IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No 1075 of 1987

IN THE MATTER OF an application by the Federated Liquor and Allied Industries Employees' Union of Australia - Tasmanian Branch for interpretation of the Hotel and Motel Keepers Award

re clause 53 - Casual Employment

PRESIDENT

GEORGE TOWN, 20 April 1988

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Appearances, thank you.

MR SHERRY: If the Commission pleases, **SHERRY, N.J.** I appear on behalf of the Federated Liquor and Allied Industries Employees' Union of Australia - Tasmanian Branch.

PRESIDENT: Thank you, Mr Sherry.

MR BROTHERSON: If the Commission pleases, **BROTHERSON, K.**, for the Tasmanian Confederation of Industries.

PRESIDENT: Thank you, Mr Brotherson.

Mr Sherry?

MR SHERRY: Mr President, the application before you deals with a question concerning clause 52 of the Hotel and Motels Award, Casual Employment.

If we examine the existing clause 52 ... I assume you have a copy of the provision in front of you, Mr President?

PRESIDENT: Yes.

MR SHERRY: On page 51 of the award it makes it clear in the first paragraph of (a):

> "Casual employees working Monday to Friday inclusive shall be paid per hour 1/40th of the weekly rate prescribed for the work he or she performs plus 25%; such additional amount to be payment in lieu of annual leave, sick leave or public holidays".

The contention of the Union is that in the following two paragraphs where it outlines:

> "That a casual employee shall be paid at the rate of time and a half for work performed on Saturdays ..."

And then in the next paragraph:

MR SHERRY:

> "... Sundays and public holidays, casuals shall be paid at the rate of double time".

The contention of the Union is, when those second two paragraphs are applied to the base hourly rate of a casual, that base hourly rate is determined by taking 1/40th of the weekly rate and including the 25%.

We would argue that logically reading the application of the second paragraph of sub-clause (a):

> "Casual employees shall be paid at the rate of time and a half for work performed on Saturdays".

If you read that together with the first paragraph of sub-clause (a), that there can be nothing but a logical conclusion that the base rate having been outlined in sub-clause (a) in the first paragraph, including the 25%, is in fact the base rate.

The position in this award is that there is a penalty rates not cumulative clause on page 59 ... clause 68. Penalty Rates Not Cumulative, on page 59.

The contention of the Union is that the loading of 25% is not a penalty rate. It is a payment in lieu of annual leave, sick leave and public holidays as is clearly indicated in sub-clause (a) of 52. Casual Employment.

If in fact, as is clearly stated, in sub-clause of (a) of 52 the 25% loading is a payment in lieu of annual leave, sick leave and public holidays, there is no logical or sound reason why that is excluded when applying the rate of time and one half and the rate of double time on Sunday and public holidays, because the 25% is not a penalty rate and therefore the clause 68. Penalty

MR SHERRY: Rates Not Cumulative does not affect that particular provision.

I'd like to contrast that with the first section in the award, dealing with the hotels. If we look at clause 14. Casual Work in the hotels section on page 22, it very clearly stipulates the loading that is payable for work and the way in which it is calculated, and I don't believe there can be any question in that particular section, due to the way in which the clause is set out.

In sub-clause (b)(i):

> "From 1 January 1985 a casual employee shall be paid per hour at the rate of 1/39th of a weekly rate prescribed for the class of work performed, plus the appropriate undermentioned addition to that rate:
>
> (i) 25% plus the shift payment;
>
> (ii) 75% for work on Saturday;
>
> (iii) 100% for work on Sunday;
>
> (iv) 150% for work on holidays".

So it very clearly makes it that those percentages are added on top of the hourly rate, excluding the 25% loading.

I'd also like to draw your attention to the Licensed Clubs Award where we have a similar situation to that that arises in the motels industry.

In the Licensed Clubs Award, clause 14. Casual Employees, it outlines in the first clause the way in which the casual hourly rate is arrived at. It refers to:

MR SHERRY:

> "Payment for casual work shall be on the basis of 1/39th from 1 February 1985 of the appropriate weekly wage prescribed in sub-clauses (i) and (ii) of clause A and an additional loading of 25%".

Then, in that same award, if we look at clause 20. Holiday and Sunday Work, it says:

> "For all time of duty on Sunday, payment shall be made at the rate of double time. For all time of duty on any of the holidays mentioned in clause 21 hereof, payment shall be made at the rate of double time and one half".

We have a similar situation, although the loading is different but the wording is the same for Saturday work.

Saturday work, clause 35:

> "For all ordinary time of duty performed on Saturday, payment shall be made at the rate of time and a half".

Now the way in which that provision is set out in the Clubs Award is in identical terms, except it doesn't say that the 25% in the Clubs Award is in lieu of annual leave, sick leave etc., but it is set out in three different sub-clauses, as distinct from the Motels Award where those particular provisions are in one clause.

In the Licensed Clubs Award, we don't have a formal ruling, but the advice of the Department of Labour and Industry in this award over many years has been that the application of the Saturday penalty and the Sunday and public holiday penalty, i.e. in respect to Sunday, public holidays ... I'll take Sundays first.

MR SHERRY: The double time is on top of the hourly rate including the 25%. So we have similar wording in the Clubs Award. I'd also point out that in the Licensed Clubs Award, there is not a provision including or excluding a penalty on a penalty provision.

This matter was dealt with - I don't have a copy of a decision, although I have read it - in a matter before you, T.530 of 1986, involving the interpretation of the Hospitals Award and, as I understand, having read the case, the application of that case dealt with casual loadings to the calculation of shift premiums.

But in respect to the loading, the decision of yourself referred to the minimum ordinary time rate. It was ascertained by multiplying the base award rate by 20%. We would argue that similarly in this section of the Hotels and Motels Award a similar situation exists.

The matter has also been examined in a case, of which I have copies - the Metal Trades case, Nicholls Brothers of 1942 - when the dispute as to whether the casual loading was included as part of the base rate when determining the application of rates applying on public holidays and other days, and it was determined that it did, and I'll table a copy of that decision.

PRESIDENT: Thank you. That'll be Exhibit A.

MR SHERRY: The matter for your President ... sorry, the matter, for your information, Mr President, in terms of the application followed a query from one of our members who is employed at a motel covered by the State Award.

And we therefore sought to ... and upon her employer receiving advice from the Department of Labour and Industry that the 25% loading is, in fact, part of the base rate for the calculation of Saturday, Sunday and public holiday hourly rates.

The employee concerned approached the Union and requested us to seek enforcement of that, and our view at that stage was that we should seek some sort of ... an interpretation of the way in which the particular provision applies, particularly given the contrasting wording of the application of the loadings for casual employees with the Hotel and the Licensed Clubs Award.

I understand that the practice in the industry is that the 25% loading does not apply. That is the practice.

But the issue in respect to Tasmania has never been tested formally and the matter of the construction of this clause is unique to Tasmania's motel industry.

The provision ... I don't have a copy of the provision applying in other States, but the provision in other States provides for a 33.1/3% loading for casual employees and also, in addition to that, a formula for the calculation of pro rata annual leave for casual employees, which in effect means another 5 or 6% on top of the 33.1/3% loading. So to that extent, this particular matter is unique to Tasmania.

MR SHERRY: Thank you, Mr President.

PRESIDENT: Yes. Mr Sherry, it's customary with interpretation matters to address the question of operative date of any decision, whether it should be retrospective or prospective.

MR SHERRY: Well, thank you for drawing my attention to that, Mr President. I haven't dealt with interpretation of award matter before.

As I understand it, under the Act your decision does allow prospective or if ...

PRESIDENT: Or retrospective.

MR SHERRY: ... or retrospectivity.

PRESIDENT: It's a matter for the discretion of the President.

MR SHERRY: Okay. Well I think in these circumstances, Mr President, we would take the attitude that it should apply from the date of your decision.

PRESIDENT: Yes. Thank you ...

MR SHERRY: Because I ... bearing in mind the enormous administrative problems that it would cause if, in fact, that wasn't the case and we wouldn't seek to ... certainly our organisation would take a reasonable approach and not seek to - given the particular issue revolves around an interpretation of the award - cause any undue administrative problems or back wage payments that an employer has not foreseen quite accidently.

PRESIDENT: Yes. Mr Sherry, you'd appreciate, of course, that in drawing to the Commission's attention an interpretation that I did in the Hospitals Award, I could only be concerned in that case, as I am in this case, with what the actual words meant.

I was not attempting to rule on the

PRESIDENT: question of merits, only what the words said.

MR SHERRY: Yes, I understand that.

PRESIDENT: And that would be the case here. So that it is possible, of course, to have quite different interpretations on substantially the same subject matter. It would all depend on the way in which particular awards being interpreted has been cast.

For example, if we could go back to clause 14, you may interpret that the same as I would, and indeed, I think you may have alluded to it. But the 75% for work on Saturday, of course, would not really give you any ... or not give you a great deal of comfort, would it, because the effect of what you're putting is that if I interpret the award the way that you would seek to have it interpreted for work on Saturday at time and a half, it would mean 50% of 25%.

MR SHERRY: Correct.

PRESIDENT: That's 62.1/2% added on to ... is that right? Yes, on to the base ...

MR SHERRY: No, 50% on top of 25% would be slightly higher than 75%. I don't have my calculator with me, but whatever the ...

PRESIDENT: Yes. Well that's right ... 70 ... 70 ... it would be 87.1/2%, wouldn't it?

MR SHERRY: Yes.

PRESIDENT: Yes.

MR SHERRY: Yes, somewhere in that vicinity.

PRESIDENT: Whereas you'll note that clause 14 allows 75%.

MR SHERRY: Correct.

PRESIDENT: And for Sunday, of course, it's just

MR PRESIDENT: straight double time.

MR SHERRY: A hundred per cent.

PRESIDENT: Yes ...

MR SHERRY: But it's ... I draw your attention to that ...

MR PRESIDENT: ... but it's not 100% of time plus 25% because, you see ... and I know I'm not being asked to interpret that particular clause, but I simply draw this your attention by way of example.

It says in (b)(i):

> "From January '85 a casual employee shall be paid per hour the rate of of 1/39th of the weekly rate prescribed for the class of work performed, plus the appropriate undermentioned addition to that rate".

Well now, the appropriate weekly rate would be ascertained by reference to the classification section in the award and to that you would add, under `1. 25%'; that's for work Monday to Friday.

On Saturday, 75% and on Sunday, 100%. But clause 52 is cast in different language, of course ...

MR SHERRY: Yes. Oh yes, I accept that.

MR PRESIDENT: ... and that's what we're looking at, class ...

MR SHERRY: Yes, I accept that ...

PRESIDENT: Yes.

MR SHERRY: ... I just drew your attention to the hotel section by way of the fact that I believe it's very clear. It clearly sets out the hourly rate, plus the additional percentage on each prescribed day.

PRESIDENT: Yes.

MR SHERRY: It doesn't do that in the motels clause. It doesn't do that in the Licensed Clubs Award, and the percentages that you have mentioned, time and a half on top of 25%, 87.1/2% if that would be roughly the figure is, in fact, the way it applies in the Licensed Clubs Award, with similar type results.

PRESIDENT: Yes. All right, thank you.

MR SHERRY: Thank you.

PRESIDENT: Mr Brotherson.

MR BROTHERSON: Thank you, Mr President.

And I'd also note your comments that we must concentrate on the words actually used in this award, which was the point I was going to make.

But I would submit that a number of areas that Mr Sherry referred, which you've already noted, such as the hospitals award, possibly even the Metal Industry Award decision, which he's referred to could, in fact, be taken as bordering on the question of merit, as could the reference, perhaps, to the Licensed Clubs Award. I don't have a copy, I might add, of the Licensed Clubs Award with me.

In ...

PRESIDENT: Well if you need it, you can have it.

MR BROTHERSON: Yes. Oh, it's not paramount to the submission I'll be making.

In earlier decisions of this Commission on the subject of interpretation, a number of observations have been made as to how they should be addressed, and you've referred to some of those already, Mr President.

Notably, I would pay attention to the

MR BROTHERSON: observations concerning ... provided the words used are in the general context of the award and its application of 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 those suggested by ordinary English usage.

Another observation that I'd like to make note of is the one you have referred to and that is that an award must be interpreted according to the words actually used.

It is my submission that bearing those observations or principles in mind, clause 52 of the Hotel and Motel Keepers Award cannot be read as Mr Sherry's suggesting.

The clause begins:

> "Casual employees working Monday to Friday inclusive shall be paid per hour 1/40th of the weekly rate prescribed for the work he or she performs, plus 25%".

This is clearly referring to Monday to Friday and refers to the 25%. And I think we should note that the 25% is not referred to again in that clause, nor does the clause indicate that the add-on forms part of the basic wage or the basic rate.

MR BROTHERSON: I would also perhaps mention there that despite the reference to the DLI the DLI has no interpretative authority under the Act as we operate.

The clause continues:

> "... that such additional amount to be payment in lieu of annual leave, sick leave and public holidays".

Again, the reference to `additional amount´ clearly relating, as we would see it, to the 25%.

The clause then, in my submission, details the actual rate payable on Saturdays, Sundays and public holidays, and it details the rate of time and one-half work on Saturday, work on Sunday and public holidays at the rate of double time.

There is no reference to additional amounts for these days.

At this stage I would like to refer the Commission to clause 7 of the award, which is the definitions section, and particularly a definition under Division A of the award which, of course, strictly relates to the hotel section, but I think in the general context of the award should be considered.

There is on page 6 of the copy of the award that I have definition (k) Double Time, and that definition is:

> "... shall mean double the ordinary hourly rate prescribed for a weekly employee".

PRESIDENT: I am sorry, Mr Brotherson, you have lost me. Did you say page 6 of the award?

MR BROTHERSON: Page 6 of the copy that I have, Mr President. It´s under clause 7.

MR BROTHERSON: Definitions, Division A, definition (k).

PRESIDENT: No, it's on page 6 of the ... did you say 6 of yours?

MR BROTHERSON: Yes.

PRESIDENT: Well, I wasn't listening very well. Yes, I have it, thank you.

MR BROTHERSON: Well I will just reread that. Sub-clause (k), or definition (k) describes or defines double time as meaning `double the ordinary hourly rate prescribed for a weekly employee'.

It makes no reference to a 25% add-on for casual employees, and clause 52 of course just says that the payment for public holidays and Sunday work will be double time.

As I've acknowledged, that definition is in Division A, but I believe in the general context of the award, is significant.

I would also add that clause 7 ... with that definition of double time, whilst it doesn't provide us with a definition of time and a half, logic would suggest that time and one half would be one and a half times the ordinary hourly rate prescribed for a weekly employee.

Within the general context of the award I think we should look at a clause Mr Sherry referred to, and that is clause 68, the penalty rates not being cumulative.

It's on page 59 of the copy of the award I have.

This provision makes it quite clear that:

> "... except as provided in clause 62. Meal Periods hereof where time worked is required to be paid for at more than one ordinary rate,

MR BROTHERSON:

> such time shall not be subject to more than one penalty, but shall be subject to that penalty which is to the employee's greatest advantage".

Mr Sherry submitted that the 25% is not a penalty. I would suggest that it probably is. It wasn't an argument, and it isn't an argument that I really think I intend to go into, but if we refer to clause 14 again, `Casual Work' for Part A of the award (which Mr Sherry did) on page 22, he highlighted the fact for us of 4 add-ons which go to the casual rate.

Now I think there would be no argument from anybody that 2, 3, and 4 - that is the 75% for work on Saturday, 100% for work on Sunday, and 150% for work on holidays - would be deemed to be penalty rates.

It would seem strange therefore to suggest that the first add-on there of the 25% also would not be a penalty rate.

I think perhaps also within the context of examining the general context of the award, Mr President, I'd like to refer to clause 66 which covers part-time employees, and this is in Division B of the award. It's on page 57 of the copy that I have.

In summary, that clause provides that part-time employees have a pro rata entitlement to annual leave, sick leave and holidays which, of course, casuals don't.

However, the part-time employees also have a loading of 10% instead of the 20% which applies to casuals.

But if I can refer to sub-clause (c) of clause 66 it makes it quite clear that:

> "The additional 10% herein prescribed shall not apply in

MR BROTHERSON: addition to the rates prescribed for weekly employees for work performed on Saturday, Sunday, holidays, and overtime where double time or double time and one half is prescribed in this division".

I believe that within the general context of the award that may also be of assistance to the Commission in its interpretation.

In all the circumstances, Mr President, I would submit that Mr Sherry's claim must fail, and that the interpretation should be that within that clause 52 the penalty rate for Saturday would be that the rate of one and a half be ordinary rate on the Saturday, and at double time, again, of the ordinary hourly rate for a weekly employee for Sundays and public holidays.

PRESIDENT: Thank you, Mr Brotherson. Mr Brotherson, if we could take a hypothetical case of a casual employee working only Saturdays and Sundays, it seems to me that on the logic of your argument that person whilst being paid time and a half and double time respectively of the ordinary weekly rate, would receive no compensation whatsoever for sick leave, annual leave and public holidays.

MR BROTHERSON: I wonder, Mr President, whether that perhaps is not a question of merit that ...

PRESIDENT: I think it probably is, if one were to decide this matter on that basis, but I'm just trying to ascertain the intention of the award-maker having said that the 25% addition Monday to Friday is no more than compensation for non-entitlement to annual leave, sick leave and public holidays.

Knowing that casuals can sometimes, and frequently do, work only

PRESIDENT: weekends, it's obvious that they would receive no compensation for sick leave, annual leave and public holidays.

On the other hand, of course, there are no public holidays on weekends. But if a casual was sick on what would otherwise be a rostered working day, and that would be a Saturday or a Sunday, they would most assuredly lose pay, without having been compensated.

It is complex. I've often wondered if this loading in lieu of sick leave, annual leave and public holidays shouldn't be shown separately in the award as a separate add-on, quite different, instead of part of the hourly rate.

It seems to create endless disputes from time to time.

I suppose the people who draft up the awards know what they mean, but those of us who come along later and have to attempt to discover from the actual words used what the intention was, can sometimes find themselves in the horns of a dilemma.

It's true that a fair-minded person would have to agree that this award is, in a sense ... it's at arm'slength with itself in part, because one part of it seems to make it clear (that's clause 14, for example), and the other part may be arguably contradictive.

Can we get any more comfort, or any more assistance, from a close consideration of the actual words used, Mr Brotherson, or do you think they are clear and unambiguous?

MR BROTHERSON: I believe, Mr President, that they are clear and unambiguous, particularly when they are read within the general context of the award, as I've referred.

MR BROTHERSON: Notably, that the application to the part-time employees, and the question of it being a penalty rate, as referred to by Mr Sherry, which I've countered by suggesting that the four points listed in 14 are penalties, therefore that would have to be referred to as well for it to apply in this clause.

PRESIDENT: Should ... to make the award self-explanatory, do you think ... going back to clause 52(a), the second paragraph, should it say following the words `Saturdays' - `that casual employees shall be paid at the rate of time and a half for work performed on Saturdays', such additional amount to be in payment in lieu of something else?

We already have reference to that, that interpretation, if you like, of why 25% is payable Monday to Friday. There is no interpretation as to why time and a half is paid on Saturday and no interpretation why double time is paid on Sundays.

MR BROTHERSON: Again, as you've commented, it's not always easy for those of us that come along later to know what was meant by the people who drafted it.

But one could, perhaps, theorise that in lieu of the annual leave and sick leave applying to the Monday to Friday is because those are accepted in most industries as the ordinary hours of work, or the ordinary days of work. It is on those days that the, if you like, entitlement to the annual leave and sick leave would accrue through virtue of service and that work on Sundays ... Saturdays and Sundays in a number of cases would be overtime and the penalty rates apply for the work on those days.

Now obviously in an industry such as this where sometimes a roster is worked, then I guess it has to be accepted that for some people Saturday and Sunday, even those permanent employees, would be ordinary days. But most ... I can't highlight the clause, but my understanding going through the award in some detail earlier was that there is that reference in there to the ordinary working week shall be no more than 5 days which, as I've said, would normally be taken as Monday to Friday.

PRESIDENT: Yes. I've had this argument before, of course, often on merit, but at least once before on interpretation, which was referred to by Mr Sherry this morning. The situation of certain nurses in the public hospitals was referred to, and it's a well-known fact that many of them, perhaps married women, only work Saturdays and Sundays as casuals.

Now, I take it that it would be your view (if this clause applied to nurses, say, who only work Saturday and Sunday) that the only penalty they would receive for that would be the penalty that would be payable to

PRESIDENT: day workers, working Saturdays and Sundays. No extra for being casuals.

MR BROTHERSON: That is our submission, Mr President.

I'm fully familiar with the situation with nurses only working weekends. My wife's in that precise situation, or has been in the past.

PRESIDENT: I see.

MR BROTHERSON: Again, I think we're getting very much to the question of merit ...

PRESIDENT: That's merit. That's merit, of course.

MR BROTHERSON: ... but a lot of people ... there are people and there are nurses that I'm aware of who do have, say, part-time or even full-time work during the week on the usual 9.00 to 5.00 basis (or what would be a more normal 9.00 to 5.00 basis), who then of course try and maximise their income, for other reasons, by working casually at weekends.

Now those people I think do so knowing full well that they have no comeback, if they're sick on those days and if they are away, say, a period of holidays, they're not going to be paid for those days.

And I think most people, certainly in the nursing area that I'm aware of, do so in the full knowledge of that.

PRESIDENT: Yes, it's just another case, I suppose, that we could point to that really should be looked at on merit by the interested parties. I don't mean just in this award, but other awards where this kind of thing arises.

It ought to be made clear just what the intention is. However, that's as you say, largely merit and this Commission cannot be concerned with merit in questions of interpretation.

PRESIDENT: Mr Brotherson, operative date?

MR BROTHERSON: We would see that if an interpretation is given, the operative date could be (as you've said, it's at your discretion, sir) from today, but it would be our view that the way we have argued has been what is applying and what should have been applied in days gone by.

PRESIDENT: Yes, but if it was against you ...

MR BROTHERSON: If it was against us, certainly we would expect a ...

PRESIDENT: ... you'd be arguing for a prospective date, wouldn't ... ?

MR BROTHERSON: I think I was anticipating that perhaps we had a solid case.

I would certainly think it would need to be prospective from some type of date so that people in the industry could be fully familiarised with the decision and the application.

PRESIDENT: Thank you, Mr Brotherson.

Mr Sherry, anything in response?

MR SHERRY: Just a couple of points.

Mr Brotherson referred to the definition on page 6 of double time, in the hotels sections of the award and drew attention to the fact that the ordinary hourly rate did not make any reference to, amongst other things, the 25% loading.

I just make the point that, aside from the fact that they're two very different awards, the loading for casuals is very clearly expressed in the casual provision in the Hotels Award.

I don't think there can be any argument about it. And therefore, there's no need to include any reference in the hotels definition of double time of whether the 25% is included or excluded, because the

MR SHERRY: casual clause is quite clear.

I just conclude by emphasising the last question, or the question you asked Mr Brotherson when he concluded his submissions, is the point that I had picked up and I would emphasise in terms of the fact that the 25%, it makes very clear in sub-clause (a) of 52, is in lieu of annual leave, sick leave and public holidays.

Now logically, as you've pointed out, Mr President, if a person works on Saturday or Sunday exclusively, or even for part of their week, if they do not receive the 25% as part of their base rate then they are logically not being compensated for annual leave, sick leave and public holidays.

And we would argue very strongly that as a matter of logic a person expects to be compensated when they're a casual employee for annual leave and sick leave, because they don't receive those things, whether they work on a Monday to Friday or a Saturday or a Sunday. Because a permanent employee and a part-time employee, as is very clear under this award and almost all awards I'm familiar with, most certainly if they work on Saturdays and Sundays as part of their normal hours 40 hours, or 38-hour week, the days or the hours they work on the weekends - the Saturdays, the Sundays, the public holidays - those hours do contribute to their annual leave and sick leave entitlements.

Their annual leave and sick leave entitlements are not discounted by that proportion of the hours that they work on Saturdays or Sundays.

And this award, as I say, makes it very clear that the 25% for the calculation of the rate is in lieu of annual leave and sick leave. And they are entitlements that a casual is very clearly excluded from under

MR SHERRY: this award, therefore it's a matter of logic that they should be compensated for that.

And as a matter of logic, on a Saturday and Sunday, their hourly rate should include that compensation, which is the 25%.

PRESIDENT: Yes. I remember a rather tenacious Mr Edwards arguing that if that's a reasonable interpretation, then it is unreasonable to suggest that the compensation for sick leave, annual leave and public holidays should be paid at twice the rate for Saturdays and Sundays, given that certain casuals might also work weekdays.

I think Mr Edwards argued that a full-time person can only receive, say, 10 or 12 public holidays per annum. A person who is a casual, who works mainly weekends, but certainly during weekdays, could in fact over a period of time pro rata accumulate more than they should for that reason. And so, the argument becomes very convoluted.

On the one hand if you don't give them anything, they don't get any compensation. If you paid them at the rate of double time and time and a half there is a chance that they might, pro rata, be over-compensated.

So I don't think it's easy. It ought to be dealt with on merit, but we're going to have to do the best we can on this.

MR SHERRY: I just make the point that the rate for Saturdays and Sundays, whatever that they may be (and in the motel section is time and a half on Sundays) is compensation for ... and these were consent matters. I'm not aware of decisions in respect to the level of the penalty rate for Saturday and Sunday. They are compensating for other factors other than annual leave, sick leave.

PRESIDENT: Oh yes.

MR SHERRY: They are compensation for unsociable hours etc.

And as I say, they're consent matters that have largely been established in the dim past. I'm not aware of a formal decision setting specific percentages for penalties on Saturdays or Sundays. There may be one, but not one that comes readily to mind.

So that is another issue.

PRESIDENT: Oh, there is a famous weekend penalties case at the Federal level, in the 40s.

MR SHERRY: Thank you, Mr President.

PRESIDENT: It seems that you're going to have to leave it to me, Mr Sherry.

Thank you.

I will reserve my decision on this matter.

That concludes this hearing.

HEARING CONCLUDED