

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T No 1850 of 1989

**IN THE MATTER OF** an application  
by the Shop Distributive and Allied  
Employees' Association for  
interpretation of Retail Trades  
Award

re shop branch manager

PRESIDENT

George Town, 8 March 1989

**TRANSCRIPT OF PROCEEDINGS**  
(Unedited)

PRESIDENT: I'll take appearances, thank you.

MR FENTON: If the Commission please, **FENTON P.A.** on behalf of the Shop Distributive and Allied Employees' Association. I appear on behalf of **MR JOHN CROSLAND**, and appearing with me today is **MR PAUL GRIFFIN**.

PRESIDENT: Thank you, Mr Fenton.

MR SMITH: If the Commission please, **SMITH G.J.** I appear on behalf of Uptons Salvage.

PRESIDENT: Thank you, Mr Smith.

MR PETTMAN: Mr President, **PETTMAN G.** I can see no reason why I should be intervening in this and I would just seek your indulgence to remain as an observer, Mr President.

PRESIDENT: Yes, I take it there's no objection to the Department of Labour and Industry being present as an observer?

Yes, your presence is approved, Mr Pettman, thank you.

Mr Fenton, how do you wish to proceed?

MR FENTON: Thank you, sir. As a preliminary matter we had two applications in before the Commission: T.1806 and T.1850. At this stage we would like to give notice that we will take leave in 1806, withdraw that application and proceed straight into the interpretation T.1850.

PRESIDENT: Are you telling me that, Mr Fenton, that there is no longer an industrial dispute between your organisation and Uptons?

MR FENTON: There is still an industrial dispute between ourselves and Uptons. The matter T.1806 was left before the Commission hoping that we may have been able to settle it beforehand.

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APPEARANCES - PRESIDENT - FENTON

MR FENTON: It appears though we can't, hence we came to the interpretation. But as it now stands, the reasoning behind that application was for the possible dismissal of Mr Crosland by Uptons Salvage. That dismissal has now taken place.

PRESIDENT: You're not seeking reinstatement?

MR FENTON: We're not seeking reinstatement, no. So with your permission, we would go straight into T.1850.

PRESIDENT: Yes. Any objection to the application to withdraw?

MR SMITH: No, Mr President.

PRESIDENT: There being no objection, your application to withdraw T.1806 is granted, Mr Fenton.

Now if you'll address the other application, T.1850.

MR FENTON: Thank you, sir. If I may just give a short history to what's going on. Our application before you, T.1850, covers one section of the Retail Trades Award, and that is clause 7 'Definitions'.

If I may just tender a copy of that particular clause as an exhibit.

PRESIDENT: That will be Exhibit F.1.

MR FENTON: I'll just read out the particular definition in question, and it can be seen as highlighted on this particular page:

"`Shop or branch manager or manageress', i.e. an employee (whether adult or otherwise) who is in charge of a shop or branch shop, with or without the duty of buying notwithstanding that such employee may be under the orders of a superior who does not devote the whole or any

MR FENTON:

part of his time to the management of the said shop or branch shop."

As I said, I'll just give a short history as to this particular application.

On 26 January 1989, this Association wrote to the directors of Uptons Salvage Hobart with a claim for back pay for our member, Mr John Crosland.

Now if I can also tender an exhibit of that particular letter sent to Uptons Salvage.

PRESIDENT:

You must remember that in matters of this kind, the Commission cannot be concerned with merit. It can only be concerned with what a particular clause or part of an award means, but in order to interpret an award, the Commission needs some factual situation to test against that which it is sought to be interpreted. So if this document is directed to that, I'll accept it.

MR FENTON:

I understand the conditions, sir, that you put down. What I'm merely trying to do is give a background as to the whole situation as it stands.

PRESIDENT:

Yes. Exhibit F.2.

MR FENTON:

Without going into the fine details of the particular letter, I think it can be seen that our application for Uptons was on the basis that we believed that Mr Crosland was the manager under the definition of the Retail Trades Award. Hence this application for Uptons was sent on 26 January 1989.

I won't go through this particular letter.

On the 21st of the following month we did receive a reply from Uptons Salvage per the Tasmanian Confederation of Industries. That was to refute a claim as per

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PRESIDENT - FENTON

MR FENTON:

Mr Crosland being a manager under the Retail Trades Award.

To that end I have a further exhibit of the reply given to us by the Tasmanian Confederation of Industries.

PRESIDENT:

Exhibit F.3.

MR FENTON:

Again, without going through the complete details of this particular letter, I would just refer the Commission down to the third paragraph on the first page. It states:

"Mr Crosland was the only employee at the Launceston establishment and accordingly may, subject to appointment as such, be regarded as in charge of a shop or branch shop. However, the shop was visited on a weekly basis (i.e. one day per week on average) by Uptons Salvage management in addition to virtual daily contact via the telephone. It is clear that Mr Crosland was employed as a sales assistant and the shop was in fact managed by management from Hobart."

Again I say I won't go into the other details of this particular letter, but that was the response that we had from the particular company which led us to have to apply to this Commission the interpretation.

MR FENTON:

As I said, with the reply we're left with no alternative but to pursue the matter before yourself and to have the matter decided by yourself if Mr Crosland is or was a manager under the definition of the Retail Trades Award.

If this is decided in our favour, it would then give us the right to pursue the claim through the appropriate avenues of authority.

Sir, I intend, with your permission, to have Mr Crosland give evidence as to his duties while employed at Uptons Salvage, and show that his position is encompassed by the definition of shop or branch manager as per clause 7 of the Retail Trades Award.

Before I do so, I would just like to put up a further exhibit which is an extract from the Macquarie Dictionary which concerns the meaning of the word `manager`.

PRESIDENT:

Exhibit F.4.

MR FENTON:

I'll just quote this particular definition:

"Manager: one who manages; one charged with the management or direction of an institution, a business or the like".

Now I'd like this exhibit to be kept in mind when Mr Crosland gives his evidence.

With your permission I'd like to have Mr Crosland give evidence to this Commission now.

John CROSLAND sworn

PRESIDENT:

Be seated, Mr Crosland.

Yes, Mr Fenton?

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PRESIDENT - FENTON

MR FENTON: Thank you, sir. Mr Crosland, could you please state your full name, address and occupation?

MR CROSLAND: John Edward Crosland. My address is 19 Como Crescent, Newstead. I'm at present unemployed.

MR FENTON: Thank you. Could you please give the Commission a short and concise history as to what led up to your employment at Uptons Salvage?

MR CROSLAND: Well I had been unemployed for about 18 months since selling my business in St Helens and I used to consult the CES notice board almost daily, and I happened to see this job description on the notice board and I applied.

MR FENTON: Can you recall what the job description was at the Commonwealth Employment Service?

MR CROSLAND: It said: required for the Launceston branch of a hardware store (as near as I can say) someone to manage or train as manager; someone with experience in the building trade; someone able to do book work and accounts etc.

MR FENTON: Do you have qualifications as far as that particular position is concerned?

MR CROSLAND: I believe I do. I run my own shop for just over 2 years; I had 25 years within the building industry; I've had 14 years' clerical experience, six of those as a cashier and I believe I that I would have qualified.

MR FENTON: That's all we need.

In the interview you had with Uptons after the initial contact with the CES, what was the position you were told that you'd be filling?

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FENTON - CROSLAND - XN

MR CROSLAND: .... manager.

MR FENTON: Can you tell me how long Uptons have been in Launceston?

MR CROSLAND: From looking at the day book, 8 days.

MR FENTON: So the business was a completely new venture as far as that particular company was concerned?

MR CROSLAND: As far as that particular company was concerned, yes.

MR FENTON: If you got there after 8 days, whose position were you taking?

MR CROSLAND: When I got there, one of the directors, Mr Mike Upton was there.

MR FENTON: And what was his capacity at that particular store?

MR CROSLAND: As far as I know, directory was running the store.

MR FENTON: What happened to that person once you took over that person's positions?

MR CROSLAND: Well he was there for a few days to show me the ropes, then he went back to Hobart.

MR FENTON: In those few days, what training did you receive in that particular position?

MR CROSLAND: Oh, I was shown the goods that were for sale, the prices, what was expected of me.

MR FENTON: Could you tell the Commission what Uptons Salvage deals in?

MR CROSLAND: What they dealt in?

MR FENTON: Yes.

MR CROSLAND: Building materials, both new and used. Some of them were in second condition, but most of them were plumbing materials, timber, window frames, doors - new ones, second-hand

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FENTON - CROSLAND - XN



MR CROSLAND: ones, desks, various small tools, paint, and painters requisites.

MR FENTON: That's all we need to know.

At the time of your training under the director, Mr Upton, what were you classed as by Mr Upton himself?

MR CROSLAND: The only thing I know that I was classed as was what was on the form I had to sign from the CES which was that of trainee manager.

MR FENTON: Good.

What were the duties that you performed, say, on a daily basis, after the director had gone back to Hobart?

MR CROSLAND: Opening of the store, checking that nothing had been broken into, and checking the cash float, putting it in the till, taking goods outside on display, cleaning some of the items, and general maintenance around the place, and of course selling.

MR FENTON: I was going to get on to that, just straight after.

What was your position as far as the selling of goods was concerned?

MR CROSLAND: Well I was responsible for the sales. If we ran out of stock, I'd be responsible for ordering more from Hobart.

MR FENTON: In the first, say, couple of months that you were there, and after you stopped receiving the training by Mr Upton, were you visited by the directors of that particular company?

MR CROSLAND: Yes, on a weekly basis.

MR FENTON: How many times a week?

MR CROSLAND: Once a week.

MR FENTON: Just once a week. And how long did that go on for?

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FENTON - CROSLAND - XN

MR CROSLAND: Well on a regular once-a-week basis  
for about 4 months.

MR FENTON: Was there much telephone contact with  
you by Uptons Salvage?

MR CROSLAND: Usually on my part, if I ordered  
material.

MR FENTON: Did anyone work with you as an  
assistant?

MR CROSLAND: No, sir.

MR FENTON: When the directors of Uptons Salvage came up to the yard at Launceston what did they normally come up for?

MR CROSLAND: Usually to inspect the books and check that the takings corresponded with the books; to deliver stock; to buy and if I had any materials to deliver to deliver materials.

MR FENTON: When you say check the books was that in an audit type fashion?

MR CROSLAND: Just check the day book for the takings and check the takings.

MR FENTON: You had control over the bookwork in the office?

MR CROSLAND: Yes.

MR FENTON: When they came up ... how long did they stay at the store or the yard?

MR CROSLAND: Usually ... it varied from, say, about 3 hours to maybe 5 hours.

MR FENTON: You mentioned before that when they used to come up that they would come up with stock. Can you explain what sort of stock it was and what was done with that particular stock?

MR CROSLAND: Well all depending on what was available. Sometimes it would be wall board, masonite, chipboard or .... ware, baths or toilet cisterns or paint. That was .... the stock.

MR FENTON: When they came up .... Hobart did they relieve you in any way of your responsibilities?

MR CROSLAND: Not that I'm aware of. No, sir.

MR FENTON: So you were still managing this particular shop even when they came up?

MR CROSLAND: Oh yes.

MR FENTON: Could you just tell me again how many times the directors visited the yard ....?

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FENTON - CROSLAND - XN

MR CROSLAND: Well as I say for the first 4 months it was on a weekly basis.

MR FENTON: What happened after that time?

MR CROSLAND: After that they might visit 2 weeks running and then possibly something would crop up down in Hobart and they'd ring and say 'I won't be up this week I'll see you next week' and ask if everything was all right and so on.

MR FENTON: Did you have any authority to purchase items?

MR CROSLAND: Yes, after about 5 months, yes.

MR FENTON: And did you purchase items?

MR CROSLAND: On occasions, yes, sir.

MR FENTON: Did you have any authority to discount items within the store when selling?

MR CROSLAND: Yes.

MR FENTON: Where was the address of Uptons Salvage at that particular stage?

MR CROSLAND: Hobart Road. On the corner of Woolven Street and Hobart Road.

MR FENTON: And how long were Uptons at Kings Meadows for?

MR CROSLAND: We left there at the end of June 1988.

MR FENTON: In your own mind up until that date or even thereafter who do you believe was ultimately responsible for the running of that particular shop and yard?

MR CROSLAND: Well I was responsible for the day to day running of the yard. I was responsible for the keys and security etc.

MR FENTON: Did your duties change in any way with the move to the new location?

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FENTON - CROSLAND - XN

MR CROSLAND: Except that the premises were bigger, no.

MR FENTON: Where was the new yard?

MR CROSLAND: 167 Invermay Road.

MR FENTON: When you actually moved into the new yard or shop who was responsible for having things such as Hydro Electric Commission power, Telecom laid on?

MR CROSLAND: I had to sign for that.

MR FENTON: And who actually gave you the authority to go and sign those particular documents to have the power and telephone put on?

MR CROSLAND: The director.

MR FENTON: And that was?

MR CROSLAND: Mr Greg Upton.

MR FENTON: Did you have to sign the documentation ....

MR CROSLAND: I had to sign the Hydro Electric Commission. With the telephone it was done over the phone but they did ask me my position with the firm.

MR FENTON: How were you normally paid, Mr Crosland?

MR CROSLAND: Usually by cheque but sometimes if the directors didn't come I had to deduct it from the takings and make a notation as such.

MR FENTON: You actually took your wages out of the daily or weekly takings.

MR CROSLAND: Weekly takings, yes.

MR FENTON: Was that the policy of Uptons Salvage that you should do that?

MR CROSLAND: Well that's what I was told to do.

MR FENTON: Who was responsible for the upkeep of the shop and the yard?

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FENTON - CROSLAND - XN

MR CROSLAND: I was.

MR FENTON: What duties did they entail?

MR CROSLAND: Well as I say opening and closing of the shop, displaying goods for sale, general maintenance of the goods around the yard.

MR FENTON: Cleaning and so forth of the yard and the shop. Who was responsible for that?

MR CROSLAND: My responsibility ....

MR FENTON: You did all that?

MR CROSLAND: Yes.

MR FENTON: You mentioned the bookwork before. Can you give the Commission an idea of what bookwork used to take place in this particular shop?

MR CROSLAND: Well the bookwork was very simple. It was just a matter of keeping a day book for goods sold; a stock control book on the different types that we stocked and the number and quantity of such goods; another book that I kept for goods wanted, goods that were requested and goods that were ordered; another book that was for quotes, people that rang up in answer to our adverts that had material for sale. I used to take their names and addresses and put them down in that book.

MR FENTON: When you say there were adverts in the paper what form did the adverts take?

MR CROSLAND: In the goods wanted column 'Wanted building materials'.

MR FENTON: Who was responsible for putting those ads in the paper?

MR CROSLAND: I was authorised by the directors to put those adverts in.

MR FENTON: In the bookwork and so forth of that particular office were you

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FENTON - CROSLAND - XN

MR FENTON: responsible for banking in any way, shape or form?

MR CROSLAND: After awhile, yes, I was.

MR FENTON: After how long?

MR CROSLAND: After about 4 months.

MR FENTON: And what was entailed in the banking?

MR CROSLAND: Just paying in cash, writing down cheques in the paying-in book and any such as Bankcard and Visa Card etc. and then paying it into the bank.

MR FENTON: And did you physically do the banking?

MR CROSLAND: Yes, I've done that on occasions. Yes.

MR FENTON: If the stocks of certain items within your yard or store were low what was the method of getting new stocks in?

MR CROSLAND: I had to ring the Hobart store and order them if they were available.

MR FENTON: Do I take it by that you mean that if they had stocks in Hobart and you ordered a particular item they could come up with it to Launceston?

MR CROSLAND: Yes.

MR FENTON: Going back to the purchase of stock what was the method of buying this particular stock?

MR CROSLAND: Well people used to bring stock into the yard and I would inspect it and if it was suitable and it wasn't a great price I would then pay them out of the cash takings and get the people to sign the receipt.

MR FENTON: If there was not enough money in the cash takings what was the situation then?

MR CROSLAND: I had to then refer them to come back and see the director when he came up.

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FENTON - CROSLAND - XN

MR FENTON: So depending on how soon it was in between each visit would depend on how soon that person got the pay for the items they'd sold.

MR CROSLAND: That's right, yes.

MR FENTON: Can you recall on any occasions when you were referred to as the manager by the directors of the company?

MR CROSLAND: I can recall on occasions when I've had customers that have visited the Hobart store and were told to call in and see the ... this is by the customers themselves saying they had to call in and see the manager of the Launceston store.



MR FENTON: ... wholly in stage by the directors of the company that you were manager at that particular store?

MR CROSLAND: I was told that it was my shop, so I just naturally thought that inferred that I was manager.

MR FENTON: Can you recall on any occasions when you sighted any documents with you being referred to as manager of the store?

MR CROSLAND: Yes. The wages book. On the top of the wages book it had 'Manager'.

MR FENTON: The wages book - was that held in Launceston or in Hobart?

MR CROSLAND: No that was held in Hobart.

MR FENTON: How did you come by it to see that particular book?

MR CROSLAND: When I signed for my wages.

MR FENTON: Do I take it by that you mean that they brought the book up to Launceston?

MR CROSLAND: Yes, on occasions, yes.

MR FENTON: And you signed that particular book?

MR CROSLAND: I did, yes.

MR FENTON: How was it marked in the book that you were manager?

MR CROSLAND: My name at the top and it said, 'Position - Manager'.

MR FENTON: At the time, were you aware of the rates of pay that a manager should be receiving?

MR CROSLAND: No.

MR FENTON: Who had the possession of the keys and so forth for the yard and the shop ...

MR CROSLAND: I did.

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FENTON - CROSLAND - XN

MR FENTON: ... and the safe.

MR CROSLAND: I did.

MR FENTON: Were there any other keys at all?

MR CROSLAND: Not for the Invermay yard - no.

MR FENTON: But there were for Kings Meadows I take it?

MR CROSLAND: Yes, there was one other key for the Kings Meadows one - yes.

MR FENTON: Was a company vehicle supplied to you?

MR CROSLAND: No, sir.

MR FENTON: What were your normal hours of employment?

MR CROSLAND: 8.30 to 5.30 Monday to Friday, and 8.30 till 1 o'clock on a Saturday.

MR FENTON: Do I take it you had lunch hours included in that?

MR CROSLAND: No, no lunch hour.

MR FENTON: You were expected to work through your lunch hour?

MR CROSLAND: Yes.

MR FENTON: And why was this?

MR CROSLAND: Well there was no-one to relieve me in the shop, if it wasn't closed.

MR FENTON: So you had no assistant at all at that stage?

MR CROSLAND: Not at that stage, no.

MR FENTON: Was there any chance of obtaining some help at some stage?

MR CROSLAND: Well prior to us going into Invermay, one of the directors, Mr Mike Upton ... it had been discussed, and he asked me if I knew of any young chap round about 20 to 22 years old that

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FENTON - CROSLAND - XN

MR CROSLAND: might be interested in a job, and would I contact him.

I did contact one, and interviewed him and ...

MR FENTON: You actually interviewed?

MR CROSLAND: I actually interviewed him and sent a copy of his curriculum vitae.

MR FENTON: What was the outcome of that particular interview?

MR CROSLAND: I never heard any more about it. They were still thinking about it.

MR FENTON: Who was responsible for the loading and unloading of all goods supplied to the yard, whether it be buying or selling?

MR CROSLAND: Well I was the only person in the yard, so I had to be there ...

MR FENTON: You were responsible for all the loading and unloading.

MR CROSLAND: That's right.

MR FENTON: Can you tell the Commission what happened when you first realised that you were being underpaid as a manager?

MR CROSLAND: Well it came as quite a shock, and I did realise that if I told my employers I run the risk of being dismissed. I had to think about it for some time before I did get round to telling them.

MR FENTON: Did you eventually ask the directors about the ... ?

MR CROSLAND: Yes I did.

MR FENTON: What was the final reaction?

MR CROSLAND: They said that ... I told Mr Greg Upton, and he said ... well it came as quite a shock to him by the look on his face and he said `I can't

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FENTON - CROSLAND - XN

MR CROSLAND: afford it but it will look like we'll have to finish you'.

MR FENTON: What did you take that to mean to be?

MR CROSLAND: That they couldn't afford to pay me the proper rate and it would have to cease operations.

MR FENTON: Thank you. I've no more questions.

PRESIDENT: Yes. Mr Crosland, when goods were offered to the Launceston shop for sale by members of the public ...

MR CROSLAND: Yes.

PRESIDENT: ... I understood you to say that you had a look at them did you, as they came into the yard?

MR CROSLAND: Pardon.

PRESIDENT: I thought you said that you had a look at the goods ...

MR CROSLAND: Yes.

PRESIDENT: Did you decide whether they were good value, or did you negotiate a price or ...?

MR CROSLAND: On occasions I decided whether they were good value, and negotiated a price.

PRESIDENT: Yes.

MR CROSLAND: On other occasions, if I wasn't too sure, I would telephone Hobart ...

PRESIDENT: Yes.

MR CROSLAND: ... for a second opinion.

PRESIDENT: Did you have the authority to settle on a price?

MR CROSLAND: Yes.

PRESIDENT: I see.

Were you paid any overtime for the

PRESIDENT: hours that you worked?

MR CROSLAND: I was paid a flat figure for all the time.

PRESIDENT: I see. And did that include an over-award payment, or ...?

MR CROSLAND: I wasn't sure what it ... I thought that that was the award.

PRESIDENT: Well you must have subsequently found out that it was less than the manager's rate, or ...

MR CROSLAND: Well I did, but it took me 14 months to find out.

PRESIDENT: Well it was less than the manager's rate.

MR CROSLAND: Yes.

PRESIDENT: The flat figure was less than the manager's rate. Was it more than salesman or senior salesman rate? Would you know that?

MR CROSLAND: No, it wasn't.

PRESIDENT: It wasn't.

MR CROSLAND: It wasn't any more, no.

PRESIDENT: I see.

MR CROSLAND: Not from comparing the lists I've since seen.

PRESIDENT: Yes. How was the Uptons described? Did it have a name outside?

MR CROSLAND: It's Uptons Salvage ...

PRESIDENT: Yes.

MR CROSLAND: ... Building Supplies.

PRESIDENT: It didn't say Launceston branch or anything like that on it?

MR CROSLAND: No.

PRESIDENT: Did you sign any cheques or ... when

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PRESIDENT - CROSLAND

PRESIDENT: the accounts for payment, say, the HEC or rates or telephone accounts would come in ...

MR CROSLAND: They were directed straight ... such accounts were directed straight to Hobart.

PRESIDENT: I see.

MR CROSLAND: If any came to Launceston branch, I'd pass them off to Hobart.

PRESIDENT: So you didn't have the power to pay any accounts?

MR CROSLAND: I didn't have the authority to sign any cheques at all.

PRESIDENT: No. But did you have authority to do any purchasing?

MR CROSLAND: Yes, to do some purchasing, yes.

PRESIDENT: Such as goods bought into the yard?

MR CROSLAND: Goods bought into the yard, yes.

PRESIDENT: And you'd take that money out of the takings?

MR CROSLAND: Yes, and make an entry in the day book.

PRESIDENT: Make an entry in the day book.

Yes, thank you, Mr Crosland.

MR CROSLAND: Sir.

MR SMITH: Mr Crosland can you just go back to the time when you approached the CES for the position at Uptons Salvage ...

MR CROSLAND: Yes.

MR SMITH: ... and just explain to me again what you understood the position to be?

MR CROSLAND: I understood it to be that of manager, or prospective manager of a shop.

MR SMITH: And that advice came from the CES or from Uptons Salvage?

MR CROSLAND: That advice came from the job description that was on the notice board.

MR SMITH: Right. Were you subsequently interviewed for that position?

MR CROSLAND: Yes.

MR SMITH: By whom?

MR CROSLAND: By Mr Mike Upton.

MR SMITH: Right. Were you interviewed by anyone from CES?

MR CROSLAND: Yes.

MR SMITH: How did the people from CES explain the job to you?

MR CROSLAND: The same as the job description; that it was to take charge of a shop.

MR SMITH: And how did Mr Upton explain the job to you?

MR CROSLAND: That it was to ... he explained the duties to me and I had to run the shop as manager.

MR SMITH: He indicated that you had to run the shop as manager?

MR CROSLAND: He indicated that I had to represent Uptons in Launceston.

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SMITH - CROSLAND - XXN

MR SMITH: But wouldn't any employee of any establishment, wherever it may be, be representing their employer.

MR CROSLAND: But quite possibly.

MR SMITH: What were the overheads for the Launceston shop?

MR CROSLAND: Pardon?

MR SMITH: What were the overheads for the Launceston shop?

MR CROSLAND: The overheads for the Launceston shop?

MR SMITH: Mm.

MR CROSLAND: I'm not sure. I was kept informed of all the overheads.

MR SMITH: Who set the sales targets in the Launceston shop?

MR CROSLAND: I did and the directors did.

MR SMITH: I beg your pardon?

MR CROSLAND: I did along with the directors of Uptons.

MR SMITH: Along with the directors.

Can you give me some specifics in relation to those sort of targets?

MR CROSLAND: After I'd been there 3 months I was told that the target had to exceed \$3,000 per week.

MR SMITH: But you were told that?

MR CROSLAND: I was told that, yes.

MR SMITH: Yes.

MR CROSLAND: That was the goal.

MR SMITH: Yes. Do you know what the overall profit of the Launceston establishment was?

MR CROSLAND: No, sir.



MR SMITH: Did it run at a loss?

MR CROSLAND: I would imagine it would part of the time.

MR SMITH: But you don't know?

MR CROSLAND: I would imagine it would part of the time, I don't know for sure.

MR SMITH: You indicated that you didn't have any authority in terms of the payment of accounts, that's correct is it?

MR CROSLAND: Not to pay accounts that came in from any statutory authorities or others, not without ... the only account I ... as far as I know we had an account in from a sign-writer there and as far as I know that was the only account I had authority to pay out of the till.

MR SMITH: You indicated in response to questions from Mr Fenton that you were responsible for the cleaning and the general upkeep of the building.

MR CROSLAND: Yes.

MR SMITH: What did you mean by that? Did you mean that you physically carried out those tasks?

MR CROSLAND: Yes.

MR SMITH: Was there ever any maintenance that required the expertise of a tradesman from outside the organisation?

MR CROSLAND: Yes.

MR SMITH: Right. Did you have the authority to engage that person or were you required to obtain permission from Hobart?

MR CROSLAND: I had the authority to engage that person, yes. When we entered the yard in Invermay Road I had to ... I was told by Mr Greg Upton to contact an electrician. Mr Upton contacted an earth moving contractor to dig a trench for that electrician to lay

MR CROSLAND: conduit. The earth moving contractor burst a drain. I was then told to contact a plumber to repair that damage.

MR SMITH: Well, from what you've just said, on each of those occasions they were specific instructions that gave you the authority.

MR CROSLAND: Yes.

MR SMITH: Yes. You didn't have the authority on your own initiative to obtain those services? The authority came from Hobart for you to do that on each occasion?

MR CROSLAND: The authority came, yes, because it was new works.

MR SMITH: Right.

The cleaning was done by you, it wasn't done by contract?

MR CROSLAND: No.

MR SMITH: In relation to the connection of HEC and Telecom services at the ...

MR CROSLAND: Yes.

MR SMITH: ... premises at Invermay, you were given specific authority in respect of those particular ...

MR CROSLAND: Yes.

MR SMITH: ... those two particular items?

Also in relation to the discounting of items ...

MR CROSLAND: Yes.

MR SMITH: ... that were for sale in the shop. Was there a standard authority that you had in respect of discounting items?

MR CROSLAND: Yes.

MR SMITH: And that was what?

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MR CROSLAND: 5% off new materials up to ... over \$200 in value and approximately 10% off second-hand materials.

MR SMITH: So that wasn't ... that was a set authority.

MR CROSLAND: That was a set authority.

MR SMITH: And then it was at your discretion to operate within that authority?

MR CROSLAND: Within that.

MR SMITH: In relation to sock that was bought into the yard, a possible purchase by Uptons, you indicated, I think, that you frequently contacted Hobart in respect of the material that was brought in for sale.

MR CROSLAND: I did contact Hobart, yes.

MR SMITH: Yes. Any idea of what proportion of the time you would have contacted Hobart in relation to those ... the purchase of that ...

MR CROSLAND: What the materials being brought in?

MR SMITH: Yes.

MR CROSLAND: I wouldn't have any idea of the relation at all - probably about 50%.

MR SMITH: Right. Can you just explain again what happened if there was insufficient money in the till to purchase that stock?

MR CROSLAND: Well if, for instance, I'd banked the day previously and they came first thing in the morning for me to buy material and I'd only got my change float available, I was not then in any position to purchase any material.

MR SMITH: Mm.

MR SMITH: Your ability to purchase was dictated entirely by the ...

MR CROSLAND: By the size of the takings.

MR SMITH: ... the takings.

Can you recall what the upper end of the takings were for any particular week? Can you record any maximum period of takings?

MR CROSLAND: I can record on occasions just falling short of the \$3,000 mark.

MR SMITH: And what about the bad weeks?

MR CROSLAND: Bad weeks I can recall not even getting \$1,000 a week.

MR SMITH: In relation to the bookkeeping you indicated that you had a day book ...

MR CROSLAND: Yes.

MR SMITH: ... a stock book ...

MR CROSLAND: Yes.

MR SMITH: ... a goods requested book ...

MR CROSLAND: Yes.

MR SMITH: ... and a quotes book.

MR CROSLAND: Yes.

MR SMITH: From your previous experience were they bookkeeping records that were sufficient to maintain a business in its entirety?

MR CROSLAND: Not in its entirety, no.

MR SMITH: Or sufficient to maintain a discrete branch or arm of a business?

MR CROSLAND: It was sufficient, yes. But not ...

MR SMITH: Even though you didn't have the figures in terms of overheads or sales tax, payroll tax.

MR CROSLAND: I had no occasion for payroll tax

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MR CROSLAND: because .... employee at Launceston.

MR SMITH: What I'm asking you is were those figures and the entries that you made in the books sufficient for the total running of that branch as a discrete unit of Uptons Salvage?

MR CROSLAND: I wouldn't say they were completely so because I was not aware of all of the cost prices of materials that came up from Hobart, for instance.

MR SMITH: Who actually set the prices on the stock in the store?

MR CROSLAND: The stock came up from Hobart with prices on it.

MR SMITH: And what about second-hand material that came into the shop?

MR CROSLAND: Second-hand materials which I purchased I assessed the price on occasions.

MR SMITH: For resale?

MR CROSLAND: For resale.

MR SMITH: Did you have any guidelines from Hobart in respect of the market?

MR CROSLAND: No, because Hobart guidelines for market prices were different from Launceston prices.

MR SMITH: That in itself indicates that you were aware of what was happening in Hobart in respect of mark ups, if the two markets were different.

MR CROSLAND: Yes. Hobart prices were much higher than Launceston prices. In Launceston there was far more competition.

MR SMITH: Did you understand that you had specific authority to interview for the position of sales assistant?

MR CROSLAND: For the position of sales assistant?

MR SMITH: Yes.

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MR CROSLAND: Yes, I was told to interview him.

MR SMITH: You were actually told to interview that person?

MR CROSLAND: Yes, I was told to see him.

MR SMITH: Thank you.

And you firmly believe that the entry on the wages book in Hobart indicated that your position was that of manager?

MR CROSLAND: Yes.

MR SMITH: You don't believe that it said trainee manager?

MR CROSLAND: It did not say trainee manager.

MR SMITH: Okay.

The visits from management from Hobart is it a fair assessment that they took place on average once a week?

MR CROSLAND: For the first 6 months it would be pretty close. But after that it wasn't on a once-a-week basis.

MR SMITH: Well how frequent were they after that?

MR CROSLAND: Well after we initially got the shop going in Invermay Road sometimes I'd get a visit two consecutive weeks and then it might be 2 weeks before anyone came up. Then possibly it might be the same again and then it might be 3 weeks. On one occasion it was 5 weeks.

I believe at the time the directors were involved with other projects in Hobart.

MR SMITH: Did you have any contact with the management from Hobart in those periods where there were no actual visits?

MR CROSLAND: I occasionally got a phone call from

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MR CROSLAND: one of the directors but more often than not my only contact with Hobart was when I rang enquiring about materials etc. Then I didn't always speak with the directors.

MR SMITH: What happened to the records that you kept in those periods where there were no visits?

MR CROSLAND: As far as I know they're still in the office at Uptons Salvage.

MR SMITH: They weren't sent to Hobart?

MR CROSLAND: No.

MR SMITH: No. Okay.

What would you say distinguished ... I beg your pardon I'll ask you a different question first.

What was your understanding of what the directors from Hobart did when they arrived in Launceston?

MR CROSLAND: What was my understanding of?

MR SMITH: What do you believe that the directors did when they arrived in Launceston? What function did they perform?

MR CROSLAND: Well they performed the function of any employer; they came to check on their investment. They delivered materials. They occasionally had business in Launceston itself. They used to perform delivery tasks, any goods that I had sold that needed delivering. They used to go out and purchase materials from the lists in the quote book. They attended auction sales.

MR SMITH: You went through the books?

MR CROSLAND: Had a look at the books, yes.

MR SMITH: What was it then, in your opinion, that distinguished your position - assuming that the assumption made on your behalf, that you are a manager - what distinguished your duties from those of a sales assistant?

MR CROSLAND: Well for one thing I was the key holder and responsible for everything in that shop. No-one else had any keys. I was responsible for sales. I was responsible for banking.

MR SMITH: Well let me put it to you in some more specific terms then. Do you believe that any sales assistant that does the banking is a manager?

MR CROSLAND: Any sales assistant can do the banking on notice from the manager.

MR SMITH: Right. Opening a shop, does that require ... does that make a person the manager?

MR CROSLAND: Not necessarily.

MR SMITH: No.

Obviously selling goods in themselves doesn't constitute management?

MR CROSLAND: That makes you a salesman.

MR SMITH: Yes. Do you believe that the purchase within defined limits constitutes the work of a manager?

MR CROSLAND: Part of the duties of, yes.

MR SMITH: Is it also not the function of a sales assistant?

MR CROSLAND: Not that I'm aware of.

MR SMITH: Okay. I have no further questions, Mr President. Thank you, Mr Crosland.

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PRESIDENT: Yes. Any re-examination, Mr Fenton?

MR FENTON: Just a couple of questions, sir.

Mr Crosland, in the case of an emergency at the yard or at the store, let's say in relation to urgent plumbing work or electrical work, what were your responsibilities as far as that was concerned?

MR CROSLAND: To get it fixed.

MR FENTON: If it was an emergency would you have had to have gone through management in Hobart?

MR CROSLAND: No. No.

MR FENTON: After your initial interview with Uptons, what was the impression that you got as to what your position would be?

MR CROSLAND: My impression was that I was going to take charge of the shop and I was going to be the manager of the shop.

MR FENTON: Were you told at any stage that you would be a trainee manager?

MR CROSLAND: No. No. The only intimation that I was trainee manager was when I signed the document from the CES.

MR FENTON: In your own opinion, how long were you a trainee manager for if that was the case?

MR CROSLAND: I was a trainee manager until the person that instructed me left for Hobart. Once I was left on my own, I was wholly and solely responsible for the day-to-day running of the shop.

MR FENTON: When you first made aware of any possible underpayment as far as your wages were concerned?

MR CROSLAND: In December 1988.

MR FENTON: Can you tell us how that was?

MR CROSLAND: Mr Paul Griffin paid a visit. He asked ... I was serving customers and I thought he was a customer and when he approached me he asked me certain questions ... various questions. Asked me if I was a partner in the firm or ... various questions. The number of hours worked, the number of people that work there, etc. and then he asked me the amount of money I was paid weekly.

MR FENTON: One of the questions Mr Smith asked you was as to what you believed the duties were of a manager. I put the question back to you. Are part of the duties of a manager that of selling items?

MR CROSLAND: Yes.

MR FENTON: Would you consider that banking would be part of the responsibilities of a manager?

MR CROSLAND: Yes, I would think that that was part of it.

MR FENTON: Would you consider that the upkeep, the security of the yard or shop would be the responsibilities of that of a manager?

MR CROSLAND: They would be the responsibility of a manager.

MR FENTON: Were you responsible for all those particular items which I've just gone through?

MR CROSLAND: I was.

MR FENTON: No more questions.

PRESIDENT: You're excused, Mr Crosland. You may retire or you may remain, as you wish.

Yes, Mr Fenton.

MR SMITH: Excuse me, Mr President. On reflection I think that I may also call a witness. I just wonder

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MR SMITH: whether we do that now or should Mr Fenton make his submission first?

PRESIDENT: Well I prefer an applicant to put his case, Mr Smith.

MR SMITH: Certainly, sir.

PRESIDENT: This is not a court of law. I know that other procedures do apply.

MR SMITH: Yes. Sorry for that interruption.

MR FENTON: Thank you, sir.

Mr President, the evidence given by Mr Crosland would indicate to me and I think clearly show that he was a person who manages. He was, by the evidence given by himself, a person charged by his directors with the management of the Launceston store.

From the evidence in Exhibit F.3 which the Tasmanian Confederation of Industries letter answer to our claim, they seem to rest their argument on the fact that management attended the store on a weekly basis.

Mr Crosland's evidence clearly indicates that this was quite often not the case and even when he did appear at the yard or the store, it was purely for the purpose of having delivered goods or taken supplies back to Hobart or going out and picking up goods depending on the quotes that Mr Crosland got and the orders.

MR FENTON:

At no point in time did the directors contribute to the management of the said store when they came to Launceston.

Now this part of the definition is, I consider, a most crucial point in determining this application.

I'll just read part of that definition again:

"Shop or branch manager or manageress i.e. an employee, whether adult or otherwise, who is in charge of a shop or branch shop, without or without the duty of buying, notwithstanding that such employee may be under the orders of a superior who does not devote the whole or any part of his time to the management of the said shop or branch shop".

I believe that by the evidence given the directors at no time while Mr Crosland was in charge of the shop either added, took over or assisted in the management of the shop. At no time did Mr Crosland relinquish his duties of manager.

As I stated before the directors only purpose in coming to Launceston was merely either to deliver or buy goods. The fact that they only came up once a week or one each 3 or 4 weeks did not alter the intent in their visits. They could have come up each day of the week for months on end to deliver or buy goods. Their coming up in no way though could be construed as part of the definition "who does not devote the whole or any part of his time to the management of the said shop".

It is this Association's strong view that our member, Mr Crosland, was employed on the basis that he would be the manager of the Launceston store. He managed the business

MR FENTON: completely by himself; he had complete responsibility for the yard; the sale of stock and quite often the purchase of stock.

It's our strong contention that the duties of Mr Crosland are completely covered by the wording of the definition of shop manager, and would request this Commission to decide in favour of the Association's application.

PRESIDENT: Prospectively or retrospectively?

MR FENTON: Retrospectively, thank you, sir.

PRESIDENT: Yes. Thank you, Mr Fenton.

Mr Smith?

MR SMITH: Thank you, Mr President.

Before I call the witness, there are a couple of documents that I'd seek to tender to the Commission, which will also provide some background in relation to this matter.

PRESIDENT: Yes. Well, the first document which is a multi ... a two-page document, will that be Exhibit S.1?

MR SMITH: Thank you, sir.

PRESIDENT: And the other will be S.2.

MR SMITH: These documents, Mr President, are in fact an agreement that has been made between Uptons Salvage Proprietary Limited and the Commonwealth Employment Service in respect of a scheme known as Jobstart, which provides assistance to employers to take on employees.

The first part of the document, which has been marked as Exhibit S.1, is simply the agreement itself. And on the very final page it's signed on behalf of the National Director of the Commonwealth Employment Service and also signed on behalf of the employer.

MR SMITH:

Attached to that document is Exhibit S.2, which is the schedule to that agreement. And this is perhaps the pertinent document in respect of details as to the work that would be undertaken, the classification and title of the position and so on.

It can be seen that the employer is Uptons Salvage. The employee is Mr Crosland. The job title has been stated as trainee manager, with a rate of pay of \$289.10 per week. That rate is, in fact, or was at the time, the rate for an assistant, 3rd year adult experience and thereafter. In other words a sales assistant within the award.

It also specifies the duties, Mr President, under the heading of details of work experience, and provided are any other special undertakings. The sales of building material, associated bookwork, staff supervision at a later date and overtime, where applicable.

And it then goes on to give details of the subsidy and so on that would be supplied in respect of that employment.

If I could, Mr Commissioner ... Mr President, I beg your pardon, I'd now like to call Mr Greg Upton.

PRESIDENT:

Yes, very well.

Gregory UPTON sworn

PRESIDENT:

Be seated, Mr Upton, please.

MR SMITH:

Mr Upton, could you give your full name to the Commission, please?

MR UPTON:

Gregory Upton.

MR SMITH:

And your position with Uptons Salvage?

MR UPTON:

I'm the director.

MR SMITH:

Did you say 'the director' or 'a

MR SMITH: director`?

MR UPTON: No, one of the directors.

MR SMITH: One of the directors.

Does the Launceston store fall directly under your control?

MR UPTON: Yes, I'm in charge of the Launceston store.

MR SMITH: And were you involved in Mr Crosland's appointment?

MR UPTON: Yes, I employed Mr Crosland.

MR SMITH: Right. I thought Mr Crosland indicated in his evidence that he was, in fact, interviewed by Mr Mike Upton.

MR UPTON: I believe Michael had ... no, Michael is another director, sir. I believe Michael did see Mr Crosland, but I was the one that made the decision on employing him.

MR SMITH: Right. Did you also interview Mr Crosland?

MR UPTON: Yes, I did.

MR SMITH: You did.

MR SMITH: The documents that I've just tendered to the Commission, one of those documents indicates that the contact name is in fact Mr Greg Upton.

MR UPTON: Yes.

MR SMITH: I assume from that that you made the approaches to CES in respect of securing somebody for your Launceston store?

MR UPTON: Yes, that's correct.

MR SMITH: Were the duties of the position which are listed in this document as being sales of building materials, associated bookwork, staff supervision at a later date, were they the sort of duties supplied from you to the CES?

MR UPTON: That was from me, yes.

MR SMITH: Can you tell me what you meant by the staff supervision at a later date?

MR UPTON: If the business got to such a stage where we were making money out of it John would then have been promoted to manager and been in charge of staff.

MR SMITH: So you would have employed other people in the business?

MR UPTON: We would have had to have other people in the business.

MR SMITH: And that was a decision that would have been made by the directors of the company?

MR UPTON: By myself, yes, with the directors, with the other two directors.

MR SMITH: Can you explain what you saw the duties in the Launceston store entailing?

MR UPTON: For Mr Crosland?

MR SMITH: Yes.

MR UPTON: To control the sales or handle the



MR UPTON: sales as in customers coming in purchasing off him, money into the till and the item written off the stock sheet. Also to do cleaning and displays.

MR SMITH: Was it, to your knowledge, ever explained to Mr Crosland that he would in fact be the manager?

MR UPTON: Quite possibly. If we ever got to the stage where the business was going well enough he would be promoted to the managerial position.

MR SMITH: No, I meant at the time of his actual appointment was it, to your knowledge, explained to him ...

MR UPTON: Oh, yes.

MR SMITH: ... in no uncertain terms that he would be the manager or the trainee manager?

MR UPTON: No, he was employed as the trainee manager. Quite aware of that. And when the business was up to a certain level, as John said over the \$3,000 a week, then we'd be putting on staff and he'll take over as the manager.

MR SMITH: And you believe that that was clearly explained to Mr Crosland ...

MR UPTON: Oh, yes.

MR SMITH: ... at the time of his appointment?

MR UPTON: Yes.

MR SMITH: It's been indicated that Mr Crosland had various duties that he considers qualify him for the position of manager within the definition as provided for in the Retail Trades Award. I'd just like to put to you some of those duties.

Mr Crosland indicated that he was required to keep books in respect to the Launceston. Can you explain the nature of those records?

MR UPTON:

Sure. The day book ... how we ran the books is when an item was sold John was required to write down the actual item and the price next to it at what it was sold for. And that was all that was required there. He had a receipt book which, if the customer wanted a receipt, it would be written. A goods wanted book which, if someone wanted an item, that would be written in. Just a loose leaf paper type book. And a purchases book which is required to be kept by the Police Department.

MR SMITH:

Mr Crosland indicated in his evidence that he had the authority to purchase stock that was brought into the yard and that he would pay for that out of cash holdings in the till. Is that correct?

MR UPTON:

All my staff members have that authority.

MR SMITH:

Did Mr Crosland have the discretion in determining the price in relation to those goods?

MR UPTON:

On the items that he was familiar with, yes. If an item came in that he hadn't sold before he would phone myself up or one of the people in Hobart up and ask a more experienced person.

MR SMITH:

So if it was within his competence to adjudge a price then he had that authority?

MR UPTON:

Yes, but there would be a limit set on the amount. I don't think a verbal limit was set but it certainly would be not a lot of money involved. It would be under \$100, that type of thing.

MR SMITH:

Well are you aware of the cost of the largest purchase that was actually made by Mr Crosland?

MR UPTON:

No, I'm sorry, I'm not. But I would be aware if it was over that sort of figure.

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SMITH - UPTON - XN

MR SMITH: The authority to discount items was, I understand from Mr Crosland's evidence, a standard that had already been set for him.

MR UPTON: Yes, we set a limit of 5% on all goods, not just new materials. But that was new and second-hand.

MR SMITH: And does that apply to other staff members?

MR UPTON: Not in Hobart so much. The staff members more experienced and we do a lot of the selling ourselves down there. Usually they don't do discounts. If they do they come and see us first about it.

MR SMITH: The opening and the closing of the premises and the general day to day running. Did you consider that to be a function that would qualify Mr Crosland as a manager?

MR UPTON: I have other sales assistants in Hobart opening and closing for me and they are certainly not managers.

MR SMITH: All the accounts associated with the business in Launceston were forwarded to Hobart for payment?

MR UPTON: Yes. Some were sent by the Launceston shop.

MR SMITH: Who was responsible for determining the sales targets and those types of things from the shop?

MR UPTON: Well as I say I did set a limit to John. We never unfortunately got above that limit so we only had the one target set.

MR SMITH: Was that set by you or was it set ...

MR UPTON: It was set by myself.

MR SMITH: Was it set in conjunction with Mr Crosland?

MR UPTON: No.

MR SMITH: How frequently did you visit the Launceston shop?

MR UPTON: On average it would have been once a week at the start, possibly would have got a bit less towards the end in the Kings Meadows store and then again when we started the Invermay store it would have been back to once a week for a considerable part of the time.

MR SMITH: And were those visits made entirely by yourself or any of the other directors?

MR UPTON: No, myself and my brothers and the other directors.

MR SMITH: And what functions were performed on those visits?

MR UPTON: The first function would be to go straight to the yard, check the books, check the figures were right for sales against banking, wages taken out in the correct amount, then generally look around the yard, check on cleanliness and tidiness. Watch John for a while and see how he was relating to customers, seeing the general flow of customers in the business and then doing any work that we had up there to do.

MR SMITH: And you also took the opportunity on those visits to deliver goods that ...?

MR UPTON: Oh, usually we drive a truck up or something, do business as well.

MR SMITH: What specific ... beg your pardon. Mr Crosland indicated in his evidence that he was given specific authority to interview for a sales assistant.

MR UPTON: Well I'm not aware of that. I'm not aware of that at all.

MR SMITH: Is it possible that that direction could have been given by one of the other directors?

MR UPTON: By my brother, Michael? Well John said so. I haven't been made aware of it.

MR SMITH: Well would Mr ...

MR UPTON: Well put it this way. It'd be highly unlikely because it is understood to be my branch up here and they would have gone through me for it.

MR SMITH: Okay. In relation to that, Mr Crosland, in any case, indicated that the interview had been conducted and the results of that interview were forwarded to Hobart. The determination as to whether anyone was actually appointed would not have been within Mr Crosland's authority?

MR UPTON: Oh, certainly not. And then I can't see why it would have taken place because as I say, the figures never got to the stage where we could warrant promoting John to that position.

MR SMITH: If you had appointed a manager directly into that position at the commencement ... when the job was created, what duties would you have given that person that were not given to Mr Crosland?

MR UPTON: Well the complete duties of running a business. I would have merely stayed in Hobart and watch my cheque account grow, hopefully. Ledgers, staff supervision, you know, controlling the whole show.

MR SMITH: He would have given the authority to purchase goods via a cheque account?

MR UPTON: Mm. Oh, for sure, it'd have to have a cheque account.

MR SMITH: Would have had the right to engage staff that may have been required for the running of the business?

MR UPTON: As he found necessary, yes.

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SMITH - UPTON - XN

MR SMITH: Would have been responsible for ... or would he have been responsible for setting the targets in respect of sales improvements and so on as distinct from trying to meet that target?

MR UPTON: Yes, it would have been ... if I had employed someone as a manager of the store I wouldn't have had any control over it. I would have left it completely up to the person that I had employed.

MR SMITH: So in other words, if the person had been carrying out a true management function, you would not have found it necessary to visit the store?

MR UPTON: No.

MR SMITH: Okay.

It was mentioned also by Mr Crosland he placed advertisements in respect of goods that were required for the business in the 'Goods Wanted' column of the daily paper. Was that one of Mr Crosland's functions?

MR UPTON: No. Well I dispute that. When I first came up to Launceston ... when we first started the business, it's one of our business practices to put an advert in the paper like that and we just have it running every Wednesdays and Saturdays. We have an agreement with the paper. It's not something that you put in on a week-to-week basis, it's a permanent fixture.

MR SMITH: Well I take it that the goods that you require are not the same every week?

MR UPTON: No, it's an advert to ...

MR SMITH: Who would ...?

MR UPTON: ... householders for any materials that they have for sale to contact

MR UPTON: us.

MR SMITH: Oh, right. It's not advertisement for specific goods?

MR UPTON: No. No.

MR SMITH: In respect of the change of premises from Kings Meadows to Invermay. Can you indicate what authority was given to Mr Crosland in respect of that changeover?

MR UPTON: What do you mean?

MR SMITH: Mr Crosland indicated that he arranged and signed for the connection of HEC and Telecom services.

MR UPTON: No, that's not the case. When you have a new HEC connection fitted the owner of the property has to go in and sign for it. I signed for the HEC myself.

MR SMITH: Right.

MR SMITH: All the purchasing of stock, other than that that was ... may have been purchased by being brought into the yard would have been done from Hobart?

MR UPTON: Purchasing from stock could have happened in ... purchasing old stock could have happened in Launceston as well. When we came up we could have purchased a quantity of stock, left some at Launceston and took some back to Hobart.

MR SMITH: Right. Well, perhaps my question is, that it wasn't done by Mr Crosland?

MR UPTON: Not there ... a small amount of purchasing as in what people brought into the yard.

MR SMITH: Yes. Aside from that?

MR UPTON: No, he didn't do any purchasing.

MR SMITH: Can you tell me who does your banking in Hobart?

MR UPTON: I have a sales assistant doing that.

MR SMITH: Just to clear a matter up that was presented in evidence. Did Mr Crosland raised with you his possible underpayment?

MR UPTON: No, never. Sorry, not during the employment. Just after Christmas he said he had had a union official visit him and there was a problem with his wages.

I looked at the situation. I couldn't see that it was a big problem. However, I'd previously decided ... before Christmas I had decided to do a change of staff up here, and so I let John know - a few days afterwards anyway - that his time was up.

MR SMITH: Well, is it fair to say that Mr Crosland's termination of employment was not related to the matter of his rate of wage?

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SMITH - UPTON - XN



MR UPTON: It certainly had no bearing on it.

MR SMITH: Mr Crosland also indicated that in an emergency situation he would have had the authority to have rectified any problem that went wrong in respect of the shop. Is that correct?

MR UPTON: For example, when I called in this contractor to dig a hole of the electricity supply, I think, it did break a pipe. I was in Hobart at this stage. I'd left for Hobart that afternoon. It broke a pipe and so John was on the scene, yes, I gave him authority to get a plumber in and fix it.

MR SMITH: Mm. But in a true emergency situation, in the absence of anyone in authority, would you normally expect one of your staff to take some initiative in respect to correcting that problem?

MR UPTON: Oh, yes. You'd think so.

MR SMITH: Do you believe that ... sorry, I'm crossing over some old ground again. Do you believe that on the occasions of your visits to the Launceston store that you actually performed a management function?

MR UPTON: Most definitely. That was a sole reason of coming up to Launceston, is to check on how it's going up here. And the buying of the goods was more a hindrance than anything else, but it's a service that we do.

MR SMITH: Is there anything, in your opinion, in Mr Crosland's duties that would have qualified him for the description of manager of that shop?

MR UPTON: Mr Crosland only does the duties as I have other staff members in Hobart doing.

MR SMITH: That's perhaps not the question. It could be said that they might be managers too.

MR UPTON: I hope not, otherwise I've got a shop full of managers.

MR SMITH: Yes. No. Anyway, continue to answer the question.

MR UPTON: No, John was employed as a trainee manager and, in my opinion, he was never good enough to take over managing the store.

MR SMITH: Yes. I have no further questions. Thank you, Mr President.

PRESIDENT: Yes. Mr Upton, did you ever have occasion to tell Mr Crosland that he wasn't shaping up, or that his work was unsatisfactory?

MR UPTON: I had. I had asked Mr Crosland on quite a number of occasions to try and improve sales; to tidy the yard, which was not up to expectations; giving him general direction. But it didn't improve very much.

PRESIDENT: I see. You see he doesn't appear to have been employed as a sales assistant at all. The contract that ... was it you signed?

MR UPTON: Yes, sir.

PRESIDENT: ... was for a trainee manager.

MR UPTON: Yes. But that would include sales and well and dealing with the public.

PRESIDENT: Well, who was actually in charge of the shop when you were not up here?

MR UPTON: John was. John was in charge of that.

PRESIDENT: Yes. And that is regarded as a branch of Uptons?

MR UPTON: Yes.

PRESIDENT: You see, the definition of shop or branch manager or manager is: an employee who is in charge of a shop or branch, with or without the duty of buying.

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PRESIDENT: Well, now we've heard that he had some limited buying capacity. To the average man in the street who saw him there 6 days a weeks he must have been regarded, surely, as the manager.

MR UPTON: If someone came into the yard, sir, and asked John a question, he would ... and if John couldn't answer it through the experience he'd learnt over the previous months he would then refer the question to me.

PRESIDENT: Yes. But as a fair man, Mr Upton, I'm sure that you are, if you give someone the keys to a business ...

MR UPTON: Yes.

PRESIDENT: ... you give them the key to the safe, you entrust them with the task of selling, with ordering, with limited buying and general day-to-day running of the business, certainly including selling, surely that person is a manager? If that's the only ... if that person is the only person there.

MR UPTON: Well, I ...

PRESIDENT: I mean, it may not be in your idea ... in your mind, because you're an owner of a business. But all I have to go on is what the award says. And the award simply says 'a person who is in charge', it doesn't say they have to do all of these other things.

I don't know ...

MR UPTON: Well, in my opinion ...

PRESIDENT: ...quite what 'in charge' means ...

MR UPTON: In my opinion, sir, he wasn't in charge. I was in charge of it and he was merely performing the duties the way I wanted them done.

PRESIDENT: Well ...

MR UPTON: John, if it was his shop, he would have probably changed a lot of things that I wanted done my way, if he was the manager of the shop.

PRESIDENT: Yes, but when you went back to Hobart let's assume that the days when you came up you were in charge.

MR UPTON: Right.

PRESIDENT: But when you were not here he had the keys, he opened the yard, he traded in your name.

MR UPTON: Yes.

PRESIDENT: Surely he was in charge?

MR UPTON: I set the prices. I set the trading hours.

PRESIDENT: Yes, but who was in charge when you were not here?

MR UPTON: He was in charge as in day to day contact with people.

PRESIDENT: Well was he in charge of the branch shop when you were not here?

MR UPTON: Yes on a day to day basis.

PRESIDENT: Yes.

Mr Fenton?

MR FENTON: Thank you, sir.

Mr Upton, the word 'trainee manager'. What is a trainee manager?

MR UPTON: In my view?

MR FENTON: Yes.

MR UPTON: A person that is learning or training how to be a shop manager.

MR FENTON: Are you aware of any definition or classification in the Retail Trades Award that has the classification of trainee manager?

MR UPTON: At the moment I'm not, no.

MR FENTON: When does a trainee manager stop becoming a trainee?

MR UPTON: Well I would have thought when he was promoted to the position of manager.

MR FENTON: I'm not trying to put words into your mouth but does that mean when a person is virtually standing on his own two feet in charge of a business?

MR UPTON: Or when the director of a company gives that person the actual management of that shop and leaves that person to completely control it. Then he'll be the manager of that shop.

MR FENTON: Was that not the situation when the tuition finished with Mr Crosland?

MR UPTON: No. We came up and made the decisions for that shop and how it should run. Set stock numbers.

MR FENTON: I think of your own admission just before in one of the questions the President asked you did state that .... was in charge of the shop.

MR UPTON: He couldn't set the prices. He couldn't set the hours.

MR FENTON: In the evidence given by Mr Crosland before apparently he did have some authority to charge on items that he had bought through the business.

MR UPTON: On items that he knew the resale price of. In other words of items that we had dealt in and John felt confident in.

MR FENTON: So he did have the authority to mark prices on those particular items?

MR UPTON: Mark the prices as we had set, yes. As we had set.

MR FENTON: When you say `as we had set` a new item came into the store which was not an item that came into the Hobart

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FENTON - UPTON - XXN

MR FENTON: store and Mr Crosland purchased that item did he not have the authority to set the price on that?

MR UPTON: I don't think Mr Crosland would have purchased that item if it hadn't already been through his shop. Let's say, for example, a toilet bowl or something John would have known the price that they sell at so he would have bought one for sure and marked it at the price that we ... we have a standard price for things what we sell things for.

So in that aspect, yes, he could purchase those sorts of goods and sell them.

MR FENTON: But obviously to a certain extent it came down to common sense as far as Mr Crosland was concerned as to what he bought?

MR UPTON: No, I think knowledge of what we'd previously sold through the store, of what we'd taught him.

MR FENTON: Would that not go in hand with common sense?

MR UPTON: Training, for sure.

MR FENTON: In the Jobstart form which has been tendered as evidence it mentions there that there will be staff supervision taking place at a later date.

What did you envisage that would mean?

MR UPTON: Well I'd hoped that it would be a short amount of time, I was looking at probably 6 months. At that stage the business would have been starting to pay for itself. We could have put another person on under John and he would have taken over management of the store.

MR FENTON: Why would the duties then of having extra staff under a person's control, an extra business, qualify Mr

MR FENTON: Crosland as a manager? Except for the staff supervision he is doing exactly the same job as beforehand.

MR UPTON: No, because that would have also entailed ... once there was someone else in the shop, once he had got someone else there with him it would have left John free to go out and do purchasing in a larger format. Virtually we were training him to be the manager but he didn't have the experience straightaway, of course, for managing it.

MR FENTON: Are you aware that under the Retail Trades Award the definition there is nothing stated under 'shop manager' that there have to be other employees with that person in charge?

MR UPTON: I'm aware of that.

MR FENTON: What's your understanding of the definition of a shop manager?

MR UPTON: I think I've explained. Someone who completely runs the store that I don't have to come up and check on and that I can just watch my account figures only.

MR FENTON: Well what criteria do you use as to when a person is or is not a manager?

MR UPTON: Well the criteria I use for the Launceston store is when it would start paying for itself. If John could get it to that stage where it started paying for itself, the business, we could employ another person, John could then take over management with the books, have a cheque book to do major buying and take over the complete running of the store.

MR FENTON: That's your definition of how a manager or when a person becomes a manager?

MR UPTON: In this particular case. For this branch up here that's how I was defining it.

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MR FENTON: Could you equate that to, say, a larger company. Let's take, for instance, a K Mart for instance. Whereas if that company does not make a profit for the first 12 months the person in charge of that K Mart is not a manager?

MR UPTON: I don't think K Mart would be run with just one person for the first 12 months.

MR FENTON: But this is what you're equating your particular situation to, isn't it?

MR UPTON: For this case, yes. For the Launceston store. It's only a small store. You couldn't start off with two people straightaway. It would be unnecessary. My idea was to put John in to train as a manager. Once the figures got to a very realistic limit I'd then promote him to be manager, have staff under him and control the whole show.



MR FENTON: .... you had to come up and visit the store made you believe that John was not a manager?

MR UPTON: No, he wasn't the manager, he was training.

MR FENTON: Do you believe that directors of large companies or similar business should not be able to go about and visit their stores or businesses?

MR UPTON: Oh, no, they should always be able to visit.

MR FENTON: Well there's not been a similar situation to what you were doing?

MR UPTON: No, because when ... if, for example, in the case you're talking about, a director did visit a company or a store, in my opinion he shouldn't be discussing what should happen on that shop floor.

For example, whenever I came up to Launceston, I would virtually ... I'd tell John what I wanted done around the shop to try and improve sales.

MR FENTON: You gave advice?

MR UPTON: I gave ... not advice. I gave instructions.

MR FENTON: As per head office instructions virtually?

MR UPTON: As per, I came up and told him what to do.

MR FENTON: Seeing you were the director of the company, would you consider yourself virtually as being head office?

MR UPTON: I'm the owner of the company and director, yes.

MR FENTON: Isn't that normal situation for any large company to have head office come about, make suggestions where need be ...

MR UPTON: Yes.

MR FENTON: To the manager of, say, a large company, does that necessarily mean that that person is not the manager of the store? Obviously ...

MR UPTON: I'm not sure actually. I haven't got a large company. I really don't know.

MR FENTON: Well let me put it this way. Obviously, there are directors within any head office of a large company or business.

MR UPTON: Mm.

MR FENTON: And there are directions which have to be handed down to the managers of particular stores where they're in charge of. Would you agree with that?

MR UPTON: Yes. Yes.

MR FENTON: Could you just go over again what form of management you exercised when you came to Launceston?

MR UPTON: Checked on the book work to see that the figures were correct and in goods gone out and the money was correct. Checked on ...

MR FENTON: So I take it you mean by that you had a quick audit of the books?

MR UPTON: I quite often took the books back with me to go through them more thoroughly, but every time I did come up, I did have a quick audit, yes.

I'd also walk around the shop giving instruction to John on what I wanted done with it. I'd make him aware of things that I weren't happy with.

MR FENTON: You made suggestions where need be?

MR UPTON: No, I gave instructions where need be.

MR FENTON: Was the sales target you were talking about before when Mr Smith asked a question, was that ever discussed with John or ...?

MR UPTON: Yes, I told John about that.

MR FENTON: Was that after you had set the target or before you'd set the target?

MR UPTON: I would have instructed John as to the target. It was my figure because I know what is our break even point on that shop.

MR FENTON: Did you set a figure and then go and say to John, 'These are the figures I want you to come up with each month or each week'?

MR UPTON: Mm.

MR FENTON: And what was the discussion that took place when you informed Mr Crosland of that?

MR UPTON: I said to John, 'When you can get the business to this figure per week, on a regular basis, we'll then or you can employ another staff member. You employ who you want to at that stage because you'll be going to management position. You'll be running the business'.

MR FENTON: So once he gets to a certain figure in the business and another staff member he becomes manager?

MR UPTON: Yes, he takes over management because that then tells me that he knows enough about the business to manage it. It's not the sort of business you can learn at school. You have to have practical knowledge and the training in it.

MR FENTON: You were aware of Mr Crosland's knowledge and training as far as his occupation before he .... business?

MR UPTON: He use to run a smallgoods store, as

MR UPTON: far as I know.

MR FENTON: Were you aware of any other qualifications he may have had?

MR UPTON: And be a plumber.

MR FENTON: Had he had any experience in the building trade at all?

MR UPTON: Plumbing.

MR FENTON: Could you tell me why Mr Crosland wasn't, on many occasions, required to phone Hobart about discounts when the shop assistants in Hobart were? They had to get in contact with yourself or the other directors.

MR UPTON: They don't always, down in Hobart. I said that before, but they don't always get in contact. But if it's a large sale, they would contact us down there, the staff down in Hobart would come and see us about it.

MR FENTON: When you say `a large sale`, does that mean equating to dollar terms or a large discount?

MR UPTON: Oh, well it would be one running with the other.

PRESIDENT: Mr Fenton, Mr Smith, I've allowed this questioning to go on perhaps a little bit too long. I think we're tending to stray away from interpretation matters and get back to that dispute situation which no longer exists.

Really, my task is, surely, to decide whether or not Mr Crosland was fits the definition of someone who was in charge of a branch or a shop. I don't really think it is material to consideration of this interpretation that I should know much about Mr Crosland's background or matters of that kind. I think those issues are probably very important when it comes to merit.

PRESIDENT: My task is to interpret the award and I don't know how this line of questioning - and that goes equally to you, Mr Smith - is going to help me in that regard.

MR FENTON: I apologise, sir. I take on board what you've said and I will ...

PRESIDENT: No, there's no need to apologise. It's so easy for us to get carried away with these things.

But had this been a section 29, I'd have been listening intently. But I'm still waiting for somebody to get to the point as to what the words mean.

MR FENTON: Just a couple of more questions. No, I'll leave it at that, if you don't mind, sir. I'll finish the questioning ...

PRESIDENT: Well I hope I didn't frighten you off, Mr Fenton.

MR FENTON: No, you certainly didn't, sir.

PRESIDENT: We'll see what effect it's had on Mr Smith who now has the right to re-examine.

MR SMITH: Even before you raised it, sir, it was not my intention to re-examine.

PRESIDENT: Then you're excused Mr Upton. You may retire or you may remain as you wish.

MR UPTON: Thanks, sir.

MR SMITH:

Mr President, as you've quite rightly pointed out, the key to this particular matter is what the words of the award actually say. And from there, how they apply to this particular set of circumstances that we've had outlined before us today.

In Exhibit F ... bear with me a moment, F.3, Mr President, it's a letter from myself to Mr Targett, the secretary of the Shop Distributive and Allied Employees' Association, on behalf of Uptons Salvage in relation to this matter. It says in the second paragraph, and I quote:

"Your claim is based on the assumption that Mr Crosland was employed as manager of Uptons Salvage, Launceston".

And it goes on to specify the definition, which has already been read.

And in the third paragraph it goes on to say:

"Mr Crosland was the only employee at the Launceston establishment and accordingly may, subject to appointment as such, be regarded as in charge of a shop or branch. However, the shop was visited on a weekly basis, i.e. one day per week on average, by Uptons Salvage management in addition to virtual daily contact by the telephone.

It is clear that Mr Crosland was employed as a sales assistant, and the shop was in fact managed by management from Hobart."

Notwithstanding that the evidence may not support entirely the fact that there was daily phone contact, or that the true average turned out to be one day per week in terms of visits to Launceston, I still believe

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SMITH

MR SMITH:

that the evidence clearly indicates that on the occasions when the store was visited by management from Hobart a management function was performed by that visiting employee from Hobart, or the visiting director.

It's quite obvious that it could be reasonably construed that in the absence of one of the directors from Hobart, Mr Crosland was, as I've put in that document in inverted commas, in charge of the shop. I mean, somebody had to be, he's the only person there.

But the definition says more than the fact that the person must be in charge. In fact, there's a very important qualification placed on the definition wherein it says, that a shop or branch manager is an employee who is in charge of a shop or branch with or without the duty of buying. So we can virtually ignore the fact that there may or may not be buying doesn't really enter into it.

But it goes on to say, notwithstanding that such employee may be under the orders of a superior who does not devote the whole or any part of his time to the management of the said shop or branch shop.

What that means, in our submission, Mr President, is that in order for that to happen, in order for a person to be a branch manager or manageress, the superior should not be devoting any time, either in whole or any part of his time, to the management of that shop. He is permitted to give orders or directions in relation to the management of the shop providing, in accordance with the definition, that he doesn't devote any of his time to it.

So not only does the person have to be in charge of the shop, but there's also a criteria in place there that there should be no involvement in terms of a management function, apart

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SMITH

MR SMITH:

from the issuing of orders or directions by a superior to the person that's in charge of the shop.

Mr Fenton handed to you in Exhibit F.4 the definition of manager. But I think a more appropriate definition from the same reference document, which was the Macquarie dictionary, is the definition of management, which defines ... which is the word used in the latter part of the definition. And it says:

"That management is: 1) the act or manner of managing, handling, direction or control; 2) skill in managing, executive ability; 3) the person or persons managing an institution, business et cetera; and 4) executives collectively".

It's quite clear that the first three of those definitions for the term 'management' fit the bill in this particular case, but the true management of the shop was done by management from Hobart.

And we will acknowledge that in the absence of the physical presence of a director from Hobart, Mr Crosland was in charge of the shop, in the same way as any sales assistant is in charge of the shop in the absence of the owner or ... particularly if they're working alone, in the absence of the owner, or the principal in the business.

That doesn't make them the manager of the shop.

The principal duties involved in this particular job were that of the sale of building materials, attached to it was the purchase of some of the stock when required, the banking duties and the opening up of the store. All functions that are quite capably performed by sales assistants in other areas.

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SMITH



MR SMITH:

So in our submission, Mr President, we believe that there was an involvement by the directors of the company, in terms of the management of the shop and that they did devote, not the whole, but part of their time to the management of this shop.

And accordingly, the definition doesn't have the application that is purported on behalf of Mr Crosland.

MR SMITH:

In terms of the job title of trainee manager, I really don't think that that has any great bearing on the question of whether or not Mr Crosland was in fact a manager.

The term 'trainee manager' is used quite widely in the retail industry. Most major retail establishments employ, at some stage, trainee managers.

Their duties are far removed from what we would consider a manager, as such, and they're certainly not paid in accordance with anything other than the sales assistant rates in general.

Since the time of Mr Crosland's appointment, there have in fact been traineeship provisions inserted in this particular award which may lead to some change in the situation that applies in respect of trainee managers. But for the purposes of this exercise, obviously the definition is the most important thing, and it's our submission that you should find in your interpretation that because of the circumstances of this case in that there was time devoted to the management of the shop by directors from Hobart in accordance with the definition, therefore, Mr Crosland was not a shop or branch manager or manageress. And certainly the evidence has indicated he was never appointed as such and was never given the control that would be necessarily exercised to qualify him as a manager.

Bearing in mind that, as you've indicated, there is no definition of what 'in charge' means, but in the context of this particular matter, it's been clearly indicated what would be expected by Mr Crosland if he was in charge and/or any employee that would be in charge as a manager, as distinct from being in charge of the day-to-day running.

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SMITH

MR SMITH::

Accordingly, Mr President, we would submit to you that the definition doesn't support the fact that Mr Crosland was employed as a branch or branch manager, and accordingly, we would urge you to find in our favour in that respect.

If, however, you are swayed by the arguments that have been put to you by my colleague, then we would, of course, argue that the interpretation should apply prospectively in that the award has been applied by the parties, or by one of the parties on the basis of what they understood a manager to be.

Now if that definition is subsequently changed, it has probably not only wide reaching effects for this particular employer, but may impact upon many others who probably have a similar understanding to the one that I've expressed today, and I believe that it will be unfair to retrospectively apply application or an interpretation that was not understood in general terms, to be the way the clause was designed to operate. If the Commission pleases.

PRESIDENT:

Thank you, Mr Smith.

Mr Smith, in Exhibit S.2 which you've tendered, Mr Crosland was said to be a trainee manager and the title of the award was the Retail Trades Award. What do you suppose was in the mind of Mr Upton and the CES person when they indicated that the Retail Trades Award would be the one that applied?

There is no, to the best of my knowledge, no classification of trainee manager. The rate of pay - I think we were told it was quoted there - equated with a sales assistant third year of experience, but that doesn't say that the person was a sales assistant, third year experience. It says that he was a

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PRESIDENT - SMITH

PRESIDENT: trainee manager employed under the terms of the Retail Trades Award. What, if anything, should we choose from that?

MR SMITH: Well it's very difficult for me, I suppose, to envisage what was in the mind of the parties at the signing of the agreement, but having spoken with Mr Upton since that time, it's clear that the wording used in this particular schedule to the agreement is, in fact, job title, as opposed to classification. And we all know there are a variety of job titles which don't necessarily reflect what the person actually does.

PRESIDENT: 'In house' title, in other words.

MR SMITH: 'In-house' titles, that's right. And I think that this is the case here, that the intention of the parties was to employ somebody principally as a sales assistant, and that is reflected by the fact that obviously the parties to this agreement must have looked at the award to arrive at the wage rate and extracted that wage rate from the relevant classification in the award.

It's certainly not a coincidence that it is a sales assistant, third year experience.

And the intention, as I understand it, was to engage somebody in the capacity of sales assistant, and to train that person and get the business to a stage where it may have been possible to expand by the taking on of additional staff, hence the wording in there 'staff supervision at a later date', and then to pass over the running of the business in its entirety to that particular person, and then they would become the manager, as such.

But I acknowledge there's no definition of 'trainee manager' in the award but I believe it's simply a title that's been used to reflect the

MR SMITH: subsequent intention of the parties in expanding.

PRESIDENT: Thank you for that. But, you see, the definition of `assistant` which you say or your client says more appropriately describes Mr Crosland's function. It simply means that any employee who devotes any portion of his or her time to the sale of goods including takeaway food, fastening, key cutting goods or assembling orders and/or messenger, I think the evidence would suggest that Mr Crosland did a little more than that.

Perhaps ... he couldn't have been senior sales assistant unless he was regarded as second in charge to Mr Upton then.

MR SMITH: Yes, I suppose that ... I mean, just on a first reading of the definition of `assistant`, I would agree with you that Mr Crosland's duties went further than those envisaged by `assistant`, but we would come back to the point that we don't believe that they were duties that went far enough to satisfy the definition of shop or branch manager.

I suppose that that points to an inadequacy in the award in that perhaps the definitions don't accurately reflect what's in practice.

PRESIDENT: I think I'd be inclined to agree with you too, Mr Smith, although this may not be the appropriate place to make that sort of observation.

Thank you, Mr Smith. Now, Mr Fenton, your right of reply.

MR FENTON: I'll do my normal trick and ask for a 10 minute adjournment if that is possible, please. I know the time is getting on. I believe it is about 4.15. I'll be asking for, say, 10 minutes.

PRESIDENT: How long do you think you'll be in concluding?

MR FENTON: A very short submission at the end, sir.

PRESIDENT: Very well.

...

PRESIDENT: Yes, Mr Fenton?

MR FENTON: Thank you, sir. I thank you for the adjournment. You must be getting fairly used to these adjournments late in the day, sir, when I'm before you.

As I said I will keep this fairly well to the point. I'll start off on the same track as what Mr Smith did and that was to go through the definition.

And to a certain extent I completely agree with some of his ideas as to that definition. If we do go through it slowly.

"A shop or branch manager, i.e. an employee whether an adult or otherwise who is in charge of a shop or branch shop".

Now who is in charge of a shop, I think the question was put up by you before, sir. What does 'in charge' mean?

And having the dictionary fairly close by:

"In charge of: having the care or supervision of. In charge of the class or

MR FENTON:

similar."

I think it is fairly obvious and even by Mr Upton's own admission that Mr Crosland was in charge of the store.

We go on through the definition:

"With or without the duty of buying".

Obviously to a certain extent that doesn't come into it. He did have certain powers of buying but under the definition he doesn't have to.

Notwithstanding or despite the fact that such employee may be under the orders of a superior who does not devote the whole of any part of his time to the management of the said shop.

And I suppose this is where Mr Smith and myself disagree. I certainly hope you disagree with Mr Smith as well as I.

What I'm saying is that the directors, as by the evidence given by Mr Crosland and to a certain extent, or the way I construe it, by Mr Upton, was that the directors did not devote the whole or any part of their time to the management of the shop.

Now Mr Smith put some weight on the definition of 'management'.

"Management: the act or manner of managing, handling, direction or control. Skill and managing executive ability. The person or persons managing an institution or business etc."

In my view and in the Association's view Mr Crosland, or I should say in my view and the Association's view, the directors of the company or the

MR FENTON:

superiors did not apply .... under that particular definition of the word `management`.

The directors only chose or ... sorry, I should say the directors only chores were that of delivering goods and picking up orders when they came to Launceston. They did not manage the store in any way when in Launceston. Mr Crosland continued in his normal role.

Now if Mr Smith is saying that the superiors of the company or the directors of the company, if they make visits to their particular company shops or branches or whatever, if that defines that as coming under the definition I can only put it to the Commission if the directors of other companies did not have their representatives or themselves going out to inspect the workings of their businesses and to see what is actually going on in the work place and making suggestions or by making company policy, what would be the situation with most large companies in Australia?

Obviously to a certain extent the companies must send out people to see what is going on in the work place. And in my view this is what was going on with Uptons Salvage. Mr Upton or Mr Upton and Mr Michael Upton did not come to Launceston with the purpose of managing that particular store. They came there with the intent of just seeing how the situation was going, dropping off goods where need be, picking up orders and going out and buying goods if need be.

As the question of retrospectivity for this particular interpretation I can only put it to this Commission that despite the intentions of what Uptons had in the first place as far as this particular job was concerned, ignorance of the award is not an excuse to deprive a person of his or her statutory rights to the wages

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FENTON



MR FENTON:

they are entitled to.

I would consider that if the interpretation is handed down in our favour it would be an injustice at this point for Mr Crosland, who has been underpaid or in our view has been underpaid, did not receive any amounts which are owing and due to him.

For that reason we would argue that retrospectivity should be the case.

PRESIDENT:

To the day that he first commenced when he was under direct ...

MR FENTON:

My own personal views are, sir, that the retrospectivity, if handed down in our favour, should be back to the time when he became capable of looking after the store by himself. Now I believe that was a couple of weeks after he first started there. Obviously it would be up to this Commission to decide when and you do have the final say.

PRESIDENT:

Not necessarily. A Full Bench of three would have the final say.

MR FENTON:

That would be my strong recommendation.

But on that note we would just ask the Commission to hand down the decision in what we believe should be the case and that is that Mr Crosland was the manager of the store. He comes under all the definitions of, or the wording of the definition of 'retail manager' or 'shop manager' and as such should be paid accordingly.

Obviously we can't pursue that through this Commission and if the Commission does hand down in our favour we will go through the channels where need be to get those particular wages made up.

I thank the Commission.

/JG - 08.03.89

PRESIDENT - FENTON

PRESIDENT:

Thank you, Mr Fenton.

Before reserving my decision, as I undoubtedly shall, I ought to ask the parties if they have fully explored the processes of conciliation on this matter. Am I left with no alternative but to interpret the award one way or the other?

MR FENTON:

I did have discussions with Mr Smith yesterday. I put to him the idea or the possibility of trying to settle the dispute or settle the instant that had occurred. He informed me at the time though he didn't believe it was possible to go any further other than come to this particular Commission and have the interpretation handed down.

MR FENTON: Whether Mr Smith would like to add to that.

PRESIDENT: Is that the situation, Mr Smith.

MR SMITH: Perhaps we would like, you know, 24 hours to consider that, Mr President.

PRESIDENT: Yes.

MR SMITH: Is there any problem in us addressing that situation and advising you ...

PRESIDENT: Yes.

MR SMITH: ... you know, within a set period of time as to whether or not we have reached any conclusion in relation to that.

PRESIDENT: I wouldn't have any problem with that. I was going to indicate in any case that I would withhold making a decision for probably 2 weeks, and in the event that the parties were able to somehow come to some mutual accommodation on this 'interpretation', in reality, a section 29 dispute if ever I've heard one, then perhaps they could advise me ...

MR SMITH: Yes, sir.

PRESIDENT: ... to that effect.

MR SMITH: Yes, sir.

PRESIDENT: I think that that might be the appropriate course to follow. If I don't hear from the parties within 2 weeks, or earlier hopefully, then of course I shall do what I'm required under the Act to do, and interpret the award accordingly.

That therefore concludes this hearing. My decision is reserved.

HEARING CONCLUDED