

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T.No 1837 of 1988

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

re clause 23(e) - inclusion in
annual leave pay of penalty
addition

PRESIDENT

HOBART, 6 April 1989

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: I'll take appearances, thank you.

MR EDWARDS: If it please the Commission, **EDWARDS T.J.** I appear with **MR H. HARRIS** for the Tasmanian Confederation of Industries.

MR EDWARDS: Thank you, Mr Edwards.

MR NIELSEN: If it please the Commission. My name is **NIELSEN P.L.** and I represent the Baking Employees and Salesmen's Federation, Tasmanian Branch.

PRESIDENT: Thank you, Mr Nielsen.

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

PRESIDENT: Thank you, Mr O'Brien.

MR EDWARDS: Thank you, Mr President.

Mr President, this application seeks the interpretation of subclause (e)(i) of clause 23 - Annual Leave of the Bakers Award, which is the provision which details a method of payment for employees proceeding on annual leave.

So far as is relevant to these proceedings, that provision states, and I quote:

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

In other words, we seek the interpretation of the first sentence of that provision.

It is the true meaning of these words which is in dispute primarily between

MR EDWARDS: the Tasmanian Confederation of Industries, along with its members, and the Bakery Employees and Salesmen's Federation.

That disputation between those organisations has manifested itself in an application to the Commission by the Bakery Employees and Salesmen's Federation for a hearing to settle an industrial dispute between the BESF and Nu-Bake Bakery. That application is identified as T.1827 of 1989.

PRESIDENT: Has that been heard, Mr Edwards?

MR EDWARDS: It has been listed once before the Commission, Mr President, but it was adjourned to enable these proceedings to take place.

PRESIDENT: Thank you.

MR EDWARDS: The disagreement on interpretation between the parties was so fundamental to the determination of that dispute that the TCI elected to make the application the subject of these proceedings in order that the matter should be resolved as expeditiously as possible given that Commissioner King, to whom that matter was assigned, is not permitted to interpret award provisions over which the disputation arose.

As is required by the Commission's criteria in interpretations, I intend to apply specific facts to this matter and have elected, in that respect, to use the matter raised by Mr Nielsen's application in respect of Nu-Bake Bakery, although the circumstances are, we submit, extremely common and apply throughout the industry.

The employee concerned therefore is a Mr Paul Oakenfall who is classified as a machine operator in his employment at Nu-Bake Bakery at its premises at 11 Hobart Road, Kings Meadows.

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PRESIDENT - EDWARDS

MR EDWARDS:

Mr Oakenfall works on a static roster, the hours of which I will detail by way of exhibit.

PRESIDENT:

Thank you. It will be Exhibit A.

MR EDWARDS:

Thank you, Mr President.

Exhibit A details the ordinary hours of work of Mr Paul Oakenfall and shows that he works on 5 days of the week, Sunday to Thursday inclusive, between various hours: Sunday 4.00 p.m. to 12.06 a.m., Monday 10.00 a.m. to 6.06 p.m., Tuesday 8.00 to 4.06. Wednesday and Thursday, the same as Tuesday.

I won't deal with the question of remuneration just at the moment except to the extent to say that the difference between the parties revolves around the amount of \$30.03, which is shown under the heading of 'shift' under the heading of 'remuneration' which is best called I think, for the purposes of these proceedings, 'the Sunday loading' which I understand the union - through Mr Nielsen - contend should continue to be paid to Mr Oakenfall during a period of absence on annual leave and presumably I guess, on annual leave paid out on termination.

That contention will be vigorously contested by the employer and by the TCI in this application.

It is our belief that such a claim is beyond the reasonable interpretation of the award prescription.

I wish to turn now to an examination of the award provision and in so doing indicate that, in my view, the first words in the provision in question that require consideration is the term 'amount of wages'.

And I think answering that question will go all of the way, in our submission, to answering the question of interpretation before the Commission.

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PRESIDENT - EDWARDS

MR EDWARDS:

The term `wages` is not defined by clause 7 of the award, and thus, in our submission, it is necessary to discover, if possible, from the body of the award, what can be reasonably understood by that term.

The noun `wages` is used in the heading to subclause 1 of Division A of clause 8 - Wages Rates which is found on page 7 of the consolidated copy of the award, and that provision goes on to prescribe respective weekly wages payable to adult employees - in the case in question, an amount of \$293.10 in current terms.

It is therefore our submission that the term `wages`, wherever appearing in the award, can only be realistically construed as meaning the appropriate weekly sum of money defined in subclause 1 of Division A of clause 8, or alternatively, a derivative of that computed in accordance with subclause 3, which is the juniors, or subclause 4 - Apprentices.

Subclause 1 of Division A of clause 8 says:

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

Returning briefly now to clause 23, which says:

"All employees before going on annual leave shall be paid the amount of wages they would have received".

I note and ask the Commission to note that the terminology of those prescriptions is that I've just quoted are identical, and in our submission must obviously be referring to the same thing, which can only be the rates specifically

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EDWARDS

MR EDWARDS: enunciated by subclause 1 of Division A of clause 8.

We also take comfort in this regard in the observations made by yourself, sir, in T.368 of 1986.

PRESIDENT: You'd be one of very few to take any comfort from anything I say or write, Mr Edwards.

MR EDWARDS: Indeed, sir. Indeed. You do occasionally get things right and I think you should be applauded when you do.

PRESIDENT:

MR EDWARDS: And I do so now. In matter T.368 of 1986 - which was an interpretation - your reasons for decision on 30 May 1986, you said at page 8, and I quote:

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

I observe that the same situation applies here. There is no definition per se of the term `wages`, thus it is appropriate, in our view, supported in our submission by the award terminology itself, to apply a consistent approach to the term `wages` as to that you have used in T.368 of 1986, and to use that term as meaning the classification rate clearly specified in subclause 1 of Division A of clause 8.

In our submission, at this point, it may be said that prior to going on annual leave, Mr Oakenfall is entitled to be paid the amount of \$293.10 for each week that he is

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PRESIDENT - EDWARDS

MR EDWARDS:

absent on annual leave. That is the amount of wages he would have received during the period, had he been at work.

According to our negotiations that have taken place in respect of this matter with the Bakery Employees' and Salesmens' Federation, what remains to be determined is whether the balance of the first sentence of subclause (e)(i) of subclause 23 supports a contention that, in addition, Mr Oakenfall is entitled to receive the amount of \$30.03 per week.

In our submission, that question turns on whether \$30.03 - I will take the Commission to the appropriate clause in a moment - can be deemed to be wages.

It is our strong contention that the words of the award provision cannot reasonably be construed to lead to such a conclusion.

The only words that remain in clause 23, that could be construed as being in any way ambiguous, are the words 'ordinary time', although we argue that, given the definition of 'wages', it is superfluous to give further consideration to those words. Nevertheless, I will endeavour to provide our understanding of the proper construction of that term in respect of Mr Oakenfall's employment by Nu-Bake Bakery.

The ordinary hours of work, or the ordinary time hours employees engaged under Division A Clause 8 engaged in the production of bread, are specified in subclause 1(a) of clause 9, which is Hours of Work.

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EDWARDS

MR EDWARDS:

That clause provides, so far as is relevant, that the ordinary hours of work for those persons are: on Sunday between the hours of 4.00 p.m. Sunday and 4.00 a.m. on Monday.

On Monday for persons engaged on Sunday to Thursday inclusive, between 10.00 a.m. and 10.00 p.m. On Tuesday between 8.00 a.m. and 8.00 p.m. On Wednesday 8.00 a.m. till 8.00 p.m. and Thursday, 8.00 a.m. until midnight.

When those ordinary hours or ordinary spread of hours - however described - are compared with Mr Oakenfall's rostered hours, which are shown in Exhibit A, it can be noted that all hours fall within the spread of ordinary working hours prescribed by clause 9.

In our submission, the term 'ordinary time' means an employees ordinary 38 hours per week worked within the spread of ordinary hours. I don't any other realistic interpretation could possibly be given to that term.

This term, as used in clause 23, in our view, in no way impacts on the calculation of wages to be paid and is, in our view, probably included only to make clear that overtime and other extraneous matters are not to be used in calculating wages for the purposes of annual leave.

Doesn't this statement concede that wages are the total amount accruing to the employee

I indicated before that I'd take the Commission to the area in the award where the \$30.03 payment is derived and that arises from subclause (ii)(1) of clause 12 of the award which is found on the consolidated copy at page 17.

Where it says, under the heading of 'Sunday work' - and it's (1):

"Employees whose normal week of 38 hours is worked on Sunday to Thursday inclusive

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PRESIDENT - EDWARDS

MR EDWARDS:

shall be paid a loading of ... [and I cut out a few words here] 50% in addition to his ordinary rate for all time worked on a Sunday."

I've taken the words out there which allowed for the phasing in of a ... from 45% to 50%.

PRESIDENT:

Time and a half in other words.

MR EDWARDS:

Time and a half in essence, sir, yes. Although it's a loading of a percentage factor not in itself stipulated as being time and a half and it's to be compared, I guess, with (2) where the rate of double time is prescribed for people who would be working overtime on a Sunday because their hours are worked Monday to Friday.

PRESIDENT:

You cannot be paid less than that.

MR EDWARDS:

Less than ...?

PRESIDENT:

The time rate, plus 50%.

MR EDWARDS:

For work on a Sunday, no. Indeed.

It is our submission that the payment computed in accordance with this provision does not constitute wages in the context of this award and is rather in the form of a loading or an allowance for the disability of working ordinary hours on a Sunday, which we say don't arise on annual leave.

And we say that very quickly and go straight off the subject otherwise we'll be accused of introducing merit considerations.

There are, in our view, numerous authorities that ordinary rates or ordinary pay or ordinary wages means the award classification rate and excludes extraneous payments, such as penalty rates, shift allowances.

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PRESIDENT - EDWARDS

MR EDWARDS:

And to nominate just two areas where that has been dealt with, I refer again to T.368 of 1986 to which I've already referred and I refer you again, sir, to page 79 of transcript of T.91 of 1985 and page 20 of T.189 of 1985, both of which were interpretations before yourself, both of which record a quote from the Macquarie Dictionary.

And I quote it here again, with approval. It says that:

"Ordinary pay [and I interpret that to mean also payment for ordinary time] means remuneration for an employees normal weekly number of hours fixed under the terms of his employment but excluding any amount payable to him for shift work, overtime or other penalties."

When that interpretation is applied to this award - that is, ordinary wages - we believe it excludes extraneous payments and it is beyond reasonable dispute that the \$30.03 Sunday loading or 50% Sunday loading can be used in computing ordinary wages for the purposes of annual leave.

That amount, in our submission, is an add on to wages or, in our view, an extraneous payment. Whereas expressed in clause 12 of the award, it's in addition to the ordinary rate which expression, in our submission, is interchangeable to the term 'wages' used in clause 23(e)(i) - that is, the term 'ordinary rate'.

In any event, in our view, such a loading cannot be construed to form part of wages as used in clause 23 which, in turn, is used specifically and very clearly in subclause (1) of Division A of clause 8.

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EDWARDS

MR EDWARDS: Returning now to clause 23, we say Mr Oakenfall should be paid for his annual leave in accordance with this exhibit.

PRESIDENT: It will be Exhibit B.

MR EDWARDS: Exhibit B, Mr President, shows how we believe the wages for Mr Oakenfall should be calculated. And that is, that his wage, in this case \$300.30 which includes an over-award component, which accounts for the difference between 293.10 and \$300.30 is paid. And I've done it on the basis of the taking of 4 weeks of annual leave for simplicity's sake. That he gets 4 weeks at his wage of \$300.30 which is 1,201.20, plus his annual leave loading, which is an amount equivalent to the minimum wage, which is \$231.10 currently, giving a total payment of \$1,432.30. And it is that, we believe, sir, that constitutes the proper interpretation of sub-clause (e) of clause 23.

PRESIDENT: Then how does the Commission read into (i) of sub-clause (e) of 23? The fact that the loading for Sunday is excluded but the over-award payment is included.

MR EDWARDS: An over-award payment is made at the discretion of the employer, and we would submit for the purposes of these proceedings that it forms part of wages, because it is an ordinary part of wages which is paid for his ordinary work Sunday to Thursday inclusive, or, if he worked Monday to Friday it would be payable on those days in lieu of the amount of 293.10.

All the employer has done by paying an over-award payment is substituted the amount of 293.10 with \$300.30.

PRESIDENT: But can ...

MR EDWARDS: Certainly on a strict interpretation of the award one could argue that you could reduce the wage rate by

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PRESIDENT - EDWARDS

MR EDWARDS: reverting back to the award rate of 293.10. However, we think that would be unreasonable.

PRESIDENT: So you're saying that ordinary time in this context includes ...

MR EDWARDS: Can include an over-award payment.

PRESIDENT: ... over-award payment and therefore presumably to carry that ...

MR EDWARDS: A rate for each and every hour worked.

PRESIDENT: Yes, so then the hourly rate for overtime would also include the over-award payment would it?

MR EDWARDS: In fact it does. The calculation of over-award payment ... of overtime et cetera is done on the basis of the over-award rate. It's not reduced back to the award rate for the purpose of calculating overtime.

PRESIDENT: Well then if that's the case, what would the loading be for Sunday work? 50% of the ...

MR EDWARDS: Of \$300.30.

PRESIDENT: 50% of 1/5th

MR EDWARDS: Yes, following the calculation you'd reduce it back to an hourly rate, but the hourly rate would be computed, using the \$300.30.

PRESIDENT: Doesn't say that anywhere in the award does it, that over-award payment should be included for all purposes?

MR EDWARDS: No, it doesn't. It doesn't deal with over-award payments at all in this award which is not surprising, because it's a minimum-rates award. So it would be very unlikely to be dealing with the question of over-award payments, they being payments made at the discretion of the employer. And I could have, I guess,

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PRESIDENT - EDWARDS

MR EDWARDS: for simplicity's sake deleted the over-award payment from the documents I've handed to the Commission. But to do so, would have produced a picture which wasn't totally accurate, and for that reason I've included it.

PRESIDENT: Yes, except that you're asking this Commission to accept the fact that Exhibit B is a fair interpretation of the award. I really could not read into the award anything that says the ordinary-time rate shall include something that's paid at the discretion of the employer.

MR EDWARDS: No, indeed I understand that, sir. What we're dealing with is the method of calculation. I've shown in Exhibit B what that results in for Mr Paul Oakenfall, because your guidelines on interpretation - or the Commission's guidelines - stipulate you must use an actual example.

PRESIDENT: Oh indeed, indeed.

MR EDWARDS: But I could have picked any bakery in the State where they don't pay over-award payments and use that, but I've simply used the one that Mr Nielsen's highlighted in his dispute notification, and thus am stuck with the situation where an over-award payment is made.

But our submission is that the method of calculation is four by the employee's wage, as we've already sought to define it, which is in our submission as far it's relevant to this interpretation, four times the rate shown sub-clause (i) of division (a) of clause 8 for the taking of four weeks' annual leave which constitutes wages.

Now then of course, obviously there's an over-award payment. That's at the employer's discretion.

PRESIDENT: We'll probably both regret this,

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PRESIDENT - EDWARDS

PRESIDENT: Mr Edwards ...

MR EDWARDS: Probably.

PRESIDENT: ... but didn't I read somewhere in the award that over-awards up to a certain amount are absorbed anyway?

MR EDWARDS: That's already been done in this case.

PRESIDENT: So the over-award was in fact more?

MR EDWARDS: \$5 and some cents higher than that originally, yes, sir.

PRESIDENT: Yes. That's all right. That explains that.

MR EDWARDS: There was a \$5.10 amount which could be absorbed as a result of the second-tier agreement. So that has already been taken care of.

Mr President, I've endeavoured to avoid transgressing into the area of merit arguments during the course of the submission. However, I cannot resist the temptation to simply observe that annual leave loadings had their genesis in cases such as this where persons were claiming to be losing the penalties that they normally received during periods when they were on annual leave, that they would normally have received when at work.

I feel moved simply to record that Mr Oakenfall does receive an annual leave loading. I know that's not a matter that you'll take into account in interpreting the award, but I feel that I couldn't have resisted the temptation to at least make the observation.

To briefly recap, Mr President, we would argue that the entirety of this interpretation turns on the interpretation of the word wages as used in subclause e(i) of clause 23 which we say to be read consistently with the way that term is used throughout the award. It must be the amount of money shown in subclause (i) of division (a) of clause 8 because it says that they are the wages that are payable and for that reason we would argue that the interpretation can be none other than that classification rate, to steal

MR EDWARDS: your words from T.396.

PRESIDENT: And should I find myself in agreement with you, should that be done prospectively or retrospectively?

MR EDWARDS: I think the Commission is well aware of my attitude to retrospectivity, Mr President. So I would say that when you find in our favour, you should declare prospectively that that is the correct interpretation of the award.

PRESIDENT: Yes.

Mr Edwards, would you care to address the Commission, since we've been applying our mind to the question of wages, would you care to address the Commission on your interpretation of clause 30 of the award?

MR EDWARDS: Briefly, Mr President, although it's a question without notice ... perhaps I should put it on the notice books. We would argue that it uses the term weekly wage down to the stage of three lines above the bottom and that's clearly been, in our view, explained today what that term means and it says:

"In addition thereto, such overtime or other penalty rates, if any, that may have occurred during the relevant period".

It is our submission that whilst on annual leave - and it unfortunately goes slightly to a merit situation - that there has not occurred any penalty rate payment because the employee hasn't had the disability of working on the Sunday for which the 50% loading is paid.

PRESIDENT: Yes, but the award says he's to be paid the rate that he would have received had he been and the heading of clause 30 is `Full Week's Wages`.

MR EDWARDS: Well it says, `the wages he's to be

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PRESIDENT - EDWARDS

MR EDWARDS: paid and we've already defined to you, sir, in our submission this morning what the term wages mean. It does not include any rate of payment arising from clause 12 nor indeed from clause 11.

PRESIDENT: But clause 30 seems to suggest that that's not right.

MR EDWARDS: I tend to disagree. I believe it's talking about penalty rates that have occurred during the relevant period. In my view, clause 12 only comes into operation if an employee actually works on a Sunday.

PRESIDENT: Well, go back to Exhibit A. This man worked on Sunday ...

MR EDWARDS: When he works, yes.

PRESIDENT: ... or would have worked on Sunday. He could not have been paid ...

MR EDWARDS: For which, when proceeding on annual leave, he's paid the amount of money or the amount of wages ...

PRESIDENT: Yes.

MR EDWARDS: ... as can reasonably be determined from the award, which is the classification rate in clause 8 - Wage Rates.

PRESIDENT: He's to be paid the wages that he would have received had he been at work on those days.

MR EDWARDS: Yes.

PRESIDENT: And had he been at work on those days he would have been required to work on Sunday. He could not have been paid less than 50% extra for Sunday.

MR EDWARDS: I agree. I agree with that.

We would still argue that clause 23 - Annual Leave makes the payment for periods of leave quite specific, that he paid the amount of wages he would have received. Now wages, I believe, is clearly defined in the award.

PRESIDENT: Yes. But you reject clause 30 then ...

MR EDWARDS: Yes, I do. Yes, I do.

PRESIDENT: ... as providing some assistance?

MR EDWARDS: I do for the purposes of computing annual leave payments, because I believe the annual leave clause can stand alone and can clearly be made sense of without resort to any other clause in the award, with the exception of the clause that makes clear what the term wage means.

PRESIDENT: Well now, there's a provision in the award that deals with shift work.

MR NIELSEN: Section 5.

PRESIDENT: Clause 5, is it?

MR EDWARDS: Subclause (v) of Division A of clause 8.

PRESIDENT: Doesn't that also make it clear?

MR EDWARDS: Well it makes clear that there is added, during a period of sick leave or annual leave, specifically an amount equivalent to shift allowances.

PRESIDENT: And the second paragraph?

MR EDWARDS: But if I ... that's exactly what I've just read. That it makes it specific

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PRESIDENT - EDWARDS - NIELSEN

MR EDWARDS: that that is added to annual leave.

PRESIDENT: Yes.

MR EDWARDS: But if you go to clause 12, which is the Sunday loading, it does not say anywhere in there specifically that that rate is to a period of annual leave, as opposed to the shift allowance where it specifically says that it shall be.

PRESIDENT: Mm. Would it ...

MR EDWARDS: Which means obviously to me that it would not otherwise have been added on.

PRESIDENT: Would it be necessary do you suppose, Mr Edwards, to spell out in the award that the Sunday loading must be added on, when the award says in effect that you cannot pay anyone less than - for convenience sake - time and a half for a Sunday? In what circumstances could someone be paid less? If the person was sick on a Sunday, could he get less than time and a half?

MR EDWARDS: In my view, yes. In my view, he could.

PRESIDENT: Mm. Perhaps we shouldn't go into the area of sick leave, but it does beg the question.

MR EDWARDS: Well that's going to a very contentious area and case law on the interpretation of the words used in sick leave clauses is legion. And I think one of the ... the most used one says that in fact you are not paid shift loadings whilst on sick leave.

PRESIDENT: Well then let's come back to 12 then. For all time worked on Saturday, Sunday and public holidays the following rates shall apply.

MR EDWARDS: Yes.

PRESIDENT: Now certainly this man did not work, but the annual leave clause 23 says

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PRESIDENT - EDWARDS

PRESIDENT: that he is to be the wages he would have received had he worked.

MR EDWARDS: The wages he would have received - that's the point that we're arguing over, sir. The definition of the term wages, as we have said, that wages means the classification rate.

If I go back to Exhibit A, we've shown under the heading "Wage" what we construe the term wage to mean. And that is, an amount - in the case of this employee - of \$60.06 per day.

So he's being paid the amount of wages he would have received in respect of the ordinary time he would have worked. What he hasn't been paid is shift loadings or penalty rates which may have applied in some or all of those days had he actually worked on them.

PRESIDENT: Yes. But you're asking ...

MR EDWARDS: It's the add-ons or the extraneous payments that have been excluded.

PRESIDENT: You're asking the Commission to accept that the wage - to use your term - for a Sunday is in fact ordinary time.

MR EDWARDS: Yes. And then there is a penalty rate applicable to it.

PRESIDENT: Yes.

MR EDWARDS: As loading.

PRESIDENT: Yes.

MR EDWARDS: I mean it's the same as any other sort of loading.

PRESIDENT: Yes.

MR EDWARDS: I mean the wage for doing "X" work could be, for example, \$1 an hour, but it may go to \$1.10 an hour if that work unduly dirty or offensive.

That doesn't mean when you proceed on annual leave that you get paid at the

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PRESIDENT - EDWARDS

MR EDWARDS:

rate of \$1.10 an hour. It's a loading to compensate for specific factors.

I don't want to go into merit considerations because I'll get a smack.

PRESIDENT:

Oh, no you wouldn't, Mr Edwards.

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PRESIDENT - EDWARDS

PRESIDENT:

Yes, very well, thank you.

Mr Nielsen or Mr O'Brien?

MR NIELSEN:

Mr President, we attempted back in August of last year to negotiate this between the particular company and our association. And there was a feeling, and still is, of goodwill and cooperation there and the desire from both parties to resolve this particular issue. And ultimately as time developed and at some stage we were of the thinking that we were coming together to resolve it and then as later events came to being we drifted away from that resolving.

And then there was an agreement between the two parties - and I emphasise that very loud and clear - that we go before a Commissioner to settle the matter. And as you're aware and as has been repeated by my colleague, Mr Edwards, that a section 29 did take place and then during that hearing the application by the Chamber of Industry is now before you.

Now we say loud and clear and this particular employee, member, that his ordinary working year was 48 weeks of Sunday to Thursday. His ordinary working week for the year was Sunday to Thursday for the 48 weeks. Now as I understand that was the position for the last 4 years, his ordinary working week.

And then when he proceeds for the 4 weeks of the year for his annual leave we believe that that award and that section 23 clearly says, and the complete sentence says:

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

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PRESIDENT - NIELSEN

MR NIELSEN:

We say there is no argument; there is no confusion. That's loud and clear. And that the loading that applies for the Sunday working automatically in accordance with the award should apply to his annual leave.

Secondly, Mr Chairman, as it's been related here this morning that the section 30 which has been referred to ... where it says, and I'm repeating the words:

"... at the weekly wage prescribed for a week of 38 hours and in addition thereto such overtime or other penalty rates, if any, that may have occurred during the relevant period".

We again believe that spells it out loud and clear. And also in reference to the section 5 which again acknowledges the going on annual leave, that particular shift loading shall apply for purposes of annual leave and sick leave.

Now we are concerned that the dispute ultimately has eventuated before you here today. We were quite hopefully confident that the matter would have been resolved between the employer and our own association and then in the ultimate situation when we got before Commissioner King. But as I've indicated to you before we briefly only want to submit a couple of exhibits, if I may, Mr President.

PRESIDENT:

That will be Exhibit C.

MR NIELSEN:

These, Mr Commissioner, were also submitted in the section 29 dispute. And I make reference to the first column on the left-hand side. This exhibit, as you are aware with the heading, it's from the Industrial Law Review and it's in reference to December 1971 and on that left-hand column, that third paragraph might I

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PRESIDENT - NIELSEN

MR NIELSEN:

say where it starts off with the words:

"In a statement issued by Moore, J., the Presiding Judge, short points were made in respect of each of the findings as to the first claim which was made only for blue collar workers and members of the Amalgamated Postal Workers Union of Australia that the Benches were persuaded that the present situation could result in people going on leave ...

And this is where I want to emphasis, these words:

"... at a rate less than their normal rate and this could produce hardship and that the Benches were inclined therefore, after the National Wage Case, to take steps to rectify the situation probably along the lines of some Tasmanian determinations which provide that an employee going on leave shall be paid an amount equivalent to that which he would have earned had he remained on work, but not including overtime".

MR NIELSEN: And another exhibit ... I just wish to take the Commission's time very briefly, is in regards to a food award.

PRESIDENT: Exhibit D.

MR NIELSEN: This is the new Food Shops Award and was sent to me from one of the Victorian colleagues, and all I wish to emphasise here, Mr Chairman, that it's in regards to night fillers and that they are paid their wages plus 30% and their 17.1/2% loading. And I understand that makes reference ... if you go to the page which is numbered page 5, and it refers to (c). Clause (c).

"The ordinary time rate or pay for a weekly employee engaged on nightshift shall be at the appropriate ordinary weekly rate described in sub-clause (ii) plus 30% nightshift premium".

And the emphasis I want to say there, that in that particular award they emphasise the night premium that they pay to those night fillers.

And also I think in regard to page 10, or correction, the page ... the sheet that is referenced 10 down on clause (e), and it says there in clause (e):

"During a period of annual leave an employee shall receive a loading of 17.1/2% on the rate of wage prescribed in sub-clause (ii)".

All I desire then is to say once again, that in those the particular employees receive their ordinary week's pay plus their 30% loading plus their 17.1/2% leave loading.

Mr President, I believe the award is clear. I believe that, and I am

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PRESIDENT - NIELSEN

MR NIELSEN: not able to bring evidence, but I am somewhat of the thinking from comments made, that the practice of paying leave loading is already in operation.

MR EDWARDS: Leave loading ... I hope so.

MR NIELSEN: Apologies. Thank you, Mr Edwards. The practice of paying the Sunday leave loading is already in operation. Forgive me. And I therefore contend, Mr President, again, that the particular employee in question, which precipitated this situation here today, is, and has, been working his ordinary working week of his ordinary year as 48 weeks a year, consistent to Sunday to Thursday, and therefore the 4 weeks' balance of his year we believe that he should be paid at ordinary week ... at ordinary rate which picks up that 50% loading on Sunday.

PRESIDENT: That in effect, is what sub-clause (ii) on page 10 of your exhibit says, doesn't it? You haven't referred me to it, but I note it says:

"Where no ordinary time rate of pay is fixed for an employee working under the terms of his employment, the ordinary time rate of pay shall be deemed to be the average weekly rate earned by him during the period in respect of which the right to annual leave accrues."

MR NIELSEN: Yes. Yes, Mr Chairman, oh, Mr President.

That's my submission, Mr President.

PRESIDENT: Yes. Do you have a view as to whether the interpretation that I must give, should be retrospective or prospective? It's a sort a lottery isn't it?

MR NIELSEN: Well no disrespect ... I've got grey hair and I'm an old dog in the

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PRESIDENT - NIELSEN - EDWARDS

MR NIELSEN:

Commission, both State and Federal, and retrospectivity never goes down very easy when it's raised. And I'm about winning a principle or trying to maintain a principle first, Mr President.

Now retrospectivity or prospectivity is another question. I suppose it's a difficult one, Mr President.

PRESIDENT:

I said it's a bit like a lottery when it comes to interpretation.

MR NIELSEN:

Yes.

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PRESIDENT - NIELSEN

PRESIDENT: You could be right retrospectively or you could be wrong retrospectively.

MR NIELSEN: Yes. I'd have to be consistent - and you've put the question to me - to say that if it's the determination that supports our submission well then consistent with that, of course, previously the justice would prevail accordingly, or the consistent attitude would prevail accordingly.

PRESIDENT: Is that another way of saying, retrospectively?

MR NIELSEN: Yes, Mr President.

PRESIDENT: Yes.

MR EDWARDS: No.

MR NIELSEN: Yes, that's what I thought you said, Mr Nielsen.

MR EDWARDS: He meant prospective.

PRESIDENT: Thank you, Mr Nielsen.

MR NIELSEN: Thank you, Mr President.

PRESIDENT: Mr O'Brien?

MR O'BRIEN: Thank you, Mr President.

I would indicate that I have spoken to Mr Edwards about this particular problem in relation to another employment situation and it's certainly timely that this matter should come before the Commission for interpretation in view of that other situation.

In relation to the provision in the award, which is the subject of interpretation, it's our argument that it's meaning is clear on the words contained within the provision.

Mr Edwards, this morning mostly, sought to rely upon one word and the meaning of one word in a phrase to arrive at a conclusion, which no doubt he's bound to attempt to seek.

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PRESIDENT - NIELSEN - EDWARDS - O'BRIEN

MR O'BRIEN:

However, it's my submission that that conclusion is not reasonably open to the Commission in this matter.

The words in question are "all employees" and this applies only to Division A for the purpose of these proceedings, but I see that these words are repeated in relation to other divisions. Their significance in relation to the example that Mr Edwards uses is minimal, because there is no ordinary time work on a Saturday or Sunday, as I read the other divisions.

Perhaps there may be circumstances where they arise, but I can't see them.

However, in relation to this area the provision reads:

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

Now the amount of wages Mr Edwards asks you to rule is the minimum rate prescribed in clause 8. And indeed, in clause 8 the rates are described as, or are introduced as:

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

And to properly understand what that means you need to go the hours clause in each division. I don't think Mr Edwards would really argue that clause 8 is the be all and end all clause as to the question of remuneration or wages for the purposes of the award were concerned.

Because if he were to argue that, if you look at clause 38 - Payment of

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O'BRIEN

MR O'BRIEN:

Wages, it reads:

"Wages shall be paid weekly
no later than Thursday in
each week".

If Mr Edwards argues that wages only means those amounts prescribed in clause 8, then what he's saying is that there would never be able to be a prosecution under this award for non-payment of, for example, shift loading or overtime amounts, Sunday loadings or the Sunday premium because there's no requirement to pay them at any time, but they may remain payable and if not paid there's not necessarily an obligation to pay them at any specific time.

I think that's a nonsense.

I think to read down the word wages to mean something quite artificial in the circumstances does not assist in the interpretation of the provision.

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O'BRIEN

MR O'BRIEN:

We come back to the provision in question. The test in my view is to examine the ordinary time which would have been worked, that is, to exclude any time worked which is not ordinary time consistent with the hours provision of the award, and then to calculate the amount of wages that the employee would have received in respect of that time. And I think that is a reasonable way of interpreting the provision.

You analyse what ordinary time would be worked and then you ascertain the amount of wages they would have received in respect of that ordinary time, and that is the amount which needs to be paid. Then the additional amount comes into question, and that is not relevant for the purpose of this interpretation.

Those, in my submission, are the natural meaning of the words. I would point out that there isn't reference to the ordinary rate of pay, the rate of pay as described in clause 8.

I guess it would have to be said that there are a great many awards in this and in other jurisdictions which could be better expressed. But to say that is not to say that they ought to be given meanings which are not reasonably open on the words which are there, having regard to all of the circumstances.

I take heart from the Commission's reference to clause 30, because that clause, in addition, seems to me to make it clear that wages, for the purpose of this award, also include other amounts.

Now, for the purpose of annual leave, we would not contend that overtime was included, because overtime is not ordinary time. And those words were not dwelt upon at any point by Mr Edwards when he sought to convince

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O'BRIEN

MR O'BRIEN:

you of a meaning of clause 23(e)(i).

Ordinary time is officially ascertained with reference to the appropriate provision, which is clause 9 - Hours of Work, in this case. And in clause 9 it reads:

"The maximum ordinary hours of work for employees mentioned in this division shall be 38 per week to be worked in 5 consecutive days of 7 hours 36 minutes per day (exclusive of meal breaks), within the following spread of hours:

1(a) In respect of employees engaged in the production of bread other than dough makers ..."

I'm not sure of the status of the employee in question, but assuming that he ...

MR EDWARDS:

Machine operator.

PRESIDENT:

Machinist.

MR O'BRIEN:

Well, it seems then, he is an employee engaged in the production of bread and he is not a dough maker.

PRESIDENT:

Not making big dough, anyway.

MR O'BRIEN:

Well, no, he is ...

MR EDWARDS:

You're excused.

MR O'BRIEN:

No, I'll steer clear of that. There's too many puns that you could introduce.

And then it goes on:

Sundays - between the hours of 4.00 p.m. Sunday and 4 00 a.m. Monday ..."

And then recites the daily hours. The hours in Exhibit A appear to fall within the ordinary hours as prescribed.

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PRESIDENT - O'BRIEN - EDWARDS

MR O'BRIEN:

It is my submission that with reference to that clause, one can understand what the award means when it is talking about the amount of wages they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.

It is clear in this case that the employee's ordinary time was regularly rostered on the days Sunday to Thursday. And the amount of wages he would have received if he had been at work at that time would include an amount equal to time and a half on Sunday and ordinary time Monday to Thursday.

It is that amount which, it appears to me, the award requires be paid in the case of this employee, and I guess there would be quite a number of other employees who would be in similar circumstances, as a significant section of the industry covered by this award would operate ordinary time shifts on the days Sunday to Thursday.

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O'BRIEN

MR O'BRIEN:

And that would therefore mean that this provision, which is in dispute at more than one establishment, may not be being observed in the appropriate way.

Which comes to the question of the prospective/retrospective or contemporary order which might be made one way or the other in these proceedings.

I'm not sure of the real significance of retrospectivity in the sense that if the award which has substantially not been changed for the relevant period of time, that might be considered with regard to retrospective claims. That even if the Commission interpreted the provision in a contemporary sense only, or prospectively, the words would still be ... wouldn't have changed their meanings.

The only real consequence of retrospectivity is the effect, if any, on proceedings which have taken place, perhaps in the Magistrate's Court, for prosecution. I don't know that in fact if a retrospective determination would require any determination by a magistrate to be reviewed.

But I think in reality if the Commission, for example, were to find operative from the date of decision, that the award meant what I suggest it meant and that therefore there was a dispute and this employee and perhaps others haven't been paid correctly that there was a breach. I don't think that that would harm or hinder the question of the meaning of the award in the past.

The Commission's interpretation would be quite powerful in relation to what took place in the past.

So as to the question of retrospectivity, I'm really in the hands of the Commission as to what it

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O'BRIEN

MR O'BRIEN: feels it ought to do. I don't really think that a great deals turns on it in that sense.

I do take some comfort also from the definition of wages in the Act. It's a very small definition and it only extends the meaning of the word wages to mean also salary.

PRESIDENT: I think you have to go back to the 14th Century to discover the difference between wages and salary. I forget the precise definition ...

MR O'BRIEN: Well I'm not capable of doing that ...

PRESIDENT: ... attributed to wages ...

MR O'BRIEN: ... but perhaps we can research that period.

PRESIDENT: ... but salary was only a shortened or a modern version of salt.

MR O'BRIEN: Yes. I think perhaps it's ...

PRESIDENT: Workmen were paid in salt, I think, at one stage.

MR O'BRIEN: Yes. Well perhaps the Romans did that, I'm not sure.

PRESIDENT: Now it's simply rubbed into the ...

MR EDWARDS: Might reintroduce that.

MR NIELSEN: At another period they paid them in rum, I think.

MR O'BRIEN: Yes. Well that's a `rummary`.

Wages - the definition of wages includes salary. And going back to what Mr Edwards said about the meaning of the word wages and the reference to transcript, if that's what the Act says I would draw to the attention of the Commission that a salary is often an amount which includes consideration of work beyond what's normally considered ordinary hours, or work outside of the span of

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PRESIDENT - O'BRIEN - EDWARDS - NIELSEN

MR O'BRIEN:

ordinary hours in lieu of overtime. That's not always the case, but it's capable of meaning that.

And the reason that I draw that to the attention of the Commission is that I think to define wages as narrowly as Mr Edwards suggests is not really consistent with the Act.

Having said that, it seems to me that the meaning of the words are clear. This matter was drawn to my attention by a member who raised this matter with the employer to find that that employer had the same attitude.

My immediate response on reading the clause was to agree with the member's interpretation. Having looked into the matter further and heard the discussion today I'm further convinced that, indeed, the words mean as I indicated: that the amount of wages that an employee would have received in respect of the ordinary time he would have worked, had he not been on leave, includes payment of that Sunday premium or indeed a shift loading for work, for example, on a Thursday evening after 8.00 p.m.

And I would ask the interpretation sought by the TCI not be granted. That the award be interpreted in the manner I suggest.

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O'BRIEN

PRESIDENT: Thank you, Mr O'Brien.

MR O'BRIEN: Thank you.

PRESIDENT: Mr Edwards?

MR EDWARDS: Just briefly, Mr President. I don't agree with all that has fallen from my colleagues at the other end of the table.

In particular I don't agree with Mr O'Brien's observation that I wouldn't seek to argue that what was in clause 8 is the be all and end all of wages. In fact I would seek to argue that and have sought to argue it and will continue to argue it and continue to maintain it. So to that extent I don't think his submission was quite accurate.

We maintain, Mr President, that the term wages used in clause 23 and used in clause 8 should, for the purposes of the award, be said to have the same meaning. To decide otherwise is to make the award almost indecipherable to those persons charged with that responsibility in the community, namely the employers out in the field who are required to pay wages.

If we can interchange words throughout an award and have them having different meanings every time we use them, then really, the whole document becomes totally indecipherable and we are going to have chaos.

Mr O'Brien in his submission used two separate descriptions of moneys payable to an employee, and to that extent I tend to agree with him. He talked of the term remuneration. He then spoke of a different term called wages.

I agree that there is a differentiation between the two. Remuneration, in my submission, is what an employee receives in his pay

MR EDWARDS:

packet at the end of a week. In the context of this award, the term wages means that rate of pay fixed by subclause 1 of Division A of clause 8.

And the two can clearly be distinguished, because the term remuneration, in our submission, includes or could include such extraneous payments such as the Sunday loading.

But I note that clause 23 subclause (e)(i) does at no point say that an employee receives his weekly remuneration, but instead says he gets his wages. And I believe quite clearly wages means that amount defined in the award as wages.

It tells us in subclause 1 of Division A what an employee's wages are for the purposes of the award. And it spells them out quite clearly with no ambiguity at all. And it is that interpretation that has persisted in this industry for untold number of years.

I did a little bit of research before coming here today and determined that at least as far back as 1971, the terminology in the award is as it is now as far as the description of how you calculate someone's pay when they go on annual leave as they get their wages.

Now, Mr Nielsen indicated that he thought most people in the industry were already paying in accordance with his interpretation.

MR NIELSEN:

I didn't say that.

MR EDWARDS:

Well, if I have misunderstood what you have said, I apologise. But certainly my information from the Bread Manufacturers Association is that it is not normal for the Sunday loading to be paid to employees when proceeding on annual leave.

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EDWARDS - NIELSEN

MR EDWARDS:

It really only applies to the major plant bakeries predominantly, all of whom are represented by the Bread Manufacturers Association, all of who have confirmed with me this morning that they have never paid the Sunday loading to employees proceeding on annual leave.

To that extent this interpretation does potentially have some very serious consequences for the industry at large because this rate has never been paid to an employee proceeding on annual leave. It is for that reason why we have sought to come before the Commission today because we do view it very seriously.

I think I should also acknowledge Mr O'Brien's observation that he has in the past raised this issue with me in respect of another bakery in the south of the State. He has indeed. At the same time we informed him that we didn't agree with his interpretation. So indeed he might describe this application as 'timely'. I don't know quite when that was. It was about 6 months ago, I think.

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EDWARDS

MR EDWARDS:

In our view, Mr President, it would be to make a nonsense of the award to interpret the word wages to mean anything other than the rate clearly spelt out in clause 8 - Wage Rates and we urge the Commission to adopt our interpretation.

And indeed, if the employee organisations then feel aggrieved, they have a right to have the matter considered on merit.

If it please the Commission.

PRESIDENT:

Yes. Thank you, Mr Edwards.

I was, whilst listening to you with one ear, reading with one eye ...

MR EDWARDS:

I'm insulted.

PRESIDENT:

... subclause 4 of section 49 of the Industrial Relations Act. It seemed to me that that has a little bit each way because it says:...

PRESIDENT:

"Except as otherwise provided in an award [I'll omit the irrelevant parts] an employee who is employed on a casual or part-time ... [no] other than an employee who works on a part-time or casual basis works in any one week for less than the maximum number of hours fixed by the award relating to his employment, he is entitled to be paid in respect of the work performed by him during that week wages at the rate fixed by the award for a full week's work if, at all times during the ordinary working hours in that week, he is ready and willing to work."

Now didn't we read somewhere in this award that the minimum rate to be paid to anyone who was ready and willing to work was a full week's wages calculated to include all those things that might be attracted?

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PRESIDENT - EDWARDS

MR EDWARDS: Well it's that point that we differ on, Mr President. In my view, the term wages in respect of the Bakers Award and as used, therefore in the Act means the rate fixed by clause 8 and nothing else.

To import anything else into it is to make a nonsense of the terminology of clause 8 of the award.

PRESIDENT: Yes. But doesn't it say, even in the Act ...

MR EDWARDS: No, it says, 'wages', sir.

PRESIDENT: Yes. But it says, 'for a full week's work'.

MR EDWARDS: Indeed. And we ...

PRESIDENT: Yes. Well what would you got for a full week's work?

MR EDWARDS: Well we have said, in Exhibit A, that the wage for a full week worked for Mr Oakenfall is \$300.30. That's using the term wages, as it can be clearly understood, out of the Bakers Award.

And I don't think it's reasonable to import into the Bakers Award observations made from the Act if they're not consistent with the terminology of the award in looking at an interpretation of the award proper.

Now clearly the award, in our submission, does define the term wages. It tells you precisely what the term wages means. It gives you the dollar amount of what the wages are for each and every employee, with the exception of apprentices and juniors where you've got to calculate them.

PRESIDENT: But clause 30 ... I know we really can't take much notice of headings, but clause 30 ...

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PRESIDENT - EDWARDS

MR EDWARDS: None at all.

PRESIDENT: Well it depends on your point of view, doesn't it?

MR EDWARDS: They're only a guide, sir.

PRESIDENT: Oh, yes.

MR EDWARDS: I'll come back and argue a different way next time.

PRESIDENT: But it says, 'a full week's wages'.

MR EDWARDS: Yes, it's strange terminology and I think it supports largely one observation that Mr O'Brien made that awards in the past have been very loosely drafted and it does cause concern for everyone.

And that's one of the reasons why we keep coming back to the Commission to have interpretations on almost precisely the same matter and that is the term such as ordinary pay, ordinary time, wages, salary - I notice you have dealt with that issue in respect of the health sector - the difference between salary and wages.

And, in fact, I take some comfort from what you said in that decision, even though I haven't got it here.

So, in my view, it's the loose terminology of the award that gives rise to these sorts of issues that what we're now faced with, potentially at least - I'm fairly confident you'll decide in our favour anyway - but potentially we're faced with employers being faced with retrospective adjustments to employees going back to the statute of limitations - presumably is the only realistic limitation - over an interpretation which, in our submission, was reasonably open to them on the words used in the award.

The end loser is the employer which is neither fair nor reasonable, in

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PRESIDENT - EDWARDS

MR EDWARDS: our submission. But I know that's something you don't have to take into consideration as you consider an interpretation.

But we do say that, in our submission, our interpretation of the award is very clearly open to anyone reading the actual words in the award. That is, the term wages which again is defined in clause 8.

PRESIDENT: Do you have any recollection of the way in which the leave provision is drafted or couched ... the terms in which it is couched for shift workers? Not in this award, but in awards generally. Isn't it cast in ...?

MR EDWARDS: The either/or?

PRESIDENT: Yes, that's what I'm getting at, that an employee going on a shift work shall be paid the wages he would ordinarily receive ...

MR EDWARDS: Either/or.

PRESIDENT: ... or 17.1/2%.

MR EDWARDS: Indeed.

PRESIDENT: Yes. Well if it says wages ...

MR EDWARDS: But that's a provision that's ...

PRESIDENT: ...that would include shift penalties, wouldn't it?

MR EDWARDS: Well it could in the context of that award.

PRESIDENT: Yes, I know.

MR EDWARDS: But again, you'd have to look at the context in the award we were dealing with. I'm saying ... I'm only dealing with this award quite deliberately and defining the term wages as defined in this award, which is not a shift work award as such. That's already been before the Commission.

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PRESIDENT - EDWARDS

MR EDWARDS:

But the term wages is used in the annual leave clause. It says:

"An employee is paid his wages when he goes on leave."

Now very clearly, we say the term wages can be taken to mean that amount described, particularly in clause 8.

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EDWARDS

MR EDWARDS: With no ...

MR EDWARDS: Mr O'Brien says ...

MR EDWARDS: Oh, I'm sure he does.

PRESIDENT: Yes. On payday what do you get?

MR EDWARDS: He gets his remuneration.

PRESIDENT: Well no, the award says ...

MR EDWARDS: That's his other word he used.

PRESIDENT: The award says he gets his wages.

MR EDWARDS: Yes, indeed. Well maybe that's what it'll resort to.

PRESIDENT: So they could be a bit short, do you think, on payday?

MR EDWARDS: It's an interesting concept. It's not one that I'd oppose. Very interesting concept.

That again, in my submission, highlights the difficulties in trying to read documents such as awards which have been so loosely framed in the past. And I'm sure you're more aware of it than anyone else, being charged with the responsibility to try and interpret the things. I mean, it's absolutely incredible.

PRESIDENT: I sometimes wonder what I've done to deserve all these interpretations.

MR EDWARDS: I could provide a list a mile long, but I don't think they're relevant for transcript, sir.

PRESIDENT: On that note I'll reserve my decision, Mr Edwards. Thank you.

That completes the hearing.

HEARING CONCLUDED

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PRESIDENT - EDWARDS