

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

**T. No 309 OF 1986**

**IN THE MATTER OF** interpretation  
of the Fire Brigades Award  
re Clause 5

PRESIDENT

HOBART, 21 January 1986

**TRANSCRIPT OF PROCEEDINGS**

PRESIDENT: I'll take appearances thank you;  
firstly, from the applicant.

MR TOMES: **KEVIN TOMES**, United Firefighters'  
Union.

MR CREW: **PAUL CREW**, State Fire Commission.

MR THOMSON: **JOHN THOMSON**, State Fire Commission.

MR LOWE: **TERRY LOWE**, State Fire Commission.

PRESIDENT: Thank you.

Mr Tomes, it is your application,  
will you please now address it.

MR TOMES: Thank you, Mr President.

You gave us an interpretation to read  
outside and I think that our  
application would come under the  
fourth guideline there, an award  
must be interpreted according to the  
words actually used, even if it  
appears that the exact words used do  
not achieve what was intended.

Within the fire service, we have two  
separate organizations. We have the  
Urban Fire Service and they are  
covered by the United Firefighters'  
Union and we have the Officers of the  
Commission Association.

We had separate pay days, or ends of  
pay periods, in the fact that our pay  
period finished on the Tuesday and  
the Officers of the Commission pay  
period finished on the Thursday.

This created a fair amount of hassle  
if persons changed from the United  
Firefighters' Union award over to the  
Officers of the Commission or vice  
versa.

So, at our suggestion, the Commission  
decided to change the pay days and  
rationalize it to everybody being  
paid on a Thursday.

To do this, they decided to pay the

MR TOMES:

Urban Firefighters an extra two days' pay, therefore making the pay period to finish on the Thursday.

Now, when they did this, they paid us 12 hours' pay - 2 days' pay at 6 hours per day. Now, we can't rationalize that at all in the fact that we work shift work - 10-hour shifts on the day shifts, 14-hour shifts on the night shifts. And according to our award, we work a 40-hour week with two hours' overtime. Now that is clause (a)(ii) in the determination which states 40 hours per week worked in four shifts with an extra duty allowance of two hours.

Now, our interpretation of that is that if we work a 40-hour week, the normal working week is 5 days, so therefore the minimum it should have been would have been two 8-hour days.

If you look through our determination a little bit further, in clause 6 it clarifies our week, in fact it clarifies two 10-hour day shifts and two 14-hour night shifts; four on and four off. So, one could say that we work a four-day week with four days off. So, therefore, that would bring it up to probably 10.5 hours' pay instead of the 6 hours that was paid.

PRESIDENT:

Can I stop you there?

If one were to look at clause 6. 'Rosters' and calculate the actual hours, you would find that two day shifts of 10 hours would be 20 (I presume that includes a meal break) and two 14 hour shifts totals 28; 28 and 20 is 48 hours. You are supposed to work 42.

MR TOMES:

Yes, I was in omission there. We work over an 8-week cycle which averages out to 42 hours per week: A 42-hour week over an 8-week cycle. This week we might work 48, next week

MR TOMES: it might work down to 36 within the pay period. So it is averaged out over an 8-week cycle to 42 hours per week.

PRESIDENT: How could you work a 36-hour week, if you worked in accordance with these rosters?

MR TOMES: 34, I am sorry: Sometimes it works out to a 34-hour week. Over an 8-week cycle it averages out to 42 hours per week.

PRESIDENT: So, you could have two 10-hours and a 14. Yes, I follow.

Right, thank you.

MR TOMES: Yes, the whole argument, as far as we are concerned, is the fact that it states in our wages board determination that we work a 40-hour week. And we feel that there has been an omission on the Commission's part, in the fact that they should have divided that 40 hours by 5, and come through with 8 hours per day - two 8-hours or, if you so wish, taking the shift into consideration, it might work out to a 4-day week and four days off - taking the rostered hours into consideration.

PRESIDENT: Mr Tomes, without even attempting, at this stage, to interpret the award, would I be correct in assuming that if you were paid incorrectly, according to your calculations, for the two days, then it would surely follow that on your own calculations you were overpaid on the next pay day? Because, I presume, you haven't lost any money.

Are you following me? If you were only paid for 12 hours, in addition to two weeks' pay. I presume - are you paid fortnightly or weekly?

MR TOMES: We are paid fortnightly.

PRESIDENT: Then if you are paid two weeks plus

PRESIDENT: 12 hours in order to bring your pay day into line with the Officers, then on the next pay day you must have surely been paid, what - 12 days of 6 hours?

MR TOMES: Sorry?

PRESIDENT: Well, perhaps you were paid 14 days at 6 hours.

MR CREW: In fact though, Mr President, if I may interject there: They were paid their two normal fortnightly pays plus two additional days of 6 hours per day. So they received their normal fortnight's pay, plus two days, each based on two sevenths of their normal weekly pay.

PRESIDENT: So, in a period of four weeks and two days, from the shift worker's point of view, they were paid a total of four weeks pay plus 12 hours?

MR CREW: Yes, that is correct, sir.

PRESIDENT: I am with you now, thank you.

Mr Tomes?

MR TOMES: I don't think that I can add anything else at this stage, Mr President. I would only reiterate the fact that we are of the opinion that it should have been two 8-hours' pay instead of the two 6-hours, by our determination.

PRESIDENT: Can you point to the relevant part of the award that says that a day shall consist of 8 hours?

MR TOMES: No. It does not say that a day should consist of 8 hours. It doesn't specify that we work a 5-day week under the shift workers.

PRESIDENT: Does it specify that you work a - how many week roster?

MR TOMES: 8 weeks, sir.

PRESIDENT: Does it say that anywhere?

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PRESIDENT - TOMES - SUB

MR TOMES:

No, I don't think it specifies that. I think that that was just an agreement between the Commission and the union, at the time. It wasn't ratified under the determination.

Clause (a) (ii) states:

"Shift work. Shift Firefighters, Watchroom Operators and Officers, - The rostered hours of duty shall be 40 per week plus 2 extra duty hours per week to be paid for as prescribed in clause 1 (Loadings) hereof. Such rostered hours of duty shall be worked in shifts of 10 or 14 hours in accordance with roster of hours in clause 6 hereof."

Clause 6 just states:

"The Roster of Hours for Shiftwork Firefighters, Watchroom Operators and Officers shall be as follows in rotation: 2 day shifts 0800 hours to 1800 hours. 2 night shifts 1800 hours to 0800 hours. 4 days off."

PRESIDENT:

And is that roster adhered to?

MR TOMES:

That roster is adhered to, yes. It is never altered.

PRESIDENT:

Well then, if it is never altered, I take it that I am misinterpreting the intention of clause 6, because I thought you were telling me that sometimes it would be possible, in one week of seven days, to work only 34 hours.

MR TOMES:

That is true, Mr President, but it says there:

"The Roster of Hours for Shiftwork Firefighters, Watchroom Operators and Officers shall be

MR TOMES:

as follows in rotation:"

Now, because it rotates, over an 8-week cycle, at some periods you can come down to a 34-hour week. The next week you might be working a 48-hour week.

PRESIDENT:

But that would mean only working three days in a week, wouldn't it?

MR TOMES:

Yes.

PRESIDENT:

Yes, thank you.

Yes, very well, who is going to open the batting?

MR CREW:

Mr President, Paul Crew.

I would like to firstly refer to the Fire Brigades Award, Part 2, Conditions, Clause 5, sub-clause (a) (ii) which Mr Tomes has referred to, where he says that the shift work firefighters' rostered hours of duty shall be 40 per week, plus two extra duty hours per week.

Now, the loadings that they receive on their pay conditions for that clause are quite specific about the - If I may quote them, the loading calculated on the basis of 36.25% of the total basic wage and margin for skill comprising of "15% for shift work; 7.5% for weekend work" and 3.75% for public holidays and a 10% loading for the two extra hours above 40 per week.

In practice, it has been that the firefighters work regardless of Christmas day, public holiday, whatever - wherever their roster falls within the week.

Over the 8-week cycle it does work out at 42 hours per week. Now, we

MR CREW:

interpret that as being a 7-day week. The reason we interpret that is because the award is quite specific in sub-clause (a) (i) and sub-clauses (a) (iii) and (iv) where it refers to day work watchroom operators and day work firefighters and recruit firefighters. And it is quite specific when it says, the ordinary hours of duty shall be worked in 40 hours per week, Monday to Friday inclusive.

So, it is not specific with the ordinary firefighters because it simply talks about 40 hours per week plus 2 hours. So, therefore, our interpretation has always been that it - that the week is a 7-day week - 42 hours.

To calculate the two days' pay, we simply said that they received two sevenths of a normal week's pay to give them their two days.

The people who were involved, watchroom operators and recruit firefighters and so on, who are required to work a specific 40-hour week, Monday to Friday inclusive, were, in fact, paid two fifths of a week's pay, to give them their two days.

That was the rationale under which the extra two days' pay was provided to the firefighters.

PRESIDENT:

I am sorry I didn't take a note then of the cycle. Is it 8 weeks, did you say, or 4?

MR CREW:

No, sir, it is an 8-week cycle.

PRESIDENT:

So that, on your interpretation, over a period of 8 weeks, each employee - each shift-work employee - should be paid 56 sevenths?

MR CREW:

That is correct.



PRESIDENT: Eight times seven.

MR CREW: Yes.

PRESIDENT: Well now, in the instant case, would that calculation produce that result?

MR CREW: Yes.

PRESIDENT: Would those employees have been paid, over the relevant 8-week cycle, a total of 56 sevenths?

MR CREW: Yes, plus the two days.

MR THOMSON: Yes, Mr President. On the 8-week cycle they were paid their 56 sevenths, plus two extras which made it 58 sevenths over this particular 8-week cycle which we are referring to.

PRESIDENT: So, you are submitting that they haven't lost anything?

MR CREW: That is correct, sir, yes.

PRESIDENT: Well now, Mr Crew, are you able to point, with any authority, to the relevant part of the award that entitles you to spread a roster over 8 weeks?

MR CREW: No, I am not, Mr President. I am not sure that it spells it out there.

MR LOWE: I'd just like to comment there, Mr President. It isn't contained in the award. I believe it was some time ago, where it used to say that it was an 8-week cycle. But it has just been, as of now, taken for granted that with an average of 8 weeks you will have a 42-hour week. It is not specifically in the award. I believe it was some time ago.

PRESIDENT: Do you likewise subscribe to the view that one day constitutes one seventh of a week's pay?

MR LOWE:

Yes, Mr President, by virtue of the fact that that is what we have been doing for some years. That is the way we have interpreted the award.

For instance, if someone leaves the service tomorrow, regardless of the pay day, he is paid a number of days on a seventh fraction as to when he left. That has been standard procedure.

On reading your paper that you gave us before we came in here, the problem that we have is not so specific that we can actually point to a section in the award that actually says yes or no or requires clarification.

PRESIDENT:

But you see my dilemma is in interpreting a particular provision of the award, one way or the other.

My immediate feeling is that you are both wrong.

MR LOWE:

That may well be so, sir. But I think that our argument is based on the fact that that is what we have done ever since we have been working on this roster. Whether that is right or not, you can decide. But that is what has been accepted at this point in time and I would say by both parties.

PRESIDENT:

Could we just test the Fire Commission's attitude a little further and tell me, if you will, at what point a shift-work firefighter would be entitled to overtime; after six hours' work, if 6 hours' work constitutes a day's pay or after 14 hours' work or after 10 hours' work?

You see, the award says:

"Excepting..."

I am looking at page 7, Overtime (a) (ii).

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PRESIDENT - LOWE

PRESIDENT:

"Excepting as elsewhere prescribed, continuous shift workers shall be paid for all time of duty outside the rostered hours of duty at the rate of double time."

Well now, if the rostered hours of duty on a particular day covered a span of 14 hours, one would assume that, if 15 hours happened to have been worked on that day, overtime would be paid for the fifteenth hour. And that would mean that your argument of six hours constituting a day's pay would fall to the ground.

MR LOWE:

Well, when working a night shift and you are required to go over your 8 o'clock finish in the morning by an hour, you would, in fact, be paid the fifteen hours - the extra hour. And that is laid down in section 7 of the award for every fifteen minutes' work. So, in fact, you are paid overtime the moment you do exceed your roster of hours, whether it was a 10-hour shift or a 14-hour shift.

PRESIDENT:

Yes, well that was exactly the point I was making, or attempting to make, Mr Lowe.

So that a shift would constitute a day's work and, therefore, a day's work could be either 14 hours or 10 hours, not 6.

MR THOMSON:

Or no hours at all, Mr President.

PRESIDENT:

You couldn't be working a shift if you are not working at all.

MR THOMSON:

The view we had there was that, because the men are either

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PRESIDENT - LOWE - THOMPSON

MR THOMSON:

working or not working, they are working either 10-hour or 14-hour days or they are on days off. We couldn't split the men and say, "Well these men would work two 10-hour days and these men would work two 14-hour days and these men would work nothing", and pay these 14 and these 10 and these nothing.

As far as we are concerned, this was the most equitable way of paying everyone the extra two hours.

We could have taken a `per annum` figure and divided by 365 and paid them two days` extra, which works out exactly the same as dividing the weekly by seven and paying them two days` extra.

PRESIDENT:

Yes. Or you could have paid them according to roster, so that they would have different amounts in their pay packet each pay period, depending on the roster.

MR THOMSON:

I haven't got it in front of me, Mr President, but the intention of Part I, Wages, was that the firefighters get a - or the shift personnel get a constant wage throughout the year, so that they are not - if they are working the 34 hours one week and working the 48 hours the next week, over the 8-week cycle it runs out to the 42 hours, so they get a continuous 42 hours` pay per week.

PRESIDENT:

Is that stipulated in the award?

MR THOMSON:

I haven't got it in front of me, Mr President, but yes, I am pretty sure it is in Part I, Wages.

Well, as I say, I apologize. I haven't got it, but I think that both the union and the Commission would agree that it is far easier and more acceptable for the workers to have a known wage coming into their hand every fortnight, rather than having different wages. They can work their

MR THOMSON:

budgets out.

I don't think there is any dispute as to that. It only comes down to working out these two extra days.

PRESIDENT:

Yes. I am not quarrelling with you. I can only repeat what I said to Mr Lowe - or was it Mr Crew. If I am to interpret this award, in accordance with the words actually used in the provisions of the award, I need something to work with.

If I can't find authority in the award for averaging wages over a given period: If I can't find authority for the proposition that a day constitutes a seventh of a week's pay, it should be pretty obvious to you what the fate of this application will be.

And bear in mind, once the award is interpreted, that is the way it shall be read, unless subsequently varied, of course.

Of course, any decision of mine is subject to appeal, that is understood or ought to be understood.

Mr - is it Mr Tomes or Mr Tames?

MR TOMES:

Mr Tomes.

PRESIDENT:

Can you point to the relevant part of Part I which says that wages shall be averaged over a period?

MR TOMES:

No, I haven't got Part I with me, Mr President.

PRESIDENT:

Well, I do.

MR TOMES:

The only thing I can point to is in Part II, Conditions on No. 1 Loadings. But it doesn't actually specify that it will be paid over the 52 weeks - averaged over the 52 weeks.

MR LOWE:

It doesn't actually say, Mr President, but in Part I, Loadings,

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PRESIDENT - TOMES - LOWE - THOMSON

PRESIDENT: Yes, but couldn't it equally be interpreted that for each hour worked in accordance with the award, or if you like in accordance with the roster, when a point is reached that more than 40 hours in any one week has been worked, or more than 15 hours, or 10 hours, as the case might be in any one day, is worked, the appropriate loadings for the excess would be payable in accordance with clause 1.

I agree, it would produce a rather strange result, because in each pay period employees would be paid differing amounts. Perhaps in some pay periods they may not receive any loading at all - in other pay periods they may receive the whole of the eight hours.

MR LOWE: A very large pay and a very small one.

PRESIDENT: That's right.

MR LOWE: Which is not uncommon in some other industries.

PRESIDENT: That's quite true. The award perhaps may be quite deficient in that it does not authorize the averaging of wages over a given period or a number of periods.

MR LOWE: I agree with that, sir, including the actual 8-week cycle which I am sure was there in the award some time ago but has been deleted.

PRESIDENT: You see, it doesn't say (unless it says so elsewhere) that each day's work shall stand alone. So one might conclude that before any overtime, or loading (if you wish), is payable, there must be worked in any one week a total of more than 40 hours, or at least 40 hours. Do you follow what I mean?

The only authority for payment on a daily basis might be found in clause 7 (a) (ii) which says:

MR TOMES: two 8-hour days. So we think that we should have been paid the 16 hours' pay and not 12. We think that there is four hours' shortage.

PRESIDENT: You may well be correct, but have you in fact done an actual calculation from the roster to ascertain how many hours were in fact worked over that 8-week and 2-day period?

MR TOMES: No, I haven't, Mr President, and I would have thought that the secretary had done but he is sick today and couldn't get here. I didn't discuss that particular aspect with him.

PRESIDENT: Because that should become a simple question of fact. If one were to look at the roster and say, "Well, I worked on each of those days a total number of 'x' hours. I have been paid 8 weeks plus 12 hours. Now, I am either paid correctly or incorrectly."

MR TOMES: This would of course, I think, vary with the - no, it wouldn't. No. I haven't done the exercise, Mr President.

PRESIDENT: Thank you. Well, gentlemen, if there is nothing more to be put on this, I will reserve my decision and you will be advised of the outcome in due course.

HEARING CONCLUDED