

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 5029 of 1994

IN THE MATTER OF an application by
the Australian Liquor,
Hospitality and Miscellaneous
Workers Union, Tasmanian Branch
for interpretation of the
Miscellaneous Workers (Public
Sector) Award

re Clause 23 - Payment of Wages

PRESIDENT

HOBART, 17 May 1994

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: I'll have appearances, please.

MR K. O'BRIEN: If the commission pleases, I appear on behalf of the applicant organisation.

PRESIDENT: Thank you, Mr O'Brien.

MR L. FOLEY: Mr President, I am LEO FOLEY, representing the Minister for Public Sector Management.

PRESIDENT: Good. Thank you, Mr Foley. Mr O'Brien?

MR O'BRIEN: Mr President, this matter I think is one which the employer is reasonably well aware of in terms of the circumstances which give rise to the application for interpretation.

Perhaps the first thing I should do is to outline the events which do give rise to it which would give you the circumstance in relation to which we are seeking the interpretation so there are a set of facts there that you can look at.

PRESIDENT: Yes. Thank you.

MR O'BRIEN: In relation to that, I will tender a bundle of correspondence which is relevant to the matter.

PRESIDENT: Yes; we'll mark this O'Brien.1.

MR O'BRIEN: Mr President, the letters and the other documents are in order, commencing with a letter of 29th of July making a claim pursuant to clause 23 of the award payment of wages, which details in the second paragraph - well, the first paragraph says:

I write on behalf of two members who were recently made redundant from your agency.

Ms Kerstan and Ms Bailey finished work on June 30, 1993. The wages owing for this period were not received until July 13, 1993.

The clause in the award is referred to and a request is made for paid waiting time in accordance with the award.

The next item of correspondence is from the department, Corporate Services Division, under the name of Mr Ramsay to myself regarding the matter, which reads:

I acknowledge receipt of your letter of 29 July 1993 requesting the payment of waiting time to Ms F. Kerstan and K. Bailey, former employees of this Department.

Before proceeding with the claim I request your consideration of the following circumstances.

Because of the requirement to provide details of leave balances on each pay advice, a facility not available on the PAYSTAT system used in this agency, the payroll of cleaners transferred from the former Department of Construction continues to be produced in that agency.

The final pay and redundancy package payments were assembled and in order that all documentation was presented together, we also waited until the Taxation Group Certificates were also available before arranging to hand over the cheques. This was done with the intention of saving confusion and concern. There was no intention to delay the payment.

No person identified themselves as not having received their pay and in fact the matter was not raised until Michelle O'Byrne called at this office on 27 July 1993.

In that letter you will see there is a - in the second-last paragraph - an admission that there was a delay; that the delay was deliberate; although it said there was no intention to delay the payment. In fact, there was a deliberate delay for purposes which however one might wish to view them were not reasons beyond the control of the employer, the delay in payment of wages.

The following letter is in response to that signed by Michelle O'Byrne our divisional branch organiser which reads:

Please be advised that your explanation of the operation of the PAYSTAT system has been received by this office.

You will be aware that keeping the wages of Mrs Bailey and Mrs Kerstan was not in a manner "beyond the control of the employer" and as such is in breach of clause 23 of the Miscellaneous Workers Public Sector Award.

I would like to take this opportunity to inform you that both Mrs Bailey and Mrs Kerstan did indeed contact the pay office to enquire as to the whereabouts of their pay. Upon enquiry our members were informed their pay was on its way.

The writer discussed this issue with Mr Denne on Friday 16th July at 3.00 pm and was instructed to

discuss the issue with Mr R. Hayes and Mr E. Strong and did so as soon as practicable.

I trust your office will now proceed with payment of the claim.

In relation to the matter further a following apparent payment of certain monies Michelle O'Byrne wrote again on the 20th of September stating:

Further to this matter, we have been advised by our members, Ms Bailey and Ms Kerstan, that they have been paid 19 hours each for their claim on waiting time.

Clause 23 Payment of Wages states that:

'Any employee who is not paid at the time so specified shall be deemed to be working during the time he/she is kept waiting'.

As I am sure you are aware this means that Ms Bailey and Ms Kerstan must be paid for every hour that they waited after their normal pay time.

The normal pay day was June 30, 1993. Ms Kerstan and Ms Bailey were not paid until July 13, 1993.

Could you please contact this office to discuss when payment of the outstanding monies will occur.

And a letter in response dated 28 September reads:

I acknowledge receipt of your letter ...

As your interpretation of clause 23 is not clearly apparent from my reading of the Award, I have sought advice from Public Sector Management Office. I will advise you of the outcome as soon as possible.

And a further letter dated 10 November from Mr Ramsay this time to the secretary:

In reply to your letter of 20 September 1993 I advise as follows.

Advice from Public Sector Management Office (PSMO) indicates that the Miscellaneous Workers (Public Sector) Award is silent on the calculation of payment for waiting time. Normally an employee is paid waiting time in addition to their normal time. In this case the employees had ceased work and the

payment already made is considered to be suitable payment for waiting time.

Should you wish to pursue this matter further you should do so through discussions with PSMO. The appropriate officer in that organisation is Mr Des Hanlon -

- and the phone number is there included.

The next document is a chronology of events as to what occurred, and I won't go to it at this point, other than to invite the commission to read it.

The last item, 'Application to Tasmanian Industrial Commission' refers to an application under section 29 of the Act which was withdrawn in circumstances where the minister objected to the commission handling the matter under that section of the Act for want of jurisdiction and in the circumstances we indicated it was our preference to withdraw the matter and proceed otherwise.

We are before you today.

The last item is background information which advises of the status of the two employees:

Mrs Kerstan and Mrs Bailey, were employed by the Department of Construction and then later the Department of Environment and Land Management for 19 hours per fortnight as cleaners.

On 30 June 1993 they availed themselves of the redundancy package offered to State service employees.

Payment of wages owing was not made until 13 July -

- that is wages, that is not referring to leave or any redundancy payment. That is the wages due to them at the time they terminated.

Clause 23 of the Miscellaneous Workers (Public Sector) Award sets out the conditions pertaining to waiting time. The issue of the entitlement to waiting time is not in dispute it is the calculation of that rate.

Now I am not sure if that's correct. We will wait to see.

And that's all I'd seek to rely upon there.

PRESIDENT: Well you would have to have a fair idea of what it is - whether it's the - whether or not there was an entitlement or whether it is a question of rate.

I mean, I need to know so that I know what to interpret.

MR O'BRIEN: Well I think there's been some payment made. I'm not sure that that's been made in acceptance of the meaning of the provision of the award.

It's not clear to me, and all I have on that is the correspondence that you have before you.

PRESIDENT: But I mean, I guess that is something that could be settled another way, but the question of the interpretation is going to, what?

MR O'BRIEN: Well, the question of the interpretation is going to the meaning of the award.

Our view is that the award entitles the employees to be paid as if they were working from the time the pay fell due until it was paid.

We believe that's what the award means. That is the claim made by the employees through us.

We sought to have the matter resolved in proceedings under section 29 of the Act. The employer was not amenable to that course and suggested that there were jurisdictional problems.

This commission certainly has the jurisdiction to determine what the award means, if that is the problem.

If at the end of those proceedings the matter cannot be resolved, then the employees have their rights at the law to seek to recover monies.

We do have a problem, which I mentioned, on the interpretation, and that is I am fairly certain that no government has been - put itself in a position of being convicted under its own laws - and conviction under the Industrial Relations Act is probably not available, which would then mean that there would have to be a civil action for the recovery of monies, which I think would be available to the employees, dependent upon the outcome of these proceedings, in the absence of the matter being resolved between -

PRESIDENT: The Crown is bound, though, by the Act.

MR O'BRIEN: I understand that, but I am not certain that the Crown has ever been convicted under any of its acts, no matter how bound.

PRESIDENT: No. There is always a first time.

MR O'BRIEN: Yes, well forgive us for not seeking us to establish that precedent, if we don't have to.

PRESIDENT: Alright, I think I have got a bit of an idea of what we're going to.

MR O'BRIEN: What the application asks is that a determination that the provision relating to waiting time means that all time spent waiting for the wages to be paid is deemed to be time spent working. That's the first point.

We think that is easily available under the provisions in the award.

The time is paid as if the work continued for all such time. We equally think that's open to you, Mr President.

The time, other than the time spent working, because it is continuous, would be paid at overtime rates, is another of our contentions, and that -

PRESIDENT: Well, that would flow from the proposition that it is continuous. I mean if that's successful, yes.

MR O'BRIEN: I believe that it does, yes.

And, indeed, the elapsed time after the contract of employment is otherwise ceased is counted as waiting time for the purposes of the clause.

This being a circumstance where the employees were the subject of a period of notice which expired on or around the time that the payment of wages was due.

The award otherwise says that the employees are deemed to be working during the time they are kept waiting.

It is our contention that in terms of that period of time that the award has the effect of requiring - because it is the payment not the actual work that is the determination of the provision in the award, that is that time runs until the payment is made, and that is a clear provision in the award. Any other events cannot cut across the requirement of the award.

And, can I say that if that were not the case, what would be by implication the case that an employer to avoid any real penalty under a waiting time clause - and I will come to that issue later - but to avoid any penalty the employer could purport to dismiss an employee to avoid such payment, if that were the case. If it were the case that there was some

interruption to this provision by the termination of the contract of employment, and indeed the termination of the contract of employment, in our view, is not completed until the payments as required by the award are made.

PRESIDENT: That's the key.

MR O'BRIEN: That's one of the key issues, yes, Mr President.

PRESIDENT: So you are saying termination can't be effected until the payment is made?

MR O'BRIEN: In our view, Mr President, it is not so effected until - the contract is not terminated until those provisions which are in the contract of employment, as required by the award, are met.

PRESIDENT: What would flow from that?

MR O'BRIEN: Well there are a number of things that you would have to say that when someone ceases employment the provisions of their contract which continue to be obligations - for example, if I terminated my employment there is an agreement to waive notice - I still have an entitlement under the award for paid leave which has accrued. And the provision for any wages which -

PRESIDENT: But that only goes up until the date -

MR O'BRIEN: The accrual period, that's correct, but the entitlement is maintained beyond the termination of the contract of employment, yes.

PRESIDENT: True. But I guess that is a recognition of the practical needs in terms of putting together pieces of paper and money to coincide with the termination.

Anyway, I just wondered how that notion that the contract continues until the payment - termination payment - is effected; how that would impact on the question of waiting time.

MR O'BRIEN: The contract is not completed until the wages arising from the contract are paid because of a specific provision in the award, not because of some other provision, and the provision in the award says the employee is deemed to be working. That's the provision that we rely upon.

PRESIDENT: Right.

MR O'BRIEN: In the absence of that it would be a more difficult proposition to say that the employee had an entitlement that continued beyond what would otherwise be the termination of the contract of employment.

The contract is the award and the award says that the employee is deemed to be working.

So, whatever other events have occurred, this event is one which the award would deal with as a continuing aspect of the employment. The award being the contract of employment.

In relation to the provision in the award itself the award, as I say, has a couple of provisions under Clause 23 - Payment of Wages which are important in relation to this interpretation.

I will read the -

PRESIDENT: Well, they are the only things I can look at.

MR O'BRIEN: Yes.

PRESIDENT: The words, yes.

MR O'BRIEN: Yes. I think, for the purpose of the elaboration of what wages means you might have regard to clause 8, but otherwise I don't think there is a need to go beyond this clause.

PRESIDENT: Yes. I wasn't restricting my comments to clause 23. I'm just saying it is the words in the award that I have to examine and you have to address.

MR O'BRIEN: Yes. Clause 23 reads:

The employer shall specify a time and place at which wages and other moneys are to be paid to the employees other than employees engaged for less than one week.

And it is clear that the two employees in this case don't fall in the latter category because they were engaged for more than a week.

The time so specified shall not be more than 48 hours from the time when such wages become due and shall not be later than Thursday in the week. Any employee who is not paid at the time so specified shall be -

- and which I will take to mean the ordinary pay day and pay time on pay day.

- shall be deemed to be working to be working during the time he/she is kept waiting.

And then it deals with casual employees which is irrelevant.

Now there are a couple of things that flow from that. It doesn't say shall be paid waiting time, it says 'shall be deemed to be working'.

Now one asks the question, what happens when one is working, and when one is working the answer is one accumulates payment pursuant to the award.

And it flows from the words, the employee 'shall be deemed to be working' that the provision means that the employee is deemed to be working and accumulating an entitlement to payment under the award.

And if I can enlarge upon that. If you go to the last paragraph of that clause it reads:

Where payment is to be made by cheque or direct bank deposit and such cheque is not met on presentation such bank deposit is not made at the time specified, otherwise than in circumstances beyond the control of the employer waiting time shall be paid.

So the intention of the clause is further elaborated in the words 'waiting time shall be paid'. That is the time the employee is waiting, which has already been described as time which the employee is deemed to be working the employee is paid.

So we say that in relation to the provision in clause 23 the employee is deemed by that provision to be working. That is, the employee is not required to do anything in relation to that time. The time is deemed to be working time. The employee may be doing anything. There is no requirement for the employee to be actually on the premises waiting for money or performing work or doing anything other than going about whatever they wish to be going about. They are deemed to be working during the time kept waiting.

Now if some of that time is spent working it has already been paid, at least in part. The question is at what rate it should be paid.

But if the employee is deemed to be working continuously, then there may be a difference between the employee having been paid at ordinary time rates and the appropriate rate, which we would say would be overtime rates.

So we say that it is clear that the award says whatever is happening the employee so far as the provision in the award is concerned in the event that the employer doesn't pay the wages on the date and time specified, that is the normal pay day, the employee is deemed to be working.

Now if that time runs it runs until the wages are paid, because - and I say that that flows from during the time he/she is kept waiting. It might better say kept waiting for the payment of the wages. But I believe that's the only conclusion that one can reach in terms of the clause. That it means that they are waiting for the payment. The employee is deemed to be working - disregard all other circumstances - the contract of employment which the award says that is the case until the monies are paid.

So, whatever else has happened, the contract of employment in our view overrides any other event in terms of the entitlement of the employee to a payment.

Indeed, because it is not within the control of the employee we come to the specific circumstances where the employee resigns and is not paid.

This is a protection which is built into the award to ensure that there is, as has been found in other proceedings pursuant to this section of the Act, intended to be a penalty on the employer payable to the employee for the inconvenience of not being paid for wages.

And it goes beyond the question of performance of the work under the contract.

And perhaps it is an appropriate time for me to refer you to -

PRESIDENT: Before you do -

MR O'BRIEN: Right.

PRESIDENT: In the second sentence in the first paragraph it says:

The time so specified shall not be more than 48 hours from the time when such wages become due and shall not be later than Thursday in the week.

MR O'BRIEN: Yes.

PRESIDENT: How do you establish the specified time for these redundancy situations?

MR O'BRIEN: Well, you don't, you look at what is the normal pay time. You see, the pay week may be, you know, Monday to - or fortnight - it might be Monday, 1 minute past midnight Monday morning, through to midnight on the next Sunday night or Sunday fortnight, so that you have got a 2-week period.

If that were the case, the wages could be paid no later than the end of Tuesday because of that 48-hour span. That's what that means.

So that there is a requirement. Whatever time is specified it must be paid within that time.

And certainly even if the pay week finished at midnight on Wednesday it would have to be paid by midnight on Thursday, although the clause is one which is an old clause which originally comes from the old Cleaners Award, and I believe remains in this form in that award, the intention was not specifying that the employees would be paid at their particular place of employment, because of the variety of employment circumstances there, and also under this award, that there would be a time and place that wages would be paid.

Originally that was, of course, people would get their cheque or cash presented to them, or they would go to an office and get their money; and, of course, these days people are either receiving cheques or direct bank deposits, as is now provided for in the clause.

But that's the origin of that type of provision. It allows - where it says a time and a place, obviously if it is by direct bank deposit, effectively that is by depositing it in their bank account - and the ordinary time which would normally be a time on the nominated pay day.

PRESIDENT: Yes. So that time, that waiting time, doesn't start to run for 48 - until 48 hours has elapsed?

MR O'BRIEN: No. It runs immediately after that time has passed; 48 hours refers only to the pay week. The wages became due at the end of the week of the work nominated, so they work 5 days or 10 working days, finishing let us say at midnight on Tuesday night. The wages are then payable and they may be paid in accordance with this clause within the next 48 hours, but not later than Thursday. So that's what that provision in the award means.

The next step is that it's at a time and place specified, or in the case of a bank deposit directly into a bank, at a given time.

Now it is at that point if the payment is not made and there isn't an excuse as provided for in the last paragraph in relation to cheques or bank deposits, the payment is not made. Waiting time, the person is deemed to be working then.

They may well be working at that time -

PRESIDENT: How is that time specified in this case? How was it specified?

MR O'BRIEN: As I understand it, there is a normal pay time and I couldn't tell you from my own knowledge now how it is specified. There is a normal pay time.

In many circumstances where it would be by direct bank deposit what would occur that the money would be paid, actually credited the day before and be available, say, from 9.00 am the following day.

In the case of a cheque it might be that the cheque is available to be collected from a central point with the employees of this department from a certain time.

Now in one case - in the case that I'm about to draw to your attention - which involved the hospitals award and the minister for public administration the money was not available until 2.30 the following day and under the provisions of that award time ran from in that case 15 minutes after the nominated pay time until the money was available, whether collected or not.

This award doesn't provide for a 15 minute grace time, if I can call it that.

So perhaps to further elaborate on this I'll tender just part of the decision in Matters T.5752 of '87, 796 of '87 and 802 of '87, but -

PRESIDENT: Mark it O'Brien.2.

MR O'BRIEN: I'm only referring to the part of the decision which refers to T.752 of '87 - the application by the Hospital Employees Federation for interpretation re clause 30 - payment of wages - payment for period of waiting time when no wages available on regular pay day.

I think it - and my understanding, this decision was not the subject of - of appeal, it was not objected to in that sense by the employer who in the circumstances is the same employer appearing in these proceedings, although there is a different terminology now, as I understand it.

There are some differences between the award provision but in - in my submission they're actually differences which strengthen our argument.

PRESIDENT: Do you have a copy of the award submission?

MR O'BRIEN: It is referred in the decision.

PRESIDENT: It's referred to is it - good. Okay.

MR O'BRIEN: Yes, the - page 5 of the decision in the middle of the page says:

The relevant parts of Clause 30 state -

PRESIDENT: Right, okay.

MR O'BRIEN: And you'll see:

"An employee kept waiting for her wages on a normal pay day for more than a quarter of an hour after the usual time for ceasing work

- in this case -

shall be paid at overtime rates after that quarter of an hour with a minimum of a quarter of an hour."

It also says down - further down the page:

"Wages, including overtime, shall be paid by cash or by cheque if agreed to by the employer and the employee concerned (or in the event of a dispute the appropriate union) at intervals of not more than 2 weeks, and not later than Thursday of the week of payment."

The reason, I think, if I can impose this - I don't think it adds or detracts to the argument - for the differences between the two clauses, one relates to the hospital industry where people work at set sites which are usually the sites where administration is based and so the talk of payment at work during working time or within 15 minutes of normal ceasing time will be relevant with people attending for work and collecting their payment from the place at which they work. In the industry from which the provision in this award came, almost invariably the employee would not be working on the premises where the employer's administration would be based, either in the old Cleaners Award or contract cleaning area or most of the employees under the Miscellaneous Workers (Public Sector) Award who would not be working for example in the case of Department of Environment and Land Management in the office of that department but would be working at a number of other government buildings around Hobart, Launceston and other points in the state, for example.

So there is a difference there and the terminology is relevant because rather than talking about the time people finish work, that's not relevant. It is a nominated time in a day by which wages are available to be collected. And that's - if I can just put my view that there's a reason in the difference in terminology.

This clause does not say employees are deemed to be working. It just says they'll be paid at overtime rates.

Now there was an argument in these proceedings which I think you will find quite significant.

Mr Pearce argued - beginning on page 7:

However, he argued that where an employee is informed that no pay at all will be available on pay day and for that reason the employee need not remain on the premises after ceasing time, no compensation is payable as waiting time is not involved.

Mr Pearce was able to call in a number of cases decided by other courts and tribunals, these prima facie support for this contention.

- and there was reference to a South Australian case and then it goes on:

Mr Pearce argued that the ratio decidendi of Mayo J (in the judgment referred to) was preferred to the argument of the applicant that waiting time meant all time elapsing 15 minutes after knock off time on pay day until payment is actually made.

Another of the cases to which the Commission was referred was a decision by a member of the Australian Conciliation and Arbitration Commission given in transcript. This decision was, in all probability, ultra vires the Conciliation and Arbitration Act 1904 and appeared in any case to be a hybrid arrangement that was neither an interpretation nor a decision on merit.

Other references were made to decided cases. Each in their own way tended to be of some support for the opposing views presented. But none of the matters to which the commission was referred was on all fours with the issues giving rise to these applications. However, the head note to the Cranford-Webster v McFarlane Case does, I believe give some indication of the kind of the consideration that needs to be given to the interpretation of industrial awards.

And I believe if you read it that's substantially one of the principles that's used in this commission now.

The head note states:

In interpreting a provision of an award a court of summary jurisdiction or the Supreme Court has power only to ascertain what is implicit in the immediate context or in the award generally. It

has no power to supply by interpretation any omission in the award of which the intendment was not so implicit, for such an interpretation would be in the nature of a supplemental award.

This gives succinct expression to a number of the guidelines for interpretation laid down by the Commission in matter T.30 of 1985.

Having considered all the material and arguments presented by the protagonists in the context of the known facts, I am unable to read into the 4-line paragraph about which there has arisen this difference of opinion that waiting time means time spent in waiting, (a), on pay day only; or (b), at the direction of the employer.

Moreover, I am unable to conclude that payment is in the nature of a disability allowance as distinct from compensation, for receiving no pay and I cannot agree that it does not apply after the employee leaves the premises without having received payment of salary or wages due. I do not believe that the particular paragraph means that no compensation is payable if the employer indicates payment of wages will not be made on the pay day and may not be made on the next or subsequent days.

To read any of these conclusions into the words actually used would indeed be tantamount to making a supplemental award on merit without having heard argument in proceedings convened for that purpose.

Whatever the intention of the award maker was at the time, the truth is this borrowed provision was coined many years ago when more "casual" employees that weekly hired or salaried officers were to be found in the work force. In the context of today's industrial realities, none of the meanings that I was urged to accept as flowing implicitly from Mr Pearce's submissions can be discovered from the form of words actually used. One needs only to consider the clear award prohibition against determination of pay day after Thursday to realise that to ignore such a requirement could result in allegations of award breach and the consequences that flow from a transgression of that kind.

It is reasonable to suppose that proven case of breach could result in the prosecution of the offender. It should also be reasonable to conclude that an aggrieved employee might be compensated in some way for not being paid on the day his wages fall due for payment. Clearly an employee who is

not paid on his regular pay day can be seriously inconvenienced. It would seem illogical therefore that there be prosecution of, and imposition of a penalty on an employer, by a court of competent jurisdiction, unless imposed in the nature of compensation payable to an employee. It would be of cold comfort to a person who has been deprived of his pay on pay day (and perhaps for some days following) to see his offending employer fined while the aggrieved employee himself continues to wait for his wages without payment of compensation for the inconvenience suffered.

There could be no doubt in the mind of a reasonable person that in those circumstances the aggrieved employee is "waiting" for his wages to be paid and prima facie might be entitled to be compensated in some way for his trouble.

This, I believe is a sensible interpretation of the current provision. It may not be what was intended. If so, any defect can be put right by an appropriate application to vary the award.

Accordingly, I declare that on the proper construction of Clause 30 of the award the two temporary employees who received no pay on pay day are entitled to be paid waiting time.

I further declare that payment should be at the overtime rate applicable to the employees concerned and should not exceed the maximum permitted by the award.

Payment of waiting time should commence 15 minutes after each employee's normal ceasing time and conclude at 2.30 p.m. on the following day when pay was available, wither collected or not.

The waiting time component to which an aggrieved employee is entitled during any period spent at work on the day following pay day would be the difference between the ordinary time and the appropriate overtime rate. At all other times the waiting time component would be ascertained by reference to the relevant overtime provision.

This interpretation shall apply retrospectively to 26 March 1987.

I can find no authority more relevant to this matter than that decision which, as I indicated, involves this employer, it involves this commission, it involves it - whilst the provisions are not identical, the - the principles which are

espoused are equally relevant to this case. It is clear in that case the president found that it was intended by the award that the employee be compensated for not receiving their pay. The award prescribed a - a means for determining what that compensation would be which, in that case, was the period of time spent waiting paid at overtime rates. That is explicit in that award.

In this award it is said that the employee is deemed to be working. In my submission the result is no different. The employee is deemed to be working until paid and the provisions which are adopted there, excluding the 15 minute waiting time - grace period, if I can call it that - equally apply in this case. These employees, following the expiry of the time at which their normal pay was due and payable and when it was not paid, were deemed to be working until it was. That would then mean, in my submission, as I understand that they would have concluded work for the day on that particular day, that they would commence to accumulate their waiting time at overtime rates and to the extent that if they did perform any work subsequent to that day, then they would be paid the difference for that time between what they were paid and the actual overtime rates for the time so worked, but the time would be running continuously at overtime rates for the period which elapsed between the time when pay was due and the time when the payment was actually made.

PRESIDENT: Yes, there's a bit - there's a bit of subtle difference there that interests me. This one - the Hospital's Award, refers to being - the payment being at overtime rates.

MR O'BRIEN: Yes.

PRESIDENT: Specifically. The -

MR O'BRIEN: Mm.

PRESIDENT: - Miscellaneous Workers simply refers to be paid at the time - shall be deemed to be working.

MR O'BRIEN: Yes. Well the reason for the difference is -

PRESIDENT: And then it's got to be in accordance - yes - it doesn't say anything about being in accordance with the award - just to be deemed to be working during the times she - he or she is kept waiting.

MR O'BRIEN: Yes. It says - in my submission it's not necessary for it to say that because if they're deemed to be working then they're entitled to payment in accordance with the award otherwise it would be a meaningless provision. I mean what - what does it mean if it doesn't mean that?

PRESIDENT: Yes, so if they're deemed to be working, are there restrictions to the amount of work they can perform?

MR O'BRIEN: Well the hours clause, their contract of employment otherwise - those are the - the other aspects of the contract of employment which would determine the rate of payment, but as I said, of the area of work this covered, let's say that the employee concerned was not an employee of the Department of Environment and Land Management, but worked for the Education Department, their shift might be 1.30 pm to 10.00 pm, their pay may have been due at midday, they would be deemed to have started work at midday and time and would run until they were paid, so even though they worked a full 8 hours in that time, that would be calculated as their normal working time, but it would continue on after that until they were paid.

PRESIDENT: Yes.

MR O'BRIEN: And because this provision is different from the Hospitals Award provision, that is, the hospital's provision applies to an industry where people are usually working at the site where the administration exists, and not at disparate sites all over the place, it is a different provision. This provision meets the needs of the circumstances that employees under this award mostly find themselves in, that is, they are working at outlying posts away from the administration, so when they - and because shift work is the norm rather than the exception, that they are often not working when the pay time falls due.

PRESIDENT: Yes. In this - in this case, the compensation component - the waiting time - is the difference between the overtime rate and the pay rate.

MR O'BRIEN: In - in this -

PRESIDENT: In terms of the hospital one.

MR O'BRIEN: Only to the extent that work was performed.

PRESIDENT: Yes. Yes.

MR O'BRIEN: Yes.

PRESIDENT: Where work was performed and the payment was - for the work was deducted.

MR O'BRIEN: Yes, I'd see no difference between the two - if work was performed during the period employees were kept waiting then they're entitled to be paid at overtime rates - you can't double pay for that period, and we wouldn't be -

PRESIDENT: Yes.

MR O'BRIEN: - suggesting that it means that. It just deems them to have started work at the time the pay fell due and was not paid and to have worked through until it was paid - whatever - whatever was performed in that time.

We - we believe that the provision, if it has any mean it at all, it has to mean that being deemed to be working they're entitled to pay for the time they're deemed to be working and the calculation is in accordance with other provisions in the award. And equally the deeming provision overcomes any suggestion that otherwise their contract of employment has ceased because this deems them to be working until they're actually paid.

In relation to -

PRESIDENT: I suspect it's more for people who are being continued to be employed rather than those who are being terminated.

MR O'BRIEN: Well it does exclude casuals who would normally be terminated at the end of each shift.

PRESIDENT: Yes.

MR O'BRIEN: But it does not exclude - specifically exclude - people who are ceasing employment and there is an - because there is an exemption as to casuals, one can say that those people are in fact entitled to payment - well - oh, sorry - it doesn't exclude casuals - it says: The shall be paid within 1 hour of the termination of employment.

PRESIDENT: Yes. Yes.

MR O'BRIEN: So if I look at that again and withdraw what I said earlier, it could equally apply to casuals and if it applies to casuals whose contract ceases at the end of each engagement why does not it apply to others whose contract may have a longer life but can equally cease.

PRESIDENT: Mm - interesting.

MR O'BRIEN: In terms of the - the actor, we would simply at this stage that we were asking that you declare the provision of the award is to be interpreted in the manner outlined in the application subject of course to any amendments that you believe need to be made to meet your views on the interpretation of the award. We - in other words they - we believe those words are to the point and adequate but if the commission believes that some other words in the declaration are necessary to give the proper interpretation to the award then obviously that's in the hands of you, Mr President.

The - I think that all of those points deal with the circumstances which arise in this case and we would be asking that the declaration be made retrospective. It is one which - the provision having existed in the award since its making; it having been made by consent, but -

PRESIDENT: It's not been tested before?

MR O'BRIEN: It's not been tested before. We've been very patient, Mr President.

PRESIDENT: When was the award made?

MR O'BRIEN: You're testing my memory now, Mr President, I think it was 1988.

PRESIDENT: It rings a bell. Yes.

MR O'BRIEN: In any case it should be made retrospective to a date preceding the date on which the incident complained of in the circumstances giving rise to this interpretation occur.

PRESIDENT: Which would be prior to the 30th June?

MR O'BRIEN: Yes.

PRESIDENT: Ninety three.

MR O'BRIEN: Yes. That's the 1st June 1993 would be latest date. If the commission pleases.

PRESIDENT: Yes, alright, thank you, Mr O'Brien. Mr Foley?

MR FOLEY: Thank you, Mr President. I'll start by elaborating on the Environment and Land Management cleaners because I can add some information that may assist you. The cleaners were employed by environment and land management, having been transferred from the Department of Transport and Works, but because of requirements in the - in the award for pay slip information they continued to be paid by Transport and Works - the Environment and Land Management system couldn't handle the information required - so payment was prepared by Transport and Works and was - they were actually paid on Thursday mornings and a cheque was delivered to the site that they worked at - and these ones, I believe, worked at Victoria House and the cheques were delivered by the supervisor of that site before the people knocked off prior - just prior to 7.30 on a Thursday morning.

In contrast the redundancy payment was handled Environment and Land Management. The cleaners terminated on 30th June 1993 - that was a Wednesday. Their normal pay - pay day - was a Thursday, so for that week pay day would have been the following day.

PRESIDENT: They were paid weekly were they?

MR FOLEY: I'm not sure of that point, but -

PRESIDENT: Oh, I see.

MR FOLEY: - but their day of payment for that week - they due for payment on the 1st July which was the Thursday, now whether that was a week or a fortnight's pay, I'm not sure.

PRESIDENT: Yes, I took - yes. So they were terminated on the Wednesday?

MR FOLEY: They - yes - they terminated on the Wednesday and all documentation was signed on that Wednesday.

PRESIDENT: Yes.

MR FOLEY: Now that's the process that normally takes place. Now with the - with them having terminated, for the commission's information the - the cheque that was usually delivered by the supervisor found its way to the paymaster of Environment and Land Management. That was unusual of course - they had no part of the pay process previously.

PRESIDENT: And that was on the Thursday was it? Or on the Wednesday?

MR FOLEY: I can't give you a date when it found its way to Environment and Land Management. That's - when it was received there they were dealing with the redundancy and only the redundancy.

PRESIDENT: Yes.

MR FOLEY: So the cheque was assumed to relate to the redundancy and was included in that package of documents and cheques that was being prepared for the redundancy and was given to the employees on the 13th July 1993.

PRESIDENT: So was the cheque date, say, the 30 - 30th or the - or perhaps the 1st July?

MR FOLEY: Yes - I have no information on the date of the cheque but I'm confident that would be the case. It wasn't - it wasn't a cheque relating to wages until the - the final day.

PRESIDENT: Right. So effectively Environment and Land Management held the pay cheque till the redundancy -

MR FOLEY: And gave - and handed it over with the redundancy.

PRESIDENT: - documents were fixed up.

MR FOLEY: So in terms of the discussion previously about the contract of employment, the contract of employment did cease on the 30th June 1993. That's quite clear because the redundancy package was signed by all parties on that day and the people finished work on that day. So we're talking about ex employees and that is a distinction from the hospital's case as well.

Being an ex-employee of course does not exclude responsibility for payments that you were talking about such as annual leave and other payments for time worked. Cleaning employees are still entitled to those monies. It is acknowledged that they were not paid on the final day of - of their employment and they were paid on the 13th July. There were some reasons for that. The redundancy negotiations only started on the 21st June and so the preparation for these people to finish took place after that date. It's not a large time frame to - to work those things out and the people involved in Environment and Land Management - pay staff - were never aware that these people had not been paid their wages during that - for that last fortnight.

As soon as they became aware they were paid and in recognition of the delay that they had caused by holding on to the cheque, they also made payment for the time that those employees would have worked until payment was made. That was done on - as a generous gesture recognising that those employees had suffered inconvenience in not receiving their pay up to the time of termination.

PRESIDENT: So they were paid for hours that they would have worked if they hadn't been - had their employment terminated?

MR FOLEY: That's correct.

PRESIDENT: Yes.

MR FOLEY: They were paid -

PRESIDENT: So they would have worked 19 hours -

MR FOLEY: Yes - the actual amount is -

PRESIDENT: - between -

MR FOLEY: - \$219.64, which I believe is 19 hours.

PRESIDENT: - between the 30th June and the 13th July?

MR FOLEY: Yes.

PRESIDENT: And that was the rationale for that payment.

MR FOLEY: For the payment made. It wasn't paid as waiting time - I'll come back to that in a moment - but it was paid - the cleaners were not kept waiting - which I'll come to shortly - it was paid in recognition of the delay resulting from the mistake that was made, and this is, they were paid as if they were working during the period until that payment was made.

The claim for overtime - for overtime to apply it is inherent that the workers must be ready and willing and available working overtime. Payment is made for time on duty in excess of some nominated hours, and that doesn't - is not the case in this matter.

PRESIDENT: Yes, that's - but that - the - the specifics in this - in our award provision are that the employee shall be paid as if deemed to be working and that then leads one side of the argument to say well if they're going to be deemed to be working then obviously after a certain number of hours they're going to run into overtime rates.

MR FOLEY: Mr President, I will return to that -

PRESIDENT: Okay.

MR FOLEY: - I have some material prepared that may assist there and I'm quite happy to return to it in -

PRESIDENT: Very good.

MR FOLEY: - any way that you prefer, but it probably is timely in fact to move past the specific Environment and Land Management case to the - to the general matter of the determination that is sought.

PRESIDENT: Yes.

MR FOLEY: The first thing that is sought is that waiting time is interpreted to mean 'all time spent waiting for wages to be paid, is deemed to be time spent working.' As an initial point I would like to remove that comma - I don't think it makes any sense with the comma there, and I can make sense, and I believe I can make the sense that the applicant intends by taking the comma out after 'paid'.

PRESIDENT: I - I'm not certain that my copy of the award has got a comma in it.

MR FOLEY: Not the award, in the application of the -

PRESIDENT: Oh, I'm sorry.

MR FOLEY: Yes. 'We seek a determination - and there's a comma then put in after 'paid'.

The provision relating to "Waiting Time" is interpreted to mean all time spent waiting for wages to be paid, is deemed to be time spent working.

And I assume that comma is simply a misprint.

PRESIDENT: Yes, I don't think Mr O'Brien -

MR FOLEY: So -

PRESIDENT: - would object to you suggesting that the comma is irrelevant. Yes. Okay. Mr O'Brien is reluctantly nodding.

MR FOLEY: In the clause, waiting time is used only to describe the situation where a cheque has not met on presentation or a bank deposit is not made at the time specified. That's in the final paragraph of the - of the clause 23.

PRESIDENT: Would you run through that again?

MR FOLEY: Waiting time - the phrase 'waiting time' -

PRESIDENT: Yes.

MR FOLEY: - which is what you're being asked to make a determination on, is used only to describe the situation where a cheque is not presentation or a bank deposit is made at the time specified.

PRESIDENT: And how do you reach that conclusion?

MR FOLEY: Well that's the only time that the phrase 'waiting time' is - is used in the - in the clause.

PRESIDENT: And where is that?

MR FOLEY: In the final line of the - of the clause.

PRESIDENT: Yes.

MR FOLEY: The key phrase - phrase - relating to 'deemed to be working' is 'kept waiting'. Now that's found in the first paragraph, third sentence. Significantly it is kept waiting and not spent waiting which is the wording used by the applicant in the determination sought. There is a big difference between spending time and being kept waiting. And I'll come back to that later.

First -

PRESIDENT: Yes.

MR FOLEY: - though, let me take you back perhaps to gentler times when wages were paid in cash and employees lined up at the pay office window. Of course even in those times there were employers who were prone to stretch the rules. Some paid their employees so late in the day that they were being paid in their own time. The queue was too long for all to be paid during working hours so something had to be done. And award provision was included that compensated employees in those circumstances. If they were kept waiting they were paid extra time. Sometimes at overtime rates in some awards for the time that they were delayed.

Over the years payment by cash has largely disappeared. In the public sector unions agreed to electronic funds transfer as part of the 4% second-tier arrangements. Where EFT has not been introduced payment is made by cheque. So, Mr President, you're being asked to interpret a clause that has its origins in another era. It has no relevance to modern pay procedures.

The award was first made in 1988 -

PRESIDENT: What, people don't get - don't have to wait for their pay any more?

MR FOLEY: They do not line up at windows -

PRESIDENT: Oh.

MR FOLEY: - they do not have cash put in an envelope and given to them.

PRESIDENT: That's - so that - right - so there's that distinction - yes.

MR FOLEY: And - so the clause was born of that era. This award was first made in 1988. Clause 23 - Payment of Wages - was imported from the private sector's Miscellaneous Workers Award - or perhaps the Cleaners Award at the time - word for word. It may have some relevance in some private sector business - perhaps in remote areas but it is irrelevant in the context of the public sector.

The award was made in recognition -

PRESIDENT: Why would it have been put in then?

MR FOLEY: The award was adopted to give validity to a situation that already existed. Cleaners were being paid in accordance with the private sector Cleaners Award or perhaps the Miscellaneous Workers Award had come in by that stage.

But they were then paid as if they were working in the private sector. That award was being used as a guide.

PRESIDENT: Yes.

MR FOLEY: So the - many clauses were adopted to give validity to a situation that already existed.

PRESIDENT: Yes. And at the time - is clause 23 identical to the clause which was inserted in the award when made?

MR FOLEY: Yes.

PRESIDENT: So the three paragraphs existed in exactly the same -

MR FOLEY: Yes - there's been no change to the award and clause 23.

PRESIDENT: Right. So there was - there was provision there for payment by cheque and bank deposit -

MR FOLEY: Yes.

PRESIDENT: - and EFT?

MR FOLEY: Yes, from 1988 onward.

PRESIDENT: So you could construe from that the whole provision was deemed appropriate and it covered all -

MR FOLEY: I have no knowledge of any - of that clause being contested. There were matters that were contested at the time but I'm unsure whether this is one of them.

PRESIDENT: Yes.

MR FOLEY: But the matter of wages payment in the public sector is being addressed currently. There has been a submission to update the payment of wages clause amongst others in the General Conditions of Service Award.

PRESIDENT: Yes.

MR FOLEY: That submission was made to the deputy president of the commission in August of 1993 -

PRESIDENT: Yes.

MR FOLEY: - 'T' Nos. 2323 and T.4287.

PRESIDENT: I'm prepared to listened to this argument on - on the basis that it's providing some background, but it really doesn't go to the precise issue of what the words mean which - which I have to consider.

MR FOLEY: I understand that, Mr President, but I will get -

PRESIDENT: But I - I say I'm just - I'm just making -

MR FOLEY: - I will get to the words.

PRESIDENT: - the point that I'm prepared to listen to the background but only on that basis -

MR FOLEY: Yes, I understand that and I -

PRESIDENT: - that eventually we get to the words.

MR FOLEY: - I accept that and appreciate that. But once the General Conditions of Service Award has been finalised and the wording is approved it is intended to apply to extend that provision to other public sector awards, so in that context it's unfortunate that you are now asked to interpret an outdated provision that is unsuited to the needs of 1994.

PRESIDENT: Yes, that's - that's your submission - I understand - but as I said before, that's a subjective approach to the - to the award. I have to really consider what - what the award says. I mean it's relevant for you to tell me what may have been intended in the - by the award makers but at the end of the day I've got to look at what the words are and what they mean in the ordinary use - usage of the English language.

MR FOLEY: Yes, thank you, Mr President. My intention is to give it some background in the same way that we need to know the background of the Environment and Land Management situation.

PRESIDENT: Yes, well I accepted that in the same sense because Mr O'Brien's getting very nervous about the subjective manner in which you are addressing some of the issues, and to say that the award is outdated really is irrelevant in terms of interpretation.

MR FOLEY: I'm prepared to return to the determination immediately.

PRESIDENT: Yes - thank you.

MR FOLEY: The second point is that in the - what was sought in the application is that such time is paid as if the work continued for all such time. Now 'such time' appears to refer to all time spent waiting, but if time spent waiting is

not being kept waiting, then this part of the determination must fail - the application must fail. And it must fail because the dictionary - and I've used the 'Shorter Oxford Dictionary' but I do have others if required. But the 'Shorter Oxford Dictionary' defines 'keep' and apply that to 'kept' is:

To cause or induce to remain; to detain.

So the award refers only to a situation where an employee is detained. Unless the -

PRESIDENT: What was that full definition again?

MR FOLEY: I can give you a copy of that, Mr President.

PRESIDENT: Yes, it would be helpful if you did.

MR FOLEY: At the same time, Mr President, I'll give out copies of the definition for 'wait' which I'll come to very shortly.

PRESIDENT: Yes, alright, and you've got copies for Mr O'Brien?

MR FOLEY: Yes.

PRESIDENT: We'll mark the definition of - of 'keep' as F.1, and 'wait' - F.2.

MR FOLEY: As you can see, Mr President, there's a large number of definitions for 'keep' -

PRESIDENT: Yes.

MR FOLEY: - but I have outlined the - the couple that seemed to apply to this situation. I've not been selective.

PRESIDENT: Yes.

MR FOLEY: So my contention that unless the applicant can show that the employee is detained, then the application must fail.

Similarly, the 'Shorter Oxford Dictionary' tells us that 'wait' means:

To remain for a time without something expected or promised;

or -

To remain in a place, defer one's departure until something happens.

PRESIDENT: Although - yes - so - alright - kept and waiting. There is a definition of 'waiting' of course isn't there - a specific definition - in the second column?

MR FOLEY: Yes. And I think you will find that runs onto an extension of 'wait' itself. Perhaps the last line in that column:

That waits for some person or thing.

PRESIDENT: Yes.

MR FOLEY: So the phrase 'kept waiting' clearly belongs to another era; no employee is kept waiting - detained until something happens - in current times.

Mr President, a similar question was raised in T.4564. In that case, involving the Education Department, and EFT transfer -

PRESIDENT: Which one was that? Have you got - are you going to refer to that?

MR FOLEY: Yes, I'll give you a copy of that.

PRESIDENT: Yes, we'll mark this F.3.

MR FOLEY: In this case, Mr President, and EFT transfer deposited wages into the account of another employee with the same surname. The deputy president defines the verb 'wait' on page 3 - halfway down as:

"Defer action or departure for specified time or until some expected event occurs, be expectant or on the watch".

The following paragraph says:

In my view the circumstances which existed in this particular case are not consistent with the dictionary definition of "wait", in the context of waiting to be paid.

On the previous page at - below the extract from the award it says:

In the context of this particular industrial dispute I am of the opinion that Mr Piscioneri was not in any practical sense "kept waiting" for payment of wages after ceasing work on the normal pay day or subsequently.

The evidence is that he was totally unaware of the fact that funds had not been transferred to his account as usual on each of two pay days until 30 April, and was therefore not waiting to be paid.

PRESIDENT: That's not on all-fours with the current situation is it?

MR FOLEY: Well the situation is that he - money was not available to the employee in the way that it was intended.

PRESIDENT: Well this implies that he didn't know - the employee didn't even know he hadn't been paid therefore how could he be assumed to be kept waiting.

MR FOLEY: Yes, I agree with that. He's not - that was the decision, he wasn't kept waiting because -

PRESIDENT: But there's no suggestion that the employees in this case - in the Environment and Land Management Case didn't know they hadn't been paid.

MR FOLEY: No, but -

PRESIDENT: In fact they were concerned they hadn't been paid.

MR FOLEY: It does raise the question, Mr President, of when the clock should start ticking. If we allow employees to let the clock run without notifying the employer, then they are building up in the union's contention sizeable payments that are a bonus way of what was ever intended by any - by the award provision. They are intended to be compensated for failure to pay wages at a particular time, but in this day and age where an employer may not know that a payment hasn't arrived by EFT or the cheque hasn't been presented or whatever, then it is -

PRESIDENT: But that's not what the award says, is it? There's nothing in there about whether the employer doesn't know. It just says that:

Any employee who is not paid at the time specified shall be deemed to be working during the time he/she is kept waiting.

MR FOLEY: Yes, I hinge all of my argument on the phrase 'kept waiting'. In that case with - that I've just shown you, the claim for waiting time was refused.

PRESIDENT: Yes.

MR FOLEY: But there are other cases that may assist you in determining the matter and a significant case is the Cranford-Webster v McFarlane 1974 where Mayo referred to the:

canons of construction applicable to statutory provisions imposing punishment including awards.

PRESIDENT: That was also referred to in Commissioner Koerbin's interpretation.

MR FOLEY: In my view, not enough weight was given to the comments by Mayo J. in that that decision.

I've prepared an extract of the relevant comments out of that decision.

PRESIDENT: You haven't edited it for us though have you, Mr Foley?

MR FOLEY: I have two documents - one is some of the pages of the decision and one is an edited extract which talks about the canons of construction and talks about waiting time itself. It will save a lot of reading through a lengthy decision. But I am - I have got copies of some pages of the decision where these things have been extracted from.

PRESIDENT: Yes, I think we should have those.

MR FOLEY: Certainly.

PRESIDENT: So we'll - what I think we should do is mark - mark the extract of the - from the decision as F.4, and your excerpts from it we'll just attach to F.4 as an aide memoir.

MR FOLEY: Thank you, Mr President.

If I may read from that extract where Mayo refers to:

Brett J. in Dickenson & Fletcher

re: canons of construction applicable to statutory provisions imposing punishment.

He says that:

They must fail if the words are equally capable of a construction that would inflict the penalty, and one that would not.

PRESIDENT: And where is this to be found?

MR FOLEY: That may be a question that I - I think, Mr President, that I have on these pages that I've given you only the waiting time - pages 168 and 170 - the canons of

construction are earlier in the decision than that - so I don't have those available for you. All I can tell you is that they are a direct extract quote from the decision.

PRESIDENT: Yes, yes. Well it's a fairly well-known notion in terms of interpretations.

MR FOLEY: Well I'll move straight on to the part where you do have copies and that's the 'waiting time', where he says:

"I think it means time which the employee spends at the employers establishment actually waiting for his pay ... and the payment is intended to compensate him for possible loss of other work"

Or at page 170 -

PRESIDENT: Well just take us to page 168 - whereabouts does that appear?

MR FOLEY: Towards the bottom -

PRESIDENT: Right.

MR FOLEY: About eight lines up - 'I think it means time'.

PRESIDENT: Yes. Yes.

MR FOLEY: And at page 170 - and:

the time that an employee spent and wasted in loitering about whilst payment of wages to him was not forthcoming. The appropriate meaning to be given to "waiting" would seem to be staying in expectation, stopping, or remaining stationary, or inactive till the happening of the event, holding over departure.

PRESIDENT: Yes. Now where - where is this on page 170?

MR FOLEY: We're looking - if I can hold this up and point to it, it might be the easiest way - about - there is some comments on the right-hand side of the page and it's about two lines down from there:

"Waiting time" would mean in its ordinary sense the time that an employee spent and wasted in loitering

-

PRESIDENT: Yes - down to 'forthcoming'. Yes.

MR FOLEY: And towards the bottom of the page where you see a small bracket - or the closing of a bracket in the last line of that paragraph:

I treat the prescribed payment as compensation for time lost, waiting time, and not as a penalty imposed for dilatory settlements.

And what I would like to have had is the next few lines going over the page, which I have not given you, Mr President, but where it reads at the bottom of the page:

In any case I am doubtful whether I could by judicial interpretation expand "waiting time" to give the phrase the effect Mr Wright contends -

- it goes on over the page to say:

- it would be in the nature of a supplemental award, that is, a penalty extending until payment is made.

PRESIDENT: Yes, that's the part that Commissioner - that President Koerbin referred to in his interpretation.

MR FOLEY: Yes.

PRESIDENT: So I think we can assume that it was in the original text of the decision. But it would be helpful if when you're addressing these sorts of things you could give the bench and the other side -

MR FOLEY: I appreciate that, Mr President.

PRESIDENT: - full and more extensive copies of the documents that you intend to use.

MR FOLEY: Yes, they were a late inclusion, those pages, but yes, I shall take that into account.

PRESIDENT: I don't know whether Mr O'Brien wants to take it - that any further. Are you content with what you've got there, Mr O'Brien?

MR O'BRIEN: Well in the sense that this obviously Mr Pearce's copy, who was before the president in the matter - the authority that I produced, and also in the sense that what I have is clearly not on all fours with the provision in the award at present, nor are the circumstances on all-fours because this is about a - the inflicting of a penalty -

PRESIDENT: Oh well, you'll -

MR O'BRIEN: Yes.

PRESIDENT: - you'll address that.

MR O'BRIEN: Yes.

MR FOLEY: I think it's important that in that case, Justice Mayo dismissed the claim for elapsed time describing it as extravagant and he states that to expand waiting time in that way would be in the nature of a supplemental award.

Similarly, in a 1985 matter, The Hornibrook Group and the Building Workers' Industrial Union and others.

PRESIDENT: F.5.

MR FOLEY: Commissioner Lear in that decision found no payment to be payable if the employees were not physically waiting. They were paid only for time spent on site and Commissioner Lear states at the last paragraph of the second page you have that there is no justification for the extravagant claim by the BWU to cover the elapsed period.

The situation in that one is that employees turned up for work but did not start - they remained in the amenities shed on site. They were paid for that time but they were not paid overnight when they were not on the premises.

PRESIDENT: And, do you say the award provision is on all-fours with the award provision in the Miscellaneous Workers (Public Sector) Award?

MR FOLEY: Insomuch as the award talks about 'kept waiting', it is, Mr President. There are obvious distinctions other than that, but I am referring to the phrase 'kept waiting'.

PRESIDENT: And does Commissioner Lear address the expression 'kept waiting'?

MR FOLEY: I don't believe he covers it by those words, but halfway down the second page he does say that the employees didn't start work on that day, 'they remained in the amenities shed on site. It is questionable whether the overtime penalty rates should apply to time not worked. Employees presumably considered that as they were still waiting for their wages they were entitled to wait on site as they would have been entitled to do the previous afternoon, and so expected to be paid at overtime rates.' He says, 'The award provision is not clear in this respect'.

PRESIDENT: But they still got paid overtime?

MR FOLEY: For the time that they spent waiting on site they were paid, and they received that benefit, but they didn't receive payment for the elapsed time between one day and another. So when they went home overnight they were not paid for that time. And it was paid for the time that I submit to

you is genuinely kept waiting. They are on the site and waiting for their pay.

I have two more. There is R.M. Parsons Company Ltd., and BWIU, a 1976 case, and in that case it was determined that waiting time is determined - waiting time is working time until the pay was actually delivered to the men. That is, time spent at work but not the hours spent at home overnight.

PRESIDENT: Yes, we'll mark this F.6. And that's item 437, is it?

MR FOLEY: It goes over the page - 437, yes - and it goes over the page. The important part is at the last paragraph:

Concerning what is to be paid for waiting time, a reading of pertinent decisions leads me to regard waiting time as working time on the following day until the pay was actually delivered to the men; that is in addition to any time spent on Tuesday after ordinary -

- the word is unclear in this copy -

PRESIDENT: Yes.

MR FOLEY: Quoting:

- time on the job until told that there would be no payment of wages made and the Commission decides to that effect.

So they were paid - the effect of it, Mr President, is that they were paid for the time that they were on the job but not for the elapsed time in between.

PRESIDENT: So, just help me though that again. What's, 'Concerning what is to be paid for waiting time, a reading of pertinent decisions leads me to regard waiting time as working time on the following day until the pay was actually delivered to the men; that is in addition to any time spent on Tuesday after ordinary' - ceasing, is it?

MR FOLEY: Yes, I am sure it would be ceasing time, to bring into play the waiting time provision.

PRESIDENT: '... after ordinary ceasing time on the job until told that there would be no payment of wages made and the Commission - '. Well we will have a guess at it, I suppose. So what do you want to make of that?

MR FOLEY: Well they were paid for the time that they were on the job - any time that they waited on the normal pay day. After hours they were paid for, but they were not paid when

they went home, but when they returned to work the next day and still weren't paid they were paid up until the pay was available to them.

PRESIDENT: Do we know what the award provision was?

MR FOLEY: It's not stated in the decision, but I assume it is the same as the previous one - Hornibrook and the BWIU - where Commissioner Lear also found there was no justification to cover the elapsed period; and in that one the phrase 'kept waiting' appears. They were within 2 years of each other, the two - no, I am sorry, it is not 2 years.

PRESIDENT: No, it is nearly ten.

MR FOLEY: Some years apart. But they are both -

PRESIDENT: I don't know whether the National Building Trades Construction Award was in place in '76.

MR FOLEY: In the circumstances, Mr President, I can only ask that you use that paragraph for your own purposes, on the basis that it does say, 'a reading of pertinent decisions leads me to regard waiting time as working time'.

PRESIDENT: Yes. Alright.

MR FOLEY: A final case is a 1960 case re the Commonwealth Works and Services Northern Territory Award.

PRESIDENT: F.7.

MR FOLEY: On page 337 towards the bottom you'll find a couple of marks that indicate the parts that are relevant. Spicer C.J. stated that:

... the payment provided for is designed to compensate an employee whose departure from the place of employment is delayed by reason of the failure of his employer to pay him in the employer's time.

And then at the bottom it refers -

PRESIDENT: I'm sorry, I am having difficulty. Where is this again?

MR FOLEY: You'll find two marks - a couple of marks - on the bottom right-hand, and it starts in the middle of a sentence, I must say, but halfway down the higher of those marks. '... the payment provided for' is the first phrase.

PRESIDENT: That's halfway along - I see - so it is halfway along the fifth line. It might be best - put it all in context, please, yes - reread the whole of it.

MR FOLEY: Yes, I can read that whole sentence, which is a lengthy one.

PRESIDENT: Yes, please.

MR FOLEY: Quoting:

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

PRESIDENT: Yes, well those two quotes taken from the clause which you read out put a different construction on it altogether, don't they, because they specifically refer to 'from the close of business on pay day' and 'that not more than 8 hours pay shall accrue in respect of each 24 hours of waiting'.

MR FOLEY: Yes. I don't think the second part affects it in any way.

PRESIDENT: Why is that?

MR FOLEY: Well, that's how much should accrue. We're talking about kept waiting, whether an amount of money should be paid and what time has been kept waiting.

But I can see a difference in 'from close of business on pay day' because that cuts off that time.

PRESIDENT: Well it certainly is far more -

MR FOLEY: It's paid from the close of business on pay day. And the contention in this case is that the clock starts running then and just continues to run.

There is a difference in that this award, in the Commonwealth Works and Services Northern Territory Award, limits the amount of payment to not more than 8 hours' pay in each 24 hours.

PRESIDENT: Yes. Yes, it is far - I mean, it is a far cry from clause 23 in the Miscellaneous Workers (Public Sector) Award.

MR FOLEY: Which doesn't go as far as that. It doesn't have that provision. I agree.

PRESIDENT: I'm not altogether certain if 7 is very helpful to your argument, or are you going to go further with it?

MR FOLEY: I think the important part is the part that I had read out earlier, that is designed to compensate an employee whose departure from a place of employment is delayed.

PRESIDENT: Yes, but he has made that assessment, having had regard to the previous quotes, if you'll note there. He says, 'all indicate to my mind that', and he is referring to the provisions in the award which are set out in quotes. That's as I understand it.

And he is virtually saying that those provisions in the award indicate to my mind that payment is not designed to compensate.

MR FOLEY: Well I can leave that with you for your consideration, Mr President, but -

PRESIDENT: Yes. Were you going further with -

MR FOLEY: No, I am not, indeed.

PRESIDENT: - with 7?

MR FOLEY: But I don't see that those initial award provisions affect the general statement that he has made, although I agree that he says, 'all indicate to my mind'. But he takes into account there the person who is not absent from work, that it applies from close of business on pay day, and that not more than 8 hours' pay shall accrue in each 24 hour period.

That simply limits it, but it doesn't change the fact that it is compensating an employee whose departure from a place of employment is delayed. That is the crucial point.

PRESIDENT: Yes, well are we saying here that these employees - the employees in question in the case under interpretation - were delayed in their departure?

MR FOLEY: I'm saying they are clearly not delayed. They finished work, terminated their employment, indeed, and were not delayed in any way.

So the clock should not continue to run in those circumstances.

The third determination is sought in the application reads:

Time, other than that time spent working, shall be paid at overtime rates.

Clause 23 does not mention overtime. So you are being asked to determine something outside of the award.

In effect, Mr President, you are being asked to make a supplementary award, and I believe the application must fail.

Earlier I referred briefly to overtime provisions and I will return to those now.

The overtime provisions in this award - the Miscellaneous Workers (Public Sector) Award - refer to 'all time of duty in excess of' - so many hours. Since there is no duty when employees are not on the premises the overtime provisions cannot apply.

That isn't by way of a supplementary comment. I believe that it has failed. The application has failed, anyway, because clause 23 does not mention overtime.

PRESIDENT: Well, it says, 'deemed to be working', so if a person is deemed to be working in the union's submission for nearly a fortnight, there must be a time at which they would run into penalty rates, you would think, if the expression, 'deemed to be working' included the continuous hours kept waiting for payment.

MR FOLEY: 24 hours a day.

PRESIDENT: Yes. And, at some stage, surely there must be overtime if they were working.

MR FOLEY: I think the award framers would have - or they had the opportunity to put in overtime rates if they wished to do so. They have chosen not to, and so I don't believe that we should read into it something that isn't there.

And I don't believe that a person -

PRESIDENT: Why isn't it there? I mean, perhaps it was meant to be there in the expression, 'deemed to be working'.

And, using your argument in reverse, if it wasn't meant to apply it should have been excluded.

MR FOLEY: I suppose all arguments can be reversed, but I think the onus would be on the - under those canons of

construction we have already referred to - if it can be read two ways, then it should be read in the more lenient way to the employer in this case.

PRESIDENT: So you are taking the line that by interpreting the award in the way suggested by the union would be to confer an unreasonable benefit?

MR FOLEY: Yes. I believe that the -

PRESIDENT: On one party or another.

MR FOLEY: - interpretation that I am applying to the award is a reasonable one, and if that is the case, if I and other reasonable persons would apply that interpretation, then it should - it is incumbent on the union in this case to demonstrate that overtime rates are applicable by virtue of the wording within the award, rather than some assumption.

PRESIDENT: Yes. Alright.

MR FOLEY: So the union seeks overtime as a penalty. Although the claim should fail for the reasons I have outlined earlier, it must also fail, if we are to have regard for Mayo in Cranford Webster and Spicer C.J. in the Commonwealth Works and Services Northern Territory Award who decided the clause is not designed to impose a penalty on the employer for mere non-payment, or late payment, but its purpose is to compensate an employee who waits to be paid.

PRESIDENT: Yes, which is quite at odds with what President Koerbin found in his interpretation.

MR FOLEY: Yes. As I say, I don't believe that he took into account the phrase 'kept waiting' anywhere near its ordinance.

Compensation cannot be more than an employee would have earned if they had worked in the period, even if they had been detained, or kept waiting.

The fourth determination sought is that elapsed time after the contract of employment ceases is counted as waiting time for the purposes of this clause.

Mr O'Brien commented on this previously, and I might return to his comments. These people are ex employees and we've already talked about - we know that because they signed a document on the 30th June terminating their services, as did the head of the agency.

So I think the - that does not exclude payments for amounts owing during that contract of employment and we acknowledge that people should be paid those moneys. We have also acknowledged that they experienced a delay in receiving moneys

due to them on the 30th June, 1st July if that was their normal pay day, and have sought to rectify that by an amount of money that they would have earned during the period until the payment was actually received by them.

That is a generous gesture, if you like, but one that we think is reasonable given the inconvenience that has been provided to the employees because of the particular circumstances of their termination. There is nothing in clause 23 that tells us to go past that.

So I've already provided cases where claims for elapsed time have been described as extravagant. Waiting time, if it has any meaning at all in today's environment, can only refer to a time where an employee is kept waiting on the premises. To decide otherwise would provide an incentive to an ex employee to delay notification of non payment while penalty payments mount up.

Non payment of wages is a breach of the award and the breach can be prosecuted in the Court of Petty Sessions. A magistrate may award additional penalties over and above an order for wages to be paid. So this claim for elapsed time payment following termination is outside the award terms and any such breach should be prosecuted in the courts.

MR O'BRIEN: What does that mean?

MR FOLEY: I'm sorry?

MR O'BRIEN: I don't understand what that last comments means. I wonder if you

PRESIDENT: Yes, I was -

MR FOLEY: It's non payment of wages. This award - this -

PRESIDENT: Yes, I follow that argument.

MR FOLEY: This clause doesn't talk about payment on termination, what should happen. Some awards do do that. I can give you a copy of the Carriers Award, for instance, that goes to that matter.

PRESIDENT: This is all premised on your submission that the employees who were terminated were therefore no longer employees and the provision doesn't apply to them anyway. Is that what you were saying?

MR FOLEY: An employee is still entitled to the benefits of the award -

PRESIDENT: But at what point -

MR FOLEY: They are clearly ex employees. We're not seeking to exclude them on the basis that they have terminated. We still recognise a responsibility to pay their wages up until the time they finish work -

PRESIDENT: Yes.

MR FOLEY: - and their annual leave and those things under the award.

PRESIDENT: Well I would hope so.

MR FOLEY: So just by the fact that they have terminated doesn't exclude those things.

PRESIDENT: No.

MR FOLEY: And it is unclear then as to how their time after they terminated how that should be treated. What I'm saying is that the agency has already paid them as if they continue to work for the time up until they were paid.

PRESIDENT: Yes, I follow that. You're saying that that was a completely ex gratia -

MR FOLEY: Yes.

PRESIDENT: - arrangement. Are you saying the award doesn't apply to them in terms of payment for waiting time because they are ex employees?

MR FOLEY: I'm saying that the award is silent on what you do with those employees who have terminated. It doesn't tell us what to do as some other awards do, and I have here in front of me the Carriers Award, for instance - payment of wages clause there. And I have copies if you wish.

PRESIDENT: Well it may help your argument, I'm not certain.

MR FOLEY: I will just read from it. Purely this is an example of what could be in the award to assist if the applicant wished the interpretation that they now seek.

PRESIDENT: Yes, we'll mark it F.8. And this is from the Carriers?

MR FOLEY: Yes. Mr President, I know it's from the 1990 Carriers Award but the wording hasn't changed since then for the particular clause, although the clause itself has had an addition. I have this one because I was looking at the previous case. It's in (e):

Notwithstanding anything contained herein, any employer shall pay to an employee who leaves or is

dismissed all moneys due to him forthwith, failing which he shall pay to the employee the sum of 48.95 for each and every day or part thereof during which such default continues.

So a penalty applies to an employer who doesn't pay a person when they finish up, and that will continue day by day by day. So that is a possibility that could be in the award. It is not there and I don't believe that we should be reading into the award a penalty that is not stated in it.

Mr President, you're asked to interpret an outdated award a provision in a way that will provide for windfall gains to employees. The determination sought is indeed extravagant and should be determined against the applicant. The canons of construction referred to by Mayo appear to require that decision. However if you are persuaded that the union's contention should prevail I seek prospective interpretation. A retrospective determination may cause difficulties in this case or in similarly worded awards if public sector agencies have applied their award previously in the way that I've outlined.

PRESIDENT: On that point then, Mr Foley, are there other public sector awards with the same provision?

MR FOLEY: I wouldn't know whether they have word for word but I'm sure that they do have phrases such as 'kept waiting' and 'deemed to be working'. Now whether they are word for word in all respects I don't know. As I've said earlier the public sector recognises the problem of these clauses being outdated and is seeking to remedy that.

PRESIDENT: Yes, well that's always available. No - the reason I asked the question was because that was part of your submission that if I make a declaration retrospective then it would impact in those other areas, and I was just interested to know what other areas it would impact on.

MR FOLEY: I'm unaware of a number of cases or awards that have been interpreted in this way or that they have been - the pay has been calculated in this way. But what I wouldn't want to occur is for the interpretation to be made retrospective and then see a flood of claims come in from other people who may have taken redundancies last year or some other similar circumstance.

PRESIDENT: Would there be too many who'd taken redundancy and didn't actually get their pay for a pay period?

MR FOLEY: I'm not aware of any number at all.

PRESIDENT: I think in the main -

MR FOLEY: But in the confusion of the redundancy haste then I wouldn't exclude the possibility that there would be other employees involved.

PRESIDENT: And so they should just wear it, should they?

MR FOLEY: Well I'm not aware of these employees. I seek to avoid the problem by making the decision prospective.

PRESIDENT: Yes, all right. Mr O'Brien?

MR O'BRIEN: Mr President, perhaps I'll leave that last comment until last.

PRESIDENT: Yes.

MR O'BRIEN: Mr President, I found it interesting to say the least that the provision that was introduced into this award in 1988 and contains provisions which relate to payment by cheque and direct bank deposit was described as an antiquated provision and at the same time Mr Foley refers us to a 1947 case, a 1960 case which included provisions which were certainly not on all fours with the provision in this case.

I think you are correct in - if I interpret your comments - dismissing the case referred to in exhibit F.7 as being one which has provisions so different as not to be relevant in this matter, certainly in relation to the comments that His Honour Mr Chief Justice Spicer made on page 337, as referred to by Mr Foley which relate to a provision in the award which actually limit the amount of payments to not more than 8 hours per day. And it is clear that there was an intention in that award which maintained that the period of waiting to one which was relevant to the period of work.

Contrast however the provision which exists in this award in its totality. How is one said to be waiting at work for a direct bank deposit that one has had made into one's bank account which can be made at any time and is accessible by electronic funds transfer - sorry, by electronic teller at any time? What relevance is the period of the performance of work or the period on the work site in the context that this award talks about the modern forms of payment of wages, not the lining up in the factory, as Mr Foley attempted to ensure us as being the source of this provision in the award. But in actual fact talking about the variety of methods of payment which exist today, existed in 1988 and were relevant at the time the award was made and continue in a similar form today.

The employees in this department were paid by cheque that I can almost say was certainly the case in 1988 when the award was made. Employees of other departments now paid by electronic funds transfer have been so paid for quite a number of years and I believe a number would have been paid by that

method, if not by the same technology by the depositing of a central agency of a cheque in payment which would be credited to their accounts.

So we start with what was I guess in part an attack on merit on a provision but also suggesting that the commission had to read it having regard to these somewhat dated precedents that Mr Foley produces I'd say, you, Mr President, would be well served to dismiss that argument as not being founded on the realities of the making of this award.

In relation to the authorities which we've produced let me say that - I see Mr Pearce's name is on the copy of the first page of Cranford-Webster and McFarlane. And I take it that's the same documentation which was tendered before the president in the authority that I produced which led to the finding made by the then president, Mr Koerbin, in relation to the Hospitals Award matter. That matter was debated then and I don't propose to go in great detail to the precedent other than to say that the quote from the decision is an accurate quote of the preamble, the summary of the decision which appears on the first page as far as I can see.

I think it is fair to say that a number of the comments in that decision go not to question of the powers in interpretation as they exist within the Industrial Relations Act of 1988, but those which were considered to be appropriate by His Honour in that matter at that time. Your powers, Mr President, are not limited by the views as expressed in Cranford-Webster and McFarlane but are rather those which are contained in section 43 in the act, which I suggest to you are reasonably wide in that they allow you - in fact they - I think they still require you to -

PRESIDENT: Yes, they do.

MR O'BRIEN: - declare retrospectively or prospectively how the provision of the award is to be interpreted and if the declaration so requires by order vary any provision of the award to remedy any defect in it or give full effect to it. This is not an action, this is not a prosecution, this is an application under section 43 and the principles which are suggested here to apply, that is if there is any ambiguity you find in favour of the defendant, there's not with the provision which exists in the act under which your charter lies.

The commission in these proceedings is authorised to look at the provision in this award and to describe what it's intended to mean and if need be to vary that to give - the provision in the award to give effect to what the commission interprets it to be intended to mean.

On the question of the term 'kept' versus 'spent' I agree that the term 'kept' is used in the award and not 'spent' and if that's a required alteration as was envisaged in my submission, then we would obviously have no objection to it. It is interesting to note that precisely the same word existed in the provision in the Hospitals Award which was interpreted by the president in exhibit O'BRIEN 2. That appears on page 5 of that decision, if the commission pleases.

So we again rely upon the findings made by the president in that matter, and not the subject of appeal. And might I say what - and Mr Foley is saying is, well you shouldn't follow the president, you should follow the submissions that were made to the president in that matter. It is the same employer but nevertheless we think that the commission is on very solid ground in observing the finding in relation to that matter as was found in the decision of the president.

PRESIDENT: So you don't agree that there is a very - that there is a distinction between what the actual words mean in 'kept' and 'spent' waiting.

MR O'BRIEN: I don't really think so. I've been trying to -

PRESIDENT: I mean, I don't know how seriously that distinction was addressed in the matter before President Koerbin, and the submission from Mr Foley seems to be that he may not have given sufficient weight to that. I mean, that's virtually what he's saying. Mind you, the ability to appeal interpretations was available at that time.

MR O'BRIEN: It certainly was. It was available and I think that the argument was, as I heard it, that the president hadn't given sufficient weight to Cranford-Webster versus McFarlane. That was essentially the argument and whilst the arguments of Mr Pearce are not recited in totality in the decision - and I haven't read the transcript - I do note this is Mr Pearce's copy so -

PRESIDENT: Do you recognise his writing as I do, Mr O'Brien?

MR O'BRIEN: Yes, and his name at the top of it.

The finding made in relation to that provision, as I was saying at the outset, is made in relation to a provision which existed in 1947 which was talking about the circumstances of payment which are not on all-fours with the circumstances which exist now.

Bearing in mind that the award in question and the subject of this application is one which is modern to the extent that it talks about all the modern methods of payment, and it talks about an area of work where the people don't go to a pay office and receive payment, but it is suggested that this

group of employees had their pay taken to them at their work site.

If that was the nominated place and time of payment, so be it, but that's not what was required by the award.

So, what I am saying in relation to Cranford Webster v McFarlane is that whatever the deficiencies - and they are not precisely revealed in the clause in that case - and it appears from the recitation on page 168 that Mr Justice Mayo had a view that there was some deficiency in the wording of the clause, which he had an argument with counsel for one of the parties, Mr Wright, and agreed that there was an ambiguity in the matter, he then said that the ambiguity had to be resolved in favour of the defendant in this matter, and he found that if there was to be a penalty on the employer arising from that, as well as a possibility of a penalty for breach of the award, then that wasn't possible.

Well I would have to say that if that's essentially what the submissions, if that's essentially what Mr Foley is saying, then that clearly cannot be sustained.

In my submission, if the award says there is a form of payment due in compensation for something, and also a potential for a penalty under the Act for non-observance of the award, then certainly the position is under the Act of a magistrate hearing a complaint, may award a penalty against the employer, and may award a penalty to the employee in addition to any underpayment.

That's not the same concept as the waiting time provision. The waiting time provision applies over and above any provision within the Industrial Relations Act for a magistrate to award compensation over and above the entitlement established under the award.

And that was why I asked the question of Mr Foley because I thought he was touching upon that point, and he didn't actually come back to it, but I was taking his submission to be saying somehow the employee if they have a right to seek compensation under the Industrial Relations Act arising from a prosecution, then they can't seek compensation in any form arising from a provision in the award, other than as pure wages which are not paid.

And my submission is that that is wrong. That the compensation which are provided for in the payment of wages clause is in effect the wages part of the component, and it wouldn't be a discretionary activity by a magistrate to award the employee those monies - it wouldn't be a question of them awarding them

extra compensation - it would be a question simply of awarding them their entitlement under the award, and it would be a secondary issue as to whether there was additional compensation.

And I think - I thought that what was being referred to at that stage - was the provision of the Act in section 52 of the Act, I think it was. I am trying to find it on the run, Mr President.

PRESIDENT: That's in the enforcement section?

MR O'BRIEN: Yes. Yes, it's section 52(1)(b) - yes, 52(1)(a) and 52(1)(b).

PRESIDENT: Of course Mr Foley should know all about section 52.

MR O'BRIEN: So, we would be saying that a payment arising under section 23 of the award would fall within section 52(1)(a) - that is the sums due to that person in connection with his employment, etc. - and, (b) would be the question of any further compensation.

So the Act here has already contemplated whatever is provided by the award and compensation. It's quite a different circumstance to that which was referred to in those proceedings almost 50 years ago in another jurisdiction on an entirely different set of words.

I've looked also at the questions as raised by Mr Foley about the interpretation - the meaning of the words.

The passage in the matter of the teachers' federation and the minister administering the state service decision of Deputy President Robinson drew my attention.

On page 3 the Concise Oxford Dictionary, 6th Edition, defines the verb 'wait' as, 'defer action or departure for a specified time or until some unexpected event occurs'. 'Defer action or departure'.

And if you look at the question of 'keep' and you look at the word 'keep' with adverbs which is in the third column of page 1148 it doesn't have 'keep waiting' but it has a number of other combinations such as, 'keep on', 'to maintain or retain', 'keep together', 'cause to remain in association with'.

I mean, in a number of those cases the word 'remain' is used and it isn't used in the sense solely of remaining in place, it can be remaining in a condition of something.

PRESIDENT: Yes, well in the Concise Oxford the definition referred to the deputy president there is the added state of waiting, and that's 'be expectant'.

MR O'BRIEN: Yes. I have underlined that. I wasn't sure whether that would run in with 'or until some expected event occurs' - be expectant. To remain -

PRESIDENT: No, I think the comma separates it.

MR O'BRIEN: Yes. To keep waiting, in my view, means to have a person maintained in the circumstances of awaiting their payment, but if you read that in the context again of the award it doesn't mean that you are remaining on site if your pay is actually not paid to you on site.

For example, where the award allows it to be paid by direct bank deposit. Clearly, that is not paid to you on site. And the intention is extended in relation to that circumstance by saying if the money is to be paid by that method and it is not there you are deemed to be kept waiting.

So, far from this being the antiquated provision that Mr Foley suggests, it actually contemplates the modern circumstance in a way that makes it clear that in this award we are not talking about people waiting on site until the paymaster comes and rolls up the window on the pay office and rings a buzzer or a bell, or something, and people line up and get paid, but rather they are paid in a variety of methods. There is a nominated time and place and method of payment, and where that is not observed the employee is deemed to be working until they are paid.

And that's our very strong submission. And, that being the case, if they are deemed to be working, then it's a nonsense to assume it means anything other than that they are being paid in accordance with the award while they are so working, or deemed to be working. Otherwise the provision could have no meaning at all.

If that is the case, it's our submission that they will be paid at overtime rates, save and except if they were actually working during that time, well that would be offset by whatever was paid to them for the time they actually worked.

I can envisage a circumstance where someone might actually be seen to be working at the appropriate ordinary time rate for the first 8 hours, but following that, certainly overtime would have to be paid.

But also where the person had performed their ordinary hours and the time commenced outside of the ordinary hours, the overtime clause would dictate that that would be paid at overtime rates.

Hence, our argument in relation to overtime.

The submission therefore that the claim for payment of the time at overtime rates would be a determination outside the award, in my view is flawed, and would be rejected by the commission.

PRESIDENT: I'm sorry? Would you -

MR O'BRIEN: Mr Foley said that where we had said that time other than time spent working would be paid at overtime rates that that was a determination outside of the award and would fail, and for the reasons I just outlined that, in my submission, cannot be the case.

Similarly, the submission the claim for time paid which is not worked cannot be paid, that the employees are only entitled to be paid whilst working, is overcome in my submission, by the deeming provision of clause 23. That is, they are deemed to be working.

I must say that I am not sure what Mr Foley's submission is on the last point in the application. That is, the elapsed time after the contract of employment ceases.

I think, you, Mr President, asked him on a number of occasions what he was saying in relation to the point of the entitlement continuing past the point of the expected termination of the employment as envisaged.

I didn't understand him to say to you that the termination of employment guillotined any such rights, but then I am not really sure where we ended up with that submission.

You did ask him on a couple of occasions in relation to that point, and I didn't really understand -

PRESIDENT: Yes, I did. I find it an interesting concept. I was trying to get to the bottom of both arguments. I mean, you proposed that the contract of employment continued until such time as the redundancy payments were effected and until all the entitlements were sorted out, I think.

MR O'BRIEN: Yes.

PRESIDENT: And Mr Foley I thought was saying that the contract of employment ceased on the termination date. But then he elaborated on that, so that didn't mean to say that entitlements which accrued up until termination date were no longer affected, he was saying that they were. And that is, I think, fairly common knowledge.

MR O'BRIEN: Mm.

PRESIDENT: But the point at issue that really did interest me was whether or not any weight should be attached to the question about what the definition of an employee is.

And, if indeed, the employee is no - the person concerned - is no longer an employee, does the award provision apply.

And that may not have been put by Mr Foley, but it's certainly of interest to me because, as you would be well aware, we have run into precisely this problem with the use of the word 'employee' in the Act, which clearly cuts out somebody who has been terminated.

MR O'BRIEN: I think the point of interest is that if the award entitlement as to provisions such as the payment of wages is guillotined on the point of termination, does that mean that if pay day has not been reached and the employee and the employee's employment ceases, for whatever reason, prior to that date the employee's rights as specified in the contract also cease.

Now I think that's an untenable proposition, because the contract of employment being contained in the award, insofar as it is, makes provisions which govern when the employee should be paid for work which has been performed, as distinct from leave and other things.

Now the proposition that I would put is that that right, the same as the rights which exist in relation to accumulated leave, because we are talking about pay which has been accumulated, continue in the same way and the determination of the award as to payment of that money continue until the monies are paid.

Now, that's my submission. The employee's right. The employee may have ceased to have been an employee in the sense that there was a requirement to perform work at the direction of the employer. This clause doesn't require that. It is a deeming provision which is as is put in the president's interpretation in the hospital award matter - a form of compensation for not being paid.

Now the question of what amount of compensation is appropriate in each circumstance is not a matter for these proceedings. The question is, what does this award say.

PRESIDENT: That's right.

MR O'BRIEN: Now, if in my submission, the award says the employee is deemed to be working -

PRESIDENT: Yes, but the real starting point is, is the person an employee.

MR O'BRIEN: Well, sorry, let's have a look at the question again.

It would be my submission that in the same sense as a casual employee being required to be paid within an hour of the termination of the employment, who would then cease to be an employee. If the award can require that, which I think it can, it can also make provisions in relation to the payment of other employees whose contract of employment ceases in the intervening period - in the period immediately prior to the point at which the wages become due and payable.

If it is correct to say that there could be no such provision for people who after termination, because they cease to be employees - well I suppose the Carriers provision can't possibly stand up because it has a very specific provision about people who leave or are dismissed as indeed -

PRESIDENT: Yes. Yes, but that -

MR O'BRIEN: Apart from that -

PRESIDENT: That's the distinction that seems to be addressed here. They're referring specifically to someone who has been dismissed.

MR O'BRIEN: An employee who leaves or is dismissed.

PRESIDENT: Yes.

MR O'BRIEN: I don't see any problem with this in the sense that the person - the question is part of the continuation of the employment contract. It isn't as if this is unrelated to the work performed. It is related to the work performed for which payment is due. It is a provision as to how that money is to be paid and it is a provision which, in my submission, continues as part of the contract of employment until the obligation is met.

Now it would be equally possible, in my submission, to say in this clause: Proportionate leave on termination which is not paid on such and such a date will attract such and such a penalty. And that would again be a case where the person ceased to be an employee, had an entitlement to payment and had not been paid in accordance with the award. The only difference is that this is wages which accrue rather than leave which accrued and the payment of those wages has not been made in this case in accordance with the clause at the time and place so required.

And in my submission there is no difference. The entitlement to the payment of those wages is a continuing entitlement.

The payment of wages clause clearly is a requirement which exists beyond the precise point at which the performance of work under the contract of employment ceases. Now that's the only submission that we can put on it.

PRESIDENT: Yes, I follow. And really that is crucial. That is the - that's one of the first issues that has to be determined. I think it was - Mr Foley raised it in a sense as a preliminary submission, that it was outside the award in any event.

MR O'BRIEN: Well indeed it's been debated now so I guess it's before you in any case whether Mr Foley raised it in that way or not.

PRESIDENT: Yes, that's correct. That's correct.

MR O'BRIEN: I did want to say briefly about the Carriers Award provision that it does have unusual provisions about payments of fixed money amounts for defaulting the making of any payment. I would just submit that the provisions of the Carriers Award are irrelevant to the proceedings in the sense that they would purport to go to merit.

As to the question that this interpretation is reasonable or unreasonable if you found in our favour in relation to the meaning of the clause the effect would be not substantially different to the effect of the interpretation in the Hospitals Award and in that case it not having been found to be unreasonable, reasonable benefit which arises to the employees, that is - the determining factor was when the money was available to be paid, not the rate at which it accrued or that it applied for a time - a period of time when the employees were not at work.

And the period of time being entirely within the control of the employer is not a matter which the commission should take into account in these matters. The result in this case, if our submissions were accepted, would be that there would be a calculation based upon similar reasoning to that which was found to be acceptable in the Hospitals interpretation case, if I can call it that. And for that reason, if for no other, we would be suggesting that the interpretation that we ask of is not unreasonable, that is it wasn't unreasonable in that case, it is so similar as to be almost identical and it ought not be found to be unreasonable in this.

PRESIDENT: Yes. Just before you resume your seat, and I'm sorry to drag this out. There was a proposition put by Mr Foley that the - and I'm paraphrasing - claim isn't genuine because the individuals had not made an approach for the payment of wages.

MR O'BRIEN: Well that's disputed and if you look at my first exhibit in our - one of our letters Ms O'Byrne claims, as we understand it, that there were approaches made and other than that I don't have any -

PRESIDENT: Where was that reference?

MR O'BRIEN: The third letter - the letter of the 18th August, the third paragraph.

PRESIDENT: I see.

MR O'BRIEN: However whatever their circumstances it would not impinge upon the interpretation of the award.

PRESIDENT: Yes, to a certain degree. I mean, there is the question of unreasonable benefit which is one of the - is from Mayo but it's included as one of the guidelines, I believe. I shouldn't have to ask you, should I, Mr O'Brien?

MR O'BRIEN: I didn't bring it with me.

PRESIDENT: But it is -

MR O'BRIEN: Yes, it is. It's not supposed to lead to unreasonable benefit.

PRESIDENT: Rules should not be absolute authority to confer advantage or disadvantage. Rules are to have regard to an award in totality was one of the guidelines that I think the former president provided everybody with.

Okay, thank you, Mr O'Brien. Thank you very much gentlemen. We'll conclude the matter and I'll naturally reserve my decision.

HEARING CONCLUDED