

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No 2589 of 1990

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

re rates of pay

PRESIDENT

Hobart, 14 September 1990

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Appearances please.

MR T.J. EDWARDS: If it please the Commission, EDWARDS T.J. I appear with **MR M.D. FLYNN** for the TCI and MATFA.

PRESIDENT: Thank you, Mr Edwards.

MR B.P. NEWTON: B.P. NEWTON, Mr President, I appear for the Secretary of the Department of Employment and Industrial Relations and Training.

PRESIDENT: Quite so. Thank you very much. Well, we're light on this morning.

MR EDWARDS: We seem to be a bit short one end, Mr President.

PRESIDENT: Yes. Thanks. Mr Edwards?

MR EDWARDS: Sir, the - as stated in the application, the interpretation we seek from the Commission today revolves around ascertaining the correct rate of pay for a 20-year old employed as a first year apprentice butcher under the Meat Trades Award. The previous President, sir, indicated that these sorts of matters should be run in respect of a specific case.

I don't intend to go to details as to the name of the employer or, indeed, the name of the employee, because I don't think that's necessarily material. What is material is that there is an actual case of a 20-year old who is engaged as a first year apprentice butcher, and there is a disagreement between a number of parties as to the correct rate of pay that that person ought to receive, and that is, indeed, the question that we're putting before the Bench today.

This matter has been considered by the Division of Labour and Industry of that long-named department that Mr Newton just referred to, which I won't try and repeat, and the AMIEU. However, we can't agree with the opinions proffered by those two groups which were, in any event, divergent one from the other, and both of their opinions differ from the opinion of the TCI and MATFA, or the employer groups.

In our view, the appropriate construction to be placed on the award provisions are that this employee should be paid a minimum of \$140.14 per week. That view is premised on the fact that Division G of Clause 8 - Wage Rates of the Meat Trades Award sets out, in our view, quite clearly the appropriate rates of pay to be paid to someone indentured as an apprentice, and is a specific rate designed for that purpose, and in this particular event it's 38 per cent of the rate for classification 4 of Division A, subdivision A1, which is:

A general butcher who in the course of his duties acts as a shopman or is engaged principally cutting for window displays or for sale as prepacked meat.

And the rate of pay there is \$368.80. 38 per cent of that on my calculations comes to \$140.14. There is no rounding criteria in the award, therefore, the 14 cents would be accurate, I believe.

It's been suggested that our view to some extent is vitiated by the interaction of Division H - Junior Workers other than Apprentices, and subclause (2) of Clause 8 - Wage Rates of the award, which is the minimum wage clause. Subclause (2) - Minimum Wage in essence states that no adult employee shall be paid less than a wage rate of \$241.10 per week.

The key word there, in our view, being the use of the term 'adult employee' and, really, I think the interpretation is going to turn on the meaning of that provision. Division H - Junior Workers other than Apprentices, states that a rate of pay for juniors is a certain designated percentage, dependent upon age, of classification 14 with the full adult rate being payable at 20, notwithstanding that it says at 19 years of age 100 per cent is paid.

It is a bit hard to differentiate between those two designations. Perhaps the award is saying that you're still a junior at 19 but at 20 you're an adult. But it's a bit hard to read that into what is actually there, and we really only would be guessing to try and do so.

PRESIDENT: So, the minimum wage might well be below 100 per cent.

MR EDWARDS: It could well be, yes, sir. The suggestion that an employee covered by this award is an adult at 19 or 20, however one can read Division H, is thus - and thus the employee subject to this application is, in our view, not accurate.

The preamble to Division H - Junior Workers other than Apprentices specifically excludes, from the operation of that division, people covered by divisions ... certain divisions of the award, predominately D, F and G, with the important one in this case being Division G - Apprentices. Therefore, someone who is indentured as an apprentice is not covered in any way by Division H - Junior Workers Other Than Apprentices.

So, in our submission, one can disregard the provision of Division H totally for the purposes of this interpretation. It has no bearing whatever. I can advise the Commission that nowhere does this particular award define the term 'junior workers' or 'adult employees' or the term 'adult'.

What is clear is that there are throughout the award divergent junior scales appearing. And I take the Commission in that regard to subdivision A2 of Division A ... I'm sorry, subdivision A1 of Division A, in the first instance, which is on page 8 of No.1 of 1990, which shows there that junior rates continue through to and including the age of 20.

There is also, in classification No.25 of subdivision A2 of Division A, a further junior scale, which is on page 10 of the award, which again shows the adult rate of pay continuing through to and including the age of 20.

In Division I of the award, which is the clerical provisions, which aren't germane to this but nevertheless I point it out as a further divergent scale, on page 19 of the award, it again shows that a junior is a junior through to and including the age of 20.

And then, of course, there is Division H, on page 17 of the award, which as I've already indicated, is a little confusing as to where the exact cut off point is, but the adult minimum ... the minimum adult wage applies certainly at 20 years of age and over, with 100 per cent of classification No.14 applying at the age of 19, which is \$311.50. In our view those ...

PRESIDENT: It seems odd though, doesn't it? The award is just badly constructed.

MR EDWARDS: The whole thing is odd, sir; it certainly is. And when we talk about what remedy in fact we seek this morning, it may be worth debating that particular issue a little further.

I have spoken to Mr Newton from the Division of Labour and Industry this morning and I don't think there's any great difference between us to what may be an acceptable way of resolving this particular matter - or as the previous President would have called it, an imbroglio.

PRESIDENT: I would have if I could have spelt it.

MR EDWARDS: Yes. I can say it, sir, it's up to the transcript writers to spell it. Mr President, in our submission, those provisions I've just taken you to in the award are, to say the least, unhelpful in determining this particular issue. They don't apply to the specific case in hand. In our view, the only area in the award that deals specifically with the question of apprentices is Division G.

I might just say, as an aside, sir, that our view as employers would be that next year when this particular apprentice is a

second year apprentice and 21 years of age, would be that the minimum wage would apply, because we believe at that stage he would have reached adulthood for the purposes of this award. Although, that is not clear ...

PRESIDENT: It doesn't say that in the award though, Mr Edwards.

MR EDWARDS: No, it does not, sir. In fact, we would be quite right, I believe, to continue to pay the second year rate of 55 per cent of the tradesman rate.

PRESIDENT: If your view holds, yes.

MR EDWARDS: If our construction is correct. What can be said is that none of the provisions I've just taken the Commission to apply to apprentices, except that in Division G, and don't really therefore assist us.

I tried to draw up a list of provisions in the award that may need to be considered during the course of this interpretation last night and they are many and varied, most of which I think can be disregarded. The first is, of course, subclause 1 - Wage Rates, which contains the rates of pay for adult employees engaged in retail butcher shops, where ... that's the type of environment which this particular apprentice is employed.

There is Division G - Apprentices, which I've already taken the Commission to. There is Division H - Junior Workers other than Apprentices, which I've already said I think can be disregarded. There is subclause 2 - Minimum Wage, to which I have already referred.

There is also clause 10 of the award, which is found on page 24, which deals with certain matters dealing with apprentices, and it's not particularly helpful but it does, nevertheless, deal with the question. It says in subclause (a):

No person under the age of 20 years shall be permitted to work in any of the occupations in the trades that are acclaimed as apprenticeship trades under the Industrial and Commercial Training Act -

and it goes through and names them -

- unless apprenticed in accordance with the Act.

Well, this person is apprenticed in accordance with the Act and is therefore entitled to do work in those classifications as an apprentice.

PRESIDENT: And is also over 20.

MR EDWARDS: And is also 20 plus.

PRESIDENT: 20.

MR EDWARDS: Not over 20, but actually 20.

PRESIDENT: No, but not under 20.

MR EDWARDS: But not under 20. Therefore there's no barrier imposed by clause 10.

PRESIDENT: 10(a).

MR EDWARDS: There is nothing else, I don't believe, in clause 10 that is in any way useful in dealing with this particular question, except to say that it does spell out in fairly precise terms the type of work able to be performed by an apprentices during his first year of service as an apprentice butcher or shopman, which is where this employee falls.

The only other provision that I thought could in any way be considered would be clause 28 - Junior Workers other than Apprentices which is to be found on page 33 of the award. And I only raise that simply because it uses the terminology of juniors, but it's in no way helpful, except to the effect that it excludes apprentices from the weight ranges specified by way of the heading of the clause, and again, treats apprentices in a different vein to the way it treats juniors. And interestingly the cut off point in those scales is 18 years of age, which introduces yet another variable.

PRESIDENT: Yes.

MR EDWARDS: Although I think it probably indicates that someone over 18 years can probably carry the same weight as adult.

PRESIDENT: Has reached some maturity.

MR EDWARDS: Physical maturity. So there is nothing in the award which is specifically helpful in determining this issue. The question turns, as I indicated before, I believe on the interpretation of the term 'adult'. In discussions with Mr Newton this morning, he indicated that some resort may be had to the Age of Majority Act. I believe, in the instances of industrial awards and interpretation of industrial awards, section 6(xi) of that particular Act of Parliament specifically excludes those enactments from the jurisdiction of that Act, and thus that to is unhelpful.

PRESIDENT: That was my understanding.

MR EDWARDS: Yes, sir. I knew you'd have a fairly good understanding of that Act, far better than I do. In fact, I had to beg Mr Newton for a look at the Act this morning because I didn't have a copy of it.

In our submission, sir, which is a fairly simple one, the employee is engaged as an apprentice. He is engaged under a contract of indenture through the Training Authority of Tasmania as an apprentice and thus we believe Division G of clause 8 is the only provision in the award that has any application whatever to his employment.

There is nothing in the award that says you can't have an apprentice of whatever age. It doesn't say 'junior apprentices', it just says 'apprentices' and it could be adults, juniors or any combination thereof. And it is a specific classification rather than anything general in respect of junior workers or other people. And thus, we believe it would be incorrect to apply anything other than the apprentices division to this particular employee.

Thus we would indicate that our submission would be that this particular employee is entitled to be paid \$140.14 per week. And I don't think it's appropriate for us to debate today whether or not that's an adequate salary for this particular type of employee. It's not a matter we can determine as part of an interpretation.

That really brings us to the last issue I really wanted to canvass today, and that is, how we go about solving this matter. I mean, it would be simple enough ...

PRESIDENT: I would be delighted if you could tell me.

MR EDWARDS: ... it would be simple enough for me to say to the Commission we wash our hands off it, we want you to issue an interpretation, which is a declaration and therefore binding, but I don't think that's necessarily the way to handle this particular matter.

What I would be looking for this morning is some sort of decision from the Commission as to what the award currently says, along with, perhaps, a directive to the parties that they confer for the purposes of providing an appropriate variation to the award to clarify the position so that it becomes clear, rather than an outright declaration. I don't think that's necessary in this particular instance, but the parties certainly, I think, do need guidance as to what the current provision is.

As I've already indicated, three divergent opinions have already come forward, where I think the AMIEU argued - or certainly in discussions with myself and Mr Flynn - that the

adult butcher rate ought to be paid, which is \$368.80. The Division of Labour and Industry conclusion, which Mr Newton will no doubt expand on a little further, was that the minimum wage ought to apply. Whereas I can't read the award in any way other than that that I have just indicated, Division G - Apprentices is the specific provision in the award applying to this type of employment. And it would be, in my view, an invalid interpretation to come up with any other conclusion, but, nevertheless, Mr Newton no doubt is going to try to. I wish him well.

So that would be, sir, how we would see the Commission trying to deal with this particular issue, with some indication of what the award does mean currently which the parties can then use to frame a variation to the award to make this clear and so the matter doesn't arise in the future.

PRESIDENT: You wouldn't like me to suggest an amendment?

MR EDWARDS: That would certainly be within the scope of what I've put forward, sir. Whether that should be from yourself or whether indeed the parties should try and frame one around the ...

PRESIDENT: I thought your organisation had the general view that ...

MR EDWARDS: I wouldn't ask you to vary the award, sir.

PRESIDENT: No.

MR EDWARDS: Specifically not. But you may suggest a form of variation in your decision which the parties could then debate between themselves and approach the Commission to vary the award with - either that or something similar or even different. But, I wouldn't see the Commission acting to vary the award out of this application for interpretation. I think our views on that are fairly well known and I don't think that they are all that divergent from the Commission's own view.

PRESIDENT: A bit of presumption there, I think.

MR EDWARDS: Absolutely.

PRESIDENT: Yes. Thanks, Mr Edwards. Mr Newton?

MR NEWTON: Mr President, as has been said, Division G, Clause 8(1) of the award sets out the means for calculating apprentices rates of pay. However, Clause 8(2) the Minimum Wage provision provides that:

Notwithstanding the provisions of subclause (1) of clause 8 no adult employee shall be paid less than the rate of \$241.10 per week.

And I point out that that minimum wage provision does not exclude the provisions of Division G for apprentices.

This particular issue was the subject of a request by my department to the Solicitor-General for a legal opinion in May last year, and in that request what we said was this:

The department has recently received enquiries requesting the appropriate rate to be paid to adult apprentices.

The view taken in the past has been that where there is a minimum wage provision in the appropriate award an adult apprentice, except where the award prescribes to the contrary, shall be paid the minimum wage until such time as the apprentice rate equals or exceeds that wage. I seek your advice as to whether this approach is correct.

I also seek your guidance in relation to the age an employee becomes an adult, particularly in view of the fact that some awards which have apprentice provisions provide for employees to be paid adult rates at 18 years of age. For instance, horticulturists, or 20 years of age in the Restaurant Keepers Award.

The advice which we received stated, amongst other things:

I advise I agree with you that adult apprentices may be paid a minimum rate set by an award for all employees provided the award makes no provision to the contrary.

You've asked at what age an apprentice becomes an adult for the purposes of the apprenticeship if the award is silent on the matter.

In my opinion the apprentice would become an adult on attaining the age of 18 years, as the Age of Majority Act 1973 would apply.

That is the advice which we have been relying on, or have relied on, in order to try and determine these particular questions.

I would suggest that perhaps a way of clarifying it would be the parties to consider a variation of the minimum wage provision, either if it is intended that apprentices simply get the specific rates set out in Division G irrespective of their age by including a provision in the minimum wage clause which excludes Division G from that provision, or by simply

stating in that provision an adult employee of the age of 18, 19, 20, 21, whatever is appropriate.

So, basically, Mr President, our submission is that we believe in this case a 20-year old apprentice is entitled to \$241.10, based on the legal advice which we've received.

PRESIDENT: Yes. Mr Newton, what does your ... I mean, I know you have got to rely on the Solicitor-General's opinion, but what's your understanding of the Age of Majority Act and its application to awards of this Commission? I haven't got a copy of it with me. Does it make reference to awards?

MR NEWTON: I suppose the appropriate provision which was pointed out to the Solicitor-General in asking for the advice is in section 6(11) as Mr Edwards has indicated, it says:

Nothing in this Act affects-

(a) conditions of employment or rights or obligations arising from employment; or

(b) the construction of -

(i) an industrial award, order, or determination; or

(ii) any instrument that is executed or entered into pursuant to an enactment and that prescribes or regulates wages or other conditions of, or relating to, apprenticeship.

PRESIDENT: Yes. Do you think the Solicitor-General had a look at that?

MR NEWTON: I certainly referred him to that provision, Mr President ...

PRESIDENT: You did, specifically.

MR NEWTON: Yes. If I can continue with what was in the letter. It says:

It is noted that section 37(1) of the Industrial and Commercial Training Act 1985 provides that rates of payments to be made to ... the conditions applicable to apprentices shall be in accordance with the award relating to persons employed in the declared vocation to which the contract relates.

And the Age of Majority Act 1973 provides in section 6(11) that:

Nothing in this Act affects -

(b) the construction of -

(i) an industrial award, order, or determination.

PRESIDENT: Thank you.

MR NEWTON: So, what I'm saying is, I gave the office of the Solicitor-General every opportunity to look at the relevant ...

PRESIDENT: Yes. I think all the parties agree that the award is pretty messy in this area. On the surface of it - and this is not a properly considered decision, but this a very preliminary and a summary sort of look at it - it does appear to me that Division G is pretty self-contained. The minimum wage clause talks about adult employees. The other clauses talk about rates of pay for juniors up to age 21. It's difficult to draw any conclusion that their over-age apprentices have been provided for.

I think that the industry hasn't caught up with the changing patterns of apprenticeship. It's an historical defect in the award and it needs attention, specific attention. I don't know how on earth I could find any other way really.

MR EDWARDS: On that point you raise, sir, about the award needing attention so far as bald-headed apprentices, as they are commonly known ...

PRESIDENT: No, I don't like that term.

MR EDWARDS: Nor do I, particularly, but Mr Flynn might. It is a specific issue that, certainly from the employer side, we expect to address as part of the structural efficiency exercise under this award to make specific provision in the award for adult apprentices, and it hasn't been progressed until now but it certainly will be as part of that exercise, if not earlier.

The whole area is obviously something in need of some form of variation to make the award an easier document to understand. I think I should say that I don't agree with the Solicitor-General's advice to the Division of Labour and Industry, particularly if he has been directed to the specific provisions of section 6(11) of the Age of Majority Act, but I presume from what Mr Newton has said, he hasn't made any specific comment on that in the opinion he has given and has chosen to ignore it.

PRESIDENT: Well, he seems to have ...

MR EDWARDS: He certainly referred to the Age of Majority Act, but does not appear to have taken any specific cognisance

of section 6(11) of that particular Act which disqualifies its operation from this area and talks specifically there about it not being used to provide a construction of an industrial award and, indeed, goes further to exclude it as far as apprentices are concerned in any event. That's an area that you'd be far more familiar with than I, sir, through your previous involvement in that area.

I don't think it's appropriate that one takes an arbitrary ruling that someone becomes an adult at 18, 19, 20 or 21, when there's nothing specific in the award that enables you to come to that conclusion and as you have indicated in your preliminary advice, and your preliminary advice is exactly the same as my own feelings on the subject, that the apprentices clause is self-contained and I don't think it's appropriate to read anything in to alter its specific terms.

Now, as I've indicated, we are prepared to have discussions with the union, perhaps involving the Division of Labour and Industry if they're interested in being involved, to provide some appropriate variation to the award following these proceedings but I think, in the first instance, given the divergent views of the parties, some indication of what the current position is would be most helpful to us in order to come up with an appropriate form of variation. I think we are going to argue the interpretation, rather than a provision to overcome the problem.

PRESIDENT: Yes, and I find that a bit unfortunate that we have to get to the stage of trying to do this thing by interpretation.

MR EDWARDS: It is very difficult.

PRESIDENT: Mr Flynn, could you give me any indication as to the extent to which adult apprentices are employed in the meat trades area?

MR FLYNN: I'm not sure, Mr President, it's very limited. This is the first one that's come into question with regard to wages at least in the 6 years that I've been involved. I've got to admit that I have had some questions from people wishing to take on sons on occasions, and what the appropriate rate should be, and in those cases it's normally an owner of a butcher shop who wishes to take his son on. He may be unemployed, or whatever, in which case I've said, 'Well, make your own arrangements', which is normally what happens and, of course, the son ends up inheriting the butcher shop anyway.

So ... I believe in that 5 or 6 years that there have been three adult apprentices, or what I would consider to be adult, 21 year old apprentices employed, and that would be an absolute maximum. It just doesn't occur.

PRESIDENT: Yes. I can recall when I was President of the Apprenticeship Commission we used to say once you get up to around about that age it's a matter of your good sense of what you think is appropriate, and the starting point was usually the minimum wage, and I think we reached some agreement in the electrical trades area where, in fact, that was eventually ... that was the first variation to an award, I think, which granted that.

MR FLYNN: Without going into specifics, and Mr Edwards has already mentioned in this particular case that the employer took on the apprentice, given the award that existed, and paid in good faith the rate of pay that existed then. However, I believe on obtaining the age of 21 he has agreed he will pay the minimum wage until the apprentice rate in the award overtakes that wage, as Mr Newton said before. That would be his intention. However, he baulked very badly of Mr Swallow's suggestion that he pay him full adult tradesman's rates, and that's why we are here before you today.

PRESIDENT: It's a pity Mr Swallow is not here to put his point of view.

MR FLYNN: Yes.

MR EDWARDS: Just on the subject you raised a moment ago, Mr President, about the rule of thumb, if I can call it that, that the Apprenticeship Commission and these days the Training Authority have traditionally used, I can indicate that my organisation, the TCI, have always used that same rule of thumb unless an award provides something different, and that is that at 21 years of age an employee should be paid not less than the minimum wage, and that applies until such time as that rate is overtaken by the specific apprenticeship provisions, which I think in this award probably happens in the third year, from memory. So ...

PRESIDENT: Yes. I did my sums yesterday.

MR EDWARDS: Yes. So, that's the way we have always handled it as an organisation, although that's not necessarily helpful in an interpretive proceedings. It's nevertheless an indication of the attitude employers in this State traditionally adopted.

PRESIDENT: And what if I decline to make any sort of interpretation?

MR EDWARDS: I guess we're back where we were.

PRESIDENT: You might have to sort it out in the field.

MR EDWARDS: Yes, well, that's I guess the way it would have to go. I don't know what position the Division of Labour and

Industry would have on the instant case, whether or not they would be inclined to take an action against the employer to have the matter sorted out through the civil courts, which is open to them. It's not something that I would prefer, and I don't think it's the right place to sort these sort of things out. I think that's what this provision of the Act is for. So, I would be hopeful the Commission wouldn't adopt that stance.

As I said, I don't think we need a declaration, just an indication of your perception of how the award ought to be read, on proper interpretive guidelines obviously.

PRESIDENT: How long has this individual got to go in the 20 ... as a 20-year old?

MR EDWARDS: The matter's been discussed between Mr Flynn and myself and Mr Swallow and the Division of Labour and Industry now for some 3 or 4 months and he was 20 then, so at the very most we've got 6 months. And that would be an outside figure. I'd suspect it would probably be even less but I've got no specific information.

PRESIDENT: We'll go off the record for a short while thanks.

OFF THE RECORD

PRESIDENT: Well, thank you very much for that discussion on the way we might proceed with these matters. I'll reserve my decision. The matter is concluded.

HEARING CONCLUDED