

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 4146 of 1992
T. No. 2225 of 1989
T. No. 2311 of 1990

IN THE MATTER OF an application
by the Australian Social Welfare
Union to vary the Community
Services Award

re making of a new award

COMMISSIONER GOZZI

HOBART, 14 December 1993
continued from 10/12/93

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Are there any changes in appearances this morning? If not, Mr Paterson.

MR PATERSON: If the commission pleases, we're in a position this morning to present to the commission an agreed document and we'd seek to have this document accorded the standing status of an award and seek to have an operative date for these provisions of next Monday, 20th December. The award goes to a number of matters, principally and the most substantive of which are annual leave and sick leave, grievance and discipline procedure and a consultative clause. In addition there is a clause on the standard clauses up to clause 6 of the state commission's pro forma for awards, provision for blood donors, the state parental leave standard is also enclosed - included, provision for a telephone allowance where a person is on call, required to be on call and other relatively minor matters such as notification of award and notice board, leave without pay and holidays with pay are also included as in first aid allowance.

I believe that this represents significant advance. There are a couple of matters that I had hoped we would have been closer to being able to put on the table at this time, in particular the terms of engagement or contract of employment - however there are a few minor details that preclude that from being tabled at this point in time, however they're essentially minor matters that I think can be easily accommodated.

The timetable that we put on the table at the previous hearing here is still one that the employers and the union are committed to, and employers through the CSCOT and the TCCI have remained committed to 1st March and an implementation period before then.

There is - this of course was done at some - some rush. I gave the draft to our typist yesterday afternoon and didn't have an opportunity to have a look at it before I came here and there is one small change which I've handwritten in on the annual leave page. And there is one other matter -

COMMISSIONER GOZZI: Perhaps if you give me a copy I can sort of follow you through.

MR PATERSON: I'll provide you with the best copy - the photocopy also wasn't working brilliantly this morning so that's the hard copy off the printer.

COMMISSIONER GOZZI: Is that ASWU.12 - what's the - Mr Hunter, what's the next exhibit number?

MR PATERSON: I have a couple of other things also -

COMMISSIONER GOZZI: I just need an exhibit number - just a moment. I think it's ASWU.12.

MR PATERSON: I think our last exhibit that we presented was the redrafted award which was ASU.1.

COMMISSIONER GOZZI: Was it?

MR PATERSON: From my recollection - I think we're on to ASU.2

COMMISSIONER GOZZI: Thank you, Mr Paterson.

MR PATERSON: Because of one clause that was included at this point too - well I'll go through the - they're actually further copies - I'll go through the - through the document. Do you require a copy for audio? The first change that I'd seek to have made is in fact to the scope clause and I believe that it's a minor change. I have changed it in this copy. It's in (a)(v)(1), the full bench decision said, counselling, advocacy, information, referral and liaison services.

I think the intent is referral services, and it's a word that I'd seek leave and your assistance in changing to reflect what I believe was the intent.

Reference services is not a term used.

COMMISSIONER GOZZI: Whereabouts is that?

MR PATERSON: Clause 2(a)(v)(1) - it reads - now reads, counselling, advocacy, information, referral and liaison services. The full bench decision was reference and liaison services. I think referral and liaison services is the intent and the common expression that it be given in the - in the field.

COMMISSIONER GOZZI: I don't think there's any problem with that. Mr Fitzgerald, do you have a problem with that?

MR FITZGERALD: No - no problem at all, commissioner.

COMMISSIONER GOZZI: Yes, alright - we'll amend that that way.

MR PATERSON: Thank you. The next clause, the arrangement clause - and this will involve a minor renumbering, but I guess we're looking at renumbering at subsequent date anyway -

COMMISSIONER GOZZI: Yes.

MR PATERSON: - but the rest time clause is in fact not included, so delete rest time clause 18 on page 20. I suppose for convenience and - of what we - and consistency of what we put up today, the consequent changes should be made to the clause numbers and page numbers for the sick leave and

telephone allowance clauses, so the sick leave would consequently become clause 18 and the telephone allowance clause 19.

COMMISSIONER GOZZI: Okay.

MR PATERSON: The date of operation - if the commission is amenable to the proposition, the date of operation for this award would be 20th December.

MR FITZGERALD: It's just a question of whether that's a full pay period or - or not.

COMMISSIONER GOZZI: Yes, I was going to ask you about that.

MR PATERSON: The first full pay period on or after -

COMMISSIONER GOZZI: Yes.

MR PATERSON: - would be a - would be the most appropriate.

COMMISSIONER GOZZI: Okay. Right.

MR PATERSON: The savings clause remains the same - remains unchanged as what's presented here on paper. I've left the parties and persons bound to be filled in. I don't have the - I don't know that I have all the full details of the organisations that are in fact registered and seek the assistance of the commission in completing the award interest clauses there.

COMMISSIONER GOZZI: Yes, that will just reflect what we've currently got.

MR PATERSON: That's currently there. The annual leave clause is the one with two changes that result from lack of time to edit or check the product from yesterday's meetings. Annual leave, clause 7(a)(ii) - shiftwork leave - in the third last line the change is in fact to delete (7 days) and the - the second change consequent upon my not having time to check it is subclause (g) which should read: Annual leave provided for by this clause may, where the employer and employee so agree - and what's omitted after 'agree' is, provide at least - provide that at least 3 or 4 weeks may be taken in separate periods - sorry I'll go back to that - after the word 'agree' it should read: be taken in separate periods provided at least 3 or 4 weeks or 4 or 5 weeks in the case of an entitlement above are taken in periods of not less than 1 week.

COMMISSIONER GOZZI: What does all that mean?

MR PATERSON: I was of the view that it shouldn't be an unlimited access to broken leave periods which could see total

fragmentation of someone's leave entitlement. The intent and the meaning is that at least 3 or 4 weeks or 4 or 5 weeks may not be broken down into periods of less than a week. Where the employer and employee so agree -

COMMISSIONER GOZZI: Well effectively you've got broken leave and one of them must be 3 weeks in one hit -

MR PATERSON: No.

COMMISSIONER GOZZI: - and - what?

MR PATERSON: It's at least 3 or 4 weeks are taken in periods of not less than 1 week.

COMMISSIONER GOZZI: Alright well why would you say that then?

MR PATERSON: At least three of the 4 weeks -

COMMISSIONER GOZZI: The annual leave provided by this clause -

MR PATERSON: Oh, if we'd read it that way and then it would have a semicolon and then or 4 or 5 weeks in the case of somebody with an entitlement.

COMMISSIONER GOZZI: Mm. We'll just go off the record for a minute.

OFF THE RECORD

COMMISSIONER GOZZI: So that broken leave provisions - you'll just tidy that up and give me some words after the hearing.

MR PATERSON: Yes.

COMMISSIONER GOZZI: Okay.

MR PATERSON: There are no further changes to the - what has been provided to the commission in the rest of the document. The bereavement leave reflects the discussions we had in conference both with and without your assistance, Mr Commissioner. The blood donors - essentially an agreed - well entirely an agreed clause. The consultation procedures, change and redundancy I believe are one of the two most significant contributions that this award will make. It does provide a mechanism for proper consultation which all too often creates disputes in this industry and consequent upon suggestions that yourself - you yourself made at our last hearing, the provision in respect of negotiations and agreements on measures to avert adverse consequences where

funding is discontinued or discontinuous has been included in this clause as well.

COMMISSIONER GOZZI: Mm.

MR PATERSON: The disputes and grievance procedure I believe is probably among the best in this state's system and I trust and hope that it will in fact be of use to the industry. It provides for essentially three processes; 1), the tabling of a grievance by an employee; secondly it provides for - it allows for basically an in-house grievance procedure provided it meets certain principles and where that is not there, there is a procedure for employee counselling.

The clause further goes on to outline procedures in respect of written warnings and disciplinary action and termination of employment. And I might just also make the record on the comment - on the record - that this procedure is being used as of this week in an organisation that was muddling through its disputes and grievance processes and mixing up and messing up the - muddling up the two. I believe it will certainly meet the interests of employees and the employers and I believe also significantly meet the public interest requirements of an award of this commission.

COMMISSIONER GOZZI: Mm. Now one of the concerns I have about this particular provision was - I'm not sure whether it was included here now or not, about warnings being ruled off, so to speak.

MR PATERSON: That has been deleted from the -

COMMISSIONER GOZZI: Right.

MR PATERSON: - the original - the earlier provisions had - or the earlier proposals by the union provided for a - after a certain period that the matters, as you say would be ruled off. We've changed away from that and that's prescription is not included in any way. I still believe it will be an issue to be addressed but we will make a conscious effort to address it in our -

COMMISSIONER GOZZI: Alright.

MR PATERSON: - advice to members and I presume the TCCI will make an effort to address that amongst a number of other matters.

The other concern I did have, and I was reluctant to remove it from the procedure was in fact the provision in the employee grievance that would allow for an employee to be represented by the union at any stage in the process. We again have agreed to that - well that part of that sentence being deleted, but it is my firm belief that there will be occasions

when employees are not confident in dealing with processes and this clause does not prevent them in any way from having in the union involved - it's just written in a way that encourages the work place resolution without the union if at all possible at first instance.

COMMISSIONER GOZZI: Does that apply in all circumstances?

MR PATERSON: It applies where the written warning has been provided to the union and that will only be provided to the union according to roman (i) where it's requested by the employee.

So the written warning shall be sent to the union in the case of union members if requested by the employee and where such a warning has been provided to the union then the union may meet. So yes, once the union has the warning it will be because a member requested the union's -

COMMISSIONER GOZZI: Okay.

MR PATERSON: - involvement and then it -

COMMISSIONER GOZZI: Right.

MR PATERSON: - would happen by right.

COMMISSIONER GOZZI: Does that - what about summary dismissal circumstances - is that - is that covered anywhere?

MR FITZGERALD: It's probably in the termination clauses.

MR PATERSON: Point (f) is basically, work continues in its normal and additionally that nothing in this procedure shall restrict an employer's right to summarily dismiss where justified.

It was the intent also to include a termination clause - whether we do have a termination clause or it becomes part of a contract of terms of engagement clause remains to be seen.

COMMISSIONER GOZZI: Alright. Very good. The first aid allowance.

MR PATERSON: The first aid allowance has given effect to the state public service amount - they give an expression as an amount of dollars per week. I believe this won't have in terms of current practice a very large impact. I believe some people may be required to have it but not designated and that was one of the problems we had that I believe it occurs as a practice without having designated first aid officers. And that's the agreed form of wording that has resulted.

Holidays with pay - I should put on notice here that the

question of Launceston Cup Day is a matter that we would like to see as a leave reserved matter, essentially pending the outcome of another proceeding in this commission.

COMMISSIONER GOZZI: Mm - I think that's sensible.

MR PATERSON: Those people who will of course in the savings clause and in our advice to members - those people in our advice to members, those people in Launceston who have had the privilege of a half day holiday on Launceston Cup Day, we will remind them that that is one of the things that the savings clause should save for them if they have in fact expressly had that as a term of their condition - a term of their employment.

The following three -

COMMISSIONER GOZZI: Now what's this about by mutual agreement - the above holidays may be taken on alternate dates.

MR PATERSON: The issue there arose for me - was put to me in terms of people who do not celebrate Christian holidays - people of non English non Christian background who would rather celebrate another day, so by mutual agreement an alternate date can be put and that agreement would require reasonable notice and would have to in fact be agreement, so that somebody who - a Muslim may in fact take days other than Good Friday or Easter Monday to celebrate their religious holidays.

COMMISSIONER GOZZI: What if they work - what if they work on Good Friday?

MR PATERSON: The provisions - there are further provisions that are basically, I guess, also on leave reserved in respect of holidays with pay about the provisions that will be required where people work on their - work on public holidays. That in effect is one of the leave reserve matters that we will be coming back to as one -

COMMISSIONER GOZZI: Yes.

MR PATERSON: - of the major cost items.

COMMISSIONER GOZZI: I mean I take the point about people wanting to perhaps take a different day to what is on the Christian calendar, so to speak. Right? But the question of payment then becomes a real issue because obviously they'd be working on those days, so if somebody works on, say, Good Friday, is that ordinary time or is that penalty time - you can't have it both ways I wouldn't have thought.

MR PATERSON: I would - I would think that the logical course

of action is that it's ordinary time. If an alternate is substituted that would conversely mean that an ordinary day was substituted for the public holiday day.

COMMISSIONER GOZZI: What's the incidence of this type of thing in this industry?

MR PATERSON: I don't know.

COMMISSIONER GOZZI: No.

MR PATERSON: But given that we do have migrant resource centre type organisations it may be something that's not been accessible to people that they may like to use.

COMMISSIONER GOZZI: Mm.

MR PATERSON: The other - I suppose the other application would -

COMMISSIONER GOZZI: I mean you're not telling me that -

MR PATERSON: - be that any person may wish to do it if - if Show Day was for instance not a convenient day to take off they may substitute the Friday for the Thursday and work ordinary hours on the Thursday and to have a long weekend - that would be the other intent in terms of flexibility that it would provide for.

COMMISSIONER GOZZI: But Christmas carols will still be okay will they?

MR PATERSON: I don't mind what holidays people celebrate - personally I think we need more than 11.1/2 days - and I'm not going to win that argument in an industrial jurisdiction.

MR FITZGERALD: They can have as many holidays as they like as long as they're with pay.

MR PATERSON: The French are setting the example with a 4-day week and a 30-hour week. The leave without pay -

COMMISSIONER GOZZI: They've always been a pretty peculiar crowd, I'd have to say.

MR PATERSON: Indeed.

MR FITZGERALD: They're farmers.

MR PATERSON: 'Leave without pay' basically is giving effect to a discretionary capacity of any employer and any employment relationship.

The 'notice board' basically is a fairly standard, and given our industry it shouldn't be a difficult practice because most of the workplaces have a range of notice boards, and it is more often than not a matter of allocating space on it and providing access to it, rather than installing one.

'Notification of the award': the practical reality was one of making sure that each employee had access to it, rather than necessarily being given a copy, or kept in a secure filing cabinet. So that seemed to be the simplest way to give expression to that.

COMMISSIONER GOZZI: Just going back to the 'Leave without pay' is that intended to be as open-ended as it is in the context of periods and so on?

MR PATERSON: It hasn't been proposed on any front to put any limit on it and, essentially, it is at the employer's discretion.

COMMISSIONER GOZZI: So it doesn't impact for the accrual of - well, it can't for long service leave and so on beyond what's in the regulations, or whatever.

MR PATERSON: As in point (b) it basically extends the same sort of provisions as the Long Service Leave Act provides for. That it doesn't count as service, it similarly doesn't constitute a break in service.

COMMISSIONER GOZZI: Yes. I mean, I suppose it opens up the circumstances whereby you could say, 'Look, I want to go overseas', for whatever reason, for 12 months/2 years and so on, and effectively whilst it is at the employer's discretion you could have an argument as to if you had an appropriate replacement for the employee, and so on and so forth, that you hold the job open.

Now, whether that's desirable or otherwise, I don't know. As long as you have thought about it.

MR PATERSON: Well it would be the intention of the parties I believe to address that problem through the definitions and the provisions in the Contract of Employment terms of engagement.

COMMISSIONER GOZZI: Right.

MR PATERSON: If such a person took an explicit fixed period off as leave without pay and someone was engaged similarly for that same period it would be a fixed term contract and no problem would arise.

I believe the problems in practise arise where people don't turn up for work after the end of their date of leave, and the

question of obligation at that stage is more likely to be cause for unwinnable disputes.

COMMISSIONER GOZZI: Well, yes, I suppose the thing I had -

MR PATERSON: That can happen, in any event, in terms of paid leave or any other leave that's provided for.

COMMISSIONER GOZZI: Yes. The thing I particularly had in mind that is somebody went on an extended period of leave without pay, then what are the rights and entitlements of the employee engaged to replace that employee. I mean, does that person become a permanent employee? All those type of issues that might flow from there.

I mean, short periods of leave without pay are not uncommon. It's the longer periods that generally attract those type of questions, you know, as to what really happens when somebody wants to go off.

I know of a case in the Education Department where an employee went on leave without pay for something like 2 years, and it is not uncommon for people to go for periods longer. And it is not so much the person going on leave without pay, it's how do you fill that position and what are the rights and entitlements of the person filling the position.

MR PATERSON: It certainly has been addressed in my thinking and in earlier proposals that were put up, that we will address in terms of the terms of engagement.

The question to me is one of whether - coming at it from a different angle - if any limit is put on the employment of casuals then a qualifier has to be put that opens up that limit where a person is engaged as a relief or a substitute worker.

At this stage the position that has been put to the employers is basically one of in line with suggestions made by yourself in conference that a casual be a fixed term employee, and that if the replacement employee is engaged on a fixed term and that practice is encouraged by industrial parties then I think that issue won't arise in that form.

COMMISSIONER GOZZI: Fair enough. 'Parental leave' and -

MR PATERSON: The parental leave clause basically is, well it is in fact, the variation to the WAVA Award. That is sort of I suppose reserving the position in terms of any typing mistakes or numbering, often numeric type mistakes, the intent, and I believe the practice.

The document reflects the state award standard and is drawn in this form from the variation to the Welfare and Voluntary Agencies Award.

COMMISSIONER GOZZI: Right.

MR PATERSON: This is where the numbering of course of the pages is thrown out because the parental leave pages are in fact unnumbered.

COMMISSIONER GOZZI: Did you mean to have it, '17. Parental Leave' and then discuss in (a) Maternity Leave and then in (b) Paternity Leave? And adoption leave. I mean, does that all come under the broad heading of 'parental leave' does it?

MR PATERSON: Yes.

MR FITZGERALD: My information is that it is, commissioner, yes. I think that is the standard clause in most state awards.

COMMISSIONER GOZZI: Okay.

MR PATERSON: I did just provide our office worker with the copy of the variation to the WAVA Award. It is my clear understanding that that is what she has done here.

COMMISSIONER GOZZI: Okay. So all the wages, sick leave, is just to take from -

MR PATERSON: The variations to WAVA.

COMMISSIONER GOZZI: Yes. Alright. Now we go to 'Sick Leave'.

MR PATERSON: The clause on sick leave is fairly straightforward and standard. The last variation to meet a need that the employers raised in terms of the accumulation of sick leave in the early months of employment has been added in terms of the last sentence of (a)(iv) which provides for accumulation in the first 3 months on the basis of 3.3 hours for each completed calendar month service with the employer.

The expressed intent, and on the record so that if there is any dispute or disagreement about it, at the expiry of the first 3 months what is not taken of the first full year's entitlement is accessible to the employee.

So if an employee has taken no sick leave in their first 3 months at the beginning of the 4th month they have their full two ordinary working weeks sick leave accessible to them, and of course if they have taken sick leave in accordance with that accumulation that's a debit to that entitlement.

Sick leave of course is accumulative and not payable on termination, but effectively a standard clause.

And the employers have agreed to a telephone allowance for the purposes of being on call, and another minor variation there of the words in the brackets 'as defined in clause 23' be deleted as clause 23 is probably not likely to be on call and on call is not yet included in this document in any event.

So, '(as defined in Clause 23)' be deleted.

COMMISSIONER GOZZI: Now with reference to refunding installation costs I can see the relevance of that to where a telephone is installed. However, I would also contemplate that there will be circumstances where a telephone has already been installed, and the employer may require an existing phone to be maintained. How does the installation cost part relate to that part of it?

MR PATERSON: The installation costs wouldn't - I expect the unaddressed question is the rental charges to maintain a phone and to maintain a phone connection where the employer requires it. And that is not addressed.

COMMISSIONER GOZZI: Well, yes. I mean, in the context of existing employees who may be required to use the phone. This now provides an obligation to pay regular rentals of the phone rental. Will there be, or is it clear between you what happens where phones have been installed, whether or not there will be applications for the refund of installation costs in the first place, which may have been 5 or 6 years ago, or however long?

MR FITZGERALD: Can I come in on that?

COMMISSIONER GOZZI: Mm.

MR FITZGERALD: As far as I can see, commissioner, it is only where an employer requires an employee to instal a phone in the first instance. If there is one already installed we see no reimbursement applying in those instances. It is only where from day one the employer makes that requirement of the employee and in that case there would be an obligation on the employer to reimburse the cost of installation. That's how see that clause.

MR PATERSON: It may be that that can be addressed by a rewording of this clause to the effect that where an employer requires an employee to instal a telephone the employer shall refund the installation cost, and where an employer requires an employee to maintain a phone for the purpose of being on call, then regular rental charges be refunded.

To separate the two issues: installation on installation and rental on maintenance.

COMMISSIONER GOZZI: That makes it clear.

MR PATERSON: And maybe we can deal with that in the same way as we have to deal with Clause 9 - Annual Leave, to come back with some agreed words to be included in this document.

COMMISSIONER GOZZI: Yes.

MR PATERSON: If the commission pleases.

COMMISSIONER GOZZI: Thank you, Mr Paterson. Very good. Mr Fitzgerald?

MR FITZGERALD: Yes. I won't comment at length, commissioner, because Mr Paterson has taken you through this and I don't particularly want to run the risk of being repetitious.

However, I would say that the document presented with those minor amendments, some of which are to be forwarded to you subsequent to this hearing, is in fact a consent document here this morning, and I suppose represents a major step forward to where we have been going in the last, in my memory, I think 12 odd years, where we can in fact present a consent clause, albeit not in a comprehensive form.

But we can indicate to the commission that there have been ongoing discussions programmed for next week, and I suggest that even though it has been somewhat slow, at least we are making progress and I think there is some manifestation of that here today in the form of this consent document.

We further would consent to these clauses, the selection of clauses having operative effect from the first pay period occurring on or after the 20th December 1993.

We see it as a sensible course, commissioner, in that there are obviously ongoing negotiations in respect to major aspects of the award, particularly the classification structure and pay rates and hours and associated matters, and we feel that it is in fact advance publicity to those out in the field that in fact a comprehensive award will apply.

And there are now at least some basic provisions which will now have application, and even though it is a somewhat disjointed procedure we think, given the nature of the industry, it is indeed a sensible approach to, if you like, phase - there is an agreed phasing-in process as far as other conditions are concerned - but it does give some advance notice as to an impending award.

In terms of the provisions which Mr Paterson has been through with you I don't think I have any comments, any further comments that is.

I know I have made some comments somewhat out of kilter, but I don't think I have any further comments except to indicate that on behalf of employers and particularly the Community Service Employer Organisation Tasmania who I am also representing here today there is consent to those clauses.

As you would be well aware, before the commission can make any award it must be certain that it meets the public interest provisions or tests as provided by section 36, and I'm sure, commissioner, you've had, as we all have had, some experience in this industry and some of the matters which have come before you have been difficult to resolve, often I would concede as a result of lack of procedure which are in place in particularly agencies, and we see particularly the provision relating to counselling and dispute and grievance settling as a step forward and will provide some structure and, hopefully, reduce both the workload of myself and the commission in that respect.

So, in that regard, we see it as a step forward and very much consistent with the public interest.

The other provisions are in many respects standard award provisions and don't represent departures from those provisions, and in that regard we would see again that they are consistent with the public interest and the other tests as provided by section 36(2)(a), (b) and (c) in my view are all met by the provisions which are here before you on a consent basis.

The other test which the commission has to meet are the commission's wage fixing principles, and we see that those provisions again do not infringe the wage fixing principles of the commission.

So, for all those reasons, Mr Commissioner, we would seek the commission's endorsement of the consent clauses here before you today with operative effect from the first full pay period occurring on or after the 20th of December 1993.

If it pleases.

COMMISSIONER GOZZI: Yes. Thank you, Mr Fitzgerald. Anything else, Mr Paterson?

MR PATERSON: No, nothing to add, Mr Commissioner.

COMMISSIONER GOZZI: Alright. Well, from my point of view I would like to congratulate the parties on what has been achieved by consent.

It's been a grind for you. I realise that. And in being aware of that fact I think it is appropriate I acknowledge the efforts of yourself, Mr Paterson, in getting to this stage. I know you have carried the ball a long way, and certainly I recognise the efforts, Mr Kay, of yourself since you have taken over from the previous incumbent, and with the assistance of Mr Fitzgerald.

I really do think that we're on the right track to getting this matter finalised.

Having regard to what's been put to me this morning, subject to those tidying up things, it is my intention to endorse the award operative from the first full pay period to commence on or after the 20th of December, and a decision and order will issue hopefully in the next few days.

These proceedings are now adjourned.

HEARING CONCLUDED