

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 693 and 694 of 1987

IN THE MATTER OF applications
by the Federated
Miscellaneous Workers' Union
for interpretation of the
Miscellaneous Workers Award

re hours of work, and Library
Attendants respectively

PRESIDENT

HOBART, 15 May 1987

TRANSCRIPT OF PROCEEDINGS

(CONTINUATION)

MR O'BRIEN:

So that's what we say about that passage in clause 16. It was taken from other awards and that, I think, is a fairly common provision which is included in other awards, and the intent has never been to do anything other than to reflect that situation in the context of the ordinary hours span in that particular award.

PRESIDENT:

Yes. And the only other thing I would ask you is that you've referred the Commission to its earlier laid down guidelines. You didn't make any reference to the first guideline, namely that:

"Construction or interpretation ... can only be made by considering their meaning in relation to specific facts."

Have you got any `specific facts` that you could put before us, whereby a member is alleged to have been disadvantaged or ...?

MR O'BRIEN:

So far as my members are concerned, I can indicate that none of my members have fallen foul of this interpretation.

The particular circumstances are that I'm aware that certain advice has been given to employers, but not of the particular employers. So I'm not able to point to a particular employer.

Rather to specific facts that I refer to are ... that you refer to in your decision are perhaps relevant in most cases but I think here we're going to a fundamental meaning of the award which has to be, to an extent, dealt with in the abstract. It's not as if we're dealing with a dispute with a particular employer at this stage, although there's a matter on on Monday which might raise that fact, I don't know.

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PRESIDENT - O'BRIEN

MR O'BRIEN:

But I would have to say that we don't have specific facts, but it would be futile to attempt to give an interpretation on this matter on the submissions which are before you. I think they clearly put a position which exists whereby a view is being taken that ordinary hours for employees, other than resident caretakers and janitors, extend over 7 days of the week, and we say that that specific circumstance is not within the confines of a reasonable interpretation of the award.

So to that extent if there needs to be a specific fact that's as specific as we can go on that point.

PRESIDENT:

Yes, thank you, Mr O'Brien.

Mr Abey, is it convenient to reply at this stage?

MR ABEY:

Yes, it is, Mr President.

Mr President, reference has been made to your guidelines in the earlier decision, T.30 of 1985, and reference in particular has been made to the third guideline which talks about "being construed in an intelligible way".

No reference, to date, has been made to the fourth guideline which says:

"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, the words used can only have attributed to them their true meaning."

Now, I have absolutely no knowledge of what was intended when this award was constructed.

Perhaps in an interpretation that is an advantage.

In our view, the interpretation must reflect what those words say.

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PRESIDENT - O'BRIEN - ABEY

MR ABEY:

Now, I'm a little unsure as to where Mr O'Brien is headed, because his submissions this morning in fact differ from his grounds in his application. Because he refers to, in his grounds for his application, at the end:

"It is contended, and evidence will be called to the effect, that the intention of the provisions of the said award were that Saturday be paid at time and a half for the first two hours and thence double time."

Now, clearly that's not possible under any construction.

The rate of pay under ... There can only be 2 constructions. One is that it's overtime and it's paid at double time, or one is that it's ordinary hours and it's paid at ordinary time. The time and a half for 2 hours and double time is not a construction which can be found within the award. So I'm just not sure what we're relying on in that respect.

Now, if we go to the clause in question, and I accept that it's a difficult clause to understand, but quite clearly the most intelligible construction, that can be placed on it, is that:

"The ordinary hours of work prescribed herein may be worked in not more than 8 hours on any day ..." (and then it goes on) "... but may be worked in one or two periods during the days Monday to Friday."

The "one or two periods" attracts to "the days Monday to Friday".

Mr O'Brien suggested that to read it in the manner I'm suggesting makes a nonsense of the award because we have

MR ABEY:

the situation in relation to the resident caretakers and janitors working within 6 days.

In my submission, he has misunderstood the construction which should be placed on the resident janitors and caretakers.

The 6 days is not referring to the fact that their 38-hour week can be worked on any particular day of the week - that applies, there's no question about that - but the 6 days is saying that they work 6 days a week, or they can work 6 days a week.

In other words, 6 days of some 6 and two thirds hours or whatever it equates with.

Now, if there is a deficiency in this clause, and I suspect there is, the deficiency that exists is that there should be a constraint for all other employees that their ordinary hours must be worked within 5 days.

That, I believe, was probably the intent. It's certainly the normal prescription.

And the exception for janitors is that rather than spreading it into 5 days they can in fact work 6 shifts without incurring overtime.

If we accept Mr O'Brien's contention that the 6 days is meant to extend in some way the ordinary hours over the week, then which 6 days? It just doesn't add up. You can't construe it. You can't construe it intelligibly in that way.

Now there is some logic in our submission to the construction that we place on those words.

In clause 25, 'Saturday, Sunday and Holiday Work' it quite clearly says that janitors on Saturday 'shall be paid at the rate of time and a half'.

In our submission, on our

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ABEY

MR ABEY:

construction, all other employees would be paid at ordinary rates.

Now that, in our submission, is logical to the extent that janitors have the disadvantage of having their ordinary hours spread over 6 days rather than 5, and that is a disadvantage.

In any sense of the word, it is a disadvantage to work your ordinary hours of work in 6 days of a week rather than 5, because it obviously interrupts leisure time, et cetera.

And for that reason, it's certainly arguable and logical, that they receive some advantage over those other employees on the Saturday penalty payment.

PRESIDENT:

Well, how does that submission sit with 25(b) then, Mr Abey, because that says all employees who work on a Sunday should get double time?

If we construe the award in the way that I think I understand you, would it mean that any other employee who is required to work, as part of his ordinary 38-hours on a Sunday, he would attract double time?

MR ABEY:

That's correct.

PRESIDENT: But if he worked on a Saturday, he would get ordinary time.

MR ABEY: All others would, yes.

PRESIDENT: But if a janitor is required to work on a Sunday, he would get double time.

MR ABEY: Yes.

PRESIDENT: And if he works on a Saturday, he gets time and a half.

MR ABEY: That's correct.

PRESIDENT: Why the difference?

MR ABEY: Well, I'm not seeking to defend those responsible for drafting the award, all I'm saying is, there is some logic in it, and it is not a nonsense as is suggested by Mr O'Brien.

Now, there are parallels, of course. Most awards prescribe a different payment for public holidays, as between shift workers and day workers, but on Sunday everybody gets double time. It's just the way things go.

PRESIDENT: Could you think of a single instance where an employee required to work ordinary time, as part of his ordinary weekly hours on a Saturday, could receive single time? Could you think of one single instance?

MR ABEY: I'm hard pressed to, in this State. I certainly can in other States. For example, the local government awards in Victoria you'd certainly do that. Certainly, most of the retail awards throughout the country, with the exception of Tasmania, do not prescribe a penalty for Saturday morning.

PRESIDENT: Presumably, this is the only award you could point to that doesn't?

MR ABEY: In this State, without researching it. Yes, conceivably. But we're not arguing the merit.

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PRESIDENT - ABEY

PRESIDENT: No, no, no. I was trying to follow your argument. If you're not arguing merit, I think you almost touched on it, when you were giving explanations as to perhaps why the janitor ...

MR ABEY: Well, that was only to counter Mr O'Brien's submission that to read it otherwise would make it a nonsense award.

PRESIDENT: Yes. Yes, it's very difficult, Mr Abey, not to touch on merit from time to time in these cases, although we can't, of course, go that far. But, sometimes I have that difficulty myself, I'm afraid.

MR ABEY: I've nothing further to add, Mr President.

PRESIDENT: Yes, thank you, Mr Abey. I'll have to reserve my decision.

MR O'BRIEN: Could I just say that, in relation to two points: firstly, I concede the application is wrong in referring to the overtime rate. Secondly, in relation to the submission about janitors. There's nothing in the award which allows, in fact, for janitors to work less than an 8-hour day, although that may well be implied, as Mr Abey suggests. Perhaps if Mr Abey's view of the fourth of your points is correct, then there'd be a lot of janitors in circumstances seeking 8 hours' pay for each shift. But that's another point.

All that I say is that, on the question of janitors and caretakers, I think we've adequately addressed that point.

PRESIDENT: Yes, thank you. Can we just go off the record for a moment.

...

PRESIDENT: Now, if you would outline your application with respect to 694, Mr O'Brien.

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PRESIDENT - ABEY - O'BRIEN

MR O'BRIEN: Mr President, the first thing I would do is tender a document setting out five possible circumstances where employees, who we would say would be employees falling within the meaning of the definition Library Attendant in clause 7 of the award, would exist.

And, secondly, I think that a document containing clause 7 definition: Library Attendant, perhaps in reverse order.

PRESIDENT: Yes, I'll have to identify these. I think that perhaps I should mark these as exhibits, Mr O'Brien, it's a bit confusing otherwise.

So the first one will be Exhibit A.

MR O'BRIEN: Which one are you ...

PRESIDENT: That's the circumstances.

Now, should the definition of Library Attendant be the next one or ...?

MR O'BRIEN: Yes.

PRESIDENT: That will be Exhibit B.

MR O'BRIEN: I'm tendering, also, the copy of part of page 549 of Hobart District yellow pages 1987 for, I think, reasons which are obvious in the heading, apart from other things that I've referred to.

PRESIDENT: I thought there might be something from Burnie there.

MR O'BRIEN: I could have done the same for each of the districts, Mr President, but one's enough.

PRESIDENT: That will be Exhibit C.

MR O'BRIEN: Thank you.

PRESIDENT: Hollywood Boulevard seems to be indelibly imprinted in my memory.

MR O'BRIEN: They're in that exhibit somewhere or other.

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PRESIDENT - O'BRIEN

PRESIDENT: Oh, they're probably in that too.

MR O'BRIEN: Yes, the first column.

Mr President, our concern in the matter arises from the fact that, although a number of employers are observing the classification library attended in areas which we would describe as video libraries or video cassette libraries, there is an advice been given to employers from officers of Department of Labour and Industry, (and I can say this because I rang myself as an anonymous individual to see what the advice was) that ...

PRESIDENT: How dare you. Shame.

MR O'BRIEN: I think, in the circumstances, any device is appropriate. Can I say in relation to that that I rang the Secretary for Labour last year in relation to my understanding that they might hold a different view. I was given certain information which wasn't an indication of the view taken by the Department of Labour, and have heard nothing since in an official capacity. So my anonymous information-seeking exercise was one which followed an official approach.

The situation is, that there are employees employed in these establishments; establishments which fit within one or other of the circumstances set out in Exhibit A, (and I'll go to that shortly), the employers for which are being advised that they're not obliged to observe this award, and that there's either no award applying in the area or that the question is being considered by Crown Law or advice of such a nature.

I think it is the wrong advice, and I believe that, in the circumstances, it's appropriate that the matter be cleared up in these proceedings.

I tender Exhibit A for the purpose of setting out a number of circumstances which exist in

MR O'BRIEN:

establishments which I'll term video cassette libraries; they are establishments in which there are available, for public use, video cassettes which have recorded upon them movies, commercially made, and other information available to the public for a fee: in some cases available to members of that library only at a fee, in other cases available to members of the public at a fee. And there are a great many variations in the commercial operation of these establishments.

^Circumstance 1^ relates to the basic duties as we understand them, of a person employed in that establishment where the only activity conducted in that establishment was the letting for use of these particular video or video cassettes. And if you read through there, the simple statement of duties is to keep the presentation of the video cassettes tidy. When the customer presents the cases at the counter to borrow, the employee gets the empty tape case, puts the video in the case, records the transaction (either in a written form or on a computerized system, and that will vary depending upon the establishment) and takes an amount of money to pay for the use.

The next point is: when the customer returns the video cassette in case, the employer receives and checks the return to ensure that the correct video is inside and then records the completion of the transaction. The employee would also keep the premises neat and tidy and maybe required to perform regular cleaning duties.

I guess there would be other functions which might arise from time to time. They would be the basic ones. Another connected function might be contacting a person who hadn't returned a video and pursuing the return of an outstanding video.

MR O'BRIEN:

^Circumstance 2^ is the same, except for the last point. That:

"Establishment also sells blank video cassettes and a small selection of sweets and soft drinks. The employee is seldom involved in such sales as they are ancillary to the principal operation of the business. The employee would spend less than 30 minutes per week on such sales."

If, you, Mr President, were to walk into any one of a number of establishments, you would probably see on the counter a box of Mars Bars and there might even be a mini-fridge, or a display fridge with some drinks in it, and those would be the only items actually for sale on the premises, and would, without a doubt, be a very, very minor part of the operation of the business, and would irregularly employ the employee who was basically employed on the substantive tasks that I've set out in the previous points in ^Circumstance 2^.

In ^Circumstance 3^, it is the same as 2, with the addition that the employee would be involved in hiring out video cassette recorders and perhaps cameras. Again, an ancillary operation, and the employee is only engaged in such work for an amount of time which would be less than 5% of his or her weekly time, on average.

There are a number of establishments who advertise a service where they let for hire movies and a video, or just a video recorder, for a fee, and that is part of the operation of that particular business.

However, it's secondary to the main purpose of the business, which is the conduct of what we term ^video/cassette libraries^.

The fourth circumstance is a change to that last point where the

MR O'BRIEN:

establishment also sells recorded movies, video cameras, video cassette recorders, but that such sales are infrequent, but only certain staff are involved in such duties, and that the principal purpose of the business remains the conduct of a video cassette library. And:

"And the amount of time spent on such duties will vary but will in normal circumstances occupy less than 10% of the employees working time."

And I interpolate there, of course, it is only certain of the employees as is set out earlier.

In Circumstance 5 we repeat the basic duties, the selling of blank cassettes, sweets and soft drinks, the letting for hire of cameras and recorders. Also the sale of movies, cameras and recorders. In this case:

"The sale of this equipment is a substantial part of the business of the establishment. The premises are divided into a hire section for movies only and a section for sale of movies and sale and hire of equipment. Employees generally do not move between sections and specialise in one or other area but are occasionally required to move between sections or cover both sections in unusual circumstances."

There are a range of examples which can be found at large in the community, of where there are persons employed in establishments which, as all or some part of their operations, are engaged in operating a premises which contain available for public use video recordings.

And going to Exhibit B, the definition of the Library Attendant

MR O'BRIEN:

under this award is as follows:

"It means a person employed in or in connection with a library of any kind who may be required to control access to material kept in the library and supervise access of persons to material kept in the library.

For the purpose of this definition a library shall be any place, public or private, where books, magazines, newspapers, films, tapes, sound recordings, video recordings and/or other published material is kept available for public or private use."

That classification and definition was introduced into the Insurance Award in 1984, and it was introduced ... I haven't brought the reference, but it was introduced by consent, and it was introduced in an order made by Acting Deputy Chairman King. And so it was rather late in those proceedings, and it was not one of the provisions in the Insurance Award which was the subject of common application by regulation.

It was, however, introduced into the Miscellaneous Workers Award, and introduced by consent.

The position is that there was never any doubt as to which matters were introduced as being ones which had previous common application, and which ones as a result of this application, newly have such common application.

And I take you, Mr President, to your decision on 14 October 1985, under the heading "Section 33(1)(b) Power to Make an Award - Reasons for Declaration". And if I can find the passage on the page - on page 4:

"Mr O'Brien explained that a

MR O'BRIEN:

discreet award containing the classifications referred to was desirable in order to overcome long-standing confusion within industry regarding the appropriate rates of pay for persons employed in those occupations or callings.

In fact, the work of Caretaker, General Attendant, Lift Attendant and Cleaner, is presently covered by the Insurance Award, but application of those classifications and wage rates is extended by regulation outside the insurance industry."

I refer to that passage to make clear that it was clearly on the record that those were the classifications which at that time had common rule application, and it was clear that the balance were newly been given such common rule application.

The situation, as we see it, is that from the making of the Miscellaneous Workers Award in April 1986, the classification 'Library Attendant' was given common application, subject to the limitations which exist within the 'Exemptions and Modifications' clause ... Sorry, it's an original print I have ... on the 3rd page, Clause 5. It says:

"This award shall not apply to a private employee who is engaged within an industry where an award or registered industrial agreement applies containing a classification of employee embracing the same or similar work as envisaged by the 'Scope' and 'Definitions' set out in this award."

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PRESIDENT - O'BRIEN

MR O'BRIEN: And I won't go to the mining exclusion for the purpose of this argument, because I don't think there are any miners in this sort of establishment.

PRESIDENT: It would be difficult when one has regard for the scope of the Insurance Award. It's a bit difficult to imagine how the definition of library attendant could fit any of those industries.

MR O'BRIEN: Insurance?

PRESIDENT: Yes.

MR O'BRIEN: Well, there are a great many ...

PRESIDENT: Other than ...

MR O'BRIEN: ... private libraries within establishments.

PRESIDENT: Yes, yes. Quite so, but none of the circumstances set out in Exhibit A could possibly apply, I imagine.

MR O'BRIEN: I would concede that we're talking about an area that wasn't in the insurance industry and wasn't covered by a matter of a common rule application. That's clearly conceded.

PRESIDENT: Presumably Commissioner King didn't look very closely ...

MR O'BRIEN: Well, I ...

PRESIDENT: ... at the industry of insurance when he was asked to insert the classification by consent.

MR O'BRIEN: Well, no. I don't think that's correct either, Mr President, because quite clearly a library in that industry could be public or private and could, and probably would contain many, if not all, of the items set out in the definition.

PRESIDENT: But that could be a straight

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PRESIDENT - O'BRIEN

PRESIDENT: reference library, couldn't it?

MR O'BRIEN: Well ...

PRESIDENT: I mean, I realise that's embraced in the definition.

MR O'BRIEN: Yes. So I don't know that there was any impropriety in the introduction of it in this case.

PRESIDENT: I'm not implying it.

MR O'BRIEN: And indeed, it was done by consent by the Industrial Boards, so I suppose his consent to the variation was irrelevant in that sense.

But certainly it was introduced. We sought to extend it to general application by this award, and we made no secret of that. So I'm saying that on the record now, I suppose anticipating what Mr Abey may say about his organization's surprise as to the coverage of the award, if indeed our views are correct.

MR O'BRIEN:

Exhibit C, which I will tender, outlines a number of operations in the Hobart telephone district - I guess that's the 002 district - under the heading 'Video Cassette Libraries', and sets out a number of premises in the State.

There is reference to places in other States which buy and sell movies, for example.

There's reference to a pharmacy who conduct a video establishment, 'John Clearly' - I think that's 'Cleary Pharmacy'.

PRESIDENT:

I'm not sure.

MR O'BRIEN:

There's reference to 'Leisuremail' who provide some sort of purchase and rental or exchange from another State - which we won't go into.

I understand those sort of premises are no longer able to operate in this State.

But basically, the majority of establishments under the heading 'Video Cassette Libraries' and obviously ... certainly in the eyes of the persons compiling this book, see some comparison between a library and this operation.

But be that as it may, we say the definition in the award is of a library, and material which might be in a library is the definition upon which the classification obviously stands or falls.

Just to assist further, 'Rokeby Video Hire' (in the second column there) uses the words:

"A Comprehensive Library of
Children, Family & Adult
Movies".

PRESIDENT:

Yes, that highlights the circumstance

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PRESIDENT - O'BRIEN

PRESIDENT: where the chief and principal purpose of the establishment is as stated.

But, go back to our friend `Mr John Clearly`, don't you think that someone employed in that establishment would be employed under the Retail Trades Award?

MR O'BRIEN: Or the Chemists perhaps, I'm not sure.

PRESIDENT: Yes. You wouldn't argue that?

MR O'BRIEN: I wouldn't argue where there is an award which has clear operation. This award doesn't apply.

PRESIDENT: Because the chief and principal purposes of that pharmacy would not be regarded as the hire of videos.

It's incidental thereto, and one would find in the country stores, too, a small section given over to ...

MR O'BRIEN: And newsagents, yes.

PRESIDENT: Yes, and you have no argument?

MR O'BRIEN: No. No, many of those businesses indeed are not employers, so the question wouldn't arise. But insofar as they were employers we would have no argument with the contention if an award applied to their establishment in general that that award would apply.

Insofar as there are other establishments in the listing, in the telephone book who, I'm aware, don't employ anyway, so to that extent that list isn't a full list of people who would be bound to the award, because, as I say, there are some who don't employ and therefore the situation also arise.

The question marks, if there are any, can only, in my view, be seen to arise where there is some sale of goods on the premises.

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PRESIDENT - O'BRIEN

MR O'BRIEN:

We say where that sale occurs then if it's not a substantial part of the business, and if indeed the substantive operation is the operation of a video cassette library, then certainly all of the work performed, with the exclusion of that selling work, ought be found to be the subject of this classification as far as employees are concerned.

We're uncertain as to whether indeed the additional duties, which clearly aren't those of a library attendant, fall within the definition or ought have the classification applied to it. But we think that on balance it would be appropriate to find that the substantive duties of the employee were those outlined in the definition.

But, this was an ancillary thing and it would be like saying that an employee who was employed as a brick layer, who also did some driving, was to have a transport award, or some other award applied to him for the period of time in which he was driving and not laying bricks.

PRESIDENT:

Well, the definition, of course, that appears in the award, says that it means a person employed 'in or in connection with'. I think the rubber workers case is a very old one that immediately springs to mind, in which the words 'in or in connection with'; also the graziers case affecting the Australian Workers' Union, defined ...

MR O'BRIEN:

A fairly broad use.

PRESIDENT:

Yes.

MR O'BRIEN:

The only other circumstance which causes us difficulty is in 'Circumstance 5'. And there is one establishment that I've been made aware of (and I was made aware of it through Mr Sertori) in Launceston where there is a substantial business in the sale of this type of equipment that's referred to - video cassette

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PRESIDENT - O'BRIEN

MR O'BRIEN:

recorders, video cameras, movies - on the same premises but in a different section, is the conduct of a video library.

There are employees who work in the discrete sections, and there's obviously some cross-over between the sections at various times, but not continually, as I understand what's been put to me.

If the business was a shop engaged for selling, and this was a minor ancillary part of that, then we would, I guess, be conceding that that business was primarily engaged in selling and could then fall outside the award coverage, although the Retail Trades Award might not be sufficient to cover that area.

Conversely, we are equally attracted to the view that insofar as the Retail Trades Award is not capable of covering part of an operation to the extent that the operation is award-free, that this award would apply to that area because the exclusion within the award would only arise in relation to that part of the operation which was covered by an award, and the operation would otherwise be engaging employees who would fall within the definition of being engaged in, or in connection with, the duties as outlined.

I think we've attempted to present the circumstances so that we can, in these conditions, give you, Mr President, examples upon which to base any view.

We think the words of the definition are clear cut, and believe that they would very clearly apply to the circumstances, or most of them, which are set out in Exhibit A., and we would assert there be a finding that that is the case. And that in those circumstances we'll be able to correct an obvious difficulty with some employers faced with advice from certain quarters that at the present

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PRESIDENT - O'BRIEN

MR O'BRIEN:

time they are award free.

PRESIDENT:

Thank you. I think I must, in view of the fact that the Department of Labour and Industry have written to me and chosen not to come along to these proceedings ... Is it convenient that I now read into the transcript the letter I received only yesterday?

MR O'BRIEN:

Yes, Mr President.

PRESIDENT:

And this refers to the classification of library attendant, and I quote:

"The Department has been aware for some time of the `problem` created by simply lifting the classification of `Library Attendant` from the Insurance Award and inserting it unaltered into the Miscellaneous Workers' Award. Photocopies of correspondence to the S.D. & A.E.A. and T.C.I. are attached.

While I believe it was not intended, and have no doubts that it is not appropriate, it seemed that this classification, by virtue of the definition contained in the award, was capable of covering persons employed in video hire establishments."

I might interpolate there, with the greatest respect to the writer. I don't think it's of any concern to the writer whether something's appropriate or inappropriate. Their task is to police awards, not comment on the merits of them.

"Employees of such establishments are considered `award free` unless there is a substantial amount of the employees time spent actually selling video products. Where selling does occupy a substantial amount of an

PRESIDENT:

employees time, the Retail Trades Award is applied by virtue of Section 49(3) of the Industrial Relations Act 1984. As Section 49(3) provides no practical guidance as to when it comes into operation, for administrative purposes, 'substantial amount of time' is regarded as being at least 25% of an employees time per day."

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PRESIDENT

PRESIDENT:

"Point 4 of Annexure A of the Application reads:

"The Secretary for Labour and his staff advises enquirers that they doubt that the said award applies to the operation of video libraries where the employment occurs."

"That statement ..."

I am still quoting from the letter -

"... does not sufficiently reflect the Department's view that neither the definition nor the conditions of employment prescribed in the Miscellaneous Workers' Award could be regarded as appropriate and that it is neither practicable nor desirable to attempt to enforce compliance with that award."

I read that for your information because the Secretary is entitled to appear in these proceedings, has chosen not to, but has sent this letter.

MR O'BRIEN:

I, if I may say so, find it remarkable firstly that although I made direct contact with the Secretary personally, that the Secretary chose not to direct that correspondence to myself but rather to the employers and another employee organization who is not party to either the previous award or the current award.

And secondly, I think I would be stating the obvious when I said that it isn't the business of the Department of Labour to form a view as to what ought be the case, but rather they are simply charged with administering the law and I think that as that matter ought now be public document, that I would like the opportunity to consult with the Minister about that behaviour because I think it is entirely inappropriate.

CW/HT - 15.05.87

PRESIDENT - O'BRIEN

PRESIDENT:

Yes, thank you. I felt that I ought to bring it to your attention because obviously I have been written to for a purpose and I would be in some difficulty if I had regard for information of that kind without giving the parties an opportunity to comment on it, and of course that opportunity is afforded you likewise, Mr Abey.

MR ABEY:

Thank you, Mr President. Our submission in this matter turns on the construction that the reasonable man would place on the term `library` or `library attendant`. I think the critical words are at the end of the definition where it says:

"... or other published material is kept available for public or private use."

Now, we are not suggesting for a moment that videos cannot form part of a library in the commonsense understood term of what a library is. We are saying that those words there:

"... available for public or private use."

must be construed as the reasonable man would construe them in terms of a library.

We would submit that the reasonable man, when asked what he understood a library to be, would say, a premise or premises whereby any of these items were available largely to be borrowed - certainly not bought or purchased and highly unlikely for hire. The concept of libraries is just that: you go to a library, you borrow the book or the material you want, and you return it.

You don't hire it. We suggest that the words:

"... available for public or private use."

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PRESIDENT - ABEY

MR ABEY:

must be construed in that sense, or should be construed in that sense.

Perhaps if I can draw an analogy. Under that definition a newsagency or a bookshop could be construed as a library if you took the words literally because clearly a bookshop contains books, magazines, newspapers, which are available for public or private use. The only difference between a video outlet, as we know them, and a newsagents is one is selling and one is hiring.

But in our submission neither can fall into the category of a library as understood by the reasonable man.

Clearly when this classification went into the Insurance Award it made sense within the context of that industry. Within the insurance industry it was an acceptable definition for that industry.

Perhaps if I can borrow from a well-known gentleman, when the matter came into the Miscellaneous Workers Award, we had what could well be described as an unintended consequence. Certainly it would be an unintended consequence if Mr O'Brien's application is to succeed because it simply doesn't make any sort of sensible sense or any sort of sense to apply these words to what is a fairly well-defined industry.

Reference has been made to the 'Yellow Pages' and I accept that the entry appears under the heading, 'Video Cassette Libraries'. That is of course something which the 'Yellow Pages' people have attributed to it but it carries no more weight than that.

But the interesting thing is that there are over 50 entries there, which is surprising in itself - it has certainly been a growth industry. But of those 50-odd, on my reading only one of them uses the term 'library' in the name of the

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MR ABEY: business and that is the Mornington Video Library at the top of the middle column.

So I would submit that clearly the industry itself does not view itself as being `libraries` in the commonsense accepted form of the word.

PRESIDENT: What about under `Rokeby`? `A comprehensive library`.

MR ABEY: Yes, well, they use the word `library` there; they don't use it as the name of the shop. The shop is not named. I am talking about the business name.

PRESIDENT: Yes.

MR ABEY: I concede that they do describe - they use the word `library` there. Maybe ...

PRESIDENT: A cataloguing process is carried out; wouldn't that be the reason why they use the term `library`?

MR ABEY: Well, yes, I would accept that argument.

MR O'BRIEN: There is another one just for the record.

PRESIDENT: I'm sorry Mr ...

MR ABEY: Is there?

MR O'BRIEN: Yes. `Greater Hobart Video`. In the first column it says, `Comprehensive Range Up To Date ...`.

PRESIDENT: `Library`, yes.

MR O'BRIEN: `... Library`.

MR ABEY: Three out of 50-odd make some reference to the term `library`. If by contrast you take yourself to the reference to `Public Libraries` elsewhere in the `Yellow Pages`, I think you will find universally they all use the word `library` in

MR ABEY: describing their particular operation.

Mr President, I don't think there is anything more I can add. It is an important matter but I would be simply repeating myself if I took it any further. If the Commission pleases.

PRESIDENT: Mr Abey, thank you. I realize we are all in some difficulty here. Your members - I guess they are your members ...

MR ABEY: Not all of them.

PRESIDENT: No, some might be. Are you able to tell me what award they apply?

MR ABEY: In our contention, no award applies.

PRESIDENT: They must pay them something.

MR ABEY: Well, they pay them something, but beekeepers are also award free. They presumably pay their people something.

MR O'BRIEN: Do they employ?

PRESIDENT: You see, why I ask you that is because before this Miscellaneous Workers Award was made, the other organization that might be considered to have an interest was given every opportunity to come along and object and didn't do so. It was advised of these proceedings today and it still didn't do so.

I don't think that anything really turns on it. The mere fact that someone doesn't turn up doesn't mean that one should have too much regard for that.

But so that I understand your submission, you are saying that classification is okay so far as it goes, but if there is any selling ...?

MR ABEY: No, no.

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PRESIDENT - ABEY - O'BRIEN

PRESIDENT:

No. What are you saying?

MR ABEY:

We are saying that the classification made sense within the terms of the award it was originally inserted into, being the Insurance Award, and it still makes sense in the terms of having application to say a library attendant at E.Z. Co., or Comalco or something like that, who would have a private library (maybe the T.C.I. could afford one - a librarian I mean).

PRESIDENT: You'd have a librarian, a professional librarian, wouldn't you?

MR ABEY: We have several, yes.

PRESIDENT: Cum-advocates.

MR ABEY: But, the essential point I'm making is that these video outlets invariably hire or sell. Now, our contention is that a library, in the commonsense understood sense of that word, does not hire or sell - it borrows. And I drew the analogy with the newsagents. And I know the newsagency is subject to a Retail Trades Award but, in the context of this definition, if you conclude that a video outlet which hires or sells videos is a library, then you would also have to conclude that a newsagents is a library. I know the award wouldn't apply, but the same logic would apply because they are storing books and magazines for the use of the public.

PRESIDENT: Well then, does this whole case turn on the words: 'required to control access'? What does 'control access' mean?

MR ABEY: I don't think it turns on that. I think it turns on the words: 'available for public or private use'. 'Use' is probably the critical word.

To control access to material, well that makes sense in the context of a traditional library.

PRESIDENT: Yes, because quite clearly, reference is made to films, tapes, sound recordings and video recordings, so there is no doubt that the definition of library attendant embraces that kind of activity.

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PRESIDENT - ABEY

MR ABEY: You can certainly have a library of videos.

PRESIDENT: Yes, quite so. But are you saying that where you have a "video library" (in quotes if you like) that distributes for a fee, movies and matters of that kind, then this particular classification would not apply?

MR ABEY: Yes.

Yes, I think that takes it out of the context of what is understood by a library. Within the context of public and private use, the fact that something is there for hire or for sale certainly means that it can be used by the public, but I don't believe that's what those words mean because of the analogy with the newsagent.

What is the difference between the newsagent and the video outlet in the context of this definition? They both ... they either are both libraries or neither are libraries because they are both selling or hiring one of those products, and that's the difference rather than lending.

PRESIDENT: Well, again, it's one of those unfortunate situations, isn't it, if you are of the opinion that this (I think to quote you) is an unintended consequence? It was your organization that agreed to it.

MR ABEY: Well, I accept that. I mean, in hindsight, we should have tried to tighten it up and ... I mean, if we lose this application, the first thing we'll be doing is lodging an application which clearly excludes videos. And attached to that will be an application either for a new award or for a separate part in this award which can apply to video outlets. You know, we've got no problems about video outlets being subject to award coverage. We're saying this is not the appropriate award coverage.

MR ABEY:

The Miscellaneous Workers' Union, we concede certainly has the constitutional ability to cover these employees, and we're not running away from that. You know, this is getting to merit, but the concept of award coverage is not a problem to us. And if we win this application and Mr O'Brien wants to discuss award coverage, either separately or as part of this award with us, we would be more than happy to accommodate that. But at law, we are saying at the moment, they are award free.

PRESIDENT:

Notwithstanding the words used, that a library attendant - someone employed, because they must be employed as such; the award says so. The award says:

"Subject to the exceptions and modifications prescribed elsewhere this award shall apply to the work performed by private employees classified as follows:"

MR ABEY:

Yes.

PRESIDENT:

"This award shall not apply to a private employee who is engaged within an industry where an award or registered Industrial Agreement applies containing a classification of employee embracing the same or similar work ..."

However, you're not suggesting that there is such an award.

MR ABEY:

No.

What we're suggesting is that the first line of the definition says: 'means a person employed in or in connection with a library'. Now, we're saying ...

PRESIDENT:

It's pretty broad.

MR ABEY:

I accept that. I mean, this is our submission. I'm not saying you have

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PRESIDENT - ABEY

MR ABEY: to agree with it. It's our submission.

PRESIDENT: Yes.

MR ABEY: I'm saying that video outlets are not libraries within the context of what is understood to be a library. And if they are a library, then so is a newsagent. I think that's the test you've got to apply; or for that matter, a record store.

PRESIDENT: If the Commission is against you on this, then this award could equally apply to a newsagent where books, magazines, newspapers and so on ...

MR ABEY: Well it wouldn't ...

PRESIDENT: or a chemist where films ... what kind of films?

MR ABEY: Well, it wouldn't in fact apply to a newsagent because they're subject to the Retail Trades Award, and that exemption clause would ...

PRESIDENT: Yes.

MR ABEY: ... would cover it, and the same with a record shop. But, the logic of our submission doesn't wane because of that fact. We are saying: 'What is a library?' Now, if a video outlet that hires and sells is a library, then so is a newsagent, and that's the sort of logic you've got to apply to it.

PRESIDENT: Yes, thank you.

MR O'BRIEN: Briefly, Mr President, the situation insofar as whether this is an appropriate award or not is irrelevant for the purpose of the argument, as I think would be conceded.

I point to the fact, that in relation to Mr Abey's comments on what is and what isn't a library, that a library does not have to lend to be a

MR O'BRIEN:

library. In the sense that I think Mr Abey was putting it, a library may restrict the use of its contents to people who remain within the premises or room or whatever, known as the library. So, lending isn't necessarily an intrinsic part of the operation of a library.

On the question of these places being ... hiring videos, 'hire', the dictionary says is: 'payment by contract for the use of a thing'. And I think on any meaning, if you pay to use a video, you're hiring it, but at the same time to 'borrow' means get temporary use of with promise or intention of returning. And the use of these videos, in the context that I'm talking about is just that: to get the temporary use of these videos with the promise or intention of returning them. The fact that a fee is involved is secondary to the question of whether the thing is borrowed or not. And the fact that the operators of the business say that it's a 'hire', really doesn't tell us anything other than that's a word that they wish to use.

But just so that we examine that point further, I can recall some years ago, going to holiday centres, that there would be premises set up with books, calling themselves libraries, that charged a fee to use the contents of what they called libraries. Now I don't know whether they were or not, or whether they were in fact shops selling with a return and reissue policy. That's a matter which is beyond me, but the name really of an establishment isn't necessarily going to tell us anything.

MR O'BRIEN:

Just the same, when we go to the question of classification, if I employ a cleaner and call him 'dogsbody' does that mean that I'm not covered by an award? I think the answer simply is, no. We have to look at what the award intended to cover and any attempt by some sort of subterfuge to get around that award obligation is not going to be picked up, in my submission, by any authority.

I think that's all I needed to reply upon, unless there's something you wish to raise with me.

PRESIDENT:

No, only the question of operative date again.

MR O'BRIEN:

Same position as before.

We see this is a matter which arose at the making of the award and we'd be asking that the matter apply from the date of the making of the award. And can I say, that upon the making of the award my organization distributed to a great many of the establishments a circular setting out the details of the fact that the award had been made, the definition of the classification and the rates of pay which the classification require. And in the circumstances, we think that it's appropriate that if they were in any doubt they have certainly done nothing to clarify it before now and they should not be so protected.

PRESIDENT:

Yes. Thank you.

Mr Abey, I didn't give you an opportunity, or I didn't jog your memory regarding operative date. Do you wish to say anything on that?

MR ABEY:

Yes. In both instances we, naturally enough, would oppose any retrospectivity. Both matters are, to say the least, unclear and difficult. And we suggest that should you be in favour of

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PRESIDENT - O'BRIEN - ABEY

MR ABEY:

Mr O'Brien, it's unreasonable to apply any retrospectivity on something which the ordinary employer out there in the market place could not reasonably be expected to interpret. And particularly when it would appear that in both cases that Labour and Industry have been advising in line with our submission.

PRESIDENT:

Yes, thank you.

Mr O'Brien, do you want to say anything about that, because ...

MR O'BRIEN:

I think only this; reiterating what we've said about knowledge. There's an old maxim, 'Ignorance of the law is no excuse' and if the Department of Labour were giving the wrong advice to employers, whilst that's unfortunate, the reverse side of it is that the award created legal rights for employees and there have been other opportunities for that position to be tested.

Mr Abey's members haven't brought the matter here for interpretation. There's been no application from the Secretary for Labour.

We have been before this Commission in relation to a dispute with regard to employees under the award, and in fact in some areas the award is operating and we see no reason why some employers observe the award whilst others will be protected, perhaps, by a decision which gave a prospective interpretation.

PRESIDENT:

Thank you.

Well, gentlemen, as indicated earlier I'll reserve my decision on both matters.

HEARING CONCLUDED