TASMANIAN INDUSTRIAL COMMISSION

***Industrial Relations Act* 1984 (Tas)**
Section 29(1) application for hearing of an industrial dispute

United Firefighters Union of Australia, Tasmanian Branch
(T14872 of 2021)

and

Minister administering the State Service Act 2000/Department of Police, Fire and Emergency Management

DEPUTY PRESIDENT N ELLIS HOBART, 20 MAY 2022

Industrial dispute – appointment as employee - working two classes of work - minimum ordinary working hours per week - employment contracts - statutory construction - order issued

DECISION

[1] The issue relates to determining the correct payment for an employee working in two different jobs, allegedly resulting in working hours in excess of the ordinary hours.

[2] On 18 November 2021, the United Firefighters Union of Australia, Tasmania Branch (UFUA) (the Applicant), lodged an application on behalf of Ms Amy Pennicott, pursuant to s 29(1) of the *Industrial Relations Act 1984* (Tas) (IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000/Department of Police, Fire and Emergency Management (DPFEM) (the Respondent).

[3] The Applicant contends that all hours worked in the two classes of work, to which different awards apply, should be aggregated and overtime should be paid on hours worked in excess of the ordinary hours from the same employer.

[4] Conversely, the Respondent states there are two separate contracts of employment which form different employment relationships and therefore the hours of work are treated separately and the hours are not aggregated.

[5] Submissions were sought from the parties and the parties agreed the matter would be determined on the papers.

Background

[6] An agreed statement of facts was filed by the parties and the facts are as follows:[1]

- "Amy Pennicott's employment commenced within the Department of Police, Fire and Emergency Management (DPFEM) on 23 March 2020.

[1] T14872 of 2021, Statement of Agreed Facts.

- Ms Pennicott was first employed by the State of Tasmania on a fixed term contract on a casual basis in the position of Radio Dispatch Operator in Radio Dispatch Services.

- Radio Dispatch Services (RDS) is part of Tasmania Police, within DPFEM.

- On appointment, Ms Pennicott was provided an employee number of S003907.

- The relevant Award for Radio Dispatch Operators is the Tasmanian State Service Award (TSSA).

- Ms Pennicott performs her position of Radio Dispatch Operator at the Hobart Police Station at 31-41 Liverpool Street, Hobart in Tasmania.

- In March 2021, Ms Pennicott's fixed term contract in relation to the position of Radio Dispatch Operator was extended.

- On 6 September 2021, Ms Pennicott was appointed to a permanent full-time position of Communications Officer in Fire Communications (FireComm). FireComm is part of the Tasmania Fire Service (TFS), within DPFEM.

- The relevant Award for Communications Officers within FireComm is the Tasmanian Fire Fighters Industry Employees Award (TFFIEA).

- Ms Pennicott performs her position of Communications Officer at the Tasmania Fire Service - Head Office at Corner of Argyle and Melville Street, Hobart in Tasmania.

- Ms Pennicott continues to be employed by the Minister Administering the *State Service Act* 2000 (MASSA) as a Radio Dispatch Operator and as a Communications Officer within DPFEM.

- Ms Pennicott continues to be assigned the same employee number, S003907.

- DPFEM manages the employment conditions of each position held by Ms Pennicott, separately.

- In respect to overtime, DPFEM calculate overtime based on Ms Pennicott's rostered hours of work in her position as a Communications Officer. DPFEM do not calculate overtime based on the cumulative hours Ms Pennicott works in both her positions as a Communications Officer and Radio Dispatch Officer.

- Subsequent to Ms Pennicott's appointment to the position of Communications Officer on 6 September 2021, all hours worked by her as a Radio Dispatch Operator have been paid at the ordinary hourly rate. Ms Pennicott continues to undertake casual work as a Radio Dispatch Operator.

- Ms Pennicott receives pay advice from her employer under the one employee number, with hours of work from both positions listed."

Principles of statutory construction

[7] The Applicant submits the statutory interpretation should be based on the plain meaning of the words and that the wording in ss 47AC, 49(2), 53 and 85 are unambiguous. The ordinary meaning of the words are clear and ss 8a and 8B of the *Acts Interpretation Act 1931* (Tas) should be applied.

[8] The Respondent submitted the words of the *State Service Act 2000* (Tas) (SS Act) and IR Act must be ascribed the meaning that the legislature intended them to have. Relying on case law,[2] it was stated that the context, purpose and policy of the provisions must be considered.

[9] Relying on *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*,[3] Mason J stated:

> "…to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

[10] In order to determine the issues, I am required to construe the Acts. I find there is no ambiguity in the relevant sections of the IR Act and SS Act. The plain ordinary meaning of the text and context of each section has been considered.

[11] The present basis for interpreting legislation is the "constructional choice" approach where the plurality was described by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection*, who said:[4]

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

[12] I have adopted the principles of statutory construction found in this case.

The relevant legislation

[13] Section 37 Appointment and Promotion of Employees of the SS Act states:

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[2] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [14] per Kiefel CJ, Nettle and Gordon JJ.
[3] (1985) 157 CLR 309, 315, Citations omitted.
[4] (2017) 262 CLR 362, 14.

"(1) The appointment of a person as an employee or the promotion of a permanent employee –

(a) is to be based on merit and made in accordance with Employment Directions; and

(b) is to be made by the Employer on behalf of the Crown.

(2) . . . . . .

(3) The appointment of a person as an employee is to be –

(a) as a permanent employee; or

(b) for a specified term or for the duration of a specified task.

…."

[14] Section 53 of the IR Act Employment is Subject to More than one Award states:

"Where an employee performs 2 or more classes of work to which different awards apply, he shall, in respect of all matters (other than wages rates or piecework rates) in respect of which different provisions are contained in those awards, be deemed to be employed under such of those provisions as confer on him the greatest benefits."

[15] Section 29(1) of the IR Act Hearings for Settling Disputes states:

"An organization, employer, employee or the Minister may apply to the President for a hearing before a Commissioner in respect of an industrial dispute."

[16] Section 49(2) of the IR Act Remuneration fixed by award or registered agreement states:

"(2) Subject to the provisions of an award, a registered agreement or the State Service Act 2000 and any Commissioner's Directions or Ministerial Directions issued under that Act, where an employee performs 2 or more classes of work for which differing rates of remuneration are fixed by an award or a registered agreement, he is entitled to be paid in respect of the time occupied in each class of work at the rate so fixed for that class."

[17] Section 85 of the IR Act Awards and Registered Agreements Prevail states:

"(1) Any provision of an award or a registered agreement that is inconsistent with a provision of a contract of service prevails over the latter provision to the extent of that inconsistency.

(2) Any provision of a contract of service that is inconsistent with a provision of an award or a registered agreement is to be construed and has effect as if it were modified to conform to the provision of that award or registered agreement.

(3) Any provision of a contract of service that provides for any conditions of employment that are more favourable than those provided by an award or a registered agreement is not inconsistent only because of that fact."

[18] Section 47AC of the IR Act Maximum Ordinary Working Hours states:

"Unless prescribed otherwise in an Act, award of agreement, an employee's maximum number of ordinary working hours per week is not to exceed 38."

[19] Section 8B of the *Acts Interpretation Act 1931* (Tas) states:

> "(1) Subject to subsection (2) , in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation –
>
> (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or …"

Who is Ms Pennicott's employer?

[20] The first issue to be determined is who is employing Ms Pennicott.

[21] The Applicant submits Ms Pennicott is employed by the Employer on behalf of the Crown as set out in s 37(1)(b) of the SS Act. They state this wording is deliberate and the ordinary meaning of these words are to be construed. The words reinforce the appointment as an employee by the Employer on behalf of the Crown as a unilateral act.

[22] It was contended that the words "by agreement" or "by contract" are not included in the statutory provision and that employment contracts do not form the basis of an employment relationship. Appointment is the statutory mechanism by which the employment relationship is established.

[23] Conversely, the Respondent submitted that while the SS Act and IR Act govern the obligations that arise in the employment relationship, but they do not say anything about the formation of the relationship. It was stated the employment relationship is formed by contract.

[24] They say that it is essential that the appointment set out in s 37 of the SS Act, is accompanied by an employment contract which forms the employment relationship in the state service between the state and its employees.

[25] It was further submitted by the Respondent that ss 37 and 38 of the SS Act have no influence on how the employment relationship is formed, apart from specifying that the terms and conditions of employment will be governed by an award or industrial agreement in s 38(1) of the SS Act. It was asserted the SS Act leaves the employment relationship to be formed by contract.

[26] The Instrument of Appointment[5] (IOA) signed on 2 September 2021 by Ms Pennicott and Ms Wood, Manager Employment Advisory Services DPFEM, confirmed her appointment under s 37 of the SS Act to the full time permanent position of Communications Officer under the Fire Fighting Industry Employees Award and the Firefighting Industrial Agreement, commencing on 6 September 2021.[6]

[27] A separate Instrument of Appointment,[7] dated 18 March 2021, set out her appointment for the continuation of her fixed term (casual 'as and when required') basis for the period of 24 March 2021 to 24 March 2022 inclusive as a Radio Dispatch Operator (RDO) within DPFEM under the Tasmanian State Service Award 2000.[8] This appointment

[5] Statement of Agreed Facts, Attachment F.
[6] T14811 of 2020; T14800 of 2020.
[7] (n 5), Attachment E.
[8] T14811 of 2020.

was made under s 37 of the SS Act by Ms Jane Sweeney, Manager, Employment Advisory Services DPFEM, as delegate of the Head of the State Service.

[28] The Respondent submitted there are two contracts of employment between the state and Ms Pennicott and the two classes of work are not part of the same employment relationship, resulting in multiple employments.

[29] It was further stated that Ms Pennicott holds a full time permanent position as the Communication Officer and a casual position as the RDO with DPFEM.

[30] In my view, the plain, ordinary meaning of s 37 of the SS Act provides that the Minister administering the State Service has appointed Ms Pennicott as an employee. I concur with the Respondent that the SS Act is silent on the employment relationship and employment contracts. However, in my view the Applicant is correct to assert that appointment is the statutory mechanism by which the employment relationship is established.

[31] The words in s 37 (1)(b) of the SS Act outline the mechanism for MASSA as provided in s 14 of the SS Act as the "Employer on behalf of the Crown" to appoint her as an employee. There is only one employer which is MASSA regardless of where in the state service or for which Agency the employee is working or in which roles. I am satisfied this results in the employment of Ms Pennicott as an employee of the state service by the one employer, being MASSA.

How was the appointment made?

[32] The conditions of her appointment need to be considered.

[33] The Applicant submitted Ms Pennicott is a permanent employee and is engaged in full–time employment. Section 3 of the IR Act defines a: "full-time employee, unless prescribed otherwise in an Act, award or agreement, …[as] a person engaged to work full-time employment".[9]

[34] Additionally, full time employment is defined in s 3 of the IR Act as:"… unless prescribed otherwise in the Act, award or agreement, …the employment of an employee for 38 ordinary hours per week."

[35] It was stated part time employment is defined as work "… that is performed by an employee on a regular basis for less hours per day or week that the ordinary hours of an equivalent full time employee…."

[36] It was submitted an employee's status of full-time or part-time employment is determined by a person's regular hours of employment.

[37] Ms Pennicott's appointment to the permanent full time position of Communication Officer in Fire Communications (FireComm), which is part of the TFS within DPFEM, resulted in her ceasing as a part time employee as she was no longer employed for fewer hours that an equivalent full time employee.

[38] Additionally, it was submitted that working over the 38 'ordinary hours' (or as prescribed in the relevant Award/Agreement) does not prevent the application of these definitions. Working extra hours to the 'ordinary hours' are additional hours by virtue of the application of s 47AC and s 53 of the IR Act.

[9] Emphasis added.

[39] The Applicant submitted that these definitions refer to: "a person engaged to work" rather than to the engagement of a person to work.

[40] It was contended the specific wording of s 3 indicates that it is possible to engage a person to work more than once, but it is not possible to simultaneously meet the definition of part time employment or full time employment.

[41] The Applicant submitted:[10]

> "…the specific wording of the IR Act supports the idea that where an employer and a person agree to two separate contracts of employment or engagements, that the second contract would be more accurately described as an alteration to the existing employment relationship than a new and distinct employment relationship."

[42] The Applicant alleged that to construe a separate contract to mean an entirely separate employment relationship would ignore the context provided in s 3 and would ignore the clear, ordinary meaning of the words in s 53 (Employment subject to more than one award) of the IR Act.

[43] The Applicant disagreed that the employment relationship is formed through contract. The Applicant submitted that s 37 of the SS Act requires the employment relationship forms through appointment, which it stated is a unilateral act.

[44] Additionally, it was stated by the Applicant that any employment contract between the State and the employee only has the power to improve employment conditions above those provided by the Act, Award or Agreement as outlined in s 85 of the IR Act and includes reference to remuneration and is used as an education of the employee's conditions of employment.

[45] The Respondent submitted Ms Pennicott worked under two separate employment relationships and contracts of employment between the State and Ms Pennicott; one being permanent full time employment and the other on a fixed term appointment working casual shifts.

[46] The Respondent stated that the application of the full time, part time and casual definitions refer to the employee "engaged to work". This was taken as being engaged to work by an employer with each case assuming that there is an employment relationship arising from the contract of employment.

[47] It was submitted these provisions in the definitions must be met by considering the particular employment in which she is engaged, being both fulltime and casual employment.

[48] The Respondent submitted the relationship between the award, industrial agreement and a "contract of service" is governed by s 85 of the IR Act. Additionally, s 30(1) of the IR Act refers to a contract of employment in relation to defining continuing employment, s 52(3) of the IR Act refers to remuneration due under the contract of employment and sch 2 item 1 of the IR Act relates to a factor in the calculation of continuous service under a contract of employment for entitlement of unpaid personal leave.

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[10] Submission of the Applicant, [31].

[49] The Respondent relied on the assumption of an employment relationship due to the absence of any reference in the IR Act or SS Act and therefore, it was stated the relationship comes into existence through a contract of employment.

[50] It was stated the employment contact has the usual requirements: i.e. the intention to create legal relations, offer and acceptance, valuable consideration legal capacity and consent to the terms.

[51] The Respondent relied on *Lacson v Australia Postal Corporation*,[11] which involved the construction of the phrase "particular employment" found in s 52(2) of the *Fair Work Act 2009* (Cth) relating to the application of the enterprise agreement to an employee.

[52] Mortimer J accepted that there were two contracts of employment, entered into at different times for different positions at different locations with distinct working hours and involving different rates of pay as findings of fact. Similarities arise in that the employee initially performed both roles under the same employee number and payment for both roles was recorded on a single payslip.

[53] While acknowledging the decision in relation to the FWA has no direct application to the provision of the IR Act and SS Act, it was submitted that it was instructive that *Lacson* supports an employee being employed under one Enterprise Agreement with one employer, having two separate jobs. The Respondent stated there were similarities with this case and there is nothing in either Act precluding an employer from engaging an employee in more than one employment relationship.

[54] Distinguishing the findings of *Lacson,* the Applicant stated the specific words of the FWA include "particular employment" and the Honourable Mortimer J examined the issue in the context of these words. It was stated the IR Act does not contain the words "particular employment" and has substantially different wording, specifically in the s 3 definitions, which connect the act of employment with a person.

[55] The Applicant submitted that consideration of the employee number and pay being recorded on the single payslip is extrinsic evidence with regards to the interpretation of the FWA.

Consideration

[56] I concur that the facts of this case are similar, however the application of the words "particular employment" arising from the FWA are irrelevant to this case as there are no such words found in either the SS Act and IR Act. Two separate jobs resulting in different conditions may be worked by a private employee whose employment is governed by different legislation. However, state servants are appointed as an employee under the SS Act. This appointment results in the employee being engaged to work and commences the employment relationship between the one employer MASSA and the employee. I do not accept the Respondent's submissions that the employment contract, alone and independently, commences the employment relationship or two relationships, as an employee must be appointed pursuant to the SS Act.

[57] While significant submissions were made by the Respondent in relation to the contracts of employment and employment relationships, the ordinary meaning of the relevant statutes must be construed.

[11] (2019) 268 FCR 314 ('*Lacson*').

[58] In my view, s 37 of the SS Act states a valid appointment must be based on merit and made in accordance with Employment Direction 1.[12]

[59] Public policy supports permanent employment in the state service as reflected in ED1. Clause 7 states:

> "7. Fixed-Term Employment
> (Duties for a specified term or for the duration of a specified task):
>
> 7.1 Permanent employment is the usual form of employment in the State Service. However, where necessary to meet the operational needs of an Agency, fixed-term employees may be appointed for a specified term or for the duration of a specified task [Section 37(3)(b) of the Act]."

[60] I observe the appointment must be made by the Employer on behalf of the Crown or the Minister administering this Act[13] or MASSA as provided in s 14 of the SS Act.

[61] Section 37(3) states the appointment is to be as a permanent employee or "for a specified term or for the duration of a specified task". In ordinary speech, the word "or" is used disjunctively and the word "and" conjunctively.[14] Applying this rule, an employee can either be appointed as a permanent employee or as a fixed term employee for a specified term or duration of a task, but not both.

[62] The definitions set out in ED1 state an:

> "'**Employee**' means a permanent or fixed term employee appointed under Section 37 of the Act." and;
>
> "'**The Employer'** is the Minister administering the State Service Act 2000 in accordance with Section 14 of the Act."

[63] As was agreed by the parties,[15] Ms Pennicott was appointed as a permanent full time employee pursuant to s 37(3)(a) of the SS Act on 6 September 2021. She had been appointed as a fixed term employee for a specified term pursuant to s 37(3)(b) of the SS Act for casual work concurrently. This contract had an expiration date of 24 March 2022. There is no evidence to suggest there has been a new IOA provided after that date, but she is continuing to be paid casual loading on her additional hours as an RDO.[16]

[64] Accordingly, in my view, she cannot have two appointments as both a permanent full time employee and a fixed term employee by virtue of the construction of s 37(3) of the SS Act.

[65] In matter T14449, *Anne-Marie Assiri and MASSA,* President Barclay found an IOA for "Casual Work", which was the same title of the IOA for Ms Pennicott, was a fixed term appointment. I concur with these findings that the second appointment was for a specified term on a fixed term IOA. He stated:

> "[38] The Applicant was not a casual employee as understood in the award. Rather the Applicant was appointed for a specified term within the meaning of s

[12] *Employment Direction No. 1* (Tas) ('ED1').
[13] IR Act, s 3.
[14] Dennis Charles Pearce and Robert Stanley Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 2.29.
[15] Statement of Agreed Facts, cl 11.
[16] Ibid, cl 20.

37(3) of the Act. The appointment was subject to a specific contract of employment namely a "Fixed Term Instrument of Appointment". Notwithstanding that the instrument under its heading said "(Casual Work)" that phrase is not a phrase referred to in the Act. That phrase is also not referred to in the Award. The award relates to casual employees. As pointed out by Wells DP a person appointed under an Instrument of the type the Applicant was, cannot be a casual for the purposes of the Award. That however does not change the fact that the Applicant was employed for a fixed term by the Instrument.

[39] Accordingly, the appointment was a valid appointment within the meaning of the Act. That the phrase "Casual Work" appears in the document does not change the nature and meaning of the Instrument. It is a fixed term appointment. The Applicant is a fixed term employee within the meaning of the Award."

[66] I concur with the Applicant that an employee could be appointed more than once; an example is appointment to two permanent 0.5 Full Time Equivalent positions resulting in full time employment. However, if appointed to a full time permanent position, it is clear in my view, there can be no further appointments. An employee working full time cannot work additional hours casually due to the fact they are a permanent employee.

[67] I do not concur with the Respondent's submission that there is nothing in either Act precluding an employer from engaging an employee in more than one employment relationship, because the SS Act relies on the appointment of an employee, which is the statutory mechanism for employment by the one employer, the MASSA. There is only one employment relationship between Ms Pennicott and MASSA, who it appears, is engaged to work in a combination of different classes of work. I do agree there is no reference to employment relationships in the relevant Acts.

[68] The Applicant's Instruments of Appointment accompany the Letters of Appointment[17] which advise of the appointment as an employee pursuant to s 37 of the SS Act. The Applicant has accepted the terms and conditions specified in the instrument, which include the assignment of duties as outlined in the Statement of Duties, the remuneration rate, the hours per fortnight, the classification for the role and reiterating the relevant legislation and employment conditions found in the SS Act and EDs and the relevant Awards and Agreements. The IOA for a fixed term appointment includes the start and finish date of the fixed term.

[69] In my view the appointment of an employee pursuant to s 37 of the SS Act commences the employment relationship. The appointment may be subject to the Letter of Appointment and attached IOA, which is recognised as the contract of employment or the contract of service. The IOA refers to the relevant industrial instruments and Acts and outlines the specific details of the appointment in relation to, but not limited to: the classification, remuneration, hours of work, consistent with the award or registered agreement and it may include more favourable conditions than the industrial instruments.

[70] The award is the source of the obligations of the employment relationship and pursuant to s 85 of the IR Act, a contract of employment cannot reduce entitlements set out in an Act, award or an agreement. It may set out specific details or terms of employment, which may include benefits greater than the industrial instruments.

[71] ED1 clause 9.1 outlines the appointment of an employee to undertake fixed term duties or "an assignment of fixed term duties to a permanent employee to undertake

[17] Ibid, Attachments A, B, D, E, F.

fixed term duties." This reflects the wording of s 37(3) of the SS Act, where a permanent employee undertakes a specified task or a role for a specific term. These hours are not in addition to the fulltime permanent hours, rather there is a temporary assignment of hours for the permanent employee. The employee may work either all hours as assigned for the specified term or may work some of those hours in both roles to work substantive hours. However, the employee maintains the substantive appointment as a permanent employee.

[72] In my view, the second appointment, pursuant to s 37 of the SS Act for a fixed term, is not consistent with the SS Act and ED1. Rather, Ms Pennicott is appointed as a permanent full time employee engaged to work regular full time hours and the employer offers her additional ad hoc hours as a RDO, a different class of work under a different Award. It would be correct to alter her IOA as a permanent employee to reflect those conditions, if the employer wishes to continue to employ her as an RDO.

How do the minimum ordinary working hours apply to Ms Pennicott working under two Awards?

[73] To consider the maximum ordinary working hours, both parties referred to Part III, Division 2A, Minimum Conditions of Employment Relating to All Employees, s 47AC of the IR Act, which provides that an employee's maximum number of ordinary working hours per week is not to exceed 38 hours.

[74] The Applicant stated 38 ordinary hours per week is the default maximum allowable hours, unless altered by an Act, award or agreement. It was submitted this section also applies to employees performing a class of work for which there is no award, and a protection in s 47AA(2) which provides the Commission may not make an award or approve an agreement that is less that the minimum conditions.

[75] The Applicant submitted that the TFFIEA varies the effect of s 47AC as a full time rostered shift work employee performs an average of 42 hours per week over an eight week cycle, whereas the TSSA varies the maximum ordinary hours of employment to 36.75 hours per week.

[76] The Applicant submitted s 47AC refers to a single Act, Award or agreement relevant to an employee and the hours are derived from a single source, being an Award.

[77] The Applicant countered the Respondents arguments that supports s 47AC applying to particular employments, jobs or positions, stating these words have been imported from the FWA and do not reflect the ordinary meaning of the IR Act or SS Act. They state Division 2A applies to all classes of work rather than a particular employment, job, or position.

[78] It was stated the function of s 47AC is to prevent or to allow a penalty loading, such as overtime, to dissuade a single employer from employing a person for more than 38 hours. The Applicant refuted the concept that the single employer could aggregate the maximum number of ordinary hours across multiple awards.

[79] The Respondent submitted Division 2A of the IR Act provides a safety net of minimum conditions of employment and restricts the Commission's power to make an award about matters that fall below the safety net.[18]

[18] IR Act, s 47AA.

[80] Acknowledging s 47AC does not refer to an employer or employment, the Respondent stated this provision applies to a particular employment, job or positions, based in contract.

[81] The Respondent contended that the provision[19] for leave entitlements provides pro rata payment and access to the entitlement for a part time employee after each completed year of continuous employment and that this refers to employment in a particular position and that leave entitlement will be treated separately for each position or job.

[82] It was stated that when the IR Act speaks of employment, it assumes that there is a contract of employment. Otherwise, it was submitted employees with separate employers, of which one may be a private employer, would have their hours aggregated with an entirely separate employer's obligation for the purpose of this provision. The Respondent submitted that is unlikely to be the purpose of the IR Act.

[83] The Respondent submitted that to construe s 47AC as contended by the Applicant would require s 47AC to be read inconsistently with the other safety net provisions. It was stated there is no provision in the IR Act to aggregate positions or jobs. Section 52 refers to "classes of work" assuming that the employee is employed under one contract which includes more than one class. However, it was submitted the ordinary working hours of an employee must relate to work in which the employee is engaged and means ordinary working hours of the particular employee.

Consideration

[84] In my view, by applying the ordinary meaning of the words, s 47AC applies to employees, not a particular employment, job or position. These words simply do not exist; the section relates to "all employees".

[85] I am of the view that Division 2A, s 47AC does not apply to employees who are covered by an award and or an agreement which contain more favourable conditions.

[86] As it does not apply to state service employees who are covered by an award or agreement, the minimum conditions prescribed by this Division are not applicable to Ms Pennicott. She is covered by two awards for her two classes of work and as previously found, appointed by one employer, the MASSA, which set out the maximum ordinary working hours per week. There is a requirement to determine if the hours worked in both classes of work are aggregated or considered separately.

What are the ordinary working hours for Ms Pennicott and should penalty rates applied?

[87] The evidence through the witness statement[20] of Ms Pennicott confirmed her employment by the DPFEM on behalf of MASSA to perform two classes of work. DPFEM manage her employment in both these roles separately, however she has one employee number for both positions and one Pay Advice slip for all hours she worked in both roles.

[88] Ms McDougall, Acting Principal Consultant Workplace Relations, DPFEM provided evidence[21] supporting Ms Pennicott holding two positions within DPFEM and that she is

[19] IR Act, s 47AE.
[20] Witness statement, Ms Amy Pennicott, 24 February 2022; Pay slips were attached for periods: 1 Sep 2021, 15 Sep 2021, 29 Sep 2021, 13 Oct 2021, 27 Oct 2021, 10 Nov 2021, 24 Nov 2021, 8 Dec 2021, 22 Dec 2021 and 5 Jan 2022.
[21] Witness Statement, Fiona McDougall, 11 March 2022.

employed as a rostered shift employee. She confirms Ms Pennicott is paid overtime for all time worked on a rostered day off and in situations covered by call back provisions at Part V, Clause 3 of the TFFIEA in her role as Communication Officer.

[89] She confirmed the hours worked in the RDO position were paid by DPFEM with a casual loading in lieu of leave and holiday entitlements. She stated:[22]

> "DPFEM do not aggregate hours Ms Pennicott works in the RDO position."

[90] Ms Pennicott provided a summary of how the Awards are currently applied by DPFEM with respect to maximum ordinary hours and indicated she is paid overtime for hours worked in excess of ordinary hours for work in her full time position as the Communication Officer.[23]

[91] Ms Pennicott stated she is paid at casual rates of pay for work performed as a RDO.

[92] The Statement of Duties for each role and specific contracts of employment were attached to the Statement of Agreed Facts.

[93] She is appointed on a Fixed Term Contract (Casual) at the classification of Radio Dispatch Operators Level 4, Band 3-R1-L4 ($31.98) in the TSSA at a rate of $42.64 per hour (inclusive of 25% casual loading) in position T04313. The focus of the role is described as: "Responsible for the receipt of calls and rapid and accurate dispatch of police resources in accordance with standard operational procedures."[24]

[94] She is concurrently appointed in a permanent, full time position as Communication Officer 2 in the TFFIEA on a salary of $70196 p.a. or $32.03 per hour in position 003931. The focus of this role is described as: "As a member of a team, monitor and operate emergency dispatch systems to provide a highly efficient communications centre of the Tasmanian Fire Service (TFS)."[25]

[95] The Applicant submitted s 53 of the IR Act demonstrates an employee could perform more than one class of work in the course of their employment. It was stated that this section does not refer directly to engagement or contracts, but rather employment. The ordinary meaning of the words refer to a single employee performing two or more classes of work for a single employer resulting in a single maximum number of ordinary hours to be applied. It was stated this has direct application to Ms Pennicott.

[96] Further, it was contended that the application of the "greatest benefits" test indicates there cannot be two provisions applied to the maximum number of ordinary working hours.

[97] While accepting that s 53 requires the greatest benefit to be applied, which is the maximum number of ordinary hours to be applied based on the TSSA of 36.75 hours, in the public interest, the Applicant submitted the applicable maximum number of ordinary hours should be derived from the TFFIE Award instead, which is 42 ordinary hours per week.

[98] The Applicant stated:[26]

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[22] Ibid, [11].
[23] Pennicott (n 20), [10].
[24] Statement of Agreed Facts, Attach C.
[25] Ibid, Attach G.
[26] Application for Hearing in Respect of an Industrial Dispute, 18 November 2011.

> "To determine the appropriate rate of pay for additional work performed in RDS, the Applicant relies on IRA s 49(2) which outlines that employees performing more than one class of work must be paid in accordance with the relevant Award or Agreement."

[99] It was submitted the basis of the dispute is the number of provisions which can simultaneously apply to the maximum number of ordinary hours of an employee.

[100] Conversely the Respondent submitted that s 53 should be read that each class of work is part of the same employment relationship and where an employee's contract of employment provides for different classes of work to be performed, s 53 will apply as each class of work is part of that employment relationship.

[101] However, the Respondent asserts there are two contracts of employment between the State and Ms Pennicott, resulting in two employment relationships. Therefore s 53 is not applicable and she is not entitled to overtime for work she performs as a RDO.

[102] The Respondent submitted that the public interest is not relevant to statutory construction, and in any event, aggregation of hours of work would not be in the public interest.

[103] Both parties concurred with the plain meaning of s 49(2) of the IR Act. The Applicant stated it relates only to the rate of remuneration for two or more classes of work and does not alter s 47AC of the IR Act or relate to the maximum number of ordinary working hours.

Consideration

[104] I have found Ms Pennicott is an employee, appointed by the one employer, MASSA, and it is uncontested she is employed in two different classes of work under two different awards; the TFFIE Award in her role as Communications Officer and under the TSSA for her role as the RDO.

[105] I am satisfied that the construction of s 53 does not consider employment relationships, rather the wording and context relates to the employee working in two classes of work under two different awards with different provisions.

[106] In applying s 53 of the IR Act to determine the ordinary working hours, the provision conferring the greatest benefits must be applied. I note the Applicant has submitted that in the public interest the hours prescribed by the TFFIEA would be appropriate, however, I have no discretion but to apply the greatest benefit as set out in s 53 of the IR Act.

[107] I am satisfied that the ad hoc hours worked by Ms Pennicott as a RDO should be aggregated to calculate the total weekly hours worked. In my view it is unfair that a permanent employee working additional hours does not accrue the relevant entitlements: i.e. sick leave and annual leave entitlements for all hours worked for MASSA.

[108] I am of the view that hours in excess of the maximum ordinary weekly hours results in the application of the relevant penalty overtime rate for such hours. In my view, this is the fair outcome for a fulltime permanent employee who works in excess of ordinary weekly hours and is normal for all employees in these circumstances in the State Service.

Conclusion

[109] Ms Pennicott is appointed pursuant to s 37 of the SS Act to the full time permanent position of Communications Officer. I am satisfied her appointment as a permanent full time employee includes any additional hours she may perform in different classes of work.

[110] She is employed by MASSA as the one employer and works in two different classes of work. There is one employment relationship between MASSA and Ms Pennicott through her appointment as an employee. As a permanent employee, she cannot work "casual work" as additional hours. All hours worked as a permanent employee should accrue the relevant entitlements.

[111] All hours worked as an employee should be aggregated to result in her total weekly hours worked, and if the weekly hours are in excess to the maximum ordinary hours, the relevant overtime penalty should be applied.

[112] For hours worked in two classes of work, greater than the maximum ordinary hours set out in the relevant award or agreement, s 53 of the IR Act sets out: "in respect of which different provisions are contained in those awards, …[a person is] deemed to be employed under such of those provisions as confer on him the greatest benefits." The question of which conditions arising from each award provide the greatest benefit needs to be considered.

Order

[113] Pursuant to s 31 of the *Industrial Relations Act 1984* (Tas), I hereby order that :

1) If Ms Pennicott works additional hours in a different class of work as a RDO, all hours worked for the two classes of work must be aggregated to provide the weekly number of ordinary hours worked. Any hours worked in excess of an employee's maximum ordinary weekly hours set out in the industrial instruments attract the relevant overtime penalty provision.

2) The parties are directed to confer within two weeks of this decision with the aim for agreement on the application of the provision of the greatest benefit of the maximum ordinary hours in the relevant awards and any relevant overtime payments for hours worked in addition to the agreed maximum ordinary weekly hours.

3) The Respondent will apply the agreed conditions to give effect to this decision within two weeks of the above agreement.

4) The file will remain open with leave reserved for either party to seek to have the matter relisted should that be considered necessary.

Neroli Ellis
Deputy President

Matter heard on the papers

Applicant's Submissions – 28 February 2022

Respondent's Submissions – 15 March 2022

Applicant's Submissions in Reply – 4 April 2022