

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 2941 of 1991

IN THE MATTER OF an application
by the Hospital Employees
Federation of Australia, Tasmania
Branch for interpretation of the
Hospital Employees (Public
Hospitals) Award, Clause 12 -
Conditions of Service, subclause V
- Higher and more responsible
duties allowance

re paragraph (a)(iv) in
relation to the intention of the
words 'a period of more than
twelve months'

PRESIDENT

Hobart, 28 February 1991

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Appearances please.

MR R. WARWICK: If the Commission pleases, RICHARD WARWICK for the Hospital Employees Federation of Australia, Tasmania Branch.

PRESIDENT: Thank you, Mr Warwick.

MR P. AIKEN: If the Commission pleases, PETER AIKEN representing the Tasmanian Public Service Association.

PRESIDENT: Thank you.

MR R. HUGHES: If the Commission pleases, RICHARD HUGHES with **MICHAEL STEVENS** representing the Minister administering the State Service Act.

PRESIDENT: Thank you, Mr Hughes. Well, Mr Warwick?

MR WARWICK: Sir, as our application indicates we seek, in essence, an interpretation of what is meant by the words 'twelve months' in the award. If I could get down to business, sir, I tender an exhibit in the first instance which sets out our outline of argument.

PRESIDENT: Well, this is Exhibit HEF.1.

MR WARWICK: Certainly, sir. Sir, I will endeavour to show this morning that provisions themselves in relation to clause V(a), subclause (iv) are unclear in respect of what is meant by 12 months' service. We will endeavour to show that other relevant provisions in the award do not eliminate the circumstances surrounding what payments should be made. In fact, we will also endeavour to show that neither the State Service Act Regulations or, for that matter, the Nursing Award throw any light on the matter in question.

PRESIDENT: Do you think you can go quite that far in an interpretation matter?

MR WARWICK: Oh, simply, sir, to establish that there are no other relevant award or legislative prescriptions which can assist the Commission in throwing light on the subject, sir. Whether the Commission sees that as necessary or not ...

PRESIDENT: The task really is to try and determine what the words mean.

MR WARWICK: Yes, sir.

PRESIDENT: We'll see how far that takes us.

MR WARWICK: Well, I certainly won't be making substantive submissions on that, sir, simply tabling some relevant

extracts and making the point that they don't throw light on how the matter should be interpreted.

Sir, it's our ... thirdly, it's our ... those are the first two points. Thirdly, it's our submission or will be our submission that the decisions of the Commission which led to the making of the award in respect of current higher duties provisions do not throw light on what was meant by the provisions ... what is meant by these provisions. And, we will present a couple of arguments which go to, in essence, the question of equity in relation to

PRESIDENT: I really don't know whether you can go to that extent in an interpretation matter.

MR WARWICK: I see, sir.

PRESIDENT: I'm bereft of my piece of legislation but the section dealing with interpretations requires me to establish what the words mean that exist in the award. Section 43(1)(a) enables me to declare how an award should be interpreted. I can, if I so find, declare how the matter could be remedied but in the first instance the question is, what do the words in the award mean? Issues of equity and clarity, equity particularly, isn't a matter that I can go into.

MR WARWICK: I see. Well, bearing in mind your comments I might press on, sir.

PRESIDENT: Sure.

MR WARWICK: The second page of HEF.1 does go to the question of what remedy we seek in respect of how the words should be adjusted to mean what we take them to mean. Sir, if I could tender a further exhibit which goes to the question of what, in fact, currently applies.

PRESIDENT: HEF.2.

MR WARWICK: It's simply a consolidation from 1989 of the Public Hospitals Award. The covering page obviously identifies the award. The next three pages contain the arrangement. And the fourth page, which is marked page 74, contains the clause ... the award clause in question. And in particular the fifth page contains subclause (iv). Sir, if I might just perhaps read that clause onto the record?

PRESIDENT: Yes.

MR WARWICK: And I quote:

Where an employee continues to perform the higher duties as provided for in paragraph (a)(i) for a period of more than twelve months an increment if

provided for in the higher classified position shall be paid.

PROVIDED THAT no employee shall be entitled to receive any increase in salary by virtue of this paragraph (a)(iv) unless, in the opinion of the controlling authority, his conduct, diligence and efficiency during the twelve months immediately prior to the date from which such increase would be payable shall have been satisfactory.

Sir, the proviso we don't believe is important in today's proceedings. It does appear in other clauses of the award and the State Service regulations and it's not that particular aspect of the subclause that we're interested in.

It's our view, sir, that the first paragraph of subclause (iv) means that the 12-month period can either be an unbroken period of 12 months or, indeed, an accumulated period of 12 months. That is the construction which we believe should be implied ... applied to and understood in respect of this clause.

The remaining pages of the exhibit, sir, contain merely other award clauses which I suppose ought to be read to determine whether or not any other aspect of the award or any other clause of the award in fact throws any light on what is meant by the 12-month period. And I've included those simply to, hopefully establish for the Commission's satisfaction that no other clause of the award does delineate what is meant by 12 months. And for that reason I won't go into detail in relation to any of those clauses, other than to ...

PRESIDENT: If you want me to take them into account at any stage you'd better address me on them, because I'm uncertain as to what you mean by them.

MR WARWICK: Well, sir, the clauses in particular are clause 22 - Salary Increment. It's our view that there is nothing in that clause which sheds any light on what is meant by 'twelve months; that is the salary increments clause. The ...

PRESIDENT: In particular, the reference to 12 months, what, appearing in ...

MR WARWICK: In the ...

PRESIDENT: ... each of the subparagraphs?

MR WARWICK: Sir, I would ... it's our submission that all of those references to 12 months should be taken to mean ... or should be taken to be understood to apply to persons working in their substantive positions and obtaining salary increments.

PRESIDENT: Yes.

MR WARWICK: On an issue like the ordinary basis of access to those increments. And those provisions do not apply, in our view, to the circumstance of a person working on higher duties. In respect of new appointments and promotions, sir - that is clause 16 which appears on page 94 - it's our view that that clause applies to persons who are appointed to new positions on merit and not to persons who are working on higher duties and does not have a bearing on what rate of pay should be paid to persons working on higher duties for extended

PRESIDENT: Is there any reference to a time period in this?

MR WARWICK: No, sir, there's not. I've simply included the contract of employment clause because it's a clause, I guess, that one should always look at in respect of the basic conditions of employment of all employees. There's nothing in that clause, in our view, which goes to or throws any light on the question before the Commission.

On page 80 ... or the page that is marked '88' in the exhibit, there is a clause marked 'AN. Ancillary and Clerical Staff (as defined) Special Conditions', and in particular clause AN, subclause (b), the question of promotion, again, does not go to the question.

PRESIDENT: No. No, I don't really see the relevance of those things to our mischievous clause.

MR WARWICK: Well, I guess, our submission is simply to clear that up, sir, and to say that there is nothing else in the award which has a bearing ...

PRESIDENT: Right.

MR WARWICK: ... on what is meant. If I could also tender two further documents, sir.

PRESIDENT: Which of these do you want to deal with first?

MR WARWICK: The Tasmanian State Service regulations, if the Commission pleases.

PRESIDENT: We'll make that HEF.3. And the ... this is an extract is it ...

MR WARWICK: Yes, sir.

PRESIDENT: ... from the decision on the Nurses Tas. (Public Sector) Award in ... of 1988. We'll mark that HEF.4.

PRESIDENT: What order will you be dealing with these then Mr Warwick?

MR WARWICK: Sir, the decision of Commissioner Gozzi in matter T.1519 of 1988 would be the first one that I would seek to look at.

PRESIDENT: Right, that's HEF.5.

MR WARWICK: The transcript in relation to the same matter.

PRESIDENT: HEF.6.

MR WARWICK: And the decision in respect of the General Conditions of Service Award would, with your agreement, sir, be HEF.7.

PRESIDENT: Right, thank you.

MR WARWICK: Very simply, sir - and I don't wish to spend a great deal of time on these matters - there's an understanding that in interpretation principles it is understood that parties should have recourse to the decisions in making of awards which gave rise to decisions should be ...

PRESIDENT: If there is difficulty in establishing what the words mean by any other means.

MR WARWICK: Yes, sir. Sir, HEF.5 is a decision which came about as a result of applications by the two HEF branches, as they then were, to have the full bench decision in respect of higher and extra duties ... to have those provisions inserted in the Public Hospitals Award. That, as you can see, sir, is a one-page decision. It's very simple and it was simply a matter of flowing those provisions on at the time.

The document HEF.6 contains the transcript from those proceedings. That transcript indicates that the decision of Commissioner Gozzi was seen by the parties at that time as simply a matter of flowing those provisions on; it had been decided by the full bench in the GCOS decision.

On a close reading of this transcript, sir, indicates that nothing was put to the bench which indicated that any party addressed the question of what was meant by 12 months at the time. And ...

PRESIDENT: Did you go to the transcript of the major matter, the General Conditions of Service?

MR WARWICK: I don't have it, sir. I don't have it, unfortunately, but I'm sure that if there's anything in that that does throw light on the matter Mr Hughes will bring that to the attention of the Commission. I might also indicate ...

PRESIDENT: We may not get that far, but see how we go.

MR WARWICK: Yes, sir. I might also indicate that perhaps ... oh, sorry, sir, going back to HEF.5, the last paragraph of that document indicates that the wording of the order which Commissioner Gozzi issued at that time was in fact exactly the same as the General Conditions of Service Award.

HEF.7, sir, is a decision which emanated from the full bench in respect of higher and extra duties in relation to the General Conditions of Service Award. The question of what should ... what allowance should be paid to a person who works part of the time in a higher position was addressed by the Commission in this decision. And if I can just find that, I will illuminate - no, sir, I can't put my finger on a particular point where they do mention ...

PRESIDENT: There's a lovely little piece at the bottom of page 3.

MR WARWICK: Yes, sir. We'd take that sentence to mean that ... to apply to, in particular, the matter of the 5 days qualifying period. And we do not take the view that it specifies or makes any reference to the question of what ... whether or not a person can accumulate 12 months through broken service.

PRESIDENT: What if ...

MR WARWICK: It specifically ...

PRESIDENT: What if, for example, somebody had 52 lots of 5-day periods?

MR WARWICK: Indeed, we would say that that ...

PRESIDENT: That would be a year.

MR WARWICK: Yes. Indeed, we would say that that person should therefore have access to incremental payments.

PRESIDENT: But this says that there shall be a new qualifying period every time.

MR WARWICK: In respect of the question of 5 working days, sir, the paragraph before that sentence clearly goes to the question of specifying that there must be 5 working days for a person to be entitled to higher duties of any sort. It's our view that the following paragraph should be read in conjunction with that and not be taken to mean that it bears any reference or has any reference on the question of what is meant by 'twelve months'.

PRESIDENT: No.

MR WARWICK: Sir, I'd seek to tender one last exhibit, if I may.

PRESIDENT: HEF.8.

MR WARWICK: And this goes to the question that you have already asked, and that is: is there a specific instance which gave rise to the matter in question?

Sir, this exhibit is a letter from our member, Mr David Neep, who is a senior pay clerk at the Launceston General Hospital, who wrote to the personnel department at that hospital on 31 August 1990. And Mr Neep, at that time, indicated the total number of days that he had worked in the assistant paymaster's position at that hospital for the period 7 November 1984 through to 2 February 1990.

And it's clearly the case that at 2 February 1990 Mr Neep, in fact, had acted in the assistant paymaster's position for the equivalent of one year.

The third page of the document, I guess, sir, brings us to the question of why we're here, and that is that the administration of the hospital wrote to Mr Neep and indicated that they were not prepared to provide Mr Neep with the access to the second salary increment on a salary rate appropriate to the assistant paymaster's position. The final paragraph of that letter of refusal says that, and I quote:

It was considered that the circumstances as described in your letter, being accumulation of hours over a period of years, is not within the provisions of the award.

We very strongly disagree with that, sir. We say that the words in the award mean that a person has to complete 12 months' service. The award does not say that that person must perform that service for a continual period of 12 months, that is a non-stop period.

Sir, if I can come back to HEF.1 and if I could briefly go to the fourth and fifth points of that exhibit. Point 4, sir, says:

The construction currently being applied by the employer means that an employee could work in a more responsible position for forty seven weeks and four days in every year of that employees working life and never gain access to service increments on the relevant higher scale.

We believe that that is not intended by the words that are contained in the award at present. In fact, it's our view that the words in the award mean the opposite, it is intended that people should gain access to service increments on the basis of service.

Point 5, sir, says, and I quote:

A part time employee is required to work the same number of hours that a full time worker completes in a full time year to gain access to service increments. That is, a part time worker must complete the equivalent of a total of 52 weeks full time work spread over (in many cases) a number of years before service increments are paid. On the basis of equity the same principle should apply in relation to higher duties.

Or in other words, sir, we believe that the department and the minister can't have it both ways. If a person is required to accumulate experience on a pro rata basis in a part-time position ...

PRESIDENT: Yes, I hesitate to do this but we really can't get into that sort of merit argument. We are really supposed to be discussing and trying to determine what the words as they are written mean and what the English interpretation of them is.

MR WARWICK: Yes, sir. Well, perhaps the final point I would seek to make, sir, is that in respect of the wording of the clause it is not, in our view, intended by the provisions of the award that a person should not gain access to service payments. The intention of the words and the meaning of the words is that there should be a qualifying period for persons to obtain access to those service payments. Service payments, in my understanding, sir, are paid on the basis of a reward, if you like, for the experience that's been gained over a period of time. Now, for the department to say that our construction ...

PRESIDENT: Is this ... are we talking of service payments. I'm not altogether ...

MR WARWICK: Yes, sir.

PRESIDENT: I thought we were talking about higher duties allowance.

MR WARWICK: Yes, sir.

PRESIDENT: Tell me about how the service payments get into higher duties.

MR WARWICK: Sir, the clause says that ... the subclause specifically mentions increments.

PRESIDENT: Yes. And, you're saying an increment is a service payment.

MR WARWICK: Oh, sorry, perhaps it's a poor choice of words, sir. The increments are there in the award. I perhaps don't want to get into an argument about what service payment is.

PRESIDENT: Yes, I wasn't really certain what you meant.

MR WARWICK: Yes. I think that was an inappropriate choice of words, sir, and I'll stick to increments if I may.

PRESIDENT: I can't remember whether or not service payments form part of this award. It's a long time since I had anything to do with ... they obviously don't.

MR WARWICK: It's one of those unfortunate things of being imprecise with the use of words, sir. It can lead to great confusion at times.

PRESIDENT: Well, that's why we're here.

MR WARWICK: I'm, in fact, talking about increments, sir. Sir, the test that we believe the Commission should apply in respect of what the words mean is the question of why a person should not gain access to that increment after 12 months' broken service. If the employer's construction is correct they must, in our view, prove that there is a good reason why a person should not gain access to that increment. And, they would need to, in our view, sir, not merely assert that a person shouldn't gain access but demonstrate that the words of the award contain a good reason why that person should not gain access to that service pay. Twelve months, in our view, means 12 months however defined or however accumulated. The award does not specifically say that it must be continuous.

PRESIDENT: Well, it does use the word 'continues': where an employee continues to perform higher duties for a period of more than 12 months.

MR WARWICK: Yes, sir, but it doesn't say 'continually'.

PRESIDENT: It doesn't say that, no.

MR WARWICK: Well, sir, Mr Neep, as the example in question, has continued and continues at the moment to perform higher duties as provided for in paragraph (a)(i), and has done it for a period of more than 12 months and will continue to do so, I would think, until such time as promoted.

If the award meant that the period of service must be continuous then it would specify in precise terms that it must be a continual period. And it's our view that the award provisions do not. Sir, if I could return to HEF.1, the second page ...

MR HUGHES: Excuse me, Mr President, I would like to object. The remedy sought here, in fact, proposes an award amendment and I feel that that's outside the scope of an interpretation.

PRESIDENT: Yes, it really is, at this point, I think. I understand what Mr Warwick is putting, it's a secondary part of his submission and it provides me with a proposed remedy which I can use if I so wish with a declaration, if I want to change the award. I would say though, it's not a practice that's been regularly followed or if followed at all in terms of interpretations. It would be some glaring issue and something that was well agreed between the parties before I'd readily give thought to varying an award as a result of an interpretation. But I'll allow Mr Warwick to proceed with it, Mr Hughes.

MR HUGHES: Thank you.

PRESIDENT: On the basis that it is a secondary part of his submission.

MR WARWICK: Thank you, sir. Bearing in mind your words, it is perhaps worth indicating to Mr Hughes that section 43(1)(b) of the award does allow you to order ... by order, vary any provision of the award for the purpose of remedying any defect.

Our substantive submission, sir, is that we would ask you to do that in the terms sought. But bearing in mind your words, sir, if there is some other appropriate way of remedying the problem we would certainly be amenable to that, if it were the case that it resolved, I guess, the problem in a way that was clear for all. And we would prefer that, of course, to be in our favour. That, in essence, is the submission I wish to put, sir.

I was going to address the question of what bearing an order from the Commission as a result of this hearing might have in respect of the wage fixing principles, but bearing in mind your comment I don't think there's any need to go into great detail in relation to that other than to say, that it's not our view that if you were of a mind to issue an order in the manner sought, we believe that it wouldn't be contrary to the principles. If the Commission pleases.

PRESIDENT: Right. Thank you, Mr Warwick. Mr Aiken?

MR AIKEN: Thank you, Mr President. I don't have a great deal to offer, just simply to indicate that the Tasmanian Public Service Association supports the Health Services Union in seeking an interpretation of the words in relation to the higher and more responsible duties. If the Commission pleases.

PRESIDENT: Do you have an examples of this happening to your members?

MR AIKEN: I don't have any at hand, but I'm sure it does happen. It has happened to me in the past when I was a member of ... an employee of the State Government. I don't have any examples to hand, thank you.

PRESIDENT: Right, thank you. Mr Hughes?

MR HUGHES: Mr President, thank you. I've noted your fairly regular comments and am grateful for them, in fact, regarding the ... an interpretation issue should be restricted to the words that are there and should not consider such issues as either the intent or, in fact, issues of merit. And it would be certainly my contention that those points in HEF.1 listed as 3, 4 and 5, on page 1, fall into that category. And as I said, I'm grateful for your rulings on that.

Before actually proceeding with the case, I would also like to comment further on some of the exhibits presented by Mr Warwick. I'm not sure, in fact, that HEF.2 is a current copy of the present award. I think the increment clause in the existing award, in fact, is clause 23. I'm not sure whether there are any other discrepancies.

Exhibits 3 and 4 are completely irrelevant to the issue which we are discussing in that they don't contain reference to payment one way or the other.

The HEF.6, which was presented by Mr Warwick, is reference to the transcript of the case by the Hospital Employees Federation and the Tasmanian Public Service Association where the clause which had previously been inserted in the General Conditions of Service Award was sought to flow on to the Hospital Employees (Public Hospitals) Award.

I would like to make reference, in fact, to the transcript of the original proceedings. And, I don't have copies but I am prepared to read them. And, I refer to page 41 - and I think the issue was T.760 of 1987 - and, the discussion was between Mr Geursen of the Tasmanian Public Service Association and the President at the time and they were talking about how it would apply. And, it read in part:

PRESIDENT: Excuse me, before you start, Mr Hughes, what was the page number again?

MR HUGHES: 41.

PRESIDENT: 41. Yes.

MR HUGHES: Quote:

PRESIDENT: You mean the first step, don't you?

MR GEURSEN: The first step. If there is no step, if it's a spot salary, that's the point I'm trying to make, and a person is assuming that responsibility, then he's entitled to that rate.

PRESIDENT: But even if there was a range of increments in the relieved officers' salary range, it wouldn't make any difference, would it? It would still be the first step.

MR GEURSEN: Yes, sir.

And, the next part is particularly relevant.

PRESIDENT: Subject only to the relieved officer being relieved, shall we say, for 12 months or more, in which case you would argue that the relieving officer should get an increment.

MR GEURSEN: Yes, sir. In the same way as I think is set out in our claim, and custom and practice currently applies.

PRESIDENT: Would you read that first part of the President's ...

MR HUGHES: Certainly.

Subject only to the relieved officer being relieved, shall we say, for 12 months or more, in which case you would argue that the relieving officer should get an increment.

PRESIDENT: It doesn't talk about in aggregate or continual ...

MR HUGHES: No. And, to assist in clarifying, at page 179 of that transcript as well there was a submission put as to what the Department of Public Administration's view at the time was and it said, and I quote:

And finally under sub-clause 3, the department says, and I quote:

"It is also considered that 3(b) should be reworded to reflect the period of continuous performance in a higher position before an increment should be paid."

I think those aspects of the original ...

PRESIDENT: Was that commented on at all?

MR HUGHES: Not that I was able to find, sir, because it was a presentation by Mr Jarman at the time but I was unable to find any comment from any party, in fact, relating to that particular aspect other than the parts of the transcript which I have read.

PRESIDENT: Well, that certainly refers to continuous ...

MR HUGHES: And, I thought it was relevant having regard to the issue we have today.

PRESIDENT: Yes, certainly.

MR HUGHES: The question which Mr Warwick referred briefly in HEF.7, which is the decision of the original full bench concerning T.760 of 1987, does not, to my knowledge, make any reference at all to the question of payment for anything other than continuous periods. He alluded that there was some suggestion there if he could find the point. I have scrutinised it at some length and certainly if it's there it has eluded me.

Regarding the particular issue which he has raised concerning Mr Neep, I would just point out that apart from an error in fact in that document, Mr Neep has acted on 17 occasions since November 1984 until February 1980. It is ...

PRESIDENT: February?

MR HUGHES: 1990.

PRESIDENT: 1990, yes.

MR HUGHES: It is ludicrous to my mind to suggest that over that time the job has remained the same and consequently that a period of acting in November 1984 is relevant to the position today. I'd now, sir, with your permission, like to discuss the actual case or the interpretation at hand. And, just as a bit of history, the clause was inserted in the General Conditions of Service Award as T.760 of 1987, and I've made reference to that. It was the result of an application lodged by the Tasmanian Public Service Association. And it might be added that the provisions concerning the payment of an increment in terms of continues to perform was, in fact, as

presented by the Tasmanian Public Service Association at the time. So, it would appear their stance may have changed.

Previously, higher duty allowance conditions had been prescribed in section II of the Tasmanian State Service Regulations 1985 and that, in fact, was presented as an exhibit. I'm not sure whether regulation 11 is still current. It's an issue which would need to be clarified and I'll comment further on that shortly.

Following successful prosecution of the case by the TPSA, other unions, including the HEF, sought successfully to have the clause flow on to other awards. In no case did any union seek to vary what had previously been negotiated.

That part of the clause for which interpretation is now being sought is in the award in the precise form in which it was submitted in the original application. Other parts of the clause originally submitted were varied. Reference, in fact, is made in the decision to, and I quote:

... and an appropriate clause would be inserted in the award.

End of quote.

All parties at that time were satisfied, therefore - although I suspect that, talking to Mr Willingham, he maybe the exception - with the content of the clause as it was listed. The clause reads, and I quote:

Where an employee continues to perform the higher duties as provided for in paragraph (a)(i) for a period of more than twelve months an increment if provided for in the higher classified position shall be paid.

And I would draw attention to the use of the words, 'continues to perform' and 'for a period of more than twelve months'.

The proviso which is attached to it is, I think, relevant and that states, quote:

PROVIDED THAT no employee shall be entitled to receive any increase in salary by virtue of this paragraph (a)(iv) unless, in the opinion of the controlling authority, his conduct, diligence and efficiency during the twelve months immediately prior to the date from which such increase would be payable shall have been satisfactory.

End of quote. I would also point out that the terminology used is a direct lift of that in the clause relating to increments.

The present problem relates to the situation where an individual - and we're discussing it 'in principle' rather than a particular case - occupies a higher position for which a higher duty allowance is payable, but where such acting is for intermittent periods. Application of the clause to date has required that an individual act for a period of 12 months continuously before being eligible to payment of a higher rate of allowance. That is, before progressing to the next year in the scale of the acting position.

This is consistent with the application of the identical clause in the General Conditions of Service Award. And I would draw to attention, and I will present as an exhibit, an extract of the page from the State Service Personnel Manual, which specifically relates to payment of higher duty allowance increments. And it's section 12.5.9 of the State Service Personnel Manual.

PRESIDENT: We'll call this Exhibit H.1.

MR HUGHES: I don't know whether you would wish me to read that, sir, or whether we can take it as ...

PRESIDENT: Well, I've read it. I don't know that ... if you want it to go into transcript, you can ...

MR HUGHES: No. I would certainly like to draw ...

MR WARWICK: Which particular clause number was it?

MR HUGHES: 12.5.9, the one highlighted at the top of the page.

MR WARWICK: I see.

PRESIDENT: Perhaps you'd better read it into transcript.

MR HUGHES: Right. And it says, and I quote:

12.5.9 Higher Duties Allowance Increment

Subject to satisfactory conduct, diligence and efficiency reports, when an employee has been in receipt of a higher duties allowance for a continuous period exceeding twelve months, he or she is to receive any increment applying to the position in which he or she is acting, effective on and from each anniversary of the commencement of a period of higher duties.

End of quote.

So that requires for a continuous period exceeding 12 months. And I'd emphasise the word 'continuous'.

The problem therefore, it appears to me, revolves around what constitutes, quote 'continues to perform', unquote, as contained in the award. And I would like now to present to the Commission another exhibit, which I've extracted from two, I think, generally accepted dictionaries.

PRESIDENT: H.2.

MR HUGHES: Could I borrow that for a moment, thanks? Thank you. I'm looking for the exhibit, I've just misplaced my other papers, sir.

PRESIDENT: You never know what you might find there, Mr Hughes.

MR HUGHES: I've just found the copy, thank you. And in the exhibit, which I won't quote, but they are extracts from the Australian Concise Oxford Dictionary and the Pocket Oxford Dictionary, and I draw attention to the following definitions: in the former 'not stop', 'not cease (doing)'; and in the latter, 'go on doing' or 'not cease to do'. And that defines quite clearly that continues means that it's unbroken. The only reference to 'be a sequel' is 'to resume', which is in the context of resuming a narrative of a journey, which means that you are going to continue.

So I would contend that there's no question that the wording of the award is such that it ... the acting period should be unbroken. A person occupying a position, a higher position for intermittent periods - that is, not on a continuing basis, regardless of the frequency of the aggregate period of acting involved - does not fall within the clause as it stands.

Now, this interpretation is further supported by reference to the proviso which we've already mentioned in the actual award, which again talks about: during the 12 months immediately prior to the date - so immediately prior to the date, which therefore, again, eliminates the question of broken periods.

It is apparent therefore that reference to both the subclause itself and the proviso relating to it prevent payment of an increment to a person occupying a higher position on an acting basis, unless such action is for an unbroken period of at least 12 months, and that such acting service is satisfactory as required by the award.

I would also point out that in respect of the exhibit I offered concerning the State Service Personnel Manual, that that manual was last amended in 1989. Amendments made at that time were made after consultation with the combined public

sector unions - which I think both the Tasmanian Public Service Association and the Hospital Employees Federation at the time were involved.

As that's considered the appropriate forum for any changes of the nature sought by the present application, it can be assumed that there were not any objections to the manner in which the clause has been applied up to this time. More importantly, both the wording of the subclause itself and the present method of application are service-wide standards.

There is then no doubt that interpretation of the award in the manner in which it has been applied in the past is correct and in accordance with the award as it is written. Equally as obvious is that interpretation of the award in the manner sought is in conflict with the award as it is written. That's all I have to offer, sir.

PRESIDENT: Yes, thank you, Mr Hughes. Do you agree though that in respect of that proviso it's quite feasible for the award to say that ... or to require the employee to have performed diligently and efficiently in the preceding 12 months, rather than have to go back over the whole period of the employee's acting activity.

MR HUGHES: Well, I think this is a flaw when a clause which applies in one area of the award is picked up verbatim. It would have been better, sir, in my opinion - and I bow to the fact that I'm fairly inexperienced in these matters - but in my opinion it would have been better had a specific clause been written.

PRESIDENT: Yes. But don't you agree that it's possible to have that sort of test put alongside a provision of the award which required or which permitted a certain payment?

MR HUGHES: Yes.

PRESIDENT: No matter what the period might be ...

MR HUGHES: Well, in the circumstance of higher duties ...

PRESIDENT: ... that the payment applies to.

MR HUGHES: ... I would suggest that if a person's service was less than satisfactory they wouldn't be chosen to act and it really probably wouldn't become a problem.

PRESIDENT: I'm sure that's ... I'm sure that's right. But in terms of the construction of the award the two don't necessarily have to go hand in hand.

MR HUGHES: That construction could be put on it, yes.

PRESIDENT: Yes. With your exhibit H.1, I note that's from the manual issued 1 July 1987. I take then, obviously, that that process of determining how HDAs or increments could be paid to people in receipt of HDAs that had been in place for some time.

MR HUGHES: Yes. The date that you referred to, in fact, is the date on which that particular part of the manual was last amended. Had it been amended for any clause on that page ... had any clause on that page been amended subsequently, then the subsequent date would have appeared.

PRESIDENT: Yes.

MR HUGHES: I can't say precisely how long ...

PRESIDENT: How long it had been in.

MR HUGHES: ... 12.5.9 has been there in that form. I, in fact, think that the whole manual was reissued in 1987, but again that is only my opinion.

PRESIDENT: Right, thank you, Mr Hughes.

MR HUGHES: Thank you.

PRESIDENT: Mr Warwick?

MR WARWICK: Sir, I don't want to be, well, causing any inconvenience to the Commission, but I would appreciate a short adjournment of, say, 15 minutes to avail myself of a copy of the transcript that ...

PRESIDENT: Yes, certainly. 15 minutes?

MR WARWICK: ... Mr Hughes read from. Thank you, sir.

PRESIDENT: We'll adjourn until 11.45.

SHORT ADJOURNMENT

PRESIDENT: Yes, Mr Warwick?

MR WARWICK: Mr President, thank you for that opportunity to order my notes. If I could make some comments in reply to the views put by Mr Hughes. Firstly, sir, in respect of the transcript which Mr Hughes quoted in relation to matter T.760 of 1987. Page 41 of that transcript Mr Hughes quoted the President, about halfway down the page, saying, and I quote:

Subject only to the relieved officer being relieved, shall we say, for 12 months or more, in

which case you would argue that the relieving officer should get an increment.

And Mr Geursen responded to that.

It's our view that that comment does not throw any light on the matter in question.

And, in fact, the President's words there are more or less exactly the same as the words which appear in the award at present.

The second quote that Mr Hughes put before you relating to page 179 of that transcript and Mr Hughes noted the comment of Mr Jarman at the bottom of the page when he said, and I quote:

It is also considered that 3(b) should be reworded to reflect the period of continuous performance in a higher position before an increment should be paid.

Sir, I haven't had an opportunity to read all of the transcript from the case. Obviously, there are a significant number of pages but it would seem to me that Mr Jarman at that point was reading from a document which presumably set out what it was that the minister wanted the full bench to do.

MR HUGHES: Mr President, I might be able to help with that if you wish. The document that Mr Jarman was reading from, in fact, was a submission from the Department of Public Administration, as it was at the time, on the way - their view of the world basically. So, just if that's any help at all as to what Mr Jarman was using.

MR WARWICK: I thank my colleague for those comments, sir. Nevertheless, Mr President, it would seem to me that the fact of the matter is that whatever it was that the document asked the full bench to do the full bench ultimately did not do. It did not incorporate those words in the award provision that currently exists and has existed from that time in the General Conditions of Service Award.

Sir, if I could clarify what I intended in referring to the decision in that same matter, T.760 of 1987, in respect of ... if I could clarify our position as a consequence of the comments made by Mr Hughes, and, if I could read on to transcript the last two paragraphs on page 3 of that decision; the full bench said:

That is, where a permanent employee has performed the duties of a higher classified position for a period of five working days or more, such employee shall be paid, in respect of the whole of the

period, the first step of the salary assigned to the higher position.

On each occasion that higher duties are required to be undertaken it will be necessary for a new qualifying period to be completed before any payment is required to be made.

It is our view, sir, that the word 'any' payment there means and is intended to be read in relation to the question of the qualifying period, the 5-day qualifying period, and it is not intended to have a bearing on the matter which is before the bench at the moment. If it was the intention, sir, of the full bench to clarify the particular matter that is before you I believe they would have said so.

PRESIDENT: Maybe it wasn't in dispute.

MR WARWICK: Well, it certainly is now, sir, since these circumstances have arisen in relation to ... the circumstances which have brought us before you. Certainly it is possible that the matter was not considered by any party at the time. I guess the ...

PRESIDENT: Well, what do you have to say about Mr Hughes' submission and his dictionary definitions of the word 'continue' and the importance which he places on the way that the word is used in that clause.

MR WARWICK: Well, sir, I've had a look at that exhibit, sir, and I've taken the opportunity in the break to underline some of the words that are included there. And, if I could, if you like, read out some of the words which I think make the definition which appears in the dictionary somewhat ambiguous in respect of this matter, and they are: resume, be sequel to, adjourn ...

PRESIDENT: Okay, well, just stop there. 'Resume' is qualified, as to a narrative, journey etc. 'To be sequel to', I mean, that has a definite inference of continuing on from.

MR WARWICK: But, surely, sir, it doesn't mean immediately.

PRESIDENT: Well, I don't know whether it doesn't.

MR WARWICK: Sequel is something ...

PRESIDENT: That follows on.

MR WARWICK: ... that follows on, but is after the event.

PRESIDENT: Right. Well, follows, so therefore it's after.

MR WARWICK: Yes.

PRESIDENT: But, what about the other ...

MR WARWICK: Sir, adjourn?

PRESIDENT: ... to not stop, to keep up.

MR WARWICK: Well, I think that certainly is a meaning of that word or an implication that can be drawn from that word, but there are others which may mean other things, sir. It's difficult to pick any one word out of that dictionary definition and say that that is what the word 'adjourn' means ... the word 'continue' means, I'm sorry. We wouldn't have these many entries in the dictionary if it were not the case that it had ... the word had many implications.

PRESIDENT: Do you think it might have used the word, for a period of more than twelve months in aggregate, if it had meant something other than continuous?

MR WARWICK: The award, sir?

PRESIDENT: Yes.

MR WARWICK: I think that the wording is unclear. It may have said ... if the matter was clear, it may have said on the one hand that it ... it would have specified that it needed to be continuous or it may, on the other hand, have specified that it could have been broken. It does neither of those.

PRESIDENT: Yes.

MR WARWICK: Sir, in respect of the submissions Mr Hughes made in relation to the proviso that does appear in the award under the paragraph which we believe is in contention, Mr Hughes put some weight on the question of 12 months in the proviso being relevant. But that ... the proviso says:

PROVIDED THAT no employee shall be entitled to receive any increase in salary by virtue of this paragraph (a)(iv) unless, in the opinion of the controlling authority, the employees conduct, diligence and efficiency during the twelve months immediately prior to the date from which such increase would be payable shall have been satisfactory.

Sir, the 12 months refers to conduct, diligence and efficiency and it refers, in our view, to nothing else. That is, the person's conduct, broadly speaking, must have been satisfactory in the last 12 months. And it's our submission that any other construction on the words in that proviso is grammatically incorrect.

In respect of the personnel manual, sir, we're well aware that the personnel manual says what it says. But as Mr Hughes well knows the personnel manual is a guide to employers. And we appreciate the fact that we're consulted on any changes which are made to that set of documents, but we have enough to do in administering the awards of the Commission and, unfortunately, we can't always give the time that we require to negotiating on variations to the personnel manual. And, indeed, in my experience the personnel manual is rarely, in fact, a document which we have to deal with as an organisation in work sites.

Having said all that, the relevant point, sir, is that the awards of this Commission and the interpretations that are applied to what the words in the awards mean are what determine the contract of employment of employees in the Public Service not the personnel manual. And, indeed, we don't see the remedy to the problem that we believe is, I guess, existent can be remedied by ... or should be appropriately remedied by negotiating changes to the personnel manual. It should be properly remedied by coming to the Commission to have an interpretation sought.

PRESIDENT: Or vary the award ...

MR WARWICK: Yes, sir.

PRESIDENT: ... by application rather than by way of an interpretation.

MR WARWICK: Is that the suggestion, sir?

PRESIDENT: Well, yes, it would be actually. If the wording is so ambiguous that the parties can't make it work, then they should seek to clarify it. If it's beyond interpretation, I don't believe it's appropriate for this process to vary a major provision in an award which has substantial ramifications elsewhere.

MR WARWICK: Well, I certainly appreciate your comments, sir, and in light of those comments I could indicate that that is something we would be prepared to do if it was ... if the Bench was of a mind to recommend that this problem be resolved in that manner, then we would do that.

PRESIDENT: That would be, you know, quite honestly the way that I would think the matter ought to proceed.

MR WARWICK: And we'd be able to run our arguments on merit as well.

PRESIDENT: It may well be one of those issues you want to put on the table in preparation of all your wonderful documentation to be exchanged by 30 April.

MR WARWICK: Yes. Well, it seems that all changes to the contract of employment have been lumped into that process, so I suppose that's a course of action. Although I would remind you, Mr President, of our comments in the full bench proceedings that the difficulty we've had in resolving a lot of those issues over the last 12 months.

PRESIDENT: We will arbitrate them. Once they're on the table then they can't be resolved otherwise.

MR WARWICK: Yes, sir. One last point I would make in reply, sir. Mr Hughes made the comment that a period of service such as is demonstrated by HEF.8 - which is the exhibit which goes to Mr Neep's letter applying for payment and the rejection of that request - I would have thought that Mr Hughes' comment and - and if you will allow me I will paraphrase what he said. I think he said that: the job would have changed so inherently over that period of time that the experience would not be relevant. He can correct me if that's not what he thinks he said, but I think it's fairly close. I would have thought that that was something of a moot point, sir. It would seem to me that a person who understands the history of a position surely would have a better understanding of what's required in the position. I would think that that's really a matter of opinion, at worst; and best, an argument on the merit.

MR HUGHES: Well, I may as well do that, sir, he's been doing it all morning.

PRESIDENT: I was nearly going to say that for you, Mr Hughes.

MR WARWICK: Given your comments, sir, that's the extent of my right of reply. If the Commission pleases.

PRESIDENT: Yes. Yes, thank you. Mr Aiken?

MR AIKEN: No, thank you, sir.

PRESIDENT: Well, I guess you've probably picked up during the course of the proceedings the way I feel about this sort of matter and the way it should be processed.

The question of what the words actually mean is one which I've ... the only one which I should really address in terms of an interpretation. Merit issues obviously can't be addressed. And, as I've mentioned, I'm not particularly enamoured about the prospect of varying an award ... the award through this process.

On the face of it I find the words ambiguous and I'll have a further look at that and give you a written decision in a reasonably short time. But I think at the end of the day it

will probably mean that the words are ambiguous and the parties ought to seek to clarify them by the appropriate variation of the award. That being the case - glum looks all round the room, but ...

MR WARWICK: It could have been worse, sir.

PRESIDENT: Others are saying, it could have been better. That being the case I will close this hearing and a decision will issue in due course.

HEARING CONCLUDED