring by  
the week or longer - for work  
performed..."...

PRESIDENT: Where? Can you point?

MR PHILP: I'm sorry. I've marked it but no one else has marked it. The top right-hand corner, paragraph (f).

PRESIDENT: I have it. Page 31 of the Gazette, is it?

MR PHILP: Yes, page 31 of the Gazette, yes. Sorry.

"(f) `Double time and a half`  
on public holidays shall  
mean:

(i) for an employee engaged  
on a contract of hiring by  
the week or longer - for work  
performed within ordinary  
daily hours at the rate of  
one and a half ordinary pay  
in addition to the weekly  
wage and for work performed  
outside ordinary daily hours

MR PHILP: at the rate of double and a half ordinary pay."

I think that's really what the employers believe that our clause means.

PRESIDENT: Then why is that different from the present award, Mr Philp?

MR PHILP: I will come back to that.

The next one, the New South Wales Transport Industry (State) Award, it's towards the bottom of page, clause 18, Public Holidays:

"(b) An employee, other than a casual employee, required to work on -

(1) Christmas Day or Good Friday shall be paid at the rate of double time for the actual time worked in addition to the day's pay to which he is entitled for those days in accordance with subparagraph (2), of paragraph (a), of this subclause.

(2) Any of the other days prescribed in paragraph (a), of this subclause, shall be paid at the rate of time and one-half for the actual time worked in addition to the day's pay to which he is entitled for those days in accordance with subparagraph (2) of the said paragraph."

PRESIDENT: You're not suggesting that the first part is a definition of double time, are you?

MR PHILP: No, what I'm saying is that what the clause is saying, it's double time in addition to the ordinary pay for that public holiday.

PRESIDENT: Yes. But that would surely have been some special arrangement applicable in New South Wales to Christmas day

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PRESIDENT: and Good Friday, wouldn't it?

MR PHILP: No. Yes. The point is the award makes it clear what the rate is in addition to public holiday. I'm not intending to argue on merit about what ...

PRESIDENT: It's clearly triple time.

MR PHILP: It's a penalty of double time plus payment for the ordinary day's pay.

PRESIDENT: For Christmas day and Good Friday.

MR PHILP: Yes.

PRESIDENT: Yes. You're not suggesting that's double time, are you?

MR PHILP: The overtime payment was double time.

PRESIDENT: You referred the Commission to sub-paragraph 2 (b) and you said:

"(b) An employee, other than a casual employee, required to work on -

(1) Christmas Day or Good Friday..."

and so on and so forth. Now you're not saying that that's double time, are you?

MR PHILP: I'm saying that the overtime rate is double time.

PRESIDENT: Well then what would you say the rate was for part (2) of that?

MR PHILP: Time and a half plus the ordinary day.

PRESIDENT: That would be double time and a half, wouldn't it?

MR PHILP: Yes, the overtime rate is time a half plus the ordinary day's pay.

PRESIDENT: Carry on carrying on.

MR PHILP: The next award is the - I'm afraid the title of the clause is not

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MR PHILP: clearly legible but it is on the index. It's the Edward River Crocodile Farm Pty. Ltd. Industrial Agreement No. A6 of 1986.

PRESIDENT: That would be an authoritative document then, I'm sure.

MR PHILP: It's under 'Statutory Holidays', right-hand side about half-way down the page, clause 11, and in the third paragraph:

"For purposes of this provisions, where the rate of wages is a weekly rate, "double time and a-half" shall mean one and one-half days' wages in addition to the prescribed weekly rate or pro rata if there is more or less than a day."

PRESIDENT:

I will just read that again:

"For the purposes of this provisions where the rate of wages is a weekly rate, "double time and a-half" shall mean one and one-half days' wages in addition to the prescribed weekly rate or pro rata ..."

There could be no quarrel with that, could there?

MR PHILP:

The wording is quite precise, quite clear and not subject to misinterpretation or incorrect interpretation.

PRESIDENT:

Right.

MR PHILP:

It seems to be a function of - the next one is also a Queensland award. Once again the title is Cape Flattery Bulk Loading Facility Construction Project, Marine Services Industrial Agreement No. A8 of 1986 and once again, on the right-hand side of the page, about four paragraphs down, paragraph (f) - it has effectively got the same definition as the preceding example:

"... where the rate of wages is a weekly rate, "double time and a-half" shall mean one and one-half day's wages in addition to the prescribed weekly rate, or pro rata if there is more or less than a day."

PRESIDENT:

That wouldn't mean a week's wages plus one and a half day's wages, would it?

MR PHILP:

I don't think it means that.

PRESIDENT:

You could read it that way, couldn't you, because it doesn't say for that day?

MR PHILP:

I believe ...

PRESIDENT:

It says, "... one and one-half day's wages in addition to the prescribed

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PRESIDENT: weekly rate ...". So if the weekly rate was \$500 a week he would get that plus one and a half days, would he?

MR PHILP: I don't think he would.

The next example comes from Western Australia and it is the Telford Gold Mines (Production and Maintenance Employees) Award No. A.13 of 1985. Once again, the top right-hand side, clause 13. - Overtime, sub-paragraph (2):

"Work performed on any day prescribed as a holiday under this award shall be paid for at the rate of double time in addition to the prescription of Clause 6. - Wages of this award."

Once again, it is an example of saying what the overtime rate is in addition to the rate for the public holiday.

PRESIDENT: That's what clause 6 says, is it?

MR PHILP: Yes.

PRESIDENT: You haven't included it in the exhibit.

MR PHILP: No.

The next example is once again from Western Australia, Railways Employees Award, No. 18 of 1969, on the left-hand side, (b) (ii) (a):

"If a worker is required to work on a holiday he shall be paid for all time worked at the reate (sic) of time and one half for the first eight hours worked on any shift on that day and at the rate of double time and one half for all time worked in excess of eight hours on any shifts in lieu of all other penalties which may be payable for work on that day under this

MR PHILP:

award."

If you look at (b)(i), just above it:

"Whenever any holiday falls on a worker's ordinary working day and the worker is not required to work on such day he shall be paid for the ordinary hours he would have worked on such day if it had not been a holiday."

PRESIDENT:

Does that simply mean no loss of pay for not being required to work on that day?

MR PHILP:

Yes and the purpose of this, once again, is to show that they have expressed that payment for overtime worked in an amount together with the amount that everyone gets for a public holiday.

If we turn to the next one - it is the N.S.W. Funeral Industries (State) Award, Clause 14. Sunday and Holiday Rates:

"(ii) Except as provided for in subclause (iv) of clause 13. Overtime, of this award, all time worked on public holidays shall be paid for at the rate of double time and one-half in addition to the ordinary weekly wage."

That is similar, once again emphasising that it is double time and a half plus the ordinary payment that you would receive for public holidays.

PRESIDENT:

And you maintain that that means double time and a half, not triple time and a half?

MR PHILP:

No. It means the overtime payment is

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MR PHILP:

double time and a half and they receive a day's payment for the public holiday as well.

The last example is similar. It is once again a N.S.W. one, The Council of the City of Sydney (Salaried Division - Salaries & Conditions) Award and it is on the second page of that gazette. It is about paragraph (5) (ii) (a):

"Public Holidays - double ordinary rates per hour or part thereof, and such payment shall be in addition to the employee's full day's pay for such holiday, where the time worked falls within the normal working hours were the day not a Public Holiday.

(b) Overtime worked outside that prescribed in subparagraph (a) of this paragraph shall be paid for at treble ordinary rates."

PRESIDENT:

What do you say about that?

MR PHILP:

That is demonstrating what I'm saying - that the award is quite clear. It says that you are paid double rates plus your ordinary day's pay for time worked in the normal spread of hours. That is double plus your ordinary rate of pay for public holiday and paragraph (b) says that outside the normal spread you get paid treble time.

PRESIDENT:

You maintain that that means double time?

MR PHILP:

No, I maintain the first example - that the overtime payment is for double time and that in addition to that overtime payment they receive their ordinary pay for that public holiday.

PRESIDENT:

You don't believe that the intention of the award maker would be that for

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PRESIDENT:

working on a public holiday whether during the normal spread of hours or what would otherwise be the normal spread of hours or outside those hours, the hourly rate, for work done, shall we say to make it simple, is three times the rate that would otherwise be paid had it been a working day?

MR PHILP:

Yes, and they have done that.

PRESIDENT:

That's triple time.

MR PHILP:

Yes. That's because the overtime penalty rate is double time and then they get paid for the public holiday as if they would have done had they not worked on that public holiday. The example, once again, is to try to show how clearly that the provisions have been expressed in these awards and these are just examples of some awards that we have looked at quickly.

If the employer in this case (I suppose they're represented by the Office of Industrial Relations) had believed that agencies were incorrectly interpreting the award as they effectively do believe, because of the circular issued by them in February, then I believe that they should have moved to amend the award in a fashion similar to those outlined in the exhibits - either double time and a half means time and a half in addition to the pay or it means something else in addition to the ordinary day's pay for the holiday.

I believe the circular has had the effect, and I know the circular has had the effect, of reducing the payments made to government employees for work performed on public holidays and this is of course quite a serious problem for us because in these particular cases where payments have been made in accordance with our view of the award and what it means, then they have been going on for quite a number of years and I believe in

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MR PHILP:

excess of thirty years.

All but finally, I would like to turn to Exhibit P.6, and this is a good example of what has been happening and it originated really in - our concern with regard to the clause originated when the Government decided to have stalls at the shows; the various shows held around the State and a particular example could be the Royal Hobart Show.

If you look at the situation where you have two workers in the same department, one works on the People's Day and one works on the Saturday. If you look at firstly, Case A - the person who works on People's Day - and I have looked at the fortnightly period. You will see that he physically works 10 days, Thursday, Friday, Monday, Tuesday, Wednesday, Thursday, Friday and after that, Monday, Tuesday, Wednesday. He works 10 days. He gets paid for 10 days and according to our view of the award he should receive a penalty payment of two and a half times for People's Day. That would mean his total payment for that fortnight would be 12.1/2 days' pay.

If his workmate decides to work on the Saturday of the Show, then he physically works 10 days as well - Thursday, Friday, Monday, Tuesday, Wednesday. He doesn't work Thursday, the public holiday, Friday, Saturday, Monday, Tuesday, Wednesday. He also works 10 days and he gets paid for those days that he worked, plus he also gets paid for the public holiday.

The penalty payment for Saturday work is double time, so his net payment for those days is 12 days. That, we believe, demonstrates how the award should in fact operate.

PRESIDENT:

You are getting a bit close to merit now, aren't you?

MR PHILP:

No. I think it is an example of why

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MR PHILP:

the logic of our case is there. If the employers' interpretation of the award is acceded to, then the work on the public holiday - that is Case A - would only receive payment on the public holiday of 1.1/2 days' pay.

I believe that it is illogical that a person who works on Saturday gets more for working that day than the person who works on the public holiday.

There are roughly 12.1/2 public holidays for State Government employees per year and there are 52 Saturdays in each year. Clearly, work on a public holiday is more sacrosanct than work on a Saturday and the specialness of the public holidays. They are religious holidays, they are State holidays, all sorts of holidays. The specialness is reflected in the overtime penalty rate which is in the award, which is two and a half times, whereas the penalty rate for Saturday is double time.

Clearly, working on a public holiday should be more and not less rewarding than working on a Saturday.

I hope that I haven't gone into merit. It has been an attempt to demonstrate the logic of our case, which is that the award payment for overtime worked on a public holiday is two and a half times.

Finally, sir, I wish to conclude - I believe that we followed the rules laid down for the interpretations. I think any reasonable person looking at the award would believe that the penalty rate for overtime on public holidays is two and a half times; not one and a half times plus the ordinary payment for public holiday as suggested by the employer, but two and a half times. This clearly must be the case because there are a number of agencies that have been paying it in this fashion.

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MR PHILP: As I said before, they have been paying it in this fashion for many years and in one particular agency, I believe it has been up for over 30 years. They can't be wrong.

MR WILLINGHAM: I have to rise to object to that, Mr President.

PRESIDENT: Well if you don't, I will.

MR PHILP: If the employer was concerned with how the departments and agencies were interpreting the award as outlined in your guidelines, then they should have sought to amend the award in the fashion that they desired but they chose not to do so.

As I have said before, the interpretation placed on the award by the employer has led to a reduction in payments for work on public holidays for employees, some of whom have been receiving the proper entitlements for well over 30 years and this reduction will cause much discontent and hardship and a reduced willingness for those employees to work on public holidays.

PRESIDENT: If you feel that all the other agencies who have been paying for work done on public holidays at a lesser rate have been in breach of the award, wouldn't the remedy be to take a case before a magistrate?

MR PHILP: That is definitely a possibility.

PRESIDENT: Remote possibility?

MR PHILP: We are here to seek an interpretation of the award.

PRESIDENT: Yes.

Mr Philp, if that `all but` concludes your submission - does it?

MR PHILP: Yes, sir.

PRESIDENT: Would you be good enough to address me on your understanding of the words `at the rate of`?

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PRESIDENT - WILLINGHAM - PHILP

MR PHILP: At the rate of? Well, `at the rate of` means just what it says. If the hourly rate is \$10 per hour, then the overtime penalty payment rate is \$25 per hour on public holidays.

PRESIDENT: Let's go back to Exhibit P.1, paragraph 3.4 (a) (ii), for example, and it deals with the rate of overtime payable to persons other than shift workers and it says:

"Saturdays and Sundays - at the rate of double his normal salary rate for all time so worked;"

MR PHILP: Yes. So an employee whose hourly rate is \$10 per hour receives for work on Saturday or Sunday \$20 per hour.

PRESIDENT: That is `at the rate of`, yes. The ratio, yes - "... for all time so worked;"

MR PHILP: Yes.

PRESIDENT: Do you see anything in that which says, `in addition to any other payment`?

MR PHILP: No, but there is no other payment for work on Saturdays or Sundays.

PRESIDENT: No. Right. Then let us have a look at (iii):

"... at the rate of double and one-half of his normal salary rate for all time so worked."

MR PHILP: Which means \$25 per hour.

PRESIDENT: For all time so worked?

MR PHILP: Yes. For all overtime so worked.

PRESIDENT: For all time so worked.

MR PHILP: It is an overtime provision.

PRESIDENT: Very well. Have it your way if you

PRESIDENT: wish.

All time being overtime so worked.

MR PHILP: Which means he gets \$25 per hour for each hour that he works on a public holiday.

PRESIDENT: No more, no less?

MR PHILP: In addition to his normal ...

PRESIDENT: Where does it say that?

MR PHILP: It doesn't exclude it. This is the overtime clause.

PRESIDENT: Aren't you reading something there that isn't there?

MR PHILP: No, I don't think I am, sir.

PRESIDENT: If it says, "... for all time so worked", surely that must be the intention of the award maker, Mr Philp. If the award maker intended that something else be paid, he would have surely said, "in addition to".

MR PHILP: The purpose of the exhibits and the argument is to say the award maker didn't mean that. Had they done so the implementation of the award's instructions would have said that - that this is inclusive of the normal payment for penalty for public holidays as a number of other awards as we have seen have said so.

As I have tried to emphasise, the implementation of awards instructions was the first instructions to go out to agencies relating to overtime as it was now a new award provision. If that's what was meant by the award makers, then I believe the instruction would have said so, but it didn't.

PRESIDENT: It has taken a long time for your organization to realize ...

MR PHILP: I think the answer to that is that it was only until agencies started to work show days and work the full

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MR PHILP: public holiday on show days - the Thursday and the Saturday that we realized there was an error in the way some departments were applying the award.

PRESIDENT: We are not going to be told the agencies who apply the award in what you consider to be the correct way, are we?

MR PHILP: I don't think so.

PRESIDENT: Nothing turns on it I suppose.

MR PHILP: No, I don't think it does.

PRESIDENT: Mr Philp, in the event the Commission interprets the award in the way that you would believe it ought to be interpreted, would you now address me on the question of whether it should be interpreted prospectively or retrospectively?

MR PHILP: On that particular question I believe that it should be addressed retrospectively to the extent of the departments - the Office of Industrial Relations' circular of 26 February 1986.

PRESIDENT: Would you believe that the Office of Industrial Relations' circular of that date is correct, in that it implies that shift workers, since it doesn't exclude them, should be paid double time and a half for working on public holidays?

MR PHILP: You could imply that but I'm not sure that that's what they meant.

PRESIDENT: Well using your own logic it doesn't exclude them does it?

MR PHILP: No, it doesn't exclude.

PRESIDENT: Yes, all right Mr Philp, thank you.

Anybody else wish to say anything on this?

Goodness. Mr Pearce, can you assist me in any way?

MR PEARCE: Mr President, I take the point that has been made by yourself in relation to the memorandum emanating from the Office of Industrial Relations dated 26 February.

Of itself it did not purport to go to benefits for work on public holidays to employees other than those acknowledged as day workers - Monday to Friday. It was certainly not intended to cut across existing provisions which relate to penalty payments for shift workers or persons on work other than continuous shift, for which provision is already contained ...

PRESIDENT: It could certainly be construed that way though couldn't it?

MR PEARCE: It certainly could and we'll be taking remedial steps to correct that deficiency, if indeed it is seen as a deficiency in the agencies concerned.

Mr President, to the extent that Mr Philp has sought and used by way of example double time and a half for payment on a public holiday, we are not at odds. Mr Philp however, has relied upon the incapacity of the employer to take into account payments which are already prescribed for that day, irrespective of whether the employee works or not.

He suggests that it would be in the interests of the employer to make

MR PEARCE:

application to vary, if it was concerned that the award did not provide as it, the employer, was interpreting. An admission by the employer in that respect would presumably be seen as a prima facie admission that there was something defective in the provision of the General Conditions of Service Award.

We certainly make no admission to that. Merely the intention of the memorandum was to draw to the attention of the agencies that in our view payment for work on public holidays is a maximum of double time and a half, and we feel that it is right and proper on the basis of the established and understood terminology of double time, time and a half, and double time and a half, as understood generally throughout the industrial relations community.

We merely sought therefore, given that the T.P.S.A. through the agency of its 'Service' magazine, had purported to suggest that the provisions for work on a public holiday were different than that which we maintain are accurately provided for in the current award.

Mr President, we are similarly cognizant of your views as expressed in the Social Trainers matter relating to first aid allowance and the matters upon which the parties ought to address themselves or be aware of when making submissions in relation to application for interpretation.

And whilst I do not suggest that the totality of Mr Philp's submissions went to the merit, certainly towards the latter part of his submission it certainly did, in relation to endeavouring to compare rates prescribed by the award for work on Saturdays as distinct from rates prescribed for work on public holidays.

I take it no payment ...

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PEARCE

PRESIDENT:

I thought he was pretty good today as a matter of fact. He usually oversteps the mark long before then.

MR PEARCE:

Be that as it may, Mr President, I would like to bring to the attention of the Commission certain written matters going to the words `time and a half`, `double time`, `double time and a half` as have been and are generally accepted in the industrial relations community.

The exhibits put up by Mr Philp merely seek to reinforce within the confines of those particular awards what is perceived by parties to that award as to what should apply. Hence they have taken the liberty, for example, of saying `double time shall mean double time` and then they've provided the safety net of saying further `that the ordinary rate of pay shall also apply`. That is in effect triple time.

Nowhere, as I would understand, can that be seen to impart a community standard and I believe the value of the exhibits are merely to bring to the attention of the Commission that some awards do provide greater remuneration for work on public holidays than is the generally accepted industrial standard.

If I might quote from the Industrial Information Digest, page 325, under the heading `Holiday Work`, second paragraph - and if I might read into transcript :

"Use of the expression "double time" or "time and a half" in connection with work performed on holidays, frequently gives rise to confusion in computing the total wage for a week in which a holiday falls on an ordinary working day. Where the holiday so falls, the prescription of double time rates would mean that an

MR PEARCE:

employee in such case would receive his ordinary rate of pay for the week in question in addition to a day's pay or in addition to payment at single time rates for all time worked on such holiday."

"Some awards, on the other hand, stipulate double time in addition to the ordinary weekly wage. This, of course, means that the employee is receiving triple time for all time worked on the holiday, where such holiday occurs on an ordinary working day."

We say that the effect of awards which provide double time and then express clearly that the double time is in addition to the ordinary rate of pay for the day effectively is triple time. The General Conditions of Service, as you have rightly pointed out, contains no such wording - wording to the effect that in addition to the ordinary rate prescribed for the daily employee shall be entitled to double time.

This is the concept upon which Mr Philp seeks to base his interpretation.

The question of public holidays exercised the mind of a Full Bench of the Industrial Commission of New South Wales in court session, on 12 November 1970. And there are a couple of observations which do not go to merit - or I submit do not go to merit - which I believe may assist this Commission in determining the generally understood and/or perceived nature of the wording "double time" et cetera.

PRESIDENT:

What was the case, Mr Pearce?

MR PEARCE:

The case was the Electricians and Others State Award, No.3, reprinted under paragraph S.7 of the current Review for January/February 1971.

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PRESIDENT - PEARCE

MR PEARCE:

The case itself, as I understand it, related to a claim for payment to persons on work other than continuous work ... Bear with me, Mr President.

The claim before the Commission at the time was a claim by the union, that an employee not engaged in continuous work should be paid for any time worked on a holiday at double ordinary rates for the time so worked in addition to his ordinary day's pay.

At an earlier hearing of the matter in 1966, if I might read this into transcript. Counsel for the applicant, Mr Wran :

"Mr Wran referred to the fact that a similar claim had been made by the union in the proceedings before the Conciliation Committee resulting in the 1966 Award and he provided extracts from transcript. We have quoted" (and we is the Bench) "the following passage from the submissions of the union's representative as it indicates the basis of the claim then made. Quote: At the moment the award provision provides for double time worked on public holidays and we submit that this is an anomalous situation inasmuch as an employee who is working on a public holiday receives two days' pay. He receives payment for the public holiday and in addition to that he receives an extra day's pay. So the penalty payment upon the employer for the employee working on a public holiday as it stands at the moment is single time and not double time as the award indicates. An employee who receives a lower penalty payment for working on a public holiday than another

MR PEARCE:

who elects to take it off, the one that worked would receive an additional day's pay during that week. I submit that is wrong and that the penalty payment for working on the public holiday should stand alone from the entitlement for payment for the public holiday which otherwise exists."

The Bench then observed the Chairman of the Committee, Mr Senior Conciliation Commissioner Cahill, rejected the claim saying, quote :

"By my decision sub-clause (b) of the existing award clause which provides a double time rate for Sundays and public holidays will be re-enacted. The union argued that the public holiday rate should be double time in addition to an ordinary day's pay. Although this argument has some plausibility I am not prepared in the making of this award to depart from what is the recognized standard of remuneration for public holiday work."

The matter was then addressed in court. The second application to which this refers was heard in 1970, which resulted in a change in relation to the conditions for work of those employees on public holidays.

On the last page of the judgement, as reprinted on page 50 of the current Review there are two quotes of the Bench which I would like to incorporate.

The Bench observed :

"We think that double time for the time worked, that is to say, at the rate of single time in addition to his

MR PEARCE:

ordinary wages is not an adequate compensation for foregoing, in whole or in part, the advantages of the holiday."

I merely bring that into mention, not the fact that the claim was successful in giving greater benefit to the applicant, but that the Commission as constituted said, "We think that double time for the time worked, that is to say at the rate of single time in addition to his ordinary wages". So they've said, they have expressed what, in their belief, is meant by the wording "double time".

Further, on the last paragraph :

"We award accordingly, leaving the precise terms of the variation, including any consequential amendments, to be settled by the Registrar, subject to the speaking of the minutes. However, we think that it would be preferable to express the new rate as we have indicated rather than by such a phrase as, "time and a half in addition to his ordinary day's pay", as the terms "ordinary time", "time and a half", "double time", "double time and a half" and "treble time" have consistently been given the same meanings for many years and are well understood industrially and also because of the possible uncertainties in the case of work on a holiday falling on a Saturday. In reaching this conclusion we have rejected the union's claim for double time in addition to the employee's ordinary wage (treble time) as we think that in the present circumstances it might deter work on public holidays."

MR PEARCE:

But that is another reason, another factor.

So the Commission there, as formerly constituted, indicated what it believed to be the meaning of double time et cetera in the industrial relations context.

In the matter before us, as Mr Philp has indicated, had its genesis in terms of the award in 1974, being an application at the time by the Public Service Association to incorporate into the Miscellaneous Conditions ... or to seek the making of a Miscellaneous Conditions Principal Award incorporating, in addition to other matters, payments for work on public holidays and also for overtime provisions.

In going to that I would like ... or in observing, once again, your views as contained in the Social Trainers matter on first aid, on page 9, in making a conclusion on that particular matter, your decision included the following observations - contained on page 9, third paragraph:

"... when tested against the original reasons given by the applicant in seeking inclusion of the provision in the first instance."

There quite clearly, Mr President, you took into account the nature of the application - or the reasons given by the applicant at the time that the matter was first incorporated into the award.

That being so, I would like to draw to the Commission's attention the reasons given by the Public Service Association in 1974 ...

PRESIDENT:

The Association or the Board?

MR PEARCE:

The reasons given by the Association in explanation to the Commission.

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PRESIDENT - PEARCE

PRESIDENT: Mr Philp is half up.

MR PHILP: Yes, well I will object if Mr Pearce is to use the transcript, because interpretations, as I understand, from the textbook are that transcript for cases are not to be used - judgements may be but not transcripts.

Thank you, sir.

PRESIDENT: That's only in extreme cases, Mr Pearce, that one goes to the transcript. But of course I'm not sure (as I was unsure at the time Mr Philp wished to tender the exhibits relating to other tribunals) what use you would wish to make of that. Is it a transcript excerpt?

MR PEARCE: It is, Mr President.

What it does, without explaining what it goes to, is the understanding of the Association at that time, as to what was meant by the terms 'double time' and 'double time and a half'.

PRESIDENT: Yes, well do you pursue your objection?

MR PHILP: Of course.

PRESIDENT: Well I'm afraid I'll have to allow it then, Mr Pearce.

MR PEARCE: Well unless transcript can be brought in, in your judgement Mr President, "only in extreme cases", we would ...

PRESIDENT: Is this an extreme case?

MR PEARCE: Well I would suggest that any deviation from the existing provision of 2.1/2 times, incorporating as we believe the ordinary time of pay, to something favourable to the applicant, we would see that to be extreme, to put it mildly.

PRESIDENT: Well are those whom you are representing today of the opinion that the award is deficient and that it is confused?

MR PEARCE:

No, not in the least. So I think to that extent that I might merely rely upon the words as written in the provision, which I understand my colleague, Mr Willingham, would be more than happy to aid the Commission, and also the other parties, as to what the true meaning of the words are, as they are written and contained in that particular provision.

PRESIDENT:

Well that's all I can do in the instant matter, is have regard for the award prescription and interpret that section, having regard, if necessary, for the whole of the award or other parts of the award, if needs be, in order to understand that provision in proper context.

PRESIDENT: ... otherwise of the opinion that the provision is unclear.

MR PEARCE: Right. I believe that Mr Philp may have inadvertently assisted you, Mr President, in reaching a decision not beneficial to the applicant - to the extent that of course he has pointed out.

The proviso of the particular clause, whereby it provides amongst other things, that no officer shall receive in the aggregate more than the equivalent of double time and a half of his ordinary rate. It says no more, it says no less.

The existing provision as it relates to payment, his payment shall be at the rate of double and one half of his normal salary rate for all time so worked; nothing more, nothing less.

To that extent we would merely rely upon what is contained in the award in terms of its intent and application and suggest that anything done or anything being done or contemplated to be done which would provide anything in excess of and in the aggregate of double time and one half, would be outside the existing award provision.

I might leave it at that, Mr President.

PRESIDENT: Thank you, Mr Pearce, but I would like a further explanation from you, if I might, to take you back to the memorandum which went out over the Director of Industrial Relations' signature. That explanation being, that so far as you are aware (or the Director may wish to speak for himself) the award provision regarding overtime for shift workers on public holidays would not support the conclusion that one can only draw from that memorandum - that the rate in fact is double time and a half.

MR PEARCE: Without specifically going to the

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MR PEARCE: question of to whom it was intended to apply, one could suggest that employers could interpret that memorandum to provide equally across the board as it does not ...

PRESIDENT: Because the document purports to rely on a decision of the then Public Service Board, I would doubt very much that that decision said that.

MR PEARCE: What the decision of the Public Service Board did, was to grant in full the claim of the applicant - that was to vary previously catered for by regulation double time to double time and a half.

PRESIDENT: For day workers?

MR PEARCE: Yes.

PRESIDENT: I don't wish to pursue this any further. It is simply to clarify the position that you now take, namely that the award - the particular provision relied upon by Mr Philp in these proceedings does not support or could not support the proposition that a shift worker for working on a public holiday could attract double time and half. That is all.

Mr Philp may disagree with you.

MR WILLINGHAM: Mr President, if I might just add a few comments to the outline so capably and logically presented by Mr Pearce.

PRESIDENT: Flattery will get you nowhere.

MR WILLINGHAM: Do you think not?

Mr President, I will confine myself to merely addressing the provisions of the award, which in my view are the only reason we are here. I think with great dexterity and a great deal of guile, Mr Philp has introduced a number of other matters that I believe you were exceedingly generous in allowing.

However, can I just draw to your

MR WILLINGHAM:

attention please, for the purposes of facilitating this, item P.1 from Mr Philp and at 3.4 (a)(i). To me, Mr Philp's submission stands or falls on those eight or nine lines.

Can I just read with you, Mr President:

"Monday to Friday inclusive - at the rate of time and one-half of his normal salary rate ..."

And we don't need to go to the rest.

Mr Philp would not - does not - argue that if we took the example of, say, a person receiving \$10 an hour - that if they worked overtime between Monday and Friday of, say, one hour, that at the rate of time and one half would mean that person would receive \$15 for that hour so worked in overtime. That is what one and one half means, at the rate of.

Item (ii):

"Saturdays and Sundays - at the rate of double his normal salary rate for all time so worked;"

Let us just assume eight hours on a Sunday at \$10 an hour. That person would receive \$160, and again, Mr Philp doesn't quarrel with that. Indeed he uses it as an example in support of his case.

The contentious one - item (iii):

"Public Holidays - at the rate of double and one-half of his normal salary rate for all time so worked."

Mr President, I know that you like us to have a look at a few dictionaries and I invite Mr Philp and others and particularly yourself to canvass the definitions contained in the Oxford Shorter Dictionary as to the crucial words in item 3.4 (a)(iii); `at

MR WILLINGHAM:

the rate of is defined quite properly as a standard measure of reckoning and indeed of in numerical and mathematical terms, as I am sure we all remember from our school days, simply means multiplied and in this context that is certainly what it means. There can be no doubt whatsoever about that. It simply means a cross (multiplied by). Normal is defined as conforming to standard, regular, usual, typical.

When we talk about working on a public holiday, we are saying at the rate multiplied by double and one half of his normal salary rate. If that person's hourly rate is \$10, you multiply it by 5 over 2 or 2.5 or 250% - it doesn't really matter which mathematical configuration you use - but you get the same answer. One by two is two. It is not three. One plus two is three but one by two is two, unless my colleague, who never loses his capacity to surprise me with innovative arguments has come up with a new mathematical formula of which I am, at this stage, unaware.

Those are the words, Mr President. Mr Philp has quite properly said that a number of awards exist all over the place and indeed we rely upon them, which clearly specify the method by which calculation of overtime on public holidays shall be dealt with. There is no argument with that and indeed some of them show that the claim that Mr Philp is putting forward is conservative and some would show that it is otherwise.

That is not the point. It has nothing to do with this. Can you read from this clause that you are entitled to pay three and a half times the rate for work on a public holiday? The answer, Mr President, and you have alluded to it yourself, is no, you cannot. For all time so worked the rate shall be double and one half of his normal salary rate for the day.

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WILLINGHAM

MR WILLINGHAM:

If Mr Philp doesn't believe that that properly reflects the value of work on such a day the remedy is clear to him, as he has already pointed out and indeed so do your guidelines - make an application for variation. But you cannot derive from those words anything other (in my respectful submission) than what we have done. We have not sought to interpret it. We have said that is the application of the award as the words read. It is not an interpretation. It is a literal and, we submit, a correct application of the words of the provision of that award, Mr President.

PRESIDENT:

Thank you, Mr Willingham. Mr Philp?

MR PHILP:

Yes, thank you, sir. Just a number of comments. I think Mr Pearce was mentioning that he believes that it is generally, and understood by industrial relations practitioners what the term 'double time and one half' means and he thinks it means one and a half times plus the ordinary payment for that public holiday.

I would contend that the guidelines issued by yourself with regard to interpretation are quite clear and the seventh guideline as I earlier mentioned:

"It is not permissible to import into an award by implication a provision which its language does not express. The award being a document which is to be read and understood by persons not skilled in law or versed in subtleties of interpretation, any omission or imperfection of expression should be repaired by amendment rather than applying into it provisions which are not clearly expressed by its language."

I believe this case is clearly one

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MR PHILP:

that falls into those guidelines. As I have said before, there are a number of agencies who are clearly capable of misunderstanding this clause. It needs to be rectified. We believe our view of what it means is quite clear to you. It means that the overtime penalty payment shall be two and a half times in addition to the normal payment for the public holiday. That is a view that is not shared by the employers but it is an overtime clause. It comes under 'Overtime'. There was no instruction. There has never been an instruction which says that that payment should be reduced by the amount of payment that a person would ordinarily receive for account of working on public holidays.

I think that is all.

PRESIDENT:

Thank you, Mr Philp.

I will reserve my decision.

HEARING CONCLUDED