

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

**T. Nos 752, 796 & 802 of 1987**

HOSPITALS AWARD - CLAUSE 30  
INTERPRETATION

PRESIDENT

3 June 1987

**TRANSCRIPT OF PROCEEDINGS**

(UNEDITED)

Decision given  
dated 24 June 87.

PRESIDENT: I'll take appearances, thank you.

MS FAWDRY: If the Commission pleases, **MARCIA FAWDRY** from the Hospital Employees' Federation of Australia, Tasmania No. 2 Branch and with me is **MR DAVID REES**.

PRESIDENT: In all matters, Ms Fawdry?

MS FAWDRY: Yes, Mr President.

MR LAW: If the Commission pleases, I appear for the Royal Australian Nursing Federation, together with **MISS BOUCHER, W.** and **MR HEAPY, D., LAW, R.**

PRESIDENT: Thank you, Mr Law.

MR IMLACH: If the Commission pleases, **PETER IMLACH** for the Hospital Employees Federation of Australia, Tasmania No. 1 Branch.

I seek leave to intervene, Mr President, in all matters.

PRESIDENT: Yes. Your organization would obviously have an interest in this, Mr Imlach.

MR IMLACH: Very much, Mr President.

PRESIDENT: Yes.

MR PEARCE: If it please the Commission, **PEARCE, A.**, together with **MRS S. GREGG**, appearing for the Minister for Public Administration.

PRESIDENT: Thank you, Mr Pearce.

MR MILLER: If the Commission pleases, **MILLER, R.**, Tasmanian Public Service Association, wishing to intervene in all matters.

PRESIDENT: Yes, Mr Miller. I take it there's no objection to the T.P.S.A.'s intervention. They would have an interest in this matter, I imagine. Yes, thank you, Mr Miller.

MR FITZGERALD: Yes if the Commission pleases, I

MR FITZGERALD: appear on behalf of the Tasmanian  
Confederation of Industries,  
**FITZGERALD, W.J.**

PRESIDENT: Thank you, Mr Fitzgerald.

Very well. Ms Fawdry, do you propose  
to open the batting in this?

MS FAWDRY: Yes, Mr President.

PRESIDENT: And if so, are you aware of the  
ground rules that apply to matters of  
interpretation? I'm not at all  
concerned about merit, Ms Fawdry.

MS FAWDRY: Mr President, I'm going to be  
addressing T.752, the facts of that  
matter.

PRESIDENT: Yes. What about 796?

MR REES: If the Commission pleases, I'll be  
addressing the main facts in respect  
of T.796.

PRESIDENT: Thank you, Mr Rees. As long as I  
understand.

Yes, Ms Fawdry?

MS FAWDRY: Thank you, Mr President.

As you know, Mr President, this  
interpretation matter was originally  
set down to be heard on 21 May '87  
after the H.E.F. No. 2 Branch had  
lodged the application on 16 April  
'87.

Notification was sent out to all  
parties on 30 April '87, allowing 3  
week, which we believe was ample time  
for all parties to prepare their  
submissions.

It was therefore somewhat surprising  
to be advised as late as the  
afternoon prior to the hearing date  
that the matter had to be postponed,  
due to the employer representative  
not being able to appear.

MS FAWDRY: Mr Morley, from the Department of

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APPEARANCES - PRESIDENT - FAWDRY -  
REES

MS FAWDRY:

Health Services alleged that he was not aware that the matter referred to the public sector, even though there had been dialogue between him and the branch on the matter, after the application had been lodged.

We had also had negotiations with Mr John Jamieson from the Department of Health Services in his role as General Manager, Radiation (Oncology) with regard to the pending interpretation matter 1 week prior to the hearing date of 21 May '87.

We were still, at this late stage, trying to reach agreement on the matter which led to the lodging of this application.

We therefore have difficulty in accepting the employer representatives reasons for delaying this matter, particularly in light of the fact that the 2 registered nurses affected by this delay have been waiting for a resolution of their problem since 26 March 1987.

I'd now like to proceed with the facts of the case, Mr President.

PRESIDENT:

Yes, if you would, please.

MS FAWDRY:

The Hospital Employees Federation of Australia, Tasmania No. 2 Branch, is seeking an interpretation of clause 30 of section (1) of the Hospitals Award, Part II, Conditions. This clause is cross-referenced in Section II, Part II, clause 9 of the same award with application to public hospital employees.

It is within the public sector, Mr President, that the clause has created inconsistent views in application.

Mr President, I will read the specific paragraph under consideration from clause 30 into transcript.

"An employee kept waiting for

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FAWDRY

MS FAWDRY:

her wages on a normal pay day for more than a quarter of an hour after the usual time for ceasing work shall be paid at overtime rates after that quarter of an hour, with a minimum of a quarter of an hour."

The overtime rates as specified in the Nurses (Public Hospitals) Award, clause 15 (e) 'SHIFT WORK Overtime' states in part:

"For work performed by a shift worker outside the ordinary hours of her shift double time shall be paid. ..."

And in clause 11. C. 'OVERTIME - DAY WORKERS' sub-clause (b):

"For all time worked in excess of the ordinary hours of work, Monday to Saturday inclusive, payment shall be made at the rate of time and a half for the first two hours and double time thereafter. ..."

The two employees under consideration today, Mr President, are classified as day workers.

I would like to point out that the H.E.F. No. 2 Branch believes that the intention of the award provision was and still is clear. The wording of clause 30 of the Hospitals Award is not incongruent with the wording in other awards. Example, clause 7(e) of the Metal Industry Award 1986 reads in part.

I do have photocopies, Mr President, if you would like them.

PRESIDENT:

Well, it's entirely up to you, Ms Fawdry. I'm aware that that appears to be a fairly standard clause but I'm unsure if the Metal - does the Metal Industry Award refer to bulk payment at overtime rates for waiting

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PRESIDENT - FAWDRY

PRESIDENT: time, or payment?

MS FAWDRY: Yes, Mr President.

PRESIDENT: Just payment. Perhaps you should hand it up. We'll have an immediate objection from Mr Fitzgerald, I imagine, if he doesn't get a copy.

We'll mark this Exhibit A.

MS FAWDRY: I'm referring to paragraph (c) on that page, Mr President 'Wages to be paid during working hours' and I read it in part:

"... where the majority of employees in a particular establishment are employed under the terms of this award, wages shall be paid during ordinary working hours and if an employee is kept waiting for his wages on pay day, after the usual time for ceasing work, he shall be paid at overtime rates for the period he is kept waiting. Where the majority of employees in a particular establishment are not employed under the terms of this award, an employee kept waiting for his wages on pay day for more than six minutes after the usual time for ceasing work shall be paid at overtime rates after the six minutes."

An identical clause to the Hospitals Award is also contained in the Hospitals Employees (Public Hospitals) Award at clause 12.

PRESIDENT: That was the straight importation by Mr Commissioner King, I believe, from the Hospitals Award.

John Carroll at paragraph 3-028 in the 'Australian Industrial Relations Handbook' endorses our view of the simplicity of an award provision written in this manner.

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PRESIDENT - FAWDRY

MS FAWDRY:

compensation for employees who are not paid within prescribed times and goes on to say - and I also have copies of those if the Commission requires them.

PRESIDENT:

I would be assisted in all probability.

It would save tendering a copy of the examiner, wouldn't it.

Exhibit B.

MS FAWDRY:

I'm not actually going to be referring to that particular paragraph. The section that I'm reading from is the second paragraph of `3-028 Wating time`:

"The compensation varies from award to award ranging from a simple provision of this kind, than an employee kept waiting for his wages on pay day for more than a quarter of an hour after the usual time of ceasing work shall be paid at overtime rates until he is paid, to a provision such as than in the Federal Pastoral Industry Award, than an employee kept waiting should be paid at a certain rate per day until he is paid."

Mr President, I will now turn to the specific situation that led to the branch's application for interpretation.

DISK 2

MS FAWDRY:

Two registered nurses employed by the Department of Health Services and working at the Holman Clinic in Launceston did not receive their pay cheques on Thursday, 26 March 1987.

The usual practice for securing payment for Department of Health Services employees working at the Holman Clinic is that the Department of Health Services authorises the Launceston General Hospital pay office in writing to act as their agent for the purpose of payment of wages.

On this particular occasion, the Launceston General Hospital pay office had not received any information or employment details on these two registered nurses and subsequently their pay cheques were not drawn.

The supervisory nurse at the clinic informed the Department of Health Services of the error, and from this point on there were numerous phone calls back and forth between departments and organisations.

It is alleged that the Department of Health Services denied any fault in the matter, insinuating that the problem was at the Launceston General Hospital.

Later on that day, 26 March '87, the Department of Health Services informed both employees that their wages would not be paid until the next day - Friday 27 March, 1987.

During this phone call, Miss McCulloch, one of the RN's affected, informed the Department that she had contacted the union and expected to be paid the penalty as prescribed by the award provision under discussion.

The following day - Friday, 27 March 1987 - at 2.30 pm off-line cheques were made available to both Miss McCulloch and Mr Marrable, who was the other registered nurse affected.



MS FAWDRY:

Miss McCulloch, having received more than she would expect to receive for one week's work, thought she had been paid the penalty for waiting time, and the situation appeared at that time to be resolved.

It was subsequently discovered that she had in fact been paid two weeks' salary instead of one, and that it wasn't the penalty that was included.

After the members contacted us we sought a position from the Department of Health Services. This took quite some time, but we were ultimately informed by Mrs Gregg from the Industrial Relations section, that a memorandum had just gone to the General Manager, Radiation Oncology, Mr John Jameson, informing him that the Department believed that the employees should receive penalty rates only for the time worked on the Friday and not for any of the time that had lapsed between the end of business Thursday and the start of business Friday.

That incidently was the nurses off duty time, Mr President.

It was then as a result of this advice that the branch lodged this application for interpretation. We did this because we could not understand how this conditional provision could be read into the award clause.

The banch later discussed this position with the Office of Industrial Relations, and it appeared that they were of a similar view - using the words 'active' and 'passive' waiting time as being the criteria for payment of the penalty prescribed in the award provision.

It is our belief that this award provision has no intention of qualifying the extent of penalty payment, it simply states that an employee kept waiting for her wages on a normal pay-day for more than a

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FAWDRY

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MS FAWDRY:

quarter of an hour after the usual time for ceasing work shall be paid at overtime rates.

John Carroll, as previously cited, appears to endorse this opinion when he says, and I quote - this is on page 43, at the top. It's within the Exhibit B, Mr President.:

"Where provision is made for the payment of waiting time over an extended period, there will be some special provisions in the award to cover this. For example, in the Commonwealth Works and Services (N.T.) Award 1957 there was a qualification that not more than eight hours pay should accrue in respect of each 24 hours of waiting. The Federal Pastoral Industry Award 1956 made no such stipulation and in Re Pastoral Industry Award (cited above) the Court awarded payment for the whole of the elapsed time."

PRESIDENT:

I wonder if that's the same case that I'm familiar with, which is reported in 19(i)(i)(b). That's a Pastoral Industry case, and in that matter the industrial court, their Honours Mr Justice Dumphy and Mr Justice Eggleston determined that the correct payment in those circumstances would be a day's pay divided by 24. Now it may not, but that was the Pastoral Industry Award 1956 judgement, given on 4 August '64. Do you think that's the matter Mr Carroll refers to?

MS FAWDRY:

I believe it is, Mr President.

PRESIDENT:

Yes.

MS FAWDRY:

I do have some further reference to that particular matter.

He says (and I'm talking about Carroll) :

"That there will be some

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PRESIDENT - FAWDRY

MS FAWDRY:

special provisions stated in the award to cover the payment of waiting time over the extended period. There is no such special provision in this award."

In the Pastoral Industry Award matter as reported in volume 6 of the Federal Law Report, at pages 174 and 175 (and I have copies of that as well, Mr President) ...

PRESIDENT:

That will be Exhibit C.

MS FAWDRY:

I will be reading from the second paragraph on page 174 in part, some part into the next paragraph, and stopping halfway down there, and then going across to page 175. So I'm just reading it in part, Mr President.

PRESIDENT:

Yes.

MS FAWDRY:

I've picked out the pertinent areas.

Justice Eggleston spent some time addressing the question of whether the employees should wait in this case at the station (they were shearers, Mr President) in order not to forfeit his claim for payment. I will quote some excerpts from his opinion.

"What is to be said of the case where an employee actually waits at the station for some time and is then told that no payment will be made. If the employee then leaves the property, does he forfeit his claim for any payment under this clause? Difficulties must inevitably arise in the practical application of this clause, but in my view an employer cannot escape the obligation to pay under clause 44(f) by refusing to make any payment at all, or by choosing to post cheques to the employees instead of handing them over

MS FAWDRY:

at the station.

It is necessary therefore to consider the question whether clause 44(f) applies only to time spent by the employee at or near the station waiting for payment, or whether it applies to time which elapses between the time when payment should have been made and the time when it was actually made, irrespective of whether the employee waits for the payment or not."

Over onto page 175, third paragraph :

"These difficulties, which would not exist, or would not exist in such acute form, if the clause were interpreted as applying only to employees who actually waited for payment, give rise to doubt as to whether the clause should not be so interpreted. But an equal difficulty arises if the clause is interpreted as applying only to those who actually wait for payment, since if the employer declares his intention not to pay the employees at the station but to post their cheques to their homes, the employees will virtually be compelled to return home to collect their pay, and the employer by his own disregard of the clause, will have rendered the provision for extra pay inapplicable."

And his opinion was :

"I am of the opinion that it is not essential that the employee should actually wait to receive his money."

And that's basically the implications I'm taking from that interpretation, Mr President.

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PRESIDENT - GREGG

||

MS FAWDRY:

The two Holman Clinic employees were told that their pay would not be ready until the Friday. There seemed to be little to gain by them actually waiting at work for a pay that was not going to come, even if the award provision stipulated this, as it did incidently in the Pastoral Industry Award.

Mr President, there also appears to be some different opinions on the definition of what the word `wait` means. We have heard reference to active and passive waiting time, with the assumption that active waiting time may attract payment, but passive waiting time does not.

This would appear to be a Department of Health Services opinion, when they advised that the penalties should only apply to the hours that the employee was on duty at work on the Friday.

`wait` as defined by the Concise Oxford Dictionary reads :

defer action or departure for specified time or until some expected event occurs ..."

MS FAWDRY:

And in the Macquarie Dictionary  
'wait' is defined as:

"... to stay or rest in  
expectation; remain in a  
state of quiescence or  
inaction, as until something  
expected happens."

I submit that both these definitions  
refer to waiting as being an action  
that can be inert and merely an  
expectation that something will  
occur.

If I draw an analogy to waiting for a  
telephone call or a letter, it does  
not infer that I physically stand and  
wait by the telephone or the letter  
box. But nonetheless I am waiting.

I see no difference in the inference  
in the word 'wait' in the award  
provision for until the employee  
actually physically receives the pay  
envelope they are waiting to receive  
it.

Now I take you to the final twist, Mr  
President. The General Manager of  
Radiation Oncology, Mr John Jameson,  
did not in fact take the advice of  
the Industrial Relations department  
of the Department of Health Services,  
and decided that neither employee  
would be paid any penalty at all.

I would like to tender two separate  
memos from the General Manager to the  
employess dated 14 and 15 April 1987,  
respectively.

PRESIDENT:

Is the Holman Clinic subject to this  
award, Ms Fawdry?

MS FAWDRY:

Yes, Mr President.

PRESIDENT:

The first letter will be Exhibit D.  
That's the one dated 14 April and the  
next letter will be Exhibit E.

MS FAWDRY:

I refer you first, Mr President, to  
the second paragraph of Ms

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PRESIDENT - FAWDRY

MS FAWDRY:

McCulloch's memo which infers two things.

The first inference is that the department had taken action to ensure payment was made. This I believe is questionable and I draw your attention to a letter from the Department of Health Services to the Administrator of the Launceston General Hospital dated 23 March 1987.

PRESIDENT:

That will be Exhibit F.

MS FAWDRY:

This letter was sent from Hobart by ordinary mail on Monday of the pay week. It did not arrive on the desk of the Personnel Officer at the Launceston General Hospital until 25 March 1987. That is the Wednesday, 1 day prior to actual pay day.

And you'll see a scribble over in the right hand side of the letter - 25/3 - which the Personnel Manager actually wrote on there when it arrived on his desk.

It has long been the practice at the Launceston General Hospital that all employee details for payment must be in no later than 0.900 hours on Tuesday of the pay week.

The pay office in fact did not receive notification of Ms McCulloch's employment details until the morning of Thursday, the actual pay-day, 26 March 1987.

The delay clearly rests with the Department of Health Services because had a telex or facsimile been sent on the Monday this problem would not have arisen.

The second inference is that industrial action at the Launceston General Hospital was the reason for non payment.

Although there was a dispute hearing at 2.30 pm on Thursday 26 March concerning the pay office, did event was after the fact and has no bearing

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PRESIDENT - FAWDRY

MS FAWDRY:

on this case.

In the last paragraph, Mr President, the department again refers to their satisfaction that everything in its power had been done to effect payment and therefore no penalty would be made for late payment.

I assume that the department was intending to rely on the delay not being the fault of the department and therefore payment for waiting time not warranted.

Indeed, Carroll has previously cited, concurs with this opinion and I refer you to the exhibits you already have - the bottom of page 41.

He goes on to cite a case that one would assume the employer had less control over than in the case we are dealing with. And I quote:

"Waiting time is not usually payable unless the delay is the fault of the employer. A decision by (Federal) Commissioner Brown (Re Dispute Between Ralph M. Parsons Co. Ltd. and Building Workers' Industrial Union 1976 AILR 437) illustrates a view of what constitutes an employer's fault. Here, the regular pay day was Tuesday. After Easter, work recommenced on Tuesday but the banks had been closed from Friday to Tuesday and the employees were not paid until Wednesday. The Commission found that they were entitled to waiting time from the end of work from Tuesday until they were paid."

In this case the employer should have foreseen that the banks would be closed on Tuesday, the pay day and hence made alternative arrangements.

Mr President, I reject that the

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FAWDRY



MS FAWDRY:

employer in this case has shown that there was no fault on their part as they should have foreseen the limited time factor available to make payment on time and have sent their notification by telex or facsimile and not my ordinary mail.

PRESIDENT:

Do I take it from Exhibit F. that Ms McCulloch had been employed from 16 March anyway but the authority to employ her was only given on the 23rd?

MS FAWDRY:

That's correct, Mr President.

Turning now to the memo Exhibit E. addressed to Mr Marrable. In the first paragraph, the industrial dispute is again cited as a reason for non payment.

In paragraph 3 it is implied that because the employee was notified at 12.30 pm on Thursday 26 March 1987, that payment would not be made until the following day, the department is in some way exonerated from liability of payment for waiting time.

In the fourth paragraph, the General Manager seems to infer that waiting time on the Friday would only be applicable if Mr Marrable had worked on the Friday.

This has some consistency to the advise originally given by the industrial relations section of the Department of Health Services.

In fact, Mr Marrable didn't work on the Thursday either. He'd come in specifically to collect his pay.

The fifth paragraph refers to the fact that even though Mr Marrable's pay was ready on the Friday, he didn't come and pick it up.

I don't believe that this has any relevance. However, for the record, Mr Marrable attends the Tasmanian State Institute of Technology as a full-time student and it was not

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PRESIDENT - FAWDRY

MS FAWDRY:

convenient for him to come in on the Friday to pick up his pay.

The interesting feature about these 2 memos is that although they both refer to the same incident, all be it different people, the reason in each of them are different.

I therefore submit that this evidence shows a gross inconsistency in the attitude of the General Manager.

It could be seen as General Manager relying on as many options as possible in order to justify his decision not to pay the prescribed penalty for waiting time.

The Hospital Employees Federation Tasmania No.2 Branch, has applied to this court for an interpretation of the waiting time penalty payment in the award provision in the belief that the evidence presented today clearly supports our application of the award as read.

There are no specific provisions that could give rise to the various interpretations that have surfaced in this case. We respectfully submit, that in view of the fact the award provision, relative to waiting time, contains no bar in respect of the time elapsed; that you find for the two R.N.'s who waited for their pay from the time they ceased work at 5 p.m. on Thursday 26 March 1987 to the time of payment at 2.30 p.m. on Friday 27 March 1987.

Accordingly, waiting time, as specified for day workers, at time and one half for the first two hours, and double time thereafter, be awarded for the entire period lapsed after the first 15 minutes of ceasing work on the Thursday. That comes to a total of 21.1/4 hours, Mr President.

PRESIDENT:

Actual?

MS FAWDRY:

Actual.

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PRESIDENT - FAWDRY

PRESIDENT: Or equivalent?

MS FAWDRY: Actual.

PRESIDENT: Actual.

What would you say the case would be,  
had the Friday ... ?

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PRESIDENT - FAWDRY

PRESIDENT: ... been a working day, would you have paid them triple time while they were waiting?

MS FAWDRY: Well the Friday was a working day for Ms McCulloch, but it wasn't for Mr .....

PRESIDENT: All right then, well are you saying Mr McCulloch should be paid triple time or time by three, treble time?

MS FAWDRY: Are you saying that she should be paid for her day's work plus double time? I hadn't thought of it frankly.

PRESIDENT: Yes, well I suppose I'll have to.

Ms Fawdry, it's a very short provision that we have to look at isn't it? Three lines and a little bit. It doesn't add those important words that one would have thought ought to be added to make the clause unambiguous, that is to say, "an employee kept waiting for her wages on a normal pay day for more than a quarter of an hour after the time for ceasing work shall be paid at overtime rates [that is clear] after that quarter of an hour, with a minimum of a quarter of an hour". It doesn't say "until payment is made".

MS FAWDRY: No, it doesn't

PRESIDENT: One would have thought that it should have.

MS FAWDRY: It would have certainly cleared up the matter, Mr President.

I still believe the award provision is very clear, but by adding those extra words it would make it even clearer.

PRESIDENT: Yes it seems to have stopped short of saying ...

MS FAWDRY: In mid sentence.

PRESIDENT: ... for how long. One would assume that's what it means, but it doesn't

PRESIDENT: say that. It doesn't say that it doesn't mean that either.

MS FAWDRY: No.

PRESIDENT: Do you want to say ... ?

MS FAWDRY: No, that concludes my submission.

PRESIDENT: Well, there's one other matter that I would like you to address me on, and that is on ... if I interpret the award, in the way that you would have the Commission interpret it, should it be retrospective or prospective?

MS FAWDRY: Retrospective in what way? In the sense of these employees getting ... ?

PRESIDENT: Well the Act is clear. It says, the Commission may interpret an award retrospectively or prospectively. If I were to interpret it, say, in your favour from this date, that would give your members ...

MS FAWDRY: No joy.

PRESIDENT: ... little comfort, although you may derive a great deal of comfort from having your point of view accepted.

MS FAWDRY: No, I want more than that, Mr President. I do see payment for these two registered nurses. We did lodge the application fairly quickly after we discovered the problem, and the delays have not been of our making. In fact, when I rang the registered nurses to inform them that the case had been postponed to another date, knowing that they would be less than thrilled about that, they then asked me could they get penalty payment on payment for waiting time payment - for waiting for their penalty. So it is their clear intention that they expect to have some resolution of their problem.

PRESIDENT: Yes, well I can understand how they might feel. But, clearly, the Commission has a discretion in this

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PRESIDENT - FAWDRY

PRESIDENT: matter. If you've made it clear that you seek retrospectivity, I presume to ... what was the date, the 25th?

MS FAWDRY: The 20th March.

PRESIDENT: Yes. Yes, thank you.

Well now, shall we dispose of this matter first, before dealing with the other applications?

MR IMLACH: It would certainly be helpful to all the applicants, I suggest, sir.

PRESIDENT: Yes.

Well then, I'll hear any other organizer - employee organization - who wishes to address me on this particular application.

MR LAW: Mr President, I support the submissions of Ms Fawdry on this. As to the matters you have asked about, I think, in terms of the award not specifically stating, if we have a look at the definition that Ms Fawdry read in the Macquarie Dictionary of waiting, it was 'waiting in expectation of something'. And obviously, in this case, 'waiting in expectation' is clearly 'waiting in expectation of their wages'. And I believe that would, in terms of your Guidelines, what is written within the Award can be clearly shown the direction that that means. If you're waiting in expectation of something - in this case, it's clearly in expectation of wages.

In the matter of retrospectivity, sir, I would say that should you not award ... make your decision retrospective in this case, then the people who would have been punished, and who would have suffered would have been the nurses, even though it is the employer who, clearly, has breached the award and has committed the ... in breaching the Award and the Act, in fact in not paying these people, then there clearly is that breach. And if you were to not award

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PRESIDENT - FAWDRY - IMLACH - LAW

MR LAW:

retrospectivity, then the people who would have been punished for that breach of the award will be those nurses who were made to wait for their pay. And, therefore, under those circumstances I feel that it would be unjust of you not to award retrospective payment in these circumstances.

PRESIDENT:

Thank you, Mr Law.

Mr Imlach.

MR IMLACH:

Mr President, I wish to support the submissions most ably put by my assistant, Ms Fawdry, and I endorse the application for retrospectivity because I agree with Mr Law that the whole provision for availing of an interpretation, in this particular case, it would be meaningless, if we could come here and get the interpretation and not be able to apply it on the case in hand.

I accept that any interpretation must be related to a particular set of facts. So in that context, I support the application for retrospectivity.

You did ask the question about payment for working time following or during the waiting time, and I believe it ought to be ... the employee should be paid the ordinary pay for that working time following. But the waiting time is an overtime view for another matter altogether, and I don't believe you would be paying treble time, shall we say, on that occasion, because it's in the form of a penalty for something not done for a prior event, albeit continuing.

PRESIDENT:

Yes. Well suppose, in a different set of circumstances, an employee had not had an 8 hours' break between the work of successive days and, consequently, attracted double time, in the nature of penalty, why should waiting time for payment of wages attract a greater penalty than a penalty of double time for not having

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PRESIDENT - LAW - IMLACH

PRESIDENT: had an 8 hours' break after having physically worked so much overtime between the work of successive days?

Now we mustn't get into the merits, Mr Imlach, ...

MR IMLACH: No.

PRESIDENT: ... but you are touching on the merits, and so I'm just throwing them back to you.

MR IMLACH: Well, I hadn't thought of that further example, Mr President. But, just off the cuff, I would say that it's quite clear in the second one that you've quoted, it relates to the period in question where they were denied the break not to do on past the normal, working period which was fired on straight away ... that they wouldn't go past the end of that working time on that day - the following day. I think it's to be read in that context. I don't know whether I've made myself clear.

MR LAW: As mud.

MR IMLACH: I'm struggling, as you can see, Mr President.

But I do wish to make one other point, which may appear to be merit, but I believe it's not, in that the question must be asked, 'Why is this provision in the award, and what is the intent?' And it is quite a severe penalty on the employer, if the award is interpreted as we say it should be interpreted.

And, I submit, that the reason is, that to keep an employee waiting for their wages past the normal payment time, has long been accepted as a very serious matter, because, as we know, .....depends on the income of the worker. And this is a specific instance that we are looking at that .....the pay day is reached and the pay is due, any delay in the payment of those wages could become, and quite



MR IMLACH:

often becomes, a serious matter for the worker and his family. And going back in antiquity, my readings tell me that there are two things that are serious transgressions that cry out to heaven for vengeance - they're the words used. One is scandalizing the young. The second one, quite clearly, is not paying the workers' wages on time. So it's a very serious matter, and not to be treated lightly, as I submit in this case it has been.

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IMLACH

MR IMLACH:

Is if the employees did not have a right to their payment of wages on time.

PRESIDENT:

Yes. Mr Imlach, could we take a hypothetical situation, where a temporary relief and Ms McCulloch was temporary relief, is employed on the day that the pay closes. Would you expect that person to be paid 1 day's wages on the normal pay day and if not attract waiting time?

This didn't happen, but I put it to you as a hypothetical case, having regard for Exhibit F, which only authorised that person's employment and as I understand the State Service Act anyway, the hospital itself probably couldn't authorise that person's employment. They may have had a dispensation, but if they didn't have the authority to authorise that person was in fact an unauthorised employee until the date that the letter was received, unless of course they have some communication by telephone. This may only have been a confirmation of service.

MR IMLACH:

I believe, Mr President, that is the practice, that there is a formality - the conformation - but it is nevertheless true, that the employee is not in a permanent situation, shall we say, until that authorisation appears in writing, but it's a standard practice, to my knowledge, and of course, getting back to the real point, the work having been done payment is due and it comes back to the question that you've asked.

I would be sympathetic to the employer in such a situation because this is what we're dealing with - an employer of a large number of people - and of course, it's very difficult in these days of computerisation and machinery working out these things, to be sure that everyone is picked up, but I think we would all agree that if the individual was lost sight

MR IMLACH: of in these matters, well we've failed.

Getting back to the key point that I just wanted to make, why are these provisions in the award? It's to make sure the employer understands that wages should be paid on time. It's a serious matter if they're not. I just repeat, I'm sympathetic in cases where, probably without the employers fault that these things happen, but nevertheless, these standards have been set.

They are set for a good reason and I submit that they apply in each case, even the one you've quoted, Mr President, that the people responsible for paying being aware that they've employed someone for 1 day would have to have machinery available to pay at the end of the day.

PRESIDENT: Yes, I agree, the provision makes no exception or it appears not to.

What was the situation with Mr Marrable? Was he a temporary relief as well? Ms Fawdry?

MS FAWDRY: Mr President, the memorandum says they are temporary reliefs. They are both in fact still working there in the same capacity as they were on 26 March.

PRESIDENT: Exhibit F, authorises Ms McCulloch's employment, but I was wondering how long Mr Marrable had been employed?

MS FAWDRY: Mr Marrable in fact only works one day a week, Mr President - on Tuesdays - and he's still doing that.

PRESIDENT: But he had been there for some time, presumably?

MS FAWDRY: He was there in the past and he'd left - he'd resigned to become a full-time student at the institute. Ms McCulloch was employed to do 4 days a week, wanting the Tuesday off to go to the institute herself as a

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PRESIDENT - IMLACH - FAWDRY

MS FAWDRY: part-time student. Mr Marrable was brought in to do that Tuesday so that Ms McCulloch could have that day off.

So in fact, she does 4 days and he does 1.

PRESIDENT: Yes. And Tuesday would be the closing day of the pay, would it?

MS FAWDRY: At 0900, yes.

PRESIDENT: I presume they would keep 2 days in hand or something like that. It's a common term, Ms Fawdry, 'days in hand' meaning ...

MS FAWDRY: Yes, I realise that, Mr President.

PRESIDENT: Yes. When does the pay close - at 9.00 o'clock on the Tuesday?

MS FAWDRY: The actual end of the pay period is the Saturday at midnight.

PRESIDENT: I see. So, that if the pay period was Saturday at midnight and Mr Marrable was not paid for the following Tuesday, wouldn't that be in the next pay period?

MS FAWDRY: Come to think of it, it would have been, yes.

PRESIDENT: So, does that limit us - narrow it down to one person?

MS FAWDRY: He may have worked the previous Tuesday though, Mr President.

PRESIDENT: And not been paid?

MS FAWDRY: Yes.

PRESIDENT: It's possible of course.

MS FAWDRY: Yes. He did expect a pay and he did indeed have a pay ready at 2.30 on the Friday, so I can only assume ...

PRESIDENT: From the previous week, yes.

MS FAWDRY: Yes.

PRESIDENT: Thank you for clearing that up.

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PRESIDENT - FAWDRY

MR IMLACH: I've completed, thank you, Mr President.

MR REES: Thank you, Mr Imlach.

PRESIDENT: Yes. Mr Pearce?

MR PEARCE: Mr President, if would assist the continuity of the matter in terms of a wrapping up of what might be the agreed facts in relation to the circumstances leading up to the non-payment of wages on Thursday 26th, I would defer to Mrs Gregg to provide the Department of Health Services' view in respect of the matters addressed by the applicants.

But for the purposes of putting to the Commission what our view is in relation to payment of wages and waiting time, our view in respect of both of the matters before you is, that there is no waiting time payable, therefore it would seem from my position where I can encompass both matters in the one submission to wait until we hear the factual evidence in relation to the dispute going to the nurses.

PRESIDENT: Yes. But it is important that I have before me, all the facts relating to a particular situation, Mr Pearce, in order that I can then interpret the award and apply the facts to that interpretation, or to make a finding - a declaration indeed. I could make a general declaration. I suppose we could all do that, but one of the guidelines laid down by the Commission is that it needs to have before it a specific set of facts and interpret the award in accordance with those facts because, I suspect, without really knowing, that matters also listed for hearing today will refer to a slightly different set of facts, as I understand it.

MR PEARCE: We have no difficulty in addressing the question of facts. What I say is, that given our position in both matters is identical and that is that irrespective of the circumstances of

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PRESIDENT - IMLACH - REES - PEARCE

MR PEARCE: either matter, it is our submission in relation to an interpretation that it cannot be held that waiting time in any circumstances is applicable.

PRESIDENT: Yes.

MR PEARCE: I don't see it as desirable for me to have to run through a fairly lengthy submission in relation to this specific matter and then to take up the time unnecessarily of yourself, Mr President, repeating exactly the same words in respect to matter two.

PRESIDENT: Well, that's fair enough comment, I suppose, Mr Pearce. If you are saying in advance, since I have not yet heard the applicants on the remaining matters, that your submission or the attitude of the - are you representing the Minister?

MR PEARCE: The Minister, Mr President.

PRESIDENT: Yes. The attitude of the Minister is precisely the same in each case.

MR PEARCE: It is, Mr President.

PRESIDENT: Regardless of the facts?

MR PEARCE: Regardless of the facts.

PRESIDENT: Well, then I think you need only say it once and in the other matters, simply refer to your submission in this matter, but I would still like to hear from Mrs Gregg or someone as to her version of the facts regarding Ms McCulloch and Mr Marrable, unless she agrees that the facts, as outlined or the assertions as outlined by Ms Fawdry, are in fact true in every respect.

MRS GREGG: Thank you, Mr President. I would like to add to the facts - perhaps fill in some of the gaps in the facts as stated by Ms Fawdry and certainly I would like to provide the Commission with some chronological list of events, if you like, leading to the pay day in question.

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PRESIDENT - PEARCE - GREGG

MRS GREGG:

On 6 March, there was a request from the clinic for employment of staff. On 10 March, approval was given for the employment of staff - those staff being McCulloch and Marrable, so there was a lapse of 4 days between the request for the staff and the approval of those staff being employed.

Marrable, at that time, on 10 March, was understood to be still on the Launceston General payroll, in that he had provided relief in the past and it's often the practice to keep a name on the payroll and to keep details on the payroll of people that we use as intermitent employees, if you like, who come into the system and out of the system on an irregular basis. It saves having to input total data on an employee every time they join us again.

He was not actually employed at the time.

PRESIDENT:

Then he was a temporary, not a casual?

MRS GREGG:

No. A temporary relief. These people are employed by the department.

Between 10 March and 23 March, attempts were made to get the necessary information from the clinic. Such a process - the necessary letter of appointment of McCulloch ...

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PRESIDENT - GREGG

MRS GREGG:

This was the actual authority for the Launceston General to process the payment. And that is the letter already submitted dated 23 March.

It was determined prior to 23 March that official advice should also be forwarded to Launceston General concerning the appointment of Mr Marrable. And this in fact was formalised by letter, which I'd like now to tender, on 24 March.

PRESIDENT:

That, coincidentally, will be Exhibit G.

MRS GREGG:

Thank you, Mr President.

That just perhaps adds to your existing information that's already been tendered. The HEF2 tendered the letter in relation to McCulloch, and you now have the letter that relates to both employees.

Given that the information was forwarded to Launceston General Hospital it was assumed that payment would be made on pay day of 26 March. And on 27 March the clinic advised the department that McCulloch and Marrable had not been paid.

Arrangements were then made for pay to be prepared from a trust account by cheque for the Friday. Payment was effected on Friday at 2.30 pm, and as previously stated Mr Marrable did not in fact collect his pay until the following Tuesday.

PRESIDENT:

Are you telling me that the Hospital has a trust account from which casual payment can be drawn?

MRS GREGG:

No, well I'm reading from a document that was prepared by another officer. And what in fact we do in off-line cheque payments, we use perhaps the finance people in the hospital to prepare a cheque through the Finance Branch, bearing in mind that there was a dispute in relation to the pay office going on at that very time, and pay officers were not



MRS GREGG: as available to do off-line payments as they may be at other times.

So that was the action that was taken to ensure that these people did in fact get their payment the following day.

PRESIDENT: But not until 2.30. Did the dispute go on in the morning - on the Friday morning, Mrs Gregg?

MRS GREGG: The hearing of the dispute matter was going to be 3 April. No, I'm sorry, wrong dispute. No, the dispute hearing for that day would have concluded late on Thursday afternoon.

PRESIDENT: Yes. And would Mr Marrable and Miss McCulloch have been informed that their delayed pay would be available at 2.30?

MRS GREGG: Yes, they were informed of the ...

PRESIDENT: They were told the time?

MRS GREGG: On the actual pay day they were informed that their pay was not available. McCulloch was informed at 9.30 am on the pay day, and Marrable was informed at around about noon. So on the actual pay day both employees were informed that their pay was not available, and they were subsequently informed that it would be available at 2.30 pm on Friday.

PRESIDENT: Yes.

Could you tell me please, what time employees of the Holman Clinic are normally paid?

MRS GREGG: The pay is available on pay day, and they collect it from the pay officer, or it's distributed to them. I don't have actual times - it may vary according to when employees are on and off shifts and how their working patterns fit in with the working day.

PRESIDENT: Yes.

Well now, we note that Mr Marrable

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PRESIDENT - GREGG

PRESIDENT: has been authorised to work only 4 hours per week.

MRS GREGG: Yes, he was a temporary employee for 4 hours a week.

PRESIDENT: Yes.

So if I should find in favour of the applicant, and having regard for the fact that the award says overtime shall be paid after the usual time for ceasing work, it would mean that if, say, Mr Marrable worked in the morning until lunch-time his overtime payment would commence in the afternoon. But Miss McCulloch, presumably, if she worked an 8-hour day would have to wait until ...

MRS GREGG: Exactly, Mr President.

PRESIDENT: Yes.

MRS GREGG: Yes. Mr Marrable in fact only works 1-day a week ...

PRESIDENT: He only works half a day a week.

MRS GREGG: ... and he worked during this period 4 hours a week. Yes, he is ...

PRESIDENT: That's not a day.

MRS GREGG: Exactly. He's subsequently been employed in another temporary relief capacity, but for this contract of employment, if you like, his employment ran from 16 March to 6 April for 4 hours a week.

I just wanted to clarify those facts for you, Mr President. I have nothing further to add.

PRESIDENT: Yes. Thank you.

Now, Mr Pearce?

MR PEARCE: Do I take it from that call for me to rise, Mr President, you wish me now to address you on all matters going to ...

PRESIDENT: Well, we've heard from Ms Fawdry,

PRESIDENT: we've heard from Mr Imlach, we've heard from Mr Law and Mrs Gregg has filled us in on the facts, unless we're going to hear from Mr Fitzgerald in this matter I think we're round to you Mr Pearce.

MR PEARCE: It does leave me in some difficulty, Mr President. As I indicated, I would have preferred, given that the matters were joined, that the circumstances, the facts of each matter be put to the Commission that given my response, will be the same, but I will necessarily have to talk about some of the circumstances in relation to each matter. I can do in the one submission.

If I am in a position to have to put my submission now, I'm going to have to adjust it necessarily to accommodate both of the individual matters, but put substantive submissions to you, which in essence will be identically the same.

PRESIDENT: Well then, put yourself in the position of the applicants. If I don't require you to address me in relation to this matter, then the applicants are going to have to save up their responses until all three matters have been dealt with.

It is not possible ... you see I don't know what you're going to say. But is it not possible for you to put your primary position in relation to this matter and, to the extent that you have already said that the view of the Minister is the same in all matters, it would be sufficient I think for you to say, 'Well, our position is the same as it was in ... what's this, 752 is it?

But you slewed me a little, because you said that you'd be making a slightly different submission in accordance with the facts.

MR PEARCE: Yes, but if I have to address ...

PRESIDENT: So that would suggest to me that in

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PRESIDENT - PEARCE

PRESIDENT: fact your position is different in each one.

MR PEARCE: It would assist me, Mr Commissioner, to conform with what you appear to be seeking of me, if I might have a 10-minute adjournment, so that I might address, or put my submission in order that I can address each matter separately.

PRESIDENT: Yes. Yes, well I don't want to put you under any pressure, Mr Pearce, but it does seem to me, rightly or wrongly, that although I've listed all these matters for today and they've all been called, because the parties are the same, it doesn't necessarily mean that there will simply be one interpretation.

MR PEARCE: The circumstances ... I take it the circumstances ...

PRESIDENT: Because we different people involved and the interpretation may favour one group and may not favour another. The Commission of course, as it is presently constituted, subject to appeal, so it would seem to me that the three separate declarations will be necessary - each being appealable.

MR PEARCE: I hear what you're saying, Mr President, and will proceed to make my submission in relation to this matter.

PRESIDENT: Of course, the parties may say they'll be quite happy to accept the Commission's decision and there be no appeal, but I haven't heard that said yet.

MR REES: We don't oppose an adjournment as requested, sir.

PRESIDENT: Yes. Well, perhaps 10 minutes, Mr Pearce.

MR PEARCE: Thank you, Mr President.

PRESIDENT: Mr Pearce?

MR PEARCE: Thank you, Mr President.

Save insofar as the comments of Mrs Gregg on behalf of the Department of Health Services with the purposes of correcting any omissions or deficiencies, for the purpose of the record, we would otherwise agree that the circumstances outlined by the R.A.N.F. and by the H.E.F. and the subsequent intervening organizations are as stated.

There is one exhibit tendered by the H.E.F. which concerns a matter involving R.M. Parsons, being a decision of Commissioner Brown in the Federal Commission in 1978, I believe.

She made reference to it only by cross-reference in Carroll's Industrial Handbook.

I'd submit, Mr President, that Carroll's Handbook is deficient in relation to expounding upon the decision of Mr Commissioner Brown in that matter.

PRESIDENT: I imagine he was concerned with casuals anyway, wasn't he?

MR PEARCE: That would have been the nature of employment in the industry itself, but notwithstanding the award clause as to payment in the National Building Trades Award is identical with that under the Hospitals Award.

In making comment on Carroll's reference, as read into the transcript, it indicates that the Commissioner - and this is the last sentence of the first paragraph of paragraph 3028 going to waiting time and it is quoting from Commissioner Brown:

"The Commissioner found they were entitled to waiting time from the end of work from Tuesday until they were

MR PEARCE:

paid."

I would suggest to anyone reading that that they were paid for all time.

However, if we go to the reference 1976, A.I.L.R. 437, where the matter is reprinted in full with far greater substance than that alluded to by Carroll ...

PRESIDENT:

1976 A.I.L.R. at 437?

MR PEARCE:

The actual words used by Commissioner Brown were:

"Concerning what is to be paid for waiting time a reading of pertinent decisions leads me to regard waiting time as working time on the following day until the pay was actually delivered to the men, that is, in addition to any time spent on Tuesday after ordinary ceasing time on the job until told that there would be no payment of wages made and the Commission decides to that effect."

In respect to the quotation put into transcript by Ms Fawdry, I believe that that is an important omission.

However, notwithstanding having quoted from Commissioner Brown, we do not uphold all of his findings in that particular matter.

Mr President, it is our submission, that notwithstanding any prima facie findings or declarations that might ensue going to certain requirements of the payment of wages clause having not been met by the employer, and irrespective of whether it is held that it was at the fault of the employer or not for which the award provision pays no heed, that the waiting time provisions are not applicable in the circumstances of the matter which is currently before

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PRESIDENT - PEARCE

MR PEARCE:

you.

We base this conclusion on criteria established by relevant decisions going to matters of waiting time, what it means and how it should be applied.

It would be our submission that the waiting time relates to the failure of the employer to remunerate his employees with wages only in respect to the normal pay-day and the actual working of the clause does not give rise to circumstances where the waiting time can be held to be applicable in respect to day or days occurring subsequent to the normal pay-day.

As outlined, matter T.752 relates to the non-payment of wages on pay-day 26 March to two temporary part-time employees, Mrs McCulloch and Mr Marrable.

It is against this background in which these employees were not paid wages on that day, that the union seeks an interpretation favourable to their perception of what the clause provides in order that they would then seek to invoke the waiting time penalty for the period of time elapsing between the non-payment on the pay-day and the subsequent time of payment.

Notwithstanding the circumstances which have given rise to this particular matter, it is our principal position that the award is incapable of being interpreted to substantiate the conclusions of the applicant organisation, having regard to the form of words used, or more specifically, the lack of words.

It is not possible, in our submission, to draw such a conclusion from the words actually used nor, we submit, is it proper in an interpretation matter to draw the same conclusions by inference.

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PEARCE

MR PEARCE:

It is our submission that the clause can only be interpreted to provide payment of waiting time in the circumstances of an employee kept waiting for wages on a normal pay-day after the ordinary hours set down for ceasing work.

We submit, that failure of an employer to remunerate an employee with wages on a pay-day cannot manifest itself into an employer obligation to provide a waiting time payment where the employee is not kept in the act of waiting on pay-day.

Further, we would submit that the wording of the clause is so manifestly deficient so as to render itself incapable of drawing therefrom a logical conclusion that waiting time can be extended to cover any period of time subsequent to but not encompassed within the hours of the normal pay-day.

In seeking to establish support for our belief that waiting time is limited by dint of circumstances to failure to remunerate employees on pay-day, I think it is necessary to seek to adduce the meaning of pay-day or normal pay-day as it is identified in the award.

It is indentified on the first line of the provision for which an interpretation is sought. `Pay-day` as defined by the `Shorter Oxford English Dictionary` says:

"... pay-day, day on which payment is (to be) made, esp. a periodically recurring day for the payment of wages."

The second edition `Industrial Relations Handbook` at paragraph 3023, once again the Carroll Booklet, provides:

"Pay-day, the day of the week on which wages are to be paid is always fixed by the

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PEARCE



MR PEARCE:

relevant award, although in some circumstances the fixation of the actual day is left to the parties' agreement."

Extending this background to the actual provision of the clause, being clause 30 of the award, we are able to ascertain from the first paragraph that amongst other things, wages including overtime shall be paid at intervals of not more than 2 weeks and not later than Thursday of the week of payment.

It further provides that the employer, on pay-day, shall provide certain payment advice details going to such matters as entitlements, deductions et cetera.

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PEARCE

TAPE 555 - T 752 etc HOSP. AWARD

MR PEARCE:

Paragraph 3 of Clause 30 provides:

"... that where a Public Holiday falls on a normal pay day, wages shall be paid on the day prior to that Public Holiday."

DISK 59

In the circumstances of the pay arrangements of the LGH it is I believe an uncontested fact that payment of wages occurs on a fortnightly basis and the accepted or agreed day of payment is every alternate Thursday.

We would submit that the normal pay-day in the context of the operations of the LGH is every Thursday fortnight and such arrangement is in conformity with the award prescription.

We would further submit that a payment of wages ... we would further submit that payment, be it of wages, allowances, or any other form or payment which does not occur on the accepted Thursday of every fortnight cannot be deemed to be a payment occurring on a normal pay-day.

That it takes on the connotations of being a pay-day or being a day on which a payment is made is not disputed. That such a day can be regarded as a normal pay-day is vigorously contested.

To highlight our contention I would suggest that in the circumstances of the preceding paragraph where a public holiday occurs on a normal pay-day that the day preceding the normal pay-day becomes the pay-day unless however the award expressly provides and clearly it does not in this instance, the pay-day in lieu cannot be regarded as the normal pay-day.

We could submit in the circumstances, that where a public holiday occurred on a pay-day, that where the next or where the preceding day was then

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PEARCE

MR PEARCE:

observed as the pay-day and an employee was not paid on that pay-day then in those circumstances or such a circumstance would not give rise to a payment under this provision because of the absence of the word being for the preceding pay-day being described as a normal pay-day.

Similarly, in circumstances of non payment of wages on a normal pay-day, then it is our submission the subsequent day upon which payment is then made cannot have attributed to it the description `normal pay-day`.

In the context of the words `normal pay-day`, we would submit that a payment on any other day not being a normal pay-day could be argued to be a payment particularly if it were the form of a payment of award wages, would be on an abnormal pay-day. Abnormal being a convenient antonym of the word `normal`.

To draw together our view that waiting time can one have application relative to specific circumstances occurring on the normal pay-day, we would submit where in the specific paragraph upon which the interpretation is sought, where on the whole of payment of wages clause or where within the totality of the award itself does it prescribe a condition of waiting time applying in respect to the payment of wages to any other day other than the normal pay-day.

We submit that no words of the paragraph clause or award can give comfort to any proposition that waiting time can extend into a period of time not embraced by the words `normal pay-day`

If as you, Mr President, so astutely observed, had the words `or any day or thereafter` or some words which would have given an enabling sense to enable the clause to carry on beyond the normal pay-day, then that problem would not have arisen, or perhaps it

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PEARCE

MR PEARCE:

may not have arisen.

As you quite rightly suggested, that is an assumption. We do not believe it is appropriate in the circumstances of an interpretation matter that assumptions, inferences are the proper criteria upon which an interpretation on an award can be based.

It must occur in relation to the circumstances together with the reading of the award clause in question, as such words having attributed to them the normal and ordinary meaning of what is intended.

We would submit that if an award were to be varied by way of declaration in relation to an inference or an assumption, then that of itself might be seen to be in the form of a supplementary award.

I understand or believe that it is been held that where something is implicit in an award then certain action can be taken to remedy such a situation by making it explicit. But the same cannot be done in relation to something upon which something is assumed or inferred.

We submit that the proposition of the award clause extends beyond the normal pay-day is an assumption ... an inference.

The award paragraph subject to the interpretation states:

"An employee kept waiting for ... on a normal pay day for more than a quarter of an hour after the usual time for ceasing work shall be paid at overtime rates after that quarter of an hour, with a minimum of a quarter of an hour."

Abyss Nothingness. No add ons. The payment of waiting time is incurred by the action of the employer failing

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PEARCE

MR PEARCE:

to pay within a quarter of an hour of the employee having ceased work in the circumstances whereby an employee is kept waiting.

It will be our further submission that there must be a physical presence attaching to the words 'kept waiting'.

The words to be assessed are an employer ... 'an employee kept waiting for her wages on a normal pay-day'.

And we submit such cannot be construed to authoritatively provide for a contention, an assumption, inference along the lines 'and kept waiting on any day' subsequent to the normal pay-day until such time as payment is made or is available.

PRESIDENT:

Do I take it from that, Mr Pearce, that what you're saying is that in say two given situations where an employee if you wish, is told to remain on the premises that the late payment will occur sometime during that day, on the normal pay-day, and for all waiting time the appropriate penalty will apply.

But if the employee is told 'Well look there'll be no payment today. We won't be able to pay you until next week, you can go home', then no payment is due ... no penalty is due?

MR PEARCE:

Yes. Although I would ... I don't like to adopt your generalisation that 'it won't be paid until next week'. I would certainly trust, and I know it's looking at other aspects, I'd certainly trust that every endeavour would be made to rectify the difficulty.

But in essence what you say, yes, that is the position if they are informed during the course of pay-day that they will not be paid on that day, any entitlement or waiting time on that day ceases. We say that the ...

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PRESIDENT - PEARCE

PRESIDENT: So penalty really is for the inconvenience of remaining on the employer's premises?

MR PEARCE: We submit it is not a penalty. It is a compensation.

PRESIDENT: Well, compensation if you wish ...

MR PEARCE: Yes.

PRESIDENT: ... for the disability of remaining on the employer's premises.

MR PEARCE: Yes. Because otherwise ...

PRESIDENT: That would bear no resemblance to compensation for the inconvenience of not being paid at the time that one was normally expected to be paid.

MR PEARCE: No.

PRESIDENT: Do you think that's what it means?

MR PEARCE: Well given that other awards are more specific on the matter and I will be calling into aid a particular award which addresses the question of why it would seemingly be that the payment of waiting time only goes to employees who are not absent from work.

Disc 5

MR PEARCE:

Where does it lead? Clearly it's only intended to cover such persons, otherwise it could held at people on sick-leave, rostered days off. If they were not paid on that day, they may well have an entitlement to payment, and I would say ...

PRESIDENT:

Not if their pay was ready and waiting for them. Once the employer has discharged his obligation to make up the wages due on pay day, if the employee for sickness, or for some other reason, is not there (say he's a shift worker and rostered off or something. And, of course, there is ample evidence of that) that doesn't render the employer liable to any penalty. But, when through no fault of the employee (and that might be the test) he is unable to be paid monies due to him at the regular time, or on the regular day.

And you're saying, if the employer says, 'Well, if the pay is late, we'll be able to make payment later today, after working hours, hang around'. In those circumstances, compensation (to use your words, if you wish) is payable.

MR PEARCE:

No, not my words, Mr President. They are not my words.

PRESIDENT:

Well they're certainly not the words of the draftsman here, because it says, ...

MR PEARCE:

They certainly aren't.

PRESIDENT:

It says, '... shall be paid at overtime rates'.

MR PEARCE:

.....some observations which have been made in subsequent matters dealing with almost identical, or in some circumstances, identical provisions which say that it is a compensation.

PRESIDENT:

Well the award says 'overtime rates' doesn't it?

MR PEARCE:

It does.

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PRESIDENT - PEARCE

PRESIDENT: It doesn't say 'compensation' it says 'overtime'.

MR PEARCE: Yes, but the penalty. Sorry, it is not a penalty on the employer for dilatory payment, it's a compensatory payment for the employee for being kept waiting beyond the normal ceasing hours of work.

In the absence of any specific words providing for an ongoing obligation, on the part of the employer to pay waiting time, transcending into subsequent days of the week, such a conclusion can, at best, be regarded as dubious, doubtful, predicated on inference and not fact.

The specific award provision is expressed exactly in the same terminology as the National Building Trades Construction Award. And whilst I do not have available and am unaware of any interpretation going to that provision, I am able to provide a copy of a decision of Mr Commissioner Lear, which I would tender as an exhibit. It's Print F.8976, reference 297 C.A.R.'s and 551 of 1985.

PRESIDENT: That will be Exhibit H.

MR PEARCE: The opening part of the decision (and it was a decision given as the result of an industrial dispute notification under the relevant provisions of the Conciliation and Arbitration Act). The early part deals with the factual circumstances leading up to a claim for payment of waiting time.

If I could take you to marginal notation H. and incorporate from thereon in on transcript matters addressed by Mr Commissioner Lear:

"The relevant award provision in the National Building Trades Construction Award, applying to bricklayers, states:

^36.4 - An employee kept

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PRESIDENT - PEARCE



MR PEARCE:

waiting for his wages on pay day for more than a quarter of an hour after the usual time of ceasing work shall be paid at overtime rates after that quarter hour with a minimum of a quarter of an hour."

I would suggest that that .... I haven't compared it word for word, but it would only be of a cosmetic change, if there was indeed any variation between that clause and the clause of the Hospitals Award, which is currently the subject of the interpretation.

Sub-clause 38(iv) of the Building Construction Employees and Builders Labourers Award applying to labourers is almost identical, but inserts the words, 'whilst so kept waiting after' after the words 'shall be paid' and before the words 'at overtime rates'. That is of no consequence to the matter before, Mr President.

Mr Commissioner Lear goes on to say :

"The award provision refers to a situation arising only on pay-day, and after the usual time of ceasing work on that day. It appears to go no further than that."

On this particular occasion employees were given short notice on pay-day that their wages would not be available on pay-day. There was no evidence to suggest that they waited around on pay-day in the hope that their rightful earnings might suddenly be produced.

When they appeared on site the following day, presumably at the normal starting time on Friday, they sat in the site lunch shed and did not work. When their wages were produced and paid at 2.30 on that day, about 7 hours after normal starting time, they dispersed and,

MR PEARCE:

presumably, performed no work on that day.

Reference to a number of past decisions on the question of waiting time following non-payment of wages indicates that waiting time in this instance might cover two periods. That word `might` does conjure up doubts.

Firstly, it would clearly include any period when the employees waited on pay-day expecting to be paid, and any such entitlement would end when each employee left the site. That appears to be an authority view, expressing the words `it would clearly`.

Secondly, it could apply to normal working time on the following day until wages were paid for which period the payment of overtime rate might apply.

I draw your attention to the use of the words `could` and `might`.

In the first instance there was no evidence to suggest that employees waited around for more than a quarter of an hour after the usual time of ceasing work on the pay-day. But if they did do so, they were entitled to be paid at overtime rates for any period of waiting commencing after the first quarter of an hour of waiting, and ending when they left the site - with a minimum payment of a quarter of an hour.

PRESIDENT:

What would happen if they'd camped on the site?

MR PEARCE:

An interesting proposition.

Just interposing there, Mr President, to suggest, and I don't believe there's any evidence before us which would suggest that the employees in question, namely Mrs McCulloch and Mr Marrable, were in fact kept waiting beyond of the normal hours of their work on the pay-day in question - 26 March.

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PRESIDENT - PEARCE

MR PEARCE:

Reverting back to Mr Commissioner Lear's decision. In the second instance the award clause could suggest, but does not clearly state that the overtime rate might be extended to apply as a penalty payment to normal working hours on the following day until wages were paid.

Again, I emphasize the use of the words 'could' and 'might', and also, 'but does not clearly state'.

Employees did not start work on that day, but remained in the amenities shed on the site and it is questionable whether the overtime penalty rate should apply to time not worked. But he does suggest that it is at least arguable, it is questionable.

Employees presumably considered that as they were still waiting for their wages, they were entitled to wait on the site, as they would have been entitled to do the previous afternoon, and so expect to be paid at overtime rates.

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PEARCE

MR PEARCE:

The award is not clear in this respect. Not clear, we submit, is an authoritative expose of the Commissioner.

The bricklaying subcontract is at fault in not paying wages at the appropriate time, and for this reason the disadvantaged employees should have the benefit of the doubtful circumstances.

Unfortunately, or it is of no mind to this particular matter, but we will observe that the award provision under consideration does not provide for any mitigating circumstances beyond the employers control. The aware clearly, or merely goes to the incidence of non-payment of wages on a pay-day.

But I would merely raise in respect of this matter, what would have been the circumstances if the employers payroll had been held up by an incident of armed robbery?

PRESIDENT:

By some villians?

MR PEARCE:

By some villians.

One would suggest that the award provision would not provide any relief for the employer in that situation.

PRESIDENT:

I suspect the insurance company would though.

This is a curious proposition that the Commissioner postulates nonetheless, Mr Pearce.

First, he would have no jurisdiction whatsoever to interpret the award. That was long since taken away from commissioners of the Arbitration Commission.

And second, he's saying that if an employee is kept waiting after the normal ceasing time and remains on site he attracts the appropriate overtime rate.

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PRESIDENT - PEARCE

PRESIDENT:

And if he's still not paid on the next day, being a working day, and assuming that he goes home sometime on the previous day, he continues to attract overtime rates, but presumably he get a lesser penalty for the period he's waiting if he's working.

MR PEARCE:

Well, I think that's presumably covered a little further on, Mr President. I don't know whether you beat me to it. He does seem to have something to say about the circumstance of the employees just going to the site and sitting in the lunch shed waiting for the time of day to pass until such time as they got paid.

If I could just read further and complete the decision.

MR REES:

I thought you were going to miss it.

MR PEARCE:

"Therefore I have determined that they should be paid at appropriate overtime rates for the period of about seven hours spent on site on the Friday, and not beyond 2.30 p.m. on that day unless normal work commenced at that time, which is doubtful.

There is no entitlement whatsoever to any other payment for what might be claimed as loss of ordinary wages on the Friday, as the penalty overtime rate more than adequately covers that period."

Now I don't know what happened in the circumstances as to whether the employer said, "Well, you haven't worked for me so I'm not going to pay you, but you'll get your overtime rates", or whether the Commissioner held that the payment of the overtime was sufficient compensation that he wouldn't entertain any claims for payment of ordinary rates.

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PRESIDENT - PEARCE

PRESIDENT: Yes.

Clearly he's gone to merit, hasn't he?

MR PEARCE: Yes, but I would suggest, Mr President, that that was available to him in the exercise of his duty as a conciliation and arbitration commissioner as distinct from interpretation.

PRESIDENT: Well, that was the only thing that was available to him. He certainly wasn't able to interpret the award.

MR PEARCE: No, and it would be our ...

PRESIDENT: Not legally.

MR PEARCE: No, certainly not.

PRESIDENT: And he has made a merit judgement whilst addressing the award ...

MR PEARCE: And merit judgement on very dubious circumstances. I do detect a note of reluctance. But I believe probably given the circumstances of the fairly volatile building industry as such, that it may have been a convenient way. And I would suggest that a commissioner has far greater flexibility in resolving an industrial dispute rather than the more stringent requirements and criteria laid down for interpretation.

And yet in resolving the matter in the favour of employees he does appear to be expressing considerable doubt as to how he could properly read the award provision anyway.

We would suggest that those doubts in the interpretation hearing ...

PRESIDENT: Yes, but he hasn't applied ... he doesn't purport to apply the normal rules of interpretation, nor could he. Nor is the matter one that was, I imagine, an interstate dispute.

But his reasoning is interesting and

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PRESIDENT - PEARCE

PRESIDENT: his decision even more so.

MR PEARCE: The final paragraph of that decision is :

"Nor is there any justification for the extravagant claim by the BWIU that waiting time for payment of wages should extend to cover the elapsed period of twenty-three hours from 3.30 p.m. on Thursday until 2.30 p.m. on Friday (refer: Cranford-Webster v. MacFarlane, particularly at p. 168) and that claim is dismissed."

Now indeed, he was making an observation there which tended or bordered on merit.

PRESIDENT: Yes. And yet, funnily enough he does rely upon Cranford-Webster against MacFarlane, which he says is reported in the South Australian State Report, so that would be a Supreme Court decision, I imagine.

MR PEARCE: That is correct, yes.

PRESIDENT: Yes. Which unfortunately he doesn't quote from.

MR PEARCE: No, but I shall be.

PRESIDENT: You will.

MR PEARCE: Yes.

PRESIDENT: Right.

I'd be disappointed if you didn't Mr Pearce.

MR PEARCE: So the critical point of that observation that we would submit in the context of this matter, is that he has observed that the award clause from his point of view ... and I take you back to the wording :

"The award provision refers to a situation arising only

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PRESIDENT - PEARCE

MR PEARCE:

on a pay day and after the usual time of ceasing work on that day."

It appears to go no further than that.

When he says "it appears to", it's indicated by the lack of words that it certainly doesn't go any further than that. And unless we're going to draw inferences into the interpretation exercise then I don't believe that that is appropriate.

As an overview the decision of the Commission is punctuated with a series of mights, coulds and as such could not be relied upon to represent a definitive judgement on how the award would be interpreted.

However, would submit that the powers available to the Commission in the circumstances of a dispute notification are far more flexible in determining or resolving a dispute, than available in the instance of an interpretation matter.

Notwithstanding his findings, which were ultimately to the benefit of the employees, but falling far short of what was sought, we would submit that there's sufficient doubts and dubious circumstances raised by the Commissioner during the course of his findings to suggest that upon a matter of interpretation the benefits of any such doubts must err on the side of leniency, or I would submit, in this instance on the side of the employer.

We take comfort from his findings as to non-payment of waiting time on the pay-day, when the employees were not in the physical act of waiting.

We submit however, that the broad beneficial approach in respect to employee entitlements on the next day as taken by the Commissioner in the context of the dispute hearing would not be so available in the

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PEARCE



MR PEARCE:

matter of the an interpretation proceeding, particularly in relation to an award clause which is so patently deficient of words and which one can authoritatively conclude that waiting time is payable on subsequent days.

We nonetheless are cognisant that in awarding payment based on giving the employees the benefit of doubtful circumstances that he limited the payment, albeit at overtime rates, to the ordinary working hours on the next day, dismissing as he did, the extravagant claim for payment to extend to the full 23 hours which had elapsed between 3.30 on pay-day and 2.30 next day, at which time they were paid.

I now wish to go to that matter referred to in Mr Commissioner Lear's decision, and that's the South Australia State Report, being a matter, for abbreviation purposes, known as `CRANFORD-WEBSTER v. MCFARLANE`.

PRESIDENT:

This will be Exhibit I.

I think when you've addressed that, Mr Pearce, we'll adjourn for lunch.

MR PEARCE:

Thank you, Mr President.

PRESIDENT:

Unless you're going to take us through all of it.

MR PEARCE:

No, I didn't intend to do that, unless you're interested in dirty work. It might be suggested there's dirty work afoot here though. I don't think the dirty work rate ...

PRESIDENT:

I wouldn't imply that, Mr Pearce.

MR PEARCE:

No, I withdraw any implication. They're not allowable in interpretation matters anyway, inferences.

This is a matter `CRANFORD-WEBSTER v. MCFARLANE`, a judgement by Mr Justice Mayo in the Supreme Court of South

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PRESIDENT - PEARCE

MR PEARCE:

Australia, reprinted in the South  
Australian State Reports 1947.

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PEARCE

MR PEARCE:

It dealt with two matters, but the one of interest in respect to the proceedings before you, Mr President, goes for an interpretation, in today's interpretation, is that related to the matter concerning circumstances derived from an award provision going to payment of wages, and more specifically waiting time as follows.

The award clause, the subject of the matter before the learned judge, was, and can be found at the second last paragraph on page 163.

"Wages shall be paid within a quarter of an hour of the time specified; if paid after the said quarter of an hour has elapsed, waiting time shall be paid for at the employee's last rate for every quarter of an hour beyond the first quarter of an hour."

Now, I submit that word for word, that is not the same as the Hospitals Award provision, but it is analogous to the extent that it doesn't go beyond the circumstances of the pay day or the time at which payment is normally made.

So we would submit that it is at least consistent, and indeed, I believe the findings of the judge support our contention that whilst the award clauses are not the same in verbage, they have the same doubtful conclusion. By 'doubtful conclusion', I mean that they don't elaborate upon what should occur on any time subsequent to the pay day.

PRESIDENT:

So where did he come to that conclusion?

MR PEARCE:

Well, I would hope that I can take you to it, Mr President. On page 168, three quarters of the way down, starting with the 'This' on the last word of about the ...

PRESIDENT:

Yes.

MR PEARCE:

The first part of the quote is not relevant, as I understand, to the specific matter of waiting time, but I wish to incorporate it for the purpose of coming back to it.

"This is where I part company with Mr Wright in his argument. I think that the clause is what, for the sake of politeness, we have agreed to call ambiguous. The ambiguity is not to be resolved against the defendant. The authorities cited by Mr Pickering show that it must be resolved in his favour."

I don't want to address that specific issue any further at this point in time.

"Apart from that, the reference in this clause to 'waiting time', seems to me inappropriate to the present circumstances. I think it means time which the employee spends at the employer's establishment actually waiting for his pay, and the penalty reckoned at so much per quarter-hour is intended to compensate him for possible loss of other work.

I do not agree that it contemplated anything so extravagant as the claim put forward in these proceedings. It is perfectly clear that the delay of a week did not cost these complainants anything in money. I find the charges not proved and the counts dismissed."

He then went further on page 170 at the large paragraph beginning in the middle of the page.

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PRESIDENT - PEARCE

MR PEARCE:

"In regard to what is called 'waiting time' in clause 12 (a) of the award, the following provision is made:- 'Wages shall be paid within quarter of an hour of the time specified.' That would mean, I suppose, that the appellants should have received their wages by fifteen minutes after 12 noon on 27th July, if they were 'booked off' at that hour. The clause proceeds:- 'if paid after the said quarter of an hour has elapsed, waiting time shall be paid for at the employee's last rate for every quarter of an hour beyond the first quarter of an hour. Any fraction of a quarter of an hour shall be paid for as a full quarter of an hour.' There does not appear to be any definition by which the phrase 'waiting time' is explained or further elaborated. If there is, I was not referred to it. 'Waiting time' would mean in its ordinary sense the time that an employee spent and wasted in loitering about whilst payment of wages to him was not forthcoming. The appropriate meaning to be given to 'waiting' would seem to be staying in expectation, stopping, or remaining stationary, or inactive till the happening of the event, holding over departure. It is claimed by Mr. Wright for the appellants that 'waiting time' extends from the end of the period of grace, the first fifteen minutes, until the time payment is actually made, and that waiting time money is a penalty, and not merely compensation for time thrown away. He insisted that being a penalty, it did not matter that the appellants had been

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PEARCE

MR PEARCE:

engaged in other work during the period that payment was delayed. I do not think this latter meaning is implicit in clause 12(a). Nor do I regard the clause as equivocal. Such a connotation is not in my opinion a reasonable construction to put on the phrase. If 'waiting time' is ambiguous I would reject the interpretation preferred by Mr. Wright on the grounds that I have already discussed. I treat the prescribed payment as compensation for time lost, waiting time, and not as a penalty imposed for dilatory settlements.

In any case I am doubtful whether I could by judicial interpretation expand 'waiting time' to give the phrase the effect Mr. Wright contends for. Such a rendition would in reality be in the nature of a supplemental award."

I would seek to rely on all of that.

PRESIDENT:

What do you say though, Mr Pearce, in relation to that part of this clause that specifically nominates days of the week in which pay day or payments should be made? If payment is not made on those days, then is the employer not in breach of the award?

MR PEARCE:

Are we speaking in relation to ...

PRESIDENT:

The instant matter.

MR PEARCE:

The instant report, or the instant Hospitals Award?

PRESIDENT:

Doesn't it say 'wages including overtime shall be paid by cash or by cheque if agreed to by the employer and the employee concerned at intervals of not more than 2 weeks and not later than Thursday of the

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PRESIDENT - PEARCE

PRESIDENT: week of payment?

MR PEARCE: In the Hospitals Award?

PRESIDENT: Well, that's what we're talking about.

MR PEARCE: Yes. When you mentioned the instant matter, I didn't know whether you were still referring to it.

PRESIDENT: No.

MR PEARCE: Well, I'd suggest that matters of breaches of award are necessarily the province of an interpretation hearing.

PRESIDENT: Certainly not and I wouldn't pretend that they are, but surely that is a matter that I would have to look at the whole of the clause in context, wouldn't I, in interpreting the matter before me and if I find that on the one hand the award requires that wages be paid not later than Thursday each week and if wages are not paid on the normal pay day some penalty attaches, do you think in those circumstances this interpretation, if that's what it was, could be called an aid?

Don't we have different situations? There was no suggestion, as I take it, from His Honour that a particular day of the week was nominated for pay day. It's simply a question of waiting time.

Here we have a limit imposed on the day of the week or the days of the week, mainly not later than Thursday, on which payment may be made. We have also have in the same clause a provision - you can call it compensation, I call it overtime because that's what it says - for those employees who are not paid the appropriate time.

Now you're saying, as I understand you, that that's all right, but it can only apply for the time that that employee is kept waiting or required

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PRESIDENT - PEARCE

PRESIDENT: to wait on the employer's premises on, shall we say, the Thursday.

MR PEARCE: Yes.

PRESIDENT: If the employee is told in ample time, not to wait about there will be no pay that day, he will be paid the following day, Friday, no penalty attaches and yet the award has been breached.

MR PEARCE: Yes, and I suggest that if that is the circumstances, then it's not ...

PRESIDENT: Perhaps you might consider that over lunch.

MR PEARCE: I might consider that over lunch, if that's convenient, Mr President.

PRESIDENT: Yes, 2.15.

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PRESIDENT - PEARCE



PRESIDENT:

Mr Pearce?

MR PEARCE:

Mr President, at the time of the adjournment, you had indicated or posed to me a question. It is our view that - and without wishing to prejudice in any way and certainly should not arise as a direct consequence, or it may arise as a direct consequence, but certainly not as part of the interpretation role of the matters before you - if as a matter of consequence matters were to be referred to a court of competent jurisdiction in regard to possible action under the award, then so be it.

In relation to the Cranford/Webster submission which I put before you, I called it 'in aid' because it is a matter which does dwell upon the topic of waiting time. It is a matter which has receive, or which can be averted to in other documentation reference material in industrial relations matters generally going to the payment of waiting time.

If it, and I don't resile in any way from the submissions which we put in the context in which we put them, however, clearly, should we find that the context in which they were put were manifestly not relative to the case, or the waiting time argument that we are putting before you then, clearly, the amount of weight to which you'll apply to that particular decision will undoubtedly be encompassed in whatever finding you make in respect of this matter.

In summary, we would submit that in the matter of the two nurses of the Holman Clinic who were not paid on pay day 26 March, we would submit that notwithstanding the non-occurrence of payment on that day that neither employee kept waiting for their pay in the sense that they had been advised that no pay would be forthcoming on that day.

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PEARCE

MR PEARCE:

Secondly, that they did not wait on the premises in hopeful expectation that payment of the shortfall would materialise or payment of wages, indeed in this instance, would materialise and that matters of waiting time per the award can only be contemplated in circumstances of a normal pay day.

We do not believe that the award provision is sufficiently capable of being interpreted to suggest that there is any, or can be an incidence of waiting time with overtime rates applying beyond the expiration of the normal pay day as referred to in the award, or indeed, at any time subsequent to the employer advising the employees that they would not be paid on the normal pay day.

Mr President, that concludes our submission in respect of that particular matter.

PRESIDENT:

Thank you, Mr Pearce. Mr Pearce, do I take it from your summary that in the event an employer, for one reason or another, knew in advance that he would be unable to pay the whole of his work-force on the recognized pay day provided he informed them of that fact before that day, or even on that day, then he would be subject to no penalty if those employees didn't remain on the premises waiting for their pay.

In short, he could almost change his pay day at will, provided he gave adequate notice to employees that pay would not be forthcoming on the expected day.

MR PEARCE:

I would suggest that the award provision, as it is currently written, would not in any way limit the employer from, capriciously or otherwise, changing the pay day if he so wished.

PRESIDENT:

Yes, thank you, Mr Pearce. Mr Pearce, did you have a view as to the operative date?

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PRESIDENT - PEARCE

MR PEARCE: Yes. In any instance of any finding or an interpretation that you may make in this particular matter, Mr President, we would suggest that it be prospective only in operation.

PRESIDENT: Yes, thank you.

I was just - and I understand that is your submission, perhaps I'm thinking out loud to your earlier comment that in the event a matter proceeded to a court of competent jurisdiction as you put it, namely a magistrate's court, then so be it and I understand that submission.

The curious part about this whole business is, that a magistrate and indeed a higher court is obliged to have regard for decision of this tribunal insofar as interpretation is concerned.

MR PEARCE: Whilst I am not fully au fait with what you're putting to me, I would nonetheless perhaps advance a proposition and indeed please advise me if I'm incorrect, but perhaps a court in dealing with such matters may have a wider capacity to introduce or hear other matters going to merit from which you are constrained.

PRESIDENT: You might be right, I'm not sure, but subsection (7) of 43 says:

"Subject to this Act, a declaration made under this section is binding on all courts and all persons with respect to the matter the subject of the declaration."

MR PEARCE: Perhaps they might have some flexibility notwithstanding in finding to have flexibility in determining what the penalty shall be having regard to the full set of circumstances.

PRESIDENT: Yes. Recently I dealt with a matter - in fact the decision was only given

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PRESIDENT - PEARCE

PRESIDENT: last Friday - which had been before a magistrate and was adjourned by him so that the Commission could in fact interpret the award. He didn't attempt that task. The matter went before him by way of plea by the Department of Labour and Industry for a prosecution and came back to the Commission.

MR PEARCE: Might I hazard that it might well come back and revisit us yet again. I have no further observations to make on that aspect.

PRESIDENT: That was simply an aside, Mr Pearce?

MR PEARCE: Yes.

PRESIDENT: Yes, thank you. Ms Fawdry?

MS FAWDRY: Thank you, Mr President.

In relation to Mrs Gregg's short submission, the branch is pleased to note that in relation to the facts of the case that there is no significant dissention.

In relation to Mr Pearce's submission, I believe we've answered the question of advising them - if they have been given advice that they wouldn't be paid, then they are no longer waiting. We have already stated our disagreement to that assumption.

The fact that they didn't wait on the premises - in the case of the Pastoral Industry Award, there was an assertion in their award that they should remain on the premises, but we were talking about shearer in this instance who live in shearing sheds as they move from station to station and in the hospital situation there is no such accommodation available for employees who have to stay on site to wait for their pay if it happens to be late.

We can only assume that what the Office of Industrial Relations is saying, that the nurses should be

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PRESIDENT - PEARCE - FAWDRY

MS FAWDRY:

advised that they should wait on site if they're waiting for their salary, in which case I'd suggest that that is quite ridiculous.

PRESIDENT:

Well, he's saying that if they want a penalty payment that's what should happen.

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MS FAWDRY:

Well, then we'd hope that suitable accommodation is made available to members and allowances for same, if that is the case.

In relation to Mr Pearce relying on the award only referring to the normal pay day, if that's the case then that award provision is impotent for day workers because day workers in fact finish work at around about 5.15 - well most day workers have to finish by 6.00 anyway. So, it's not going to be of any benefit to them at all because they've got no working time outside of normal working hours.

PRESIDENT:

Yes. I rather thought that Mr Pearce was saying that for any time after the normal ceasing time to midnight. He didn't actually say midnight, but it's still pay day. Is that what you meant, Mr Pearce?

MR REES:

I'm sure he didn't.

MR PEARCE:

Yes, Mr President.

MS FAWDRY:

I take your point.

Mr President, with the H.E.F. No. 2 Branch, submit that the operative date be a date that will satisfy the claim for the two employees to be paid waiting time for the period in question, that is the cessation of work on Thursday 26 March until 2.30 pm on Friday 27 March.

PRESIDENT:

Did you say the 23rd?

MS FAWDRY:

The 26 March and 27.

PRESIDENT:

Thursday 25, wasn't it?

MS FAWDRY:

26th.

PRESIDENT:

Friday 26.

MS FAWDRY:

I think it's Thursday 25. I'll have to go back to my ...

PRESIDENT:

I've written down 25th and 26th.

MS FAWDRY:

Thursday is the 26th, Friday is the

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PRESIDENT - FAWDRY - PEARCE

MS FAWDRY: 27th.

PRESIDENT: Thank you, Ms Fawdry. Mr Law?

MR LAW: Sir, in supporting the propositions of my colleague, Ms Fawdry, I believe and in rebutting those matters put up by Mr Pearce, I believe that we should put the submissions of Mr Pearce to the strict test that were contained within your original decision from the first interpretation of T.30.

PRESIDENT: I'm not sure that you're entitled. I don't think you can be heard in reply, can you? You're not an applicant in 752 are you?

MR LAW: We have the same clause up for interpretation in the other one, Mr President.

PRESIDENT: Yes. Well, we haven't called that yet - or we've called it but we're not dealing with it, are we?

MR LAW: Well it is the same clause and the same interpretation. We can't have two interpretations for the same clause can we, sir?

PRESIDENT: Yes, but we haven't heard the case yet. I'm afraid you're only a party at this stage. You'll get your opportunity on your own matter. We won't deny you the opportunity. Mr Pearce has already told us that his argument is the same, but I will reserve my decision on 752 and we'll now deal with 796. Is that the next one?

Mr Rees?

MR REES: I appear in this matter, sir, with **MS MARCIA FAWDRY**.

The matter is similar, sir, and all of the main relevant points put to you in the earlier matter, 752, and most of the exhibits tendered by Ms Fawdry will be my main argument in respect of our request that you interpret 796 when you've heard the

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PRESIDENT - FAWDRY - LAW - REES

MR REES:

facts of the matter.

Mr President, the Hospital Employees' Federation No. 2 Branch were informed by nursing administration at the L.G.H. in February 1987 that all new students entering the preliminary training school that month - that is February '87 - would commence immediately on the 38-hour week. This decision affected approximately 32 shift work nurses.

According to the pay master at the L.G.H., the pay was not correct in their first pay packet but was adjusted to accommodate the 38 divisor by their second pay, along with the adjustments from previous pays. None of the service organizations or unions were advised of that fact.

At the same meeting the nursing administration of the L.G.H. and the branch was also told that 27 shift working nurses who would be going into the second year school block in March of 1987 would also be commencing on a 19-day month roster. This plan was already set in train for the gradual implementation of the 19-day month, 38-hour week roster which was well overdue at the Launceston General Hospital.

These matters were raised when we were having discussions, following the members resolutions to force the L.G.H. to implement the 38-hour week rosters for shift work nurses.

Now the 27 nurses in the second year school should have received a 38th divisor adjustment in the pay packet of 16 April 1987. They didn't and no one picked the fault in that pay period.

PRESIDENT:

The 38-hour divisor would only be used for overtime payments - weekend penalties and matters of that kind, I take it?

MR REES:

No. It's the actual rate of pay,

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PRESIDENT - REES



MR REES: sir.

PRESIDENT: But if you've got a 38-hour divisor as distinct from a 40, the increase is 5% but if you're having a 19-day month, there's no increase in pay except that you work fewer hour. The only time you get a pay increase would be if anything had to be calculated at the hourly rate, wouldn't it?

MR REES: That's if they were having a day off - a 19-day month - yes.

PRESIDENT: Or is the 19th day a paid day?

MR LAW: It's an unpaid day, sir.

PRESIDENT: It's an unpaid day, is it?

MR REES: Yes.

PRESIDENT: Yes. So you're saying that they would have, by dividing the weekly rate by 40 - well, had they divided it by 38 they would be deducting more pay, wouldn't they?

That doesn't matter anyway, Mr Rees. It's not the calculation ...

MS BOUCHER: A higher hourly rate.

MR REES: Yes, you achieve a higher hourly rate.

PRESIDENT: Yes. So, then you deduct more pay.

MR REES: As my argument unfolds you'll find that they didn't deduct more pay.

PRESIDENT: What you're saying is, they weren't paid the correct rate and that's what we're really talking about.

MR REES: The pay office had the matter drawn to their attention by the Campbell Town District Hospital secretary who had discovered one nurse on his payroll had not been paid the 38 divisor in the same pay period - that's the pay period of the 16th.

When the L.G.H. pay office checked

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PRESIDENT - REES - LAW - BOUCHER

MR REES:

this and found it to be the case, they notified the hospital computer centre in Melbourne and brought it to their attention, both by phone and by facsimilie.

The following pay day, the 30th April, the L.G.H. checked with Campbell Town to ensure that the problem of the nurse had been rectified and it had.

On the same pay day, the 30 April 1987, one of the 27 student nurses raised the matter of underpayment with the Launceston General Hospital pay office.

On checking that issue, the pay office then discovered that none of the 27 students had yet been paid their hourly rate adjusted to the 38 divisor.

By this time nurses had had two pay packets in error - that is the 16 and 30 April. They probably did not notice the incorrect payment in the first instance, that is the 16th, because they had ...

PRESIDENT:

Peanuts, was it?

MR REES:

They're paid peanuts, yes.

... worked 38 hours, their pay to them would not have appeared, on the fact of it, any different to what they would normally receive on the 40th divisor because of the implementation of the 38-hour week system or at the flat daily rate.

Now these nurses, although shift workers, are on days only when in school. However, the pay period ending 25 April '87 and 30 April '87 was clearly indentified because they had all had their L.D.O.'s and were therefore only paid the 40th divisor for 32 hours.

Effectively, they did not receive payment for their L.D.O. and they were one day short in their

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MR REES:

fortnightly pay. The paymaster of the L.G.H. again contacted the hospital computer centre in Melbourne and informed them of their error in relation to the 4 weeks of incorrect calculations for these 27 nurses.

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REES

MR REES:

The were told it would be rectified in the following pay. None of our members contacted us on that matter, so we were not aware, at the time, of the continuing faults in the pay system.

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On April 16, '87, all shift-working, full-time nurses commenced the 38-hour week. So on the pay day of 14 May, 1987, (the dispute day in question), all full-time, shift-working nurses, at the Launceston General Hospital, should have been receiving the 38 divisor in their hourly rate.

The Launceston pay office is now aware of the mistake with the 27 nurses from the previous pay, made a point of checking all of the pay packets, and they discovered, that not only had they not been adjusted, but the 27 from the previous fortnight (which were specifically brought to their attention; that is, the hospital computer centre attention) had not been adjusted yet again.

We now had approximately 320 nurses paid incorrectly; this included the 27 students, who by this time, had been paid incorrectly for three pay periods - that is, 6 weeks' work.

The paymaster of the L.G.H. range not only the computer operators, but also the highest available manager at the hospital computing centre, and raised in no uncertain terms his dissatisfaction with the service. He was assured that it would all be adjusted and corrected by the next pay. The paymaster also informed his higher superior, Mr Clancy, the administrator of the L.G.H. of the problem.

Our branch office was notified at 8.30 a.m. on the next day - Friday, 15 May, 1987 by a Nurse Stewart, of the incorrect payment to all of the nurses, the 320. 20 people rang our office, and 4 people sought and were

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REES

MR REES:

given immediate adjustment at the pay office of the L.G.H.

And when this new pay system called Newpaye is the title of a new system that has been developed at the L.G.H. The codes correctly stated by the Launceston General were not identified by the computer's programme, and the hourly rate was not correctly calculated on the 38th divisor, as information from the L.G.H. was provided. In other words, the L.G.H. pay office had done the correct calculations - coded it correctly and sent it to the Melbourne computer service. And having been advised time and time again, they had failed to adjust the 38th divisor in the correct manner.

There were in fact, sir, 290 cheques written out on the off-line system on Monday 25 May, 1987, as directed by Commissioner John King, I think in Matters T.89 and T.90 of 1987.

PRESIDENT:

T.89 and ?

MR REES:

T.789 and T.790.

PRESIDENT:

And when were the cheques written out, what date?

MR REES:

On Monday the 25th.

PRESIDENT:

On 25 May?

MR REES:

Yes, sir, as directed by the Commissioner, John King.

The reason there were not 320 others is because they were on leave and absent from the hospital, and were unable to claim anyhow.

PRESIDENT:

I take it they've subsequently been paid?

MR REES:

Yes. As they returned to work after annual leave and so on.

It took the L.G.H. pay office, just for the record (that is eleven employees of that office) 4 hours on

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PRESIDENT - REES

MR REES:

Thursday night and 5 hours on Sunday to manually adjust the pays and draw the cheques, as approximately 100 hours of overtime .....for that pay office.

Our claim in this matter, sir, is at the employing authority who has obviously employed incompetent people insofar as the Melbourne computing staff is concerned who were advised on three occasions of the incorrect payment to 27 student nurses and continued the errors for three fortnightly pay periods, and that the waiting time - the clause of the relevant award that should be enacted upon and the penalties issued against the employer.

And if we're going to deal with some of the subject matter raised by my friend Mr Pearce, and he is an example of a person waiting for their pay, which is an interpretation of the award clause. It's taken to the most ridiculous situation, and on pay day (at the L.G.H.), it was indicated by Ms Gregg earlier this morning that it's a fairly loose arrangement. People are informed the pay is available and they go up in groups in fairly loose hours and collect their pay, and cashing facilities are available at normal hours on that Thursday - the pay day.

Now, if a person's pay isn't available, and my friend Mr Pearce is suggesting the pay office shuts at 5, and if you're roughly allocated time to go to the pay office, collect your pay at maybe 4.30, then the first 15 minutes is in your own time, and the remaining quarter of an hour would be paid, if you found that way, sir, at double time, taking that person into 5 o'clock and the pay office is shut.

Now, I think it's seriously ..... that he or she or the hundreds of them should then camp from a minute past 5 in the foyer of the west wing of the Launceston General Hospital until perhaps the

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REES

MR REES:

next pay day, when again they would attract a quarter of an hour from the half past 4 situation to 5 o'clock, and so on.

But I think he's putting to us that the normal pay day ... you're kept waiting on the normal pay day, and that would be each fortnight on the Thursday, as described in the award. Then you would only attract that penalty on that day.

I think it was you, Mr President, who raised the question when the Magistrate attempted to interpret this type of clause. And I note that my friend goes to Exhibit - is it (I) and states a case that is 40 years old - in 1947. It's quite obvious that the lack of cases forces my friend and ourselves, obviously to go to these very old matters, that in modern circumstances, obviously haven't had this question. Then in the private area, we don't have this problem. It's never been tested.

But surely the architects of the award under review, and particularly the clause under review, had in mind the problem of an employee not receiving his or her wages on the nominated pay day. And it might well be agreed that the clause may need some additional words to make it absolutely clear for the future, that penalties will be provided against an employer not properly paying his work force on the day nominated by the relevant award.

It's our submission, sir, that the architects of this award, understood quite clearly, whether they be from the private or public sector in the old wages .....system, under the Public Service Board system of this State, the Industrial Commission. We understand what we mean when we frame an award - an award clause; certainly a Magistrate wouldn't throw too and from across the - either the Bar table, or in the old days, the Wages Board table.

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REES

MR REES:

There was a fairly strong line-up from the employers and the employer representatives, who would understand their industries backwards; many of whom have sat on those wages boards for years. And up to now, these clauses have stood the test of time.

In other words, the employers most certainly have understood that a penalty - a most severe penalty - of overtime rates would apply if the pay wasn't there on time on the nominated pay day, as described in the award.

It would seem to me, that a more frivolous attitude is now being adopted by the employing authority, in the public area. It doesn't matter if you don't get your pay this Thursday. Just like this most honourable gentleman here says, in Exhibit I. What's a week's delay to a bloke that's shovelling sawdust, after all he'll probably be on one pound seven and six, and he can wait a week. And they're all casual employees anyhow - hired and fired by the hour or by the day.

And we're talking about a regulated system where the courts and this Commission itself has awarded a rate - awarded penalties for certain jobs to be done, and employees have a great expectation to receive a correct pay on pay day. And, if they're kept waiting through any error or beaurocratic miscalculations, then there's a penalty on the employer.



MR REES:

He or she isn't expected to camp there and light a Primus stove and cook a hot sausage, until the following pay day. Let people have that expectation and it's not a modern one, it certainly goes back 40 years. The labourer who is worthy of his hire, puts out his horny palm to have it crossed with silver on a day nominated by the relevant courts of that period.

Well now, if you find in our favour in respect of matter 752, our argument is the same in respect of the larger number of persons who have been inconvenienced by a shortage fall of approximately \$30 to \$50.

PRESIDENT:

But are the circumstances the same for that reason, Mr Rees?

MR REES:

Well, the circumstances, sir, was that the competent pay office officers of the Launceston General Hospital drew the attention of the paymaster in Melbourne, his continuing errors. Firstly, his original error for 27. That was ignored. It was repeated the following pay period; they were advised again of the error and again it's ignored until it reaches a larger block of nurses, then entering into their agreed 38-hour week roster systems.

Indeed, the pay office on 15 May 1987, after having a discussion with me about the enormity of the problem, issued an advice slip to all nursing staff from the paymaster in respect to the incorrect payment of wages, where he puts the matters quite firmly into place where the blame should belong and he stated:

"Due to another computer programming error at Health Computing Services - Victoria, Nursing Staff who have recently gone onto the 38 Hour week, have been underpaid between \$30 - \$50 per fortnight.

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PRESIDENT - REES

MR REES:

The underpayment resulted from staff being paid at 1/80 hourly rate instead of a 1/76 hourly rate.

Pay Staff will be working overtime next week to ensure that all Nursing Staff will receive the adjustment in their next pay.

We apologise for any inconvenience but this matter was totally beyond our control."

In other words, the Launceston paymaster is saying, the chief paymaster has been told and told and told and we're wiping our hands of the whole affair but we'll work overtime when he gets his act in order and pay you all your correct rate of pay. That was paid by M.E. Fisher, Paymaster - Pay Office."

That letter, sir, was an exhibit in the earlier matters that I read to you dealt with by Commissioner King. It's Exhibit L.1. My friend has a prepared one anyhow, sir, to tender.

I further submit, sir - I know my friend from the R.A.N.F. certainly wants to have his time on these matters - that if you find that the clause under investigation ...

PRESIDENT:

This will be Exhibit R.1, just to be different.

MR REES:

... has the intent to which the architects of it intended when the award was made, that is that the penalty would weight against the employer who didn't carry out the proper pay procedures in respect of that particular award, the employees would be entitled to an overtime rate after having been delayed in receiving their pay by 15 minutes and we would ask that the matter be adjusted in a retrospective way to ensure that the 27 student nurses would receive a penalty payment from

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PRESIDENT - REES

MR REES: the first time it was drawn to their attention - that is 16 April up to 14 May - and that the 290 nurses, the full-time shift workers should receive a retrospective adjustments in respect of their claim for waiting time at double time, retrospective from 14 May.

PRESIDENT: Yes. Since I can't interpret the award - the same clause from different dates - I guess, really, Mr Rees, what I would need to do if I came down in your favour, would be to interpret the award from 26 March which is the operative date in 752. That would be an antecedent date prior to and would be prior to the second incidence.

MR REES: Yes.

PRESIDENT: Do you follow what I'm saying?

MR REES: Yes, I do.

PRESIDENT: Yes, thank you. Mr Law?

MR LAW: Mr President, I seek some aid in this. Are we now joining T.802 with this, because they are dealing with the same?

PRESIDENT: Well, if they're identical and seek exactly the same thing, then I'm quite happy unless someone objects to join 802 with 796 and I'll assume that Mr Rees' arguments as a party to 802 would be exactly the same as the arguments he's just put in 796 to save repetition.

MR REES: I've got no objection to joining the two matters, sir.

PRESIDENT: Right. So, you can address 802 and then we'll hear Mr Imlach and Mr Pearce in relation to both matters.

MR LAW: Mr President, the facts as put forward by my colleague, Mr Rees, are not disputed by the R.A.N.F. Some of the interpretations we might get to later, we may draw different conclusions, but the actual facts are

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PRESIDENT - REES - LAW

MR LAW:

as stated by Mr Rees.

However, in seeking the interpretation, we have gone somewhat further because during the previous hearing before Commissioner King, there was argument over whether wages meant full wages or part thereof, therefore we are asking that you interpret paragraph (i) of clause 30 of the Hospitals Award with this area.

But it would be our argument, sir, that wages cannot be interpreted to mean part wages, so in your guidelines for persons wishing to bring before the Tasmanian Industrial Commission matters requiring interpretation of awards from decision T.30 your guideline (7) you stated:

"It is not permissible to import into an award by implication provision which its language does not express. The award being a document which is to be read and understood by persons not skilled in law or versed in the subtleties of interpretation. Any omission or imperfection of expression should be repaired by amendment rather than by implying into it provisions which are not clearly expressed by its language."

Mr President, I would submit that had it been the intent of this clause to mean anything other than full wages, it would have been so expressed.

Sir, it is the strength of the English language that it is a very precise language and if this clause was interpreted to mean any other than full wages, it would certainly constitute an importation by implication which its language does not express.

In those terms, I would point out,

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LAW

MR LAW:

sir, that if the wages is not qualified in terms of part wages, wages plus something else, then it means those wages that should be paid on that day.

PRESIDENT:

But if the employer genuinely believes that the wages being paid are correct at the time, has he not discharged the onus put upon him if I'm to accept that argument, even if it's later demonstrated that an error, say, a clerical error has occurred?

MR LAW:

Sir, in this case, clearly, in Exhibit R.1 the employer clearly states that he does not believe that they were paid correctly because they have been underpaid.

The subject matter is incorrect payment of wages and certainly after three attempts at getting it right, one could not say that he believed that that was the correct amount to be paid and I would even go so far as to say that on his own records, that those records show that there was indeed a record within the area which shows that the underpayment was recorded on the cards that were kept by the pay office and I would tender an exhibit which was handed out by Mr Newman, the Chairman of the Board of the Launceston General Hospital at a Press conference in Launceston to explain this decision and are actual records from the pay office in Launceston.

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PRESIDENT: Well, if you're correct in your interpretation, that would mean, would it not, that every employee who is incorrectly paid, or is not paid some overtime, unless there's an immediate adjustment, is prima facie entitled to waiting time.

MR LAW: If intent to make people wait can be proved, sir, I contend that that is the case.

PRESIDENT: This will be Exhibit L.1.

MR LAW: Whilst Mr Newman used these documents on the first number, you'll see he shows the codes. And there he has A.1 to show a 38-hour code, and he again shows that employees were paid under the code A.1 on the second document. And, again, on the third one.

But, we come to the fifth document. And whilst it shows A.1 as the code on it, it clearly shows, at the bottom and over (I've .....it for you, sir) the hourly rate of pay. And that hourly rate of pay is the 40th divisor, not the 38th. So even, at that stage on paying, when the computer returned the records, it should show that the hourly rate was wrong.

PRESIDENT: How does the pay come back? When I was associated with that award some years ago, Mr Law, as I remember correctly, the cheques came back enveloped together with the pay sheet, I think, and they were just handed over to the employees. The employer would not know, at that stage, if the pay was right or wrong.

MR LAW: Also, sir, employee's records that show the payment, are returned to the pay office for keeping, and those are copies of the cards of the employee's records that were from the computer area.

PRESIDENT: They come back with the pay do they?  
I see.

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PRESIDENT - LAW

MR LAW:

Sir, further to that seventh provision in your guideline, to an ordinary working person not skilled in Law, or versed in subtleties of interpretation, wages means full wages and nothing less.

And, further to this, sir, I again refer you to your third guideline. Provided the words used in the general context of the award are in the general context of the award and its application to those covered by its terms, capable of being construed in an intelligible way, there can be no justification for attempting to read into those words, a meaning different from that suggested by ordinary English language.

I would suggest that 'wages' in ordinary English language is full wages and not part thereof.

I submit in the context of the award, sir, that clause 30 further defines how the full wages is prescribed under contract of employment are to be paid, that is, that they should also include overtime and that they should be paid in cash or cheque at intervals of not more than two weeks and not later than Thursday of the week of payment, et cetera.

And, sir, I would indicate that clause 4 of the award (b) under the heading, CONTRACT OF EMPLOYMENT states:

"An employer, other than a casual employee, willing to work who works for less than a full working fortnight shall be entitled to a full fortnight's wages."

So there is defined a contract for that person to be paid their full fortnight's wages.

PRESIDENT:

If he is ready, willing and able ...

MR LAW:

If he is ready, willing and able. And in this case, sir, at Launceston

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PRESIDENT - LAW

MR LAW:

General Hospital, these people not only were ready, willing and able to work, they had actually worked. So there is no problem in that aspect.

And further, sir, I would submit that both clause 4(b) and clause 30, are in accord with the Tasmanian Industrial Relations Acts, clause 49(i) which states:

"Subject to this section, where an employee is employed by an employer in work for a week, for which a rate or remuneration is fixed by an award, he is entitled to be paid by his employer in respect of that work, remuneration at the rate so fixed."

Clearly, in this case, the employees were not paid at the rate so fixed, under the award. So it is clear from this, both in the general context of the award, and the Industrial Relations Act, that 'wages' means full wages.

Mr President, I would now like to come to the area that has been discussed previously in paragraph 4 of clause 30. And, indeed, the area is defined on what is meant by 'kept waiting', and my colleague, Mr Pearce has put forward his propositions in this regard.

And, again, I believe that we should examine the propositions put forward by Mr Pearce in light of those guidelines set by yourself in that Decision T.30. And, again, the seventh guideline which I quoted, and the importation of matters into the award. And it seems to me, that what Mr Pearce was doing was importing other areas and other decisions into the award of the hospital employees and not what is actually stated in the wording of the award.

And to follow that further, the definitions that Miss Fawdry put up



MR LAW:

from the Macquarie Dictionary that: `keep is to cause, to continue in some place, position, course or action specified'. And the same dictionary defines `wait as to stay or rest in expectation, or to remain in a state of quiescence or inaction as until something expected happens.

Under these terms for interpretation, sir, the words `an employee kept waiting' can only mean that an employee is caused to continue until something expected happens, and that expected thing that is expected to happen is that they would be expected to be paid their wages, and not just part of their wages, but their full wages.

Again, sir, in line with your guideline 7, we cannot import the meaning `made to wait at the pay office' or `made to wait in the hospital' or `made to wait' anywhere else, when this is not expressed in the language of the clause.

The English language, as I said before, is a very definite language and can be defined in a very fine manner. For instance, `the lady wore a dress' can then become `the lady wore a blue dress'. `The lady wore a blue dress with pink polka dots and a pinafore style' et cetera. We can be very definite in the English language, and that is one of the beauties of the English language. And the general rule, thereof, is that if it is not defined .....by an adverb, or an adverbial phrase in the case of a verb such as `kept waiting', then it is its broadest interpretation that must be taken.

And again, sir, in your guideline 4, you say, `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.' So those words

MR LAW:

`kept waiting` cannot have attributed to them `kept waiting at the pay office` or `kept waiting anywhere else`. They simply mean kept waiting wherever you are for that which is expected which is your pay.

PRESIDENT:

Do you think then that the award is deficient, in that it doesn't anywhere say `kept waiting until` ... (no, I'll re-phrase that) that the award does not indicate that payment shall continue until such time as the employee receives his or her wages?

MR LAW:

Well, sir, if we place on that the qualification that it is a document which is to be read and understood by persons not skilled in law or versed in subtleties or interpretation, I feel that the ordinary worker reading such an award (the ordinary nurse) would think that that was very plain, what it meant.

And so I submit also, that in the context of the award, that clause 30 further defines clause 4(b) CONTRACT OF EMPLOYMENT, in that it further defines when the full payment of wages is to be made; in what form, and what information is to be supplied with those wages.

I submit, sir, that paragraph 4 refers to the penalty provided, and if an employer breaches the contract for the employment to provide full wages.

PRESIDENT:

Mr Imlach.

MR LAW:

I also submit, sir, that this is consistent with the Tasmanian Industrial Relations Act 1984, clause 51(1), which states:

"An employer who does not pay an employee the remuneration to which that employee is entitled to be paid under section 49 or 50 is guilty of an offence."

And 49, sir, is again:

"Subject to this section, where an employee is employed by an employer in work for which a rate of remuneration is fixed by an award, he is entitled to be paid by his employer in respect of that work remuneration at the rate so fixed."

So I feel, sir, that is reasonable to interpret that that is a penalty provision, not compensation; that it is the penalty for the breach of contract that is laid down in the award and should be so looked upon as a penalty provision.

PRESIDENT:

Not the provision in the Act?

MR LAW:

No, in the award.

PRESIDENT:

In the award, yes.

MR LAW:

Stating what should happen is there is a breach of that section - contract of employment.

And, sir, to bring in these other awards, for them to have relevance, one would have to know and Mr Pearce did not bring anything forward in this, whether they have similar provisions for contractor of employment or whether they just have a simple guarantee clause in their award and whether the Act that they are based upon is similar to the Tasmanian Act and as no evidence has been put forward upon that, it would simply seem to me that Mr Pearce is

MR LAW:

seeking to import into the award a meaning that is not written there.

Sir, as we have defined `keep` from the Macquarie Dictionary as `cause to continue` it could be said that this implies an intent to make people wait for their wages and on that basis, perhaps it could be said that if there was no intent and once the payment had been brought to notice there had been an immediate attempt to fix the matter, then it would have been very difficult to prove intent and that maybe the employee would not be entitled because there was no intent to cause them waiting and it was done as quickly as possible to fix it.

But in the case at Launceston General Hospital, that certainly is not what happened and, indeed, as has been outlined by Mr Rees - some of the history of it - by myself, because I had been away on the Friday when this first was brought up that representatives of both the R.A.N.F. and the H.E.F. after the night shift of Thursday night and running into Friday morning, had by that stage picked up that there was an underpayment and approached the pay office on the matter.

So, they were told initially that they would have to wait the fortnight but when they stuck to their guns those of the 4 people that were paid, 3 of them were delegates of either of our organizations and another was a very vocal supporter of the organizations, but following them going home to wait as they'd been instructed, that notice which has been submitted to you, R.1, was posted throughout the hospital and I would submit, sir, that that clearly shows an intent to keep people waiting, that it was intended to cause them to wait until they got their wages and let us not be fooled by people saying how long it would take and the problems of paying.

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LAW

MR LAW:

The clear legal plight was that they had a right to pay those people and as has been outlined by Mr Rees, 9 hours of overtime working by the staff in the pay office at Launceston General Hospital were able to pay those people, so had they been instructed to immediately start work by the Monday morning at the very latest, those employees who would have been paid their pay and it would have been difficult for the unions to argue waiting because of the intent not being there but, clearly, there was an intent to keep those people waiting and under the terms of the award with that intent, the penalty should apply and they should be paid at overtime rates.

PRESIDENT:

What do you have to say then in relation to the last \$10 increase that probably has not yet been paid?

MR LAW:

I believe the Full Bench itself made a decision when that should be paid by, didn't it, sir?

PRESIDENT:

Well, it made a conscious decision as to operative date. It wouldn't have said that wages must be paid on any particular date. It simply determined the date from which the \$10 would be paid. If the \$10 has not yet been paid, would you be claiming waiting time?

MR LAW:

I was, sir - and I may be wrong in this, but I was under the understanding that the instruction was that it had to be paid before August - some time before August. Assuming it's not paid by August, then I would think the intent would be there again, sir.

PRESIDENT:

Well, I can assure you of this, that the Industrial Commission would not have said that it has to be paid sometime before August. The Treasury may have said that.

MR LAW:

In terms of that, sir, again, we would come to the intent of the employer, would we not - if he was

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PRESIDENT - LAW

MR LAW:

making a genuine attempt to pay that as quickly as possible. The intent to keep people waiting would not be there. But in this case, no such genuine attempt was made. In fact it took the pressure of Commissioner King at a Commission hearing to get the representatives of Launceston General Hospital to agree to even make the adjustment before the next pay-day.

I would just like to run through those guidelines that you set up and your first one:

"The construction and interpretation of award provisions can only be made by considering their meaning in relation to specific facts."

Well, the specific facts are those outlined and that specific intention was there not to pay. So, I feel I've addressed that matter.

Your second one deals with merit and says:

"That issues of merit should not be ..."

It's on the basis of what one party believes but the other doesn't. Neither party, I believe, in this case have addressed merit.

Sir, provided the words used, I've dealt with that in terms of this interpretation and the fourth.

The fifth:

"If a drafting mistake has been made in not properly expressing the intent of the award maker, then the remedy lies in varying the award to accord with the decision given."

So, this doesn't apply in this case either.

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LAW

PRESIDENT: Nobody listens to me when I keep drawing attention to that one. I don't know how many times I've pleaded with the parties to make applications to vary the award and not seek an interpretation for it but these please fall on deaf ears, I'm afraid.

MR LAW: If the Department of Health felt that there was incorrect drafting in this case, we shouldn't be here. We should be in another area.

PRESIDENT: I would redraft the whole of the award, not just this clause. It is a mess.

MR LAW: I couldn't agree more, sir. When it's in three different parts and you can't turn to one and find it. It took me a long time to even follow it.

PRESIDENT: You try and decipher - I think this is the award that talks about casual employees, or temporary employees in two places and calls them something quite different in the third.

MR LAW: I would say if it's the sixth one, sir, genuine ambiguity exists:

"Result may be had to the judgement accompanying the award as an aid to discovering it's true meaning."

Well, sir, I have attempted to find that judgement and I don't believe there is any ambiguity anywhere, so it shouldn't come in.

So, I would finish, sir, by saying that under the guidelines for an interpretation, I believe that we've shown clearly that there is no cause other than that outlined and asked for by the unions that can be used as an interpretation in this case and that all the quotations and documents from other awards are importing meanings into this award, which are not contained within the structure of the language that is there and in

MR LAW: that case, sir, I believe they are irrelevant.

PRESIDENT: Yes, and I take it, from your point of view, operative date would have to be antecedent in order to pick up the problem raised in the first matter?

MR LAW: That is correct. The R.A.N.F. is more concerned that the integrity of this clause be upheld.

PRESIDENT: Yes.

MR LAW: We would argue that it should be in that way.

PRESIDENT: Yes, thank you, Mr Law.



PRESIDENT: I understood your earlier submissions, Mr Imlach.

Nobody else wants to risk their arm? Mr Pearce?

MR PEARCE: Thank you, Mr President.

PRESIDENT: You have the unique opportunity to reply to your own submissions before you put them.

MR PEARCE: I got up half an hour before I went to bed.

PRESIDENT: Yes. Well, in a manner of speaking, yes.

MR PEARCE: Monty Python - apologies there too.

Mr President, as I indicated at the outset of today's proceeding I would wish to have incorporated as part of the record for this matter, all of those matters raised in the previous submission.

To comment in respect of some of those matters raised by the HEF and RANF in this particular matter before us now, might I ...

PRESIDENT: If I could stop you there? So that we do you no injustice, it might be a good idea if this was a running transcript. Although it will have different numbers, the same transcript will go to all the parties, because you've said you'd like all those matters incorporated in the transcript relating to this matter.

Some of those matters I feel sure dealt with the specifics of the first matter, so it would be far better if we make it a running transcript with the various cases identified.

MR PEARCE: Right.

PRESIDENT: And I will understand that when I come to bring down my decisions that to the extent that your earlier submissions can be construed to have

PRESIDENT: direct application to this, they will be deemed to have been directed to this. But we were talking about people who had not received any pay at all, weren't we?

MR PEARCE: Yes.

PRESIDENT: Yes.

MR PEARCE: One of the aspects raised by the HEF was something along the lines that employees, if they were not to be disadvantaged by the non-payment of wages during a particular pay-day, could be informed that they could avail themselves of waiting time.

And of course the HEF then construed that to mean that a situation arising where the employer would be required to provide accommodation etc for people who would be waiting around for payment.

PRESIDENT: I think a Bunsen burner and some sausages would have sufficed - it would have satisfied Mr Rees.

MR PEARCE: I would merely ...

MR REES: A clean bale of straw.

MR PEARCE: I would merely suggest that the circumstances by which we made those submissions are, that if it became apparent to the employer that, notwithstanding he was able to meet a payment of wages within the ordinary hours of work on a pay-day, if he had at his disposal the capacity, the wherewithal, the employees etc to rectify the non-payment during working hours by the event of working overtime to correct the incidence of one or two people, or whatever, then he might say to the employees, 'I can have your pay available at half past six this evening' and in so doing they choose to wait, then the waiting time would be payable in between the time of cessation of duty and actual time of payment.

When the employer says, because of

MR PEARCE:

the circumstances which would not enable him to make the payment within the normal pay-day, he advises the employees to the effect that, there will be no pay forthcoming today, therefore there is no point in the employee waiting around in hopeful expectation. Nothing is going to follow.

What we say is that the employer has discharged, by the giving of such advice, the capacity for the employee then to go home or whatever, not therefore being subject to a delayed departure or waiting time.

Certainly we wouldn't envisage a situation of the employer saying, 'Yes, wait around and we'll provide your accommodation and your pay will be available in a week's time.' That's not the intention and I'm sorry if I gave that impression.

But it's simply a matter that if the employer believes that he can provide the payment within a period of time, immediately following the normal hours of work on the pay-day, then the waiting time that the employee is subjected to whilst they are waiting would be remunerated at the overtime rates as provided by the award, for all time spent waiting on the normal pay-day until such time as he was paid.

Mr Rees further indicated that there appears to be only a problem in the public sector, that certainly it is not a problem in the private sector, and that the architects of the award provision understood what was intended.

I would merely submit that if the award draftsman knew what they were doing in providing for a clause which did not take into account the inability of the employer to pay for reasons beyond his control, which subsequently manifests itself into the possibility of a claim of \$2.4 million, then the inception of the

MR PEARCE:

Industrial Relations Commission is certainly a welcome advent, and perhaps it would have been desirable if it had been incorporated before that decision was actually made.

I mean no disrespect to the employee members on the board at that time, but this is a clear result of a failure by draftsmen to take into account those sorts of factors.

here we are confronted with a situation where both parties I believe are in agreement, but there are circumstances beyond the employers control as to the shortfall in the payment of wages on that day. And yet, the employee organisation would seek to advantage themselves of that situation, which was and is, which we will endeavour to substantiate, was clearly beyond the control of the employer.

The employer did on 14 May make such payments to the employees that he believed were due to them under the award at that time.

The fact that the employer subsequently advised employees on 15 May that there was a mistake, was a mistake which was not detected at the time of making such a payment. It was not a deliberate action of the employer to withhold payment. It was a payment made bona fide. It was a payment made with no intent to defraud.

It was not a payment made for the purpose of which was to cause employees to wait for payment of something which became subsequently identified as a shortfall. At the time of paying such payment on 14 May, the employer properly believed and had evidence before him to conclude that the payment that he was making on the advice of the hospital computer services, was in fact all entitlements to which the employees would be entitled by way of reference to payments under the award.

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PEARCE

MR PEARCE: It was only ...

PRESIDENT: What was that information? I don't think we've had any evidence of that, have we?

MR PEARCE: If I might, with your ...

PRESIDENT: Indulgence?

MR PEARCE: ... indulgence, Mr President, allow Mrs Gregg to explain clearly.

PRESIDENT: Yes, if she could please. Thank you, Mrs Gregg.

MRS GREGG: Thank you, Mr President.

Just before I do go on to those details, I would like to correct a couple of the other factual things we've put to you today.

There seems to be some confusion on behalf of the HEF as to the pay-days concerned. And that confusion was in fact supported by the RANF in their submissions in their supporting of the facts.

There were three pay-days involved. The first one was 16 April. And on 14 April information was put in to help computing service to change the hourly divisor for those employees at that time who were going up on a 38-hour week. The error was not detected until after the next pay-day, that is 30 April.

So we did have a fortnight there where there was no detection of the error.

Now, subsequent to the pay-day of 30 April the error was detected, and it was during the period 30 April to 14 May when efforts were made quite extensively to rectify the situation.

I just wanted to correct that impression that was given earlier.

Now Mr Law in fact did ...

PRESIDENT: So it's really two pay-days, is it?

MRS GREGG: The period from 30 April ...

PRESIDENT: To 14 May.

MRS GREGG: ... to 14 May, that was when the error was first detected for those 27 employees who were initially affected.

And then on the pay-day of 14 May, the error was continued in the system.

So that's the period that I'll be addressing in the documents that I have to present to you.

Mr Law did tender a document, or a group of documents, which he very quickly skimmed through without reference to any of them, and focused attention on what is a pay slip.

But I'll be tendering (if you'll bear with me for some repetition) identical documents, but I do have another group of documents that I'll be tendering as well as the documents that Mr Law tendered.

PRESIDENT: Can we identify what was I think L.1, which you have now tendered?

MRS GREGG: Mr President, I'd be happy if you identify my documents separately, because I do want to go through it in rather a different way too, and it does contain different extended information.

PRESIDENT: Yes, I had intended to identify it differently, but I just wanted to know which one you wanted me to identify first.

MRS GREGG: The one that's got 'SPUDS' up in the left-hand top corner is the first document.

PRESIDENT: The one that says what?

MRS GREGG: 'SPUDS'.

PRESIDENT: Spuds, yes, yes.

We'd better make this SG.1. We've already had one G.1, haven't we?

MRS GREGG: Thank you, Mr President.

Perhaps the second one would be SG.2 on that basis, Mr President.

PRESIDENT: Yes.

MRS GREGG: Thank you.

Now the 'SPUDS' document ... I'm no computer wizard, but I think it's important for the point of view of information, in factual information being presented before the Commission to tender this evidence and go through it with you.

The first document, the 'SPUDS' document that I referred to, that represents a register of codes that's used to set employees up on the computer in terms of their daily hours. It's a computer master file.

I only want to point out to you that the reference 'A1' does refer to those on a 38-hour week. So that's

MRS GREGG: my main purpose in tendering that.

The next document is dated 14 April, which is 2 days prior to the first pay-day when 27 nurses went up onto a 38-hour week. And it shows that the input data to change those 27 nurses over ...

PRESIDENT: I'm sorry, you said 14 April?

MRS GREGG: Yes, that's the second one in SG.1.

PRESIDENT: Oh, thank you.

MRS GREGG: Second page.

PRESIDENT: Yes, I thought we'd moved to SG.2.

MRS GREGG: No. Second page.

PRESIDENT: Second page, right.

MRS GREGG: We've got 27 nurses being shown on that document on 14 April, 2 days prior to the first pay-day where we experienced difficulties - although we weren't aware of those difficulties for some time.

This represents a copy of a input document. The changes are made; they are input into the computer system.

And you'll notice at the top is called a 'BATCH PROOF LISTING'. And this 'BATCH PROOF LISTING' in fact is to verify that the information has been changed in the computer. It comes back to the hospital and says 'Yes, you've made the changes, here's a verification of those changes going into the computer.' So the codes were shown as being representative of a 38-hour week at that time.

The next document, over the page, is the document of 11/5. And that again, is a 'BATCH PROOF LISTING'. And that shows that the changes were made to the master file, changing the code over to 'A1' for 290 nurses.

In fact the figure of 320 nurses has



MRS GREGG:

been stated so often in this issue, that it's become the truth. In fact there are 290 nurses involved. The 290 include the 27 original nurses who are so affected.

The pay office did issue 290 cheques. On Monday I rang and there was still 30 cheques sitting at the hospital waiting to be collected, and those 30 cheques relate to those people who were on sick-leave or annual leave or long service leave, or otherwise absent from the hospital.

That document of 11 May, is prior to the pay day of 14 May, and it shows that for that number of nurses the change was made over to the 38-hour week code. There is a highlighting on that page, you'll notice, Mr President. That is a payroll number for a particular employee. I've highlighted that for a purpose, in that the information that is subsequent to that in this document relates to that particular employee. We show here that that employee was changed over in terms of the 38-hour week code.

We move to the next page, which is dated 12 May 1987. This is what is called an employee profile record. What happens when the hospital change any information on an employee, the computer then produces a totally new employee profile, and that comes back to the hospital to show that the changed information has been incorporated into the master file on that employee, along with all the pre-existing information. And this employee profile came back. It has the new code - A.1. It's the same employee number as on the previous document. And you will see that the award salary is there. It's correctly calculated, and the calculation just below that is the new hourly rate under the 38-hour week.

The hospitals use the employee

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PRESIDENT - GREGG

MRS GREGG:

profile as a verification of the fact that everything is okay, and that was the case in this instance.

The following document which Mr Law did tender, but he referred to it very briefly, and used it to say that the employee did not believe that the pay was accurate. In fact, this is a replica of a pay slip. The cheques come in an envelope which has a blacked out front. The cheque is inside the envelope, and these details are on the back of the inside of the envelope. There is no way that the employer could have known on the pay day that this was the hourly rate that was shown in the pay, given that the verification had come through showing the new hourly rate as being inside the computer.

So there was a problem with the computer. We, the employers, understood that it had been rectified. We had information showing that it had been rectified. The payslips, in fact, when they came with the cheques inside them, were inaccurate.

That leads me to the next document, which is S.G.2.

PRESIDENT:

I presume that somebody has gone to the trouble of actually checking the calculation. It's not just a printing error?

MRS GREGG:

No. In fact, you'll find that on S.G.2, the same information on the profile sheet is displayed. This is for the pay day of 26 May - the following pay day. The information is the same. We've got the same award salary. We've got the same hourly rate - 10.11447, and the next page of that document is the actual payslip, and on that pay slip the error had been rectified, and it shows the correct hourly rate.

Again, the employer had no way of knowing, prior to getting copies of the payslips back from employees,

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PRESIDENT - GREGG

MRS GREGG: that, in fact, the hourly rate did match up with the employee profile. That was the most recent pay day at Launceston General.

But it was important to provide the Commission with those documents, given there has been some indication from the employee organizations that the employer was aware of the problem. Quite clearly, this document shows the Commission that the employer had no knowledge of the fact, that on the pay day of 14 May, employees were going to be incorrectly paid; that an underpayment, in fact, was going to occur.

...?

PRESIDENT: The figure highlighted at 700 on S.G.2, ...

MRS GREGG: Yes.

PRESIDENT: ...first page: Total Period Amount, \$768.70. Is that the gross amount that was paid?

MRS GREGG: That would be the pay for that person, yes, Mr Commissioner.

PRESIDENT: And that was still the short pay, was it?

MRS GREGG: No, that's the award salary divided by 26. That's the fortnightly salary.

PRESIDENT: The normal, standard salary?

MRS GREGG: Yes, standard fortnightly salary.

PRESIDENT: Yes. And it would be plus or minus that amount, depending on ...

MRS GREGG: The hourly rate, yes.

PRESIDENT: ... the shifts worked, and ...

MRS GREGG: The rate of pay stays the same under the award. We always pay in accordance with the award. The 38th divisor, in fact, affects penalties

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PRESIDENT - GREGG

MRS GREGG: ...

PRESIDENT: Yes, I thought that ...

MRS GREGG: ... on an hourly rate situation.

PRESIDENT: Yes. But someone working without penalty - day work, without penalty, would, in that case, be entitled to \$768.70 for a straight fortnight's work?

MRS GREGG: Pay stays the same, in terms of what they earn, but the divisor that is used is 38. We do, in fact, pay as people work, and one fortnight they work 72 hours (as the leisure day off is unpaid) the other fortnight they work 80 hours. So, ...

PRESIDENT: So they are, in fact, paid for what they work?

MRS GREGG: ... depending on what they're working ... Paid for what they work.

PRESIDENT: It varies from day to day?

MRS GREGG: Yes.

PRESIDENT: Thank you, Mrs Gregg, I'm glad you cleared that up.

MR REES: Well, with respect, I don't think she's cleared much up at all.

PRESIDENT: Do you want her to go through it again, Mr Rees?

MR REES: Well, let's go through Mrs Gregg's earlier submission. She says that on 14 April, pay information is fed into the Melbourne computer service. I'm sure she said that. Did you not?

MRS GREGG: We have the proof batch listing here of 14 April.

MR REES: Right.

So on the pay day of the 16th, there was an incorrect pay for 27 student nurses. Some time on the afternoon of the 16th, the Secretary of the

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PRESIDENT - GREGG - REES

MR REES:

Campbelltown District Hospital phoned the paymaster of the Launceston Hospital to say, 'I've got one nurse here who has an incorrect pay'. So then the mistake was known. Then the mistake was known on 16 April, and an attempt was made by the Launceston people to correct it with the main paymaster, Melbourne computer service, not a fortnight later.

Then, on the 16th, Fisher rang the person in charge of the Melbourne computer service and complained that the information being shown on S.G.1 was, in fact, incorrect. The paperwork's coming through. The 38-hour week people marked in that Exhibit A.1, and on the next page the 27 nurses highlighted, is incorrect from the fourteenth of the fourth. The pay office at Launceston could only assume that those people would have received their correct payment in accordance with the Code A.1.

However, fortunately, the Secretary of the Campbelltown Hospital had informed them that all that information is incorrect. So, properly, they raised the matter with the chief paymaster of the whole of the public system in Melbourne, that the information being fed out in the batch proof listing is wrong.

Now, if we go to the back page of Exhibit S.G.1,, on the far left-hand side, carefully printed there is the word 'owed - \$52.30'. Now you skipped out of that Shirley.

PRESIDENT:

Where do we find that?

MR REES:

On the last page of Exhibit S.G.1.

PRESIDENT:

Yes.

MR REES:

Payroll details report, page 3. On the far left-hand side, there's written in there in handwriting - 'owed \$52.30'.

PRESIDENT:

\$52.30, yes.

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PRESIDENT - REES

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Disk 10

MR REES:

Someone in the pay office at the Launceston General has looked at the hourly rates, calculated it out and 'Strike me Blue', they haven't corrected it yet. This person is owed \$52.30.

I thank Mrs Gregg for producing Exhibit SG.1 because it certainly endorses what we've been putting.

So, having once informed the Melbourne paymaster on 16 April that that pay is incorrect, it is repeated on the 30th and repeated on 14 May. That's the reason we are before you this afternoon, sir.

Had not the 290 nurses raised the issue with their respective unions, it would still be repeated, I would suggest and on and on it would go and our friends would be in proceedings similar to this in 2 or 3 months' time saying, 'But they didn't wait behind after pay-day. They're not entitled to any in accordance with the clause of the award.'

The diligence of the stewards mentioned by the RANF advocate and other members who claimed their pay, highlighted the whole errors that were being continued. Even after they warned and told and told and told on three occasions, 'Your system is incorrect' and Fisher at the L.G.H. would have done more than that - he couldn't fly to Melbourne and punch him in the mouth.

PRESIDENT:

Well, don't get too carried away. You get a chance to say all this on your address-in-reply.

MR REES:

This is my address. I thought you'd finished.

PRESIDENT:

No.

MR REES:

Well, I'll have another go then.

MRS GREGG:

Is it called two bites at the cherry, or something else. I don't know.

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PRESIDENT - REES - GREGG

MRS GREGG: The figure that is on the pay slip owed - there were calculations done on every pay when it was realised that an error occurred. We had to do calculations, otherwise the cheques wouldn't be able to be written and also, the figure - that a certain amount of money is owed - was written after the fact. It's not written on the pay slip as people are being handed their pay - the realisation of an error.

This pay slip relates to 14 May and certainly the figure there has been calculated - that there was a shortfall in the pay. There was an underpayment. There's no disputing that and that this person was underpaid by that amount, as shown.

PRESIDENT: Well, I don't want to ask Mr Rees, he'll have three goes, but \$52.30 - does that represent an accumulation of underpayments, or was it an underpayment that hadn't been put right? On 12 May, was the pay otherwise correct, except for a retrospective adjustment of \$52.30, or was the pay for 12 May less than what it ought to have been?

MRS GREGG: The pay that was actually paid ...

PRESIDENT: On 14 May, if you wish.

MRS GREGG: Yes. On the pay-day of 14 May, it was discovered that an underpayment had occurred and calculations were subsequently made as to the amounts that were underpaid to each individual.

PRESIDENT: Yes. Well, that \$52.30 represents an underpayment for the 14 May, or the period ending 14 May ...

MRS GREGG: 14 May.

PRESIDENT: ... and something for a previous pay?

MRS GREGG: I'm not sure whether this employee, in particular, was one of the original 27 but, certainly, for those 27 the calculation was made for the

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PRESIDENT - GREGG

MRS GREGG: entire period and for those other nurses that went up on to a 38-hour week in the last period that we're having the discussions about, the calculations were made for that period, once that underpayment situation had been realised.

PRESIDENT: Yes.

MRS GREGG: Thank you, Mr President.

PRESIDENT: Now, you're going to have a go, Mr Law.

MR LAW: Yes. I'd seek some help on this, sir, because I believe that Mrs Gregg may well have, unintentionally, misled the Commission on this.

PRESIDENT: Well, I'm sure she wouldn't do it intentionally.

MR LAW: Well, it seems, to my recollection she said, 'That they were unable to check this because this was a copy of what was in ...

PRESIDENT: She did, yes.

MR LAW: ... and if that is the case, how could it afterwards have had written on it by paymaster 'Owed \$52.30' and I point out that up in the top right-hand corner, it says 'Master Files Information', not pay office. If something is right or the other is right, if it was in the pay sheet, how did it get that written on it afterwards? Did the employee take it and say, 'How much am I owed and it was written on then' or is a copy of a master file kept in the pay office.

PRESIDENT: What is the procedure? Does a master come along with the total payroll, setting out the details of each employee's payment advice that would appear in the envelope?

MRS GREGG: The advice that I have from the pay office is that this is a copy of a pay slip and there may be other computer documents that are printed out at the time of payment.

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PRESIDENT - GREGG - LAW



MRS GREGG: Certainly, the employee profile is one of those.

PRESIDENT: Is this the pay slip that they sign and hand back? No.

MRS GREGG: No. The employer signs the cheque. I don't know that they have any signing and handing back situation applying. I may need to seek advice from the pay officer there who has provided me with this information.

But, certainly, it was my understanding that this information contained on the pay slip inside a blacked-in envelope with the cheque inside that envelope and that the employer has no way of knowing what's on that information, other than the employee profile.

PRESIDENT: Well, the employees must sign something for their pay.

MRS GREGG: Yes, they would sign possibly a computer print-out with names attached to it.

PRESIDENT: Does anyone know? No first-hand knowledge?

MS FAWDRY: No, Mr President, they don't.

PRESIDENT: They don't sign for it.

MS FAWDRY: No.

PRESIDENT: They're just handed it in an envelope?

MRS FAWDRY: Yes.

PRESIDENT: It could be anyone's envelope.

MS FAWDRY: No. It's got their name on it.

PRESIDENT: But it might have somebody else's name on it.

MS FAWDRY: No. They have to identify themselves.

PRESIDENT: Do they?

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PRESIDENT - GREGG - FAWDRY

MS FAWDRY: Yes. They just say who they are and they go through a little box and they're in alphabetical order and they say, 'Yes, this is you.'

PRESIDENT: That's because they are paid by cheque, I presume, is it?

MS FAWDRY: Yes.

PRESIDENT: A crossed-cheque, I guess.

MS FAWDRY: On the normal pay-day there is cashing facilities at the L.G.H. They get handed their cheque, they go across to the bank window and they can cash it straight away.

PRESIDENT: What an extraordinary arrangement.

MRS GREGG: I think the point is, Mr President, that the sume that's shown there as being owed, is something that was calculated subsequent to in time, arising ...

PRESIDENT: Mr Law, probably has a point. If it is said to be a pay slip, how would the hospital get hold of it to be able to write that amount on it.

MRS GREGG: Well, I mean, the furore that erupted subsequent to this issue arising, brought all sorts of things forward, Mr President, and I daresay that pay slips were, in some way, either repeated back through the computer so that calculations could be made on that.

PRESIDENT: If the pay slips were all handed back.

MRS GREGG: Or the computer may have done a special print-out of all those pay slips for the hospital to do the calculations on subsequent to pay-day.

PRESIDENT: It may have run another run ...

MRS GREGG: It's certainly possible, Mr President.

PRESIDENT: But we don't know?

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PRESIDENT - FAWDRY - GREGG

MRS GREGG: No, not at this time, but I can imagine that the pay office would request that other computer to allow their calculations to take place without having to bring every individual's pay slip back into the hospital.

PRESIDENT: Do you know, Mr Law?

MR LAW: Yes, Mr President.

The hospital hires a certain amount of time on the computer and we were told that that was one of the reasons why this would have to be done manually because their time is so many hours prior to the Thursday, so to say that the computer run this off for them, could not be correct.

PRESIDENT: What do you think it is, then?

MR LAW: I believe this is what it says - a master file which is kept there in which they recorded the underpayment. If it is a pay slip and it was already on it that it was owed, it's a direct acknowledgement that they knew they hadn't paid correctly.

MR REES: Certainly, sir, it's not a student nurse's pay slip. I think Mrs Gregg stated that the example shown, where it is written '\$52.30 is owed', you asked the question whether that would be an accumulation of perhaps the student nurse. I do believe she said, she thought so.

But on looking at the coding of that pay slip, you will note, sir, that she's highlighted it with a yellow coloured - '000014206' which corresponds with the shift worker nurse on the 'BATCH PROOF LISTING' that Mrs Gregg highlighted there, which is contrary to the student nurses shown on the second page for the 'BATCH PROOF LISTING' where all the A's are shown, and there she has written the 27 nurses who are the students.

MR REES: So, obviously, the pay slip example is of a senior nurse on shift work.

PRESIDENT: Well, it says, '4th year', doesn't it?

MR REES: Yes, and not a student.

MR LAW: Mr President, if you go to SG.2, and look at the second page thereof, you can see that it is a computer print-out; it has more than the one pay slip on it.

PRESIDENT: Yes.

MR LAW: And again, on the original document you can see that where it's been blanked out, the second one, it's still of it there.

PRESIDENT: There's still something in the margin.

MR LAW: So, it's obviously a computer print-out and not a document from somebody's pay-packet.

PRESIDENT: It is, as it says, a master file.

MR LAW: Yes.

PRESIDENT: Yes, thank you, Mr Law. Mr Pearce?

MR PEARCE: Thank you, Mr President. There were two matters alluded to by Mr Law, going to matters contained in the Industrial Relations Act, i.e. section 49 and section 51.

I'd draw to the attention of the hearing that they appear in 'Division 3 - Enforcement of award' as such and as I read them, and I don't believe anything hangs on it. They merely state an expression or an intent and I believe that it would have to be established subsequent to the event that there was a deliberate action which went to suggest that an employer was not going to provide at some time an award rate of remuneration, or he would need to be found guilty of an offence in relation to circumstances

MR PEARCE:

which would be discussed or put  
before another court.

I don't believe it's appropriate that  
in the issue of the interpretation of  
the award that these matters, of  
sections 49 and 51, need to be  
addressed during the course of your  
findings.

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PEARCE

MR PEARCE: I'd like to tender one further exhibit, which is a matter going to the 'COMMONWEALTH WORKS AND SERVICES (NORTHERN TERRITORY) AWARD'.

PRESIDENT: This had better be AP.1, Mr Pearce, although I'm mindful of the fact that all your other exhibits stands in this.

MR PEARCE: Federal Law Report 1 of 1960. There are a number of comments contained therein which I'd like to seek to have incorporated. Immediately under the heading, it indicates:

"An award provided for the payment of 'waiting time' if an employee was not paid on the regular pay day. The award, in addition to providing for basic rates and margins, contained provisions for special rates payable in special circumstances."

It was held by the court, consisting of Chief Justice Spicer and Justices Joske and Eggleston:

"Held, that if the employer paid to his employee on the regular pay day an amount which was a bona fide payment of all moneys believed to be due to the employee under the award he was not liable to pay 'waiting time' even though the sum paid was not the precise sum representing the total amount of all moneys then in fact due."

At the start of paragraph two, or the last paragraph before the bottom of the page there is the first sentence:

"It is not easy and perhaps unnecessary in this case to determine the precise meaning of 'wages' as used in cl. 31(a) and (b)."

We would extend that, to submit that it is not easy in any circumstances

MR PEARCE:

to determine what in fact is wages and, indeed, my research has failed to, albeit not exhaustive, I've been unable to find any definitive judgements as to what might be defined to be wages and we don't propose to put argument before you, that - we would concede, I'll put it that way, that post or on 14 May and subsequent to that date, it became apparent to the employer that an underpayment of wages or a shortfall in wages had occurred on pay-day 14 May.

We would further submit, that it was not known to the employer at the time of handing out of cheques that the cheques contained in the pay-packet would have represented anything other than the pay advice information which had been forthcoming to the hospital. They are entitled to rely on that as being the authoritative documentation to suggest that contained inside of those pay-packets were the correct amount of wages.

PRESIDENT:

Yes. I once delivered a learned paper on the meaning of salary, not wages. Salary is derived from the word `sale` meaning salt. In ancient times serfs were paid in salt and not in money.

MR REES:

If you weren't worth your salt, you didn't get paid.

PRESIDENT:

That's right.

MR PEARCE:

Perhaps I should have been looking at matters under `S` as well, rather than `W` for wages.

There are some aspects of the decision which go to waiting time. I'll take you to the commencement of the fourth paragraph on page 337:

"The conditions which attach to the payment of waiting time, namely, that waiting time is only to be paid if an employee is not absent from work, that it is to be paid

MR PEARCE:

`from close of business on pay day' and that `not more than eight hours pay shall accrue in respect of each twenty-four hours of waiting' all indicate to my mind that the payment provided for is designed to compensate an employee whose departure from the place of employment is delayed by reason of the failure of his employer to pay him in the employer's time."

I'd then adopt the last paragraph of that page:

"Support for this view of the meaning of the clause is to be found in the decision of Mayo J. in Cranford-Webster v. McFarlane (2). So construed the clause is not designed to impose a penalty on the employer for mere non-payment or late payment but its purpose is to compensate an employee who waits to be paid."

At the top of page 338:

"If the clause were designed to impose a penalty for mere non-payment or late payment it is strange that its operation is limited to the case of an employee who is not absent from work."

PRESIDENT:

That was at the top of page ...?

MR PEARCE:

Three hundred thirty-eight, Mr President.

PRESIDENT:

I don't think there are any numbers on mine.

MR PEARCE:

The second page, left-hand side.

PRESIDENT:

Thank you. Now, if you'd repeat the quotation, please?

MR PEARCE:

Yes. That's the first paragraph

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PRESIDENT - PEARCE



MR PEARCE: commencing at the top of the page, `If the clause ...` and ending on `work`.

PRESIDENT: Thank you.

MR PEARCE: I would then take your attention to the third paragraph:

"I think, however, these considerations aid in the determination of the meaning to be attached to the words `is not paid` in the clause. Those words are not in my view designed to ensure that the employee will necessarily be entitled to `wait` if the precise amount then due to him is not paid to him in full. He is, I think, paid if in substance he receives pay."

To page 341 ...

PRESIDENT: Is that the third page?

MR PEARCE: Yes, Mr President - on the right-hand side.

To the third last paragraph, commencing with the words `It was strongly` :.

"It was strongly contended that what has to be `paid` each pay day is everything to which the employee is entitled under the award, that is `paid` in sub-cll. (a) and (e) means `paid` in full, and that it is the duty of the employer to know his business, to know what should be paid each pay day and to see that it is paid. The effect of this contention is that, unless payment is absolutely impossible physically, it cannot be said that delay in payment is caused by circumstances outside the control of the employer, and consequently

MR PEARCE:

there would be small scope within which the proviso to sub-cl. (e) could operate.

One result of the contention that "paid" in sub-cl. (and and (e) means "Paid in full" is that if some error of the pay clerk or in the pay office an employee was short paid one or two shillings on pay day, waiting time would be payable under sub-cl. (e), and if the error were not discovered and he were kept waiting for this trifling sum for one, two or three weeks or even longer, a substantial penalty would be payable under the name of waiting time."

I would take you now to the last page commencing on line 4, sentence "If the contention ...".

"If the contention that there must be payment in full is correct, waitingtime becomes payable, where the full amount is not paid, even though the employer has no knowledge that a special rate is payable, or that overtime has been worked, or where there is a bona fide dispute as to what or how much is payable, or there is reasonable ground for making an inquiry as to whether something is payable. This does not seem to be fair or reasonable. It is, however, sought to justify it on the basis that the employer is bound to know what is going on, and must manage its affairs in such a way that it does know. Such a doctrine carried to its limits to which it was pressed in this case would, we think, place an intolerable and impossible burden upon the employer and would greatly and

MR PEARCE:

unreasonably add to the cost of administering its affairs. Ordinarily if an employer acts reasonably in conducting his business in accordance with ordinary business methods, and takes those reasonable precautions which a business man usually takes, no more is required of him.

The essence of the award, and the obligation of the employer under cl. 31 of the award, is that an employee is paid each pay day. There must be a physical act of payment and there must be payment in a real sense. A colourable payment is not a real payment. The obligation of the employer under cl. 31 is not satisfied by the making of a token payment, not does the employer satisfy it by making an evasive payment. A payment is a real payment when the employer has bona fide endeavoured to pay the full amount which is believed to be due to the employee at the time of payment."

If we go to the last sentence of that paragraph :

"If under such or similar circumstances the employer pays the employee the full amount which is believed to be payable, although it may turn out to be less than the full amount due, then there has been a real payment and the employee has been `paid` within the meaning of sub-cl. (e) of cl. 31 of the award."

It was followed that the award was interpreted :

That upon the true meaning and intent of the award the

MR PEARCE:

employer bound by the award  
is not liable to pay waiting  
time ... if it has paid to an  
employee on the regular pay  
day an amount which was a  
bona fide payment of all  
moneys believed to be due to  
the employee under the award  
even though it was not the  
precise sum representing the  
total amount of all such  
moneys then in fact due."

Our contention is that in the circumstances of this matter, by dint of the circumstances on 14 May, the employer handed over pay cheques which he faithfully believed contained the wages to which the employees were due. It became post facto that that handing over of the wages that the error was again brought to his attention. Errors which he had previously endeavoured to the best of his ability to rectify with the hospital computer services.

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MR PEARCE:

Given all of those circumstances, however, we would further submit (and I relate back to my earlier submission today) that no employee was in the act of waiting at the hospital following the cessation of their ordinary hours of work in hopeful expectation of the payment of the underpayment would be forthcoming. There is no evidence to suggest that that is the case. There is no evidence, therefore, to suggest that people were involved in waiting beyond the ordinary hours or work, as envisaged by the award.

Further, we would then add our submissions to the fact that the payment of waiting time in respect of the award clause is operative only on the normal pay day; that it cannot be transcended into subsequent days - day or days.

And, finally, that in whatever circumstances - whatever decision you reach in this matter, Mr President, that there be a prospective date of decision interpretation.

PRESIDENT:

Yes, thank you, Mr Pearce.

Mr Pearce, just one final question. I don't know that a great deal turns on it, but this whole sorry affair came about because of the introduction of a 38-hour week I take it. The 38-hour week was actually implemented progressively, was it, from the 14th or 16 April?

MR PEARCE:

.....There are others who would be far more familiar with the ...

PRESIDENT:

Well it's sufficient ... a simple yes or no would ...

MR REES:

It was approximately 12 months later, sir.

PRESIDENT:

Well I take that as a simple 'yes'.

MR PEARCE:

There's been a phasing in of pay and putting onto roster and I believe ...

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PRESIDENT - PEARCE - REES

PRESIDENT: At the point that it was actually put in place and, as a consequence, hourly rates changed this error occurred ...

MR PEARCE: Yes.

PRESIDENT: ... or the short fall, short payment, whatever you want to call it.

MR PEARCE: Commensurate with the changeover to the new computer services pay.

PRESIDENT: As a direct consequence, yes.

MR PEARCE: Yes.

PRESIDENT: That's all, thank you.

Now, Mr ....., would you like to have a third go Mr .....

MR FITZGERALD: Could I have a go, Mr President. I wonder if that is possible. Just very briefly, I was delighted to hear Mr Rees's submissions that this sort of mistake couldn't happen in the private sector. And, indeed, I hope it doesn't happen in the private sector. But it could, in fact, happen, sir, with the advent of computer systems, and we are anxious that there is not being an unreasonable construction put on 4.30. And in that view we would wholeheartedly support the submissions made by Mr Pearce and Mrs Gregg in that respect.

We are of the view that the application made, in terms of section 29, (application in the first instance which you weren't a party to but we have been a spectator to in these proceedings) that the applications by the union in this matter is no less than mischievous in our view, sir.

Now, we believe it's an unreasonable construction placed on clause 30, and for that reason we'd wholeheartedly support the submissions made by Mr Pearce. I have nothing further to

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PRESIDENT - PEARCE - FITZGERALD

MR FITZGERALD: put, sir, if the Commission pleases.

PRESIDENT: Thank you, Mr Fitzgerald.

MR REES: .....

PRESIDENT: Now, do you want to have another go?

Mr Law's going to have a go.

MR LAW: Mr President, once again, Mr Pearce has failed to address himself to any of the guidelines under the normal matter set down in an interpretation such as this to be accepted. He has again quoted from a document which is outside the award, which does not have the same clause. In fact, it has a clause which does define ..... the amount of waiting time to be 8 hours per day. It's a clause which, again, is not gone to see whether the construction of the award is the same with a contract of employment section in it which would entirely change, probably, the decision in that case and, therefore, can have no relevance in terms of an allowance not being paid also, rather than in the terms of what is the contract of the employment in this award not being adhered to in this case.

I'd like to address the fact that a great deal has been said about it being beyond the control of the Department of Health and the hospital. And it's said there is agreement on that. I for one and certainly the R.E.N.F. does not agree that it is beyond their control. Indeed, I believe it would be a general rule that any person who employs an agent is responsible for the deeds of that agent. And in this case, clearly, Hospital Computer Services are the agent for the Department of Health and Launceston General Hospital.

And as Mr Rees so ably showed earlier, they were aware at the time of paying that the amounts that were being paid were incorrect. And I

MR LAW:

would refer you to a media release from Mr Newman, the Chairman of the Board of Launceston General Hospital on 22 May dealing with this matter, in which he clearly outlines that they were aware that wrong pay was being paid. In fact, he goes to say,

"Mr Newman also said that the pay office had a number of communications with the Health Computer Services pointing out the errors and asking that they be corrected. These communications had been conducted by Mr Mark Fisher, the paymaster at the hospital."

Now that was in the period after the initial finding that the 27 nurses had been underpaid. And, sir, I would submit to you that an employer in his normal duties, if he knew that his agent had made a mistake twice, would certainly check (run a spot check) to see whether it was incorrect the third time. And, in fact, since this occurred I've been told by paymasters in all other major hospitals in the north, that that would have been a standard procedure in their hospital, and that even though they would have grumbled at the extra work they would have made provision to pay the people because of the error that had occurred. And that, I think again, comes down to whether we would have been in this position had there not been that intent to make people wait for a fortnight.

PRESIDENT:

I would not ordinarily have allowed you to tender this exhibit in your address and reply. It's new material in a sense. But due to the fact that it was argued that the hospital genuinely believed that the pay was correct, I think I will allow it by way of rebuttal of that argument.

MR LAW:

Thank you, sir.

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PRESIDENT - LAW



MR LAW:

And Mr Pearce made a lot of what is a trifling amount. He said a trifling amount. Well on the rates of pay that Mr Pearce has, it may be \$50 is a trifling amount. But I can assure Mr Pearce that to many nurses, \$50 is not a trifling amount. In fact, it can mean a great deal to them.

Indeed, one person who contacted the R.A.N.F., was unable to go to an engagement party because the dress she had on lay-by, she didn't have enough money without that \$50 to get it out of lay-by, so she had to cancel her engagement party. Now, that maybe something trifling to Mr Pearce, but to that nurse, it was a very important and ...

MR PEARCE:

Can I just rise to my feet to ask that Mr Law not proceed along that line. I was proposing no such situation that any monetary amount represented something less to nurses than it might to myself or anything else. I was merely quoting out of the context of the Commonwealth Northern Works & Services Award, Northern Territory decision, and that related to payment of a special rate which, at that time and in relation to those circumstances, was a trifling amount. I did not endeavour, at any stage, when addressing that document to suggest that the same situation prevailed in the hospital area, and that \$50 would be a trifling amount to nurses.

PRESIDENT:

Well does that satisfy you, Mr Law, because ...?

MR LAW:

That satisfies me, yes, sir.

PRESIDENT:

... this is not a section 29, this is an interpretation. But I don't blame you for .....

MR REES:

L.2 certainly substantiates in principal much of (m,y) earlier submissions, from my notes, in respect to the problems associated with the pay office staff at Launceston General in attempting to correct the obvious error with the main paymaster in Melbourne.

And in turning to Exhibit AP.1 tendered by my friend Mr Pearce, who hasn't been mischievous today, and quote from it. It's a Full Bench in that wonderful court of the Commonwealth Industrial Court, which used to be known as the court of pains and penalties. Even the most Honourable does find on page 341 that :

"... it is the duty of the employer to know his business and to know what should be paid each pay day and to see that it is paid."

Now the second chain of command in respect to the pay for all these nurses, the Launceston pay office paymaster attempted to do that, but of course the main employee of the case, the Northern Computer Services, failed time and time again to be advised as to the incorrectness of their calculations and the problems that they were causing.

PRESIDENT:

Now who is taking licence, Mr Rees. His Honour didn't find that, he merely repeated the argument.

MR REES:

I'm only assisting him, sir ...

PRESIDENT:

I see.

MR REES:

... what he should have said.

PRESIDENT:

I think His Honour was referring to the submissions of someone else.

MR REES:

Oh. However ...

PRESIDENT:

It was strongly contended, he said. You're at it again, Mr Rees.

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PRESIDENT - REES

MR REES:

Well, we're certainly strongly contending this matter and would ask you, sir, to find in favour of the applicants.

PRESIDENT:

...

MR REES:

Thank you.

PRESIDENT:

Yes.

Yes, thank you. I'll reserve my decision on all these matters.

That concludes the hearing of these ...