

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 693 and 694 of 1987

IN THE MATTER OF applications
by the Federated
Miscellaneous Workers' Union
for interpretation of the
Miscellaneous Workers Award

re hours of work, and Library
Attendants respectively

PRESIDENT

HOBART, 15 May 1987

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: I'll take appearances, thank you - both matters.

MR O'BRIEN: If the Commission pleases, I appear on both matters on behalf of the Federated Miscellaneous Workers' Union.

PRESIDENT: Thank you, Mr O'Brien.

MR ABEY: If the Commission pleases, I appear in both matters for the Tasmanian Confederation of Industries, ABEY, T.J.

With your co-operation, may I appear for the Tasmanian Confederation of Industries, Mr President?

PRESIDENT: Yes, by all means. I thought you said the Tasmanian Chamber of Industries.

MR ABEY: No.

PRESIDENT: Mr O'Brien, would it be convenient to deal with these matters simultaneously?

MR O'BRIEN: It would in a sense. I was going to put to you that we in fact do that.

We would be, in relation to one of the matters, firstly, seeking a declaration as to the meaning. However, if it was your view on the meaning of the words, and I go to the question of the application for interpretation relating to the question of the appropriate rate of pay for work on Saturdays, if you were of the view that our interpretation of the meaning of the words were wrong, then we would seek to convince you to exercise a discretion under subsection 43(1)(b) to vary any defect which exists within the award.

That's the way I intended to ask you, Mr President, to proceed - that we argue, firstly, the question of interpretation and if need be, depending on your view, then proceed to the question of whether there were

MR O'BRIEN:

grounds for a remedying of any defect, if it in fact exists, and if that's acceptable, that's the way I'd propose to proceed.

PRESIDENT:

Yes. I don't know how Mr Abey feels about this.

I hold the view, perhaps an incorrect one, Mr O'Brien, that in the event a defect is discovered in the award, whilst the Act is clear enough, I think, in that it authorizes the President to remedy that defect by appropriate variation, I'm nonetheless of the opinion that if variation is considered necessary it's perhaps better if it's done by way of an application to vary, so that all parties to the award, or interested parties, can have their say.

I don't think the Act necessarily demands that that be done but it just seems to me to be the way we ought to go with these things. There are after all said and done many people affected by industry awards. But however, I hear you and I'll hear Mr Abey on that question too if he wishes to address me as to whether or not in the event the Commission discovered some defect in the award that was in need of remedial action that ought to be done as a consequence of interpretation - of this interpretation - or whether or not the Commission should identify a defect and then hear the parties on the merits.

MR ABEY:

I support that position, Mr President. Whilst it's obviously open to you, I don't believe it's entirely appropriate that award variations emanate from an interpretation as such. I believe the parties should go back and determine the matter on merit as a consequence of an application.

PRESIDENT:

Yes. I don't know. How strong are you on this, Mr O'Brien?

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PRESIDENT - O'BRIEN - ABEY

MR O'BRIEN:

I'm not all that strong on the point. I think the Act envisages a situation where something arises in proceedings which clearly is not right and allows you, Mr President, to do something to vary the award to correct that situation, rather than going through the process of applying again.

However, were you, in a decision, to say, 'This is the position; it is obviously anomalous', and the matter went for application to be argued on merit, it would obviously be dealt with in the context of that decision.

PRESIDENT:

Yes.

MR O'BRIEN:

So, I don't really see, apart from the time gaps which might occur, any problems that arise in that area that there's any substantial difference between the course you're proposing and the course which might otherwise occur if you took a different view on appropriate procedures for the implementation of section 43.

PRESIDENT:

Yes. Well, thank you for that, Mr O'Brien.

Mr O'Brien, before you outline your case, I think that I ought to place on record the Commission's concern that the Department of Labour and Industry, for reasons best known to itself, has seen fit to seek a Crown Law opinion as to the operation for the correct interpretation to be applied in relation to one of the matters at issue.

I must say that I'm extremely disappointed that that approach has been made. I'm at a loss to understand why it would be made, having regard for the fact that the most recent amendment to the Act opened the door for the Secretary for Labour to himself approach this Commission for an interpretation of an award.

The purpose of that, we're all aware,

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PRESIDENT - O'BRIEN

PRESIDENT:

was to facilitate the function of the Secretary for Labour in administration of that part of the Act which requires policing of awards.

It seems to me, rightly or wrongly, in seeking an interpretation from the Law Department, intentionally or otherwise, it places the Commission in a situation, or it could place the Commission in a situation whereby there could be a contest between the Law Department and this Commission.

Having said that, I need not remind anyone, of course, that section 43, I think, of this Act makes it abundantly clear and I quote from 43(7):

"Subject to this Act, a declaration made under this section is binding on all courts and all persons with respect to the matter the subject of the declaration."

It seems to me, not only as passing strange, but most unfortunate that the Department of Labour and Industry appears to have overlooked subsection (7) in seeking an opinion from the Law Department.

I'm unaware if you've been told that such opinion was sought and the result of it.

MR O'BRIEN:

I have been told that one was sought and that a result has eventuated and indeed, that's part of our concern in bringing the matter relating to the hours question before this Commission.

And indeed my understanding is, the position creates somewhat of an anomaly in that employers will be told of a certain interpretation with regard to this award as a result of that situation. We consider it's inappropriate for that advice to be passed on, certainly at this stage, in the light that I'm certain that

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PRESIDENT - O'BRIEN

MR O'BRIEN:

the Secretary for Labour is aware
that the matter is before this
Commission with regard to the
question of interpretation.

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O'BRIEN

PRESIDENT:

Yes, well, you see, what I fail to understand is why such an opinion would be sought in the first place.

Obviously, if an agency seeks Crown Law opinion, whether it agrees with that opinion or not, it ought to act upon it.

However, if an organization subsequently seeks an interpretation from this Commission, and that interpretation is not consistent with the Crown Law opinion, we have a ridiculous situation.

MR O'BRIEN:

Yes, I appreciate that, and I'm not sure at the timing of the request for the advice, but nevertheless I believe that these proceedings ought to clarify the situation. I've never been made privy to the substance of that advice.

Our view is that it has no standing. It's an opinion. The fact that we may or may not hold a contrary view is of relevance only in an academic sense, and that the matter is now being dealt with appropriately.

And indeed, can I say that if the Secretary for Labour had a view about the matter and thought the matter ought be determined, and had approached us about the matter, then we would have done what we could to make sure that there was no doubt about the meaning of the section, and would certainly have been prepared to bring the matter before you, Mr President, to have that matter determined if the Secretary for Labour, at the time he had that concern, lacked the ability under the Act to bring the matter himself.

PRESIDENT:

Yes, well, this request for advice was dated 9 January 1987, and at that stage I'm sure the Secretary was well seized of the knowledge that the Act was to be varied to give him access to this Commission.

However, having said that ...

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PRESIDENT - O'BRIEN

MR O'BRIEN: Amendment Act 113 of '86 received royal assent according to the print on 18 December 1986.

PRESIDENT: Well, it was 9 January 1987, that the Secretary for Labour sought the Crown Law opinion.

I'm not suggesting that section 43 prohibits or proscribes that action being taken, but it seems to me to be an exercise in futility for one of us, either the Crown Law Department or this Commission.

MR O'BRIEN: Yes, well with respect to the Crown Law Department, I'd say it's ... their action is one with no substance in law.

PRESIDENT: I would not presume to criticize them. It would be quite improper for me to do so. But I'm surprised that in giving the opinion requested that some passing reference was not made to section 43 of the Act.

However, I have discharged my obligation, I think, in informing you that I have been written to by the Secretary for Labour informing me of all of this.

I will now hear you, Mr O'Brien.

MR O'BRIEN: I only wish that the Secretary for Labour had the courtesy to contact that organization that obviously has some interest in the award with regard to its enforcement and interpretation.

But, having said that, there's nothing that I can do to force what I believe is a common courtesy upon the Secretary for Labour.

Mr President, dealing with the 2 matters, I'll deal with the matter the subject of your comments first, as that's probably appropriate.

And in the circumstances I've drawn passages from awards out for the purpose of my argument; had them

MR O'BRIEN: converted to a document, 'Marked For Information', and I would seek to tender a document bearing sub-clause (a) of clause 16 'Hours of Work'.

PRESIDENT: This is 693, is it - yes - we're dealing with first.

These documents that you've ...

MR O'BRIEN: They may have come in a bundle, but I'm going to deal with them separately.

PRESIDENT: Then should I identify them as exhibits?

MR O'BRIEN: Well, exhibits, or I've simply noted that they're ... The notation 'MFI.1' ...

PRESIDENT: Well, you've marked them all 'MFI.1' - Oh! 'Marked For Information', I see. Right, very well.

MR O'BRIEN: Yes, 'Marked For Information', because perhaps the 'Circumstance' document is properly identified as an exhibit, but all I'm reproducing in the others are passages from the awards, so that it's simpler rather than flicking through the award.

PRESIDENT: Well, we'll leave it as 'MFI', and the first one will be MFI.1.

MR O'BRIEN: Thank you.

The question of interpretation arises I believe, Mr President, from a view of the passage or paragraph in sub-clause (a) which reads:

"The ordinary hours of work prescribed herein may be worked in not more than 8 hours on any day but may be worked in one or two periods during the days Monday to Friday."

In fact that's the sentence upon which the question, in this matter of interpretation, will turn.

MR O'BRIEN:

It is our contention that the true meaning of that sentence is that the sentence ought to be read as I expressed it then:

"The ordinary hours of work prescribed herein may be worked in not more than 8 hours on any day but may be worked in one or two periods during the days Monday to Friday."

We take that view, and might I say we have taken that view in relation to the provision which has existed for some time in the Insurance Award or its predecessor the award of the Insurance Industrial Board going back some decade and a half/two decades, as far as my research has gone.

We say that to seek to read the exclusion or the qualification passage in that sentence, which we say is, `but may be worked in one or two periods` as flowing on into the question of `during the days Monday to Friday` creates a nonsense in terms of the award.

Can I say now, that at the time that this clause was inserted in the award that a word was inadvertently omitted from this clause, and that word still exists in the appropriate clause in the Insurance Award.

And without referring to that, the word omitted lay between the words `any` and `day`. The word was `one` and it read, and still reads in that award, `8 hours on any one day` but otherwise that sentence is identical in both awards. It has been for some time.

Now, we say that the omission of that word does not make any substantial difference to the meaning of the clause. However, if it were your view that it did, then we say that there is ample evidence that that omission was an unintentional one and ought to be corrected pursuant to

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O'BRIEN

MR O'BRIEN:

this section or pursuant to some other proceedings.

And it will be clear in talking about this that if it were the intention to create a situation in the introduction of this award that there be ordinary time on a Saturday, and that was in conjunction with the introduction of a 38-hour week, then either Mr Sertori or myself, in original proceedings, would surely have placed on the record the fact that that was a substantial offset in relation to the introduction of this award.

However, putting that aside because we say it isn't a matter of great consequence in relation to the reading or the interpretation of the clause, we say that ordinary hours may be worked, pursuant to this clause, on any day during the days Monday to Friday. And that is qualified by the passage, 'but may be worked in one or two periods'.

Now, we would concede that there are better ways of expressing what was clearly the intent. However, we would suggest that to read the clause to say that you may work '8 hours on any day' meaning any day of the 7 days of the week, but you can work on 2 periods during the days Monday to Friday, is to read the award nonsensically and indeed would be to read the award without reference to any other part of it.

MR O'BRIEN:

For example, it's clear that the award applies in the case of resident caretakers and janitors, a situation where ordinary hours may be those which apply on 6 days of the week.

Now, to say that the award ought to be read to mean that everyone but resident caretakers and janitors, who have obvious weekend duties, are restricted to 6 days, but the other employees have their terms of employment established such that their ordinary hours run over 7 days of the week, is to demonstrate the nonsense that that interpretation would give.

It's our suggestion that on our interpretation, that ordinary hours other than for resident caretakers and janitors, are hours which fall within the spread of hours established on the days Monday to Friday and reading that in that fashion and then going to clause 20 'Overtime', and I would tender a document marked for information in relation to the appropriate passages of 'Clause 20. OVERTIME'.

PRESIDENT:

That'll be MFI.2.

MR O'BRIEN:

It's clear that the question of overtime on Saturday is dealt with in sub-clause (c) and it prescribes an appropriate rate of pay for Saturday, overtime.

Might I just ... perhaps it would have been better if we had included sub-clause (b) at that time. There is a provision in relation to resident caretakers and janitors working overtime and a provision in relation to those, which is quite ... I'm sorry - provision (b) relates to the method of calculating overtime. I was thinking of another passage.

PRESIDENT:

Yes.

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PRESIDENT - O'BRIEN

MR O'BRIEN:

Clause 25, and I haven't reproduced that, Mr President, 'Saturday, Sunday and Holiday Work' prescribes a rate of pay for ordinary hours worked by resident caretakers or janitors.

It does not prescribe any special provision in relation to other employees. It does provide for a minimum engagement provision for employees other than those resident caretakers or janitors. It does provide a provision for payment of double time for work performed on a Sunday and that is consistent with a provision in many awards that double time applies for ordinary shifts and for overtime, which applies on that particular day.

We say that all that clause 25 provides, is a special rate of pay for those employees who have within their ordinary hours of work, provision to work those hours on a Saturday, namely, the resident caretakers or janitors, a rate of pay for Sunday which is applicable to all employees in any circumstance and a minimum engagement provision in relation to employees other than resident caretakers or janitors for work on the Saturday, Sunday or public holiday situation.

As I said at the outset, there are better ways of expressing these things and I think you would be aware, Mr President, that what occurred in the creation of this award was a picking up of provisions which then existed as we believed it in the Insurance Award and the provisions which we are talking about in this award - certainly the overtime provision, or substantially the overtime provision with some minor variation and the provision relating to work on a Saturday, Sunday or public holiday has clearly been taken from the Insurance Award.

If I can, just to completely substantiate that point, go to the transcript of proceedings and indeed,

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O'BRIEN

MR O'BRIEN:

firstly your decision, Mr President, in the matter of T.105, application for the making of the Miscellaneous Workers Award, decision of 25 April on page 12, you said in relation to the passage headed, '38-HOUR WEEK':

"In my earlier findings I indicated certain reservations about a 38-hour week provision being included in this award before the 'parent' Insurance Award was varied.

At that stage I was of the opinion that to do so may well have been tantamount to the tail wagging the dog.

However it was explained to me that this award, when made, will embrace the majority of persons now subject to the extended Insurance Award. This means that in future the Insurance Award will only apply in the insurance industry and not have general application."

And I refer to that passage simply to say that it was clearly the intent of the parties and was reflected in transcript, if there's any need to go to it, to reflecting the Miscellaneous Workers Award the substantial provisions of the Insurance Award.

Now, obviously we were talking there about reflecting a 38-hour week. And my earlier point about whether there was to be any ... if there was an agreement to change circumstances whereby ordinary hours would apply on a Saturday and would be paid at ordinary time, then it's my submission that Mr Abey's organization, if not my own, would be saying that that was an offset - placing that matter before the Commission, but that clearly was not the case.

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O'BRIEN

MR O'BRIEN:

It was clearly not the intent at that time to change the situation with regard to what the parties believed they were doing in relation to hours of work.

And I guess that question goes to an extended question of what your interpretation is, and if it is against us, what ought to happen then.

But we say, and going back to MFI.1, that if you read the passage that I referred to in any other way, then you read it in such a way as to create a nonsensical situation.

There is an exception within that sentence. The exception goes ... I'm sorry, it's not an exception it's a qualification. It goes to the question of how you work those 8 hours. Not the days on which you work them, but how you work them; whether you work them in one period or two.

If you read that qualification as applying to Monday or Friday only, you create a nonsense. The only reasonable way to read that is to say the sentence contains a qualification. That qualification relates to the method in which the hours are worked. The sentence should otherwise read, if you ignore that qualification, 'The ordinary hours of work prescribed herein may be worked in not more than 8 hours on any day during the days Monday to Friday.'

We say that the word omitted, 'one', would make no substantial difference to that interpretation. In other words, if you read it, 'The ordinary hours of work prescribed herein may be worked in not more than 8 hours on any one day during the days Monday to Friday' that the substantial meaning of that passage would be unaltered.

And indeed, if you included the word 'one' and read the sentence as it is,

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O'BRIEN

MR O'BRIEN:

it would not add anything to any doubts which exist as to whether you read the passage, `but may be worked in one or two periods' in the way I suggest, or in connection with the words, `during the days Monday to Friday.'

So what we say is, the only reasonable interpretation of the matter, of the passage, is that the words, `but may be worked in one or two periods' is a qualification relating to how the hours may be worked, and certainly there are other passages within clause 16 which make specific reference to the working of split shifts.

MR O'BRIEN: In taking that view, the interpretation that ought to be given is that ordinary hours, other than for resident caretakers and janitors, are on the days Monday to Friday, in the spread of hours suggested, and that the Saturday for those employees is an overtime day.

PRESIDENT: Are you suggesting that all persons who might be required to work on Sunday would be regarded as working overtime?

MR O'BRIEN: Not necessarily.

PRESIDENT: Janitors and resident caretakers might be required to work their 38 hours over a 6-day spread, but persons other than janitors would work their 38 hours Monday to Friday.

MR O'BRIEN: That is exactly what I am saying.

PRESIDENT: But I thought you said you wouldn't necessarily agree with me that all persons required to work on a Sunday (that would include janitors) would be regarded as working overtime.

MR O'BRIEN: No, I didn't say janitors, because janitors may work 6 days.

PRESIDENT: That's right.

MR O'BRIEN: And the sixth day may be Saturday or Sunday.

PRESIDENT: I see what you mean, yes. Quite.

MR O'BRIEN: That's why I said not necessarily.

PRESIDENT: Yes.

MR O'BRIEN: And in that case, the provision of double time would apply to them in the same way as it would apply to any other employee, and that's consistent with general industrial standards for example where either overtime or ordinary time on Sunday - in a great many awards, and I haven't brought an exhibit on that matter - provides for payment at the rate of double time.

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PRESIDENT - O'BRIEN

MR O'BRIEN:

Mr President, in your decision in matter T.30 of 1985 - that is the interpretation matter - a request for an interpretation of the General Conditions of Service Principal Award.

As the first interpretation, you set down some principles. And the third of those principles was that:

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

Now, we would say that in this matter, to read (as I understand might be suggested elsewhere) the qualification I referred to, in relation to the words 'during the days Monday to Friday', would, as I suggested, create an unintelligible situation, a real doubt as to what the real meaning of the award was.

And it must be clear that the intention of the parties was never to create a situation where there was a spread of hours which applied, but that ordinary working hours could fall on any one of 7 days, when the situation was that there was already an exception for certain of the employees to extend it from 5 to 6 days.

And without presenting the history of the employment of caretakers and janitors, I think the knowledge of the Commission would go to the fact that it has been common for employees in those circumstances to work on days which are not the normal working days of the general work-force.

And, as a result of that, that fact

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PRESIDENT - O'BRIEN

MR O'BRIEN:

was reflected in the award by allowing for a span of hours to go over 6 days. And those days might include the weekend and only 3 of the 5 days, Monday to Friday.

And that was a reflection of the situation where the employee resided on the premises and carried out functions which could be considered necessary to keep the building operational and to supervise its operation on days when other persons weren't present.

And so we say, that in the context of your principle 3, as laid down in the decision I have just referred to, that the words are capable of being construed in an intelligible way, and that the intelligible way of interpreting that sentence is to say, as I have said, the words 'but may be worked in one or two periods', is a passage which ought to be read as a qualification, and in relation to the words, 'in not more than 8 hours', and that the question of which days those hours might be worked on, ought to be read 'on any day during the days Monday to Friday.'

I can agree that had the passage appeared with a comma after the word 'day' and a comma after the word 'period', that meaning would have been much more clearly presented.

And I have gone back as far as I'm able to, and I find that there is a distinct absence of that punctuation mark in any of the prints that have come out, and I can't explain that absence. Whether that was the inadequacy of the draftsman, and I can think that that is probably the likely cause, or whether they didn't appear for some other reason, I don't know.

But, as I've indicated, if my view weren't correct as to the interpretation of that phrase, and there was some other meaning which you felt mitigated against the

MR O'BRIEN:

finding that we suggest ought to be made, then we would be seeking that the award be corrected to reflect what has in fact been custom and practice for many, many years in the predecessor award.

And so far as many employers are concerned, continues to be the custom and practice under this award.

They are the points I wish to place on record in relation to that matter at this stage.

In relation to the existing provision, existing within the Insurance Award, I would refer you, Mr President, to No. 1 of 1987 - that is the award known as the Insurance Award - page 26, Clause 34, 'HOURS OF WORK'.

PRESIDENT:

Yes, I had it out to bring in. Excuse me, Mr O'Brien. Yes, you may proceed. I had the awards out, but I forget to bring them in.

MR O'BRIEN:

And just for further clarification in that decision I referred to earlier, on page 12, that the passages in transcript which might be of assistance, appear on pages 163/164 and page 168, also page 54 of the same transcript - just to further substantiate what the intention of the parties was in relation to the transition between the provisions of the Insurance Award and this award, so that there can be no doubt as to the position of both the employers and my organization on that matter.

PRESIDENT:

Yes. Mr O'Brien, if in attempting to unscramble this egg, I need to apply my mind to Clause 20(c) of the award, how do you suggest one could (on an ordinary reading of the award) determine when work on a Saturday is overtime and when it is ordinary time?

MR O'BRIEN:

How? Well, we would say that the intention was that that was determined in the 'Hours' clause, and

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PRESIDENT - O'BRIEN

MR O'BRIEN:

if it was overtime because the hours were Monday to Friday, and one went to the 'Overtime' clause, and if it wasn't, one went to the 'Saturday, Sunday and Holiday Work' rate for the resident janitors and caretakers.

PRESIDENT:

Yes. It seems to me that if one were to accept your interpretation of the intention of the award, whether the words actually used make that abundantly clear or not, perhaps not to the point at this stage.

Then sub-clause (c) of Clause 20 would be easily understood, namely that any work done by a day worker on a Saturday (other than janitors if you wish) would attract a penalty rate of double time. And any work done, in any case, on a Saturday, Sunday or public holiday by an employee covered by the award, other than a janitor, would in any case, attract a minimum payment as for 4 hours at double time.

MR O'BRIEN:

Well, that could be the case. I understand another proposition has been put and that is that it could be ordinary time. But if one accepted the view that it could be ordinary time because we read the hours clause in that different way (the way that I say is not meaningful) one comes against the problem that if you're a resident caretaker you get a penalty rate for working Saturday and if you're not, you don't.

And that's just ... going to your decision on the Principles for interpretation would, in my view, not give a really intelligible meaning to the terms of the award.

In other words, there would be a suggestion that an employee who's ordinarily expected to work on the weekend gets a penalty rate for that work, but the rest of the employees don't.

PRESIDENT:

No. That is not what I'm suggesting.

MR O'BRIEN:

Perhaps I ...

PRESIDENT:

Yes. Perhaps I haven't put it clearly enough.

What I'm suggesting to you is that maybe your interpretation is the correct one, that if we just forget janitors and resident caretakers for the moment and take, let's say, a vehicle serviceman. If that person is required to work Monday to Friday at ordinary rates, then clearly any work done on a Saturday would be paid for at double rates.

MR O'BRIEN:

Yes.

PRESIDENT:

And he would be entitled to a minimum in any case of 4 hours at the appropriate rate ...

MR O'BRIEN:

Yes.

PRESIDENT:

... for the Saturday (we'll talk about Saturday) which would mean that he could not be paid less than 8

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PRESIDENT - O'BRIEN

PRESIDENT: hours, even if he worked 1 hour. Right?

MR O'BRIEN: Yes.

PRESIDENT: Now if you're incorrect, then my question to you was: how, on a reading of the award, does one determine what the ordinary time is and what overtime is? In other words, how do we know unless there's some kind of roster if work done on a Saturday is not overtime, but in fact ordinary time? And if it is not overtime would not work done on a week day, which was in excess of 38 hours, not attract double time?

MR O'BRIEN: Yes. I think that's right. I think that's the correct view.

PRESIDENT: Otherwise there would be some discrimination against persons required to work, as part of their ordinary hours, Saturday and Sunday.

MR O'BRIEN: Excuse me?

PRESIDENT: It's only a question I put to you.

MR O'BRIEN: Well, I think that's probably correct, Mr President. It, I think, demonstrates the problem with a view different to the one I take of the hours clause. To read it in that other way creates a great many problems in interpreting the award and is not one which I think would commend itself to you, Mr President, in the light of your Principles, which are very definite on the point of the question of the words used being capable of being construed in an intelligible way.

Excuse me, I've dropped my writing implement - it's landed on its end and disappeared.

That's all that I'm seeking to put on the question of the meaning of the words within that part of the award. I would ask that a decision be made and I guess we must subsequently ask for a declaration in

MR O'BRIEN:

terms that the award be read in the fashion that I have suggested, in that passage, namely, that the qualification, 'but may be worked in one or two periods' is a qualification relating to the working of hours on a given day and that the reference to working on any day is qualified by the passage, 'during the days Monday to Friday.' So that's ...

PRESIDENT:

Do you think the problem has come about, Mr O'Brien, by reason of the fact that we know that this award is a hybrid. We know that parts of the Cleaners and Insurance Board have been plagiarized. We also know that new classifications were included in this award.

We would know of course that cleaners and people of that nature do in fact, or can in fact work over, I think, a 7-day period. Am I right in that regard?

MR O'BRIEN:

Some would work weekend work.

PRESIDENT:

Yes.

MR O'BRIEN:

It's more common ...

PRESIDENT:

There may be penalties ...

MR O'BRIEN:

... Monday to Friday.

PRESIDENT:

There may be penalties attaching in certainly caretaking and janitoring.

And is it possible that in framing this first ever craft award, insufficient attention to the detail, or consequential changes that may have been necessary, was given. You would recall at the time I expressed my concerns in some other areas, but they were going more to the merits of some of the provisions that were imported.

But I think, even so, we discovered a few deficiencies that were put right. I've forgotten the detail now.

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PRESIDENT - O'BRIEN

MR O'BRIEN: Well, I think for example, protective clothing ...

PRESIDENT: I think ...

MR O'BRIEN: ... was a matter which was a little anomalous which we corrected.

PRESIDENT: Yes, indeed.

What does concern me of course is the fact that it was a consent award and we'll hear from Mr Abey, who's been very patient. I hope he's not going to say, 'Well, this is a breach of an agreement' or something, but it was a consent award. I don't think there was any real arbitration by the Commission except possibly in relation to a 38-hour week, and that's not before us.

The rest was by consent, wasn't it?

MR O'BRIEN: I thought it was all by consent and ...

PRESIDENT: Well, it was.

MR O'BRIEN: ... that there was some guidance given by the Commission on those matters ...

PRESIDENT: I think that would be fair comment, yes.

MR O'BRIEN: ... which were attended to by consent.

PRESIDENT: Yes.

Mr O'Brien, would you have a view as to operative date of any declaration? The Act makes provision for retrospectivity and prospectivity.

MR O'BRIEN: I believe that if our view is correct as to meaning, then it ought to be held to have been correct from the day the award was made, because I believe that was the intent of the parties, and I'm willing to hear what Mr Abey says about that.

MR O'BRIEN:

The position was that we were merely reflecting a situation so far as transition of awards and that it was our intent that what we thought was the existing provision be transformed into that area. And I guess when you look at the reference to the divisor on overtime being 40 instead of 38 for a period of a year, if there wasn't going to be that overtime as a result of this, it wasn't a very meaningful offset.

So we would be saying that the interpretation ought to say that that is the meaning of it.

Whether that essentially corrects any problems which may have occurred in the field in the past, I'm not sure. And if necessary, we (I guess) would be seeking the interpretation to reflect the situation from the inception of the award.

PRESIDENT:

Yes.

MR O'BRIEN:

We are only going back to 1986, of course.

PRESIDENT:

Yes.

You don't see any complication arising from the reference in implementation of the 38-hour week? I think it's that or it might be in the 38-hour week provision itself. Clause 16 `Hours of Work' (a)(i), they talk about 38 hours being worked within a work cycle not exceeding 7 consecutive days.

MR O'BRIEN:

Yes.

PRESIDENT:

I'm familiar with that. I know that ... I realise that's a fairly standard provision within awards that ...

MR O'BRIEN:

I don't ...

PRESIDENT:

... make it abundantly clear that the ordinary hours of work shall only be worked Monday to Friday, but ...

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MR O'BRIEN:

I think too, our position on that is that that terminology was devised to allow for a working of the hours over a period.

And so, let us say that the work day was a ... the cycle commenced on a Wednesday ...

PRESIDENT:

Yes.

MR O'BRIEN:

... you could still have 5 working days ...

PRESIDENT:

Yes.

MR O'BRIEN:

... within that cycle. And it would be over 7 consecutive days.

PRESIDENT:

Yes.

MR O'BRIEN:

But more importantly, that the number of hours could be averaged over those work cycles in the context of what ordinary hours could be in other parts of the award, so that time could be accumulated for time off in the form of a half day or a full day or some other factor.