TASMANIAN INDUSTRIAL COMMISSION
Industrial Relations Act 1984

T No. 6481 of 1996

IN THE MATTER OF an application by the Construction, Forestry, Mining and Energy Union, Tasmanian Branch to vary the Furnishing Trades Award

re final wage rate increase for unapprenticed junior workers

DEPUTY PRESIDENT JOHNSON

HOBART, 11 October 1996
continued from 17/9/96

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT JOHNSON: It appears that there are no changes in appearances. I do apologise for the late start. I am sorry about that and I hope it doesn't inconvenience you.

Ms McMullan, perhaps I should commence just by asking the parties to indicate to me if there is any contest as to the nature of the order itself. Do you understand there to be any disagreement about the variation sought to the award, other than of course the operative date question?

MS MCMULLAN: No, not that I'm aware, Mr Deputy President.

DEPUTY PRESIDENT JOHNSON: Is that your position, Mr Watson?

MR WATSON: Yes. That would be right, Deputy President. In fact, shortly after the last hearing we circulated to our members a copy of the order - sorry, a copy of the new rates for the $8.00 safety net, save and except for the issue of the unapprenticed juniors. So, on that basis, there would not appear to be any problem.

DEPUTY PRESIDENT JOHNSON: Ms McMullan, on the last occasion I directed the parties to confer on the question of the operative date issue. Has that been done and if so, what is the outcome, please?

MS MCMULLAN: Mr Deputy President, I can advise that I have had discussions with Mr Cameron of TCCI in Launceston on Thursday 26 September 1996. The union's understanding of those discussions was reduced to writing with a copy sent to yourself for your information.

We have not been able to come to a consent position on this matter so we will need the assistance of the commission to decide the operative date.

Mr Deputy President, you'll be aware that as a result of our discussions with TCCI, that they undertook to conduct a survey of employees in respect to the operative date. On 9 October, Mr Cameron advised me that all the employees who responded did not favour an operative date of 10 April 1996. This, in the view of the union, is hardly surprising, however I was surprised to find out the names of employers who responded to the TCCI survey.

The first one was Custom Cabinets. This company is respondent to the federal award and will not be affected in any way by this matter. They have been respondent to the federal award since 1981. Number two - Boniwell Blinds, respondent to the federal award since 1992 in Devonport and Launceston and since 1994 in Hobart. Their parent company, Hunter Douglas Pty Ltd Tasmania became respondent in January 1996.

Huon Foam is covered by the state award. The Housing Industry Association - this is an organisation that represents employees mainly in the housing side of the construction industry. The Furnishing Industry Association of Australia would be the major furnishing industry organisation in this state. I wish to provide the commission with an exhibit, which verifies the statements I have made in respect of these companies.

DEPUTY PRESIDENT JOHNSON: I think that's exhibit CFMEU.1. Is that the case?

MS MCMULLAN: Yes, I think so, Mr Deputy President.

MR WATSON: Excuse me, Mr Deputy President, I think it's CFMEU.3.

DEPUTY PRESIDENT JOHNSON: I beg your pardon, it is too.

MS MCMULLAN: So we have print number, E9473 and you can see a quarter of the way down the page, I've marked Custom Cabinets. On Print K6792, I've marked Boniwell Blinds, Devonport and Launceston. Print L4499, I've marked Boniwell Blinds in Derwent Park and Print M9283, Hunter Douglas Tasmania Pty Ltd.

I would further point out, Mr Deputy President, that any juniors in the other occupational sections covered by this award, i.e. clerical workers or drivers, are not affected by this matter.

The union would submit that the commission should give the survey little weight as it is not representative of the industry covered by the state award, with the majority of responses coming from federal awards respondents. The commission will be aware, from my submissions of 17 September and exhibits tendered, of the history of this particular matter so I do not intend to go over those submissions again, but rather simply refer you, Mr Deputy President, to the transcript of those proceedings.

I wish to deal with the issue of retrospectivity as prescribed in section 37(5) of the Industrial Relations Act 1984 and I quote:

> *The commission may, in an award, give retrospective effect to the whole or any part of the award -*
>
> *(a) if and to the extent that the parties to the award so agree; or*
>
> *(b) if, in the opinion of the commission, there are special circumstances that make it fair and right to do so.*

It is the submission of the union that the matter before the commission constitutes special circumstances in that it would be fair and right for the award to be made operative from 10 April 1996. The commission will be aware that apprentices and junior workers became entitled to have the wages based on the total appropriate adult rate as a result of a full bench decision of the Australian Industrial Relations Commission made in October 1994.

This decision flowed on into the Furnishing Trades Award in this state commission later that year, mirroring the federal decision. Apprentices received the total increase in two or three steps automatically. Junior workers, the first two increases only, with the third being granted in principle but subject to further application by the union in March 1996.

The reason for this was that the full bench considered that an outcome from the junior rates case would affect the wages for unapprenticed juniors. As the junior rates case has not yet reached a conclusion, the union applied to the commission for the third and final phasing in increase. The union's application was made on 18 March 1996. The matter was heard on 17 April 1996 by Deputy President Watson, who in turn reported to the full bench on the junior rates case.

The full bench released its decision on 8 May 1996, awarding the application as sought by the union. The award was made retrospective to 10 April 1996. Orders were finalised on 24 May 1996. So, as this decision affects this application, Deputy President, the following events have occurred in Tasmania.

1) Apprentices employed under the Federal Furnishing Trades Award received a final increase on 10 April 1996. 2) Apprentices employed under the state Furnishing Trades Award received a final increase on 10 April 1996. 3) Unapprenticed Juniors employed under the terms of the federal Furnishing Trades Award received a final increase after 24 May 1996 and made retrospective to 10 April.

It is the submission of the union that it is only fair for unapprenticed juniors to be treated in the same manner as their counterparts in this state employed under the terms of the Furnishing Trades General Victoria, South Australia and Tasmanian Consolidated Awards 1996.

To treat the few juniors in Tasmania that such an award would apply to, differently, would be inequitable, in our view. I would refer the commission also to section 36 of the act which deals with the public interest and I quote:

> *Commission to be satisfied with regard to the public interest*
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> *36 - (1) Before the Commission makes an award under this Act or before the Commission approves an industrial agreement under section 55, the Commission shall be satisfied that that award or that agreement is consistent with the public interest.*
>
> *(2) In deciding whether a proposed award or a proposed industrial agreement would be consistent with the public interest, the commission shall -*
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> *(a) consider the economic position of any industry likely to be affected by the proposed award or proposed agreement;*
>
> *(b) consider the economy of Tasmania and the likely effect of the proposed award or proposed agreement on the economy of Tasmania with particular reference to the level of employment; and*
>
> *(c) take into account any other matter considered by the commission to be relevant to the public interest:*

The union submits, Deputy President, that it is in the public interest in this case to ensure that both employees and employers are treated equally. It is not in the public interest to have sections of the same industry in Tasmania having advantage over each other by being able to pay juniors the increase agreed to at different times, when it was the intent that they would have been paid at the same time.

This, in our view, is verified by the identical nature of the provisions. Further, we would submit that increases which will apply to a few employees ranging between $5.50 and $11.60 per week, backdated for six months, will not have an adverse effect on the viability of the furnishing industry in this state. The union would strongly urge the commission to grant the applications as sought. If the commission pleases.

DEPUTY PRESIDENT JOHNSON: Ms McMullan, if I take the latest possible date of the outcome in the federal arena which was early May this year, on the basis of your submission, why is it the case then that the union did not apply to vary the award here on or about that time. The application to vary the award in this respect in fact came about only by way of an amendment to the application, I think at the hearing on the 17th September. What is the reason for that long delay?

MS MCMULLAN: Well, Mr Deputy President, I feel in a position where I can't answer for the secretary of our union as to why that wasn't done earlier.

DEPUTY PRESIDENT JOHNSON: Thank you, Ms McMullan. Mr Watson.

MR WATSON: Thank you, Mr Deputy President. First of all, I think, like the union, we would in fact also rely on the submissions made on the previous hearing on the 17th September as the basis for our opposition to this particular claim.

I think that most of the comments made by Ms McMullan, both on the 7th September and today, would certainly not have been an issue and would have been alleviated had the application been put in on time, so I think that whilst there may or may not be any merit in what Ms McMullan has said, that certainly would have been - would not have been an issue had the application been put in either in March 1996 or, as you've just quite rightly pointed out, when the federal award in fact was varied.

Our position is, that we have had discussions with the union as per your direction at the last hearing but unfortunately those discussions have failed to produce any agreement and therefore we're really no further down the track than we were on the 17th September. However, we have tried but it's been unsuccessful.

Now in relation to the union's position, I understand both from the submissions on the 17th September and today, that the basis for the union's claim is in fact because the federal moved and the 10th April date has in fact been picked also because of the date that was awarded in the federal award for the increase for similar types of employees under similar circumstances.

I'd just like to hand up an exhibit if I can please.

DEPUTY PRESIDENT JOHNSON: Do I have any numbers for you at all?

MR WATSON: No, I don't think so, Mr Deputy President.

DEPUTY PRESIDENT JOHNSON: I'll mark this as exhibit TCCI.1.

MR WATSON: This decision, Mr Deputy President, is a decision by the full bench of the Australian Conciliation and Arbitration Commission, as it was then, dated the 5th November, 1986 Print No.G5717. Now in this matter it is in fact an appeal decision where the TCI, as we were then, appealed a decision of Commissioner Nolan where Commissioner Nolan had in fact granted retrospective operation in relation to allowances in the Glass Merchants and Glazing Contractors Tasmania Award 1976.

Now if I can take you to the bottom paragraph on that first page, and I quote - it says:

> *In the present proceedings, Mr T.J.Woods for the TCI submitted that the general principles of the Commission with respect to the granting of retrospectivity had not been properly applied in the Commissioner's decision. Further it was submitted that the Commissioner should not have relied upon any "special relationship" between the Award and the National Building Trades Construction Award 1975 as a ground for granting retrospective operation as there was no nexus between such awards.*

And again, over the page on page 2 in the second paragraph - and again I quote:

> *According to the established principles of the Commission, there must be special and compelling circumstances before it will be appropriate for the Commission to grant retrospective operation of increases in allowances.*

Now I would suggest that those general principles of the Conciliation and Arbitration Commission, as they were then, would in fact be similar, if not the same to the principles of retrospectivity that would be adopted by this commission.

And secondly, in the last sentence of that second paragraph on page 2, it says:

> *A mere nexus or special relationship with allowances in another award may not of itself provide a sufficient basis for the granting of retrospectivity.*

Now it would be our submission that that particular statement is relevant to these proceedings in that, as I understand it, what the union is claiming is that because the federal award moved on the 10th April, then it should automatically flow to the state award - same date - and in fact irrespective of the fact that the union didn't have their application in prior to the 10th April.

Again, in the third paragraph on page 2, it says:

> *In the decision appealed against, reliance was placed on a relationship between the Award and the National Building Trades Construction Award 1975. We do not need to decide for the purpose of this appeal whether any nexus exists between such awards as, in any event, the existence of a nexus would not of itself determine the question of retrospectivity.*

End quote. So again, the full bench of the commission in this appeal decision is in fact saying that nexus of itself is not an issue that would decide retrospectivity and it would be our submission, as I said, that that would seem to be the main argument that's been relied upon by the union in this particular case.

Now as I said on the last occasion, Mr Deputy President, the issue in the federal award is in fact different to what we have here. That issue - and it is in the commission's decision that was handed up on the last occasion - the actual date was approved by the commission in principle as opposed to this situation where the date was not approved. It was simply said that the union would need to get their application in and the matter would be heard.

Secondly, in the federal award, the union actually had their application in prior to the operative date that was awarded - so I think that is significant. And also, that the federal commission in that particular matter did in fact grant, I think it was, maybe a couple of weeks retrospectivity but it was based on the fact that they had actually approved the date itself in principle and also that the union application was in on time.

So it would be our submission, Mr Deputy President, that we first of all rely on our submissions from the last occasion; that we do rely on the - that full bench decision that I've handed up as a general established principle in relation to retrospectivity, first of all that there must be special circumstances, and secondly, that the mere nexus is not really an issue to be considered.

As far as an operative date is concerned, we would suggest that the best possible operative date that the union could hope for, in our view, would be the first full pay period on or after the date of their application, and that would be the date of the last hearing before yourself.

Now it would be our primary submission that the operative date should be the first full pay period on or after today's date, however, if you are not persuaded by that we would suggest that the only other alternative available would be the first full pay period on or after the 17th September, 1996.

In fact, as you have pointed out, Mr Deputy President, the application was not lodged by the union after the federal award was varied, and in fact when the union lodged

their application for the passing on of the third $8 safety net, it still was not part of that application, and that would be evidenced by the application which you would have on file.

And thirdly, that the application in fact was not made until the day of the hearing by an amendment which in itself would suggest that the union was still operating on the basis that the oversight was either still there or they were unaware that the application needed to be made. But in any case, we would say that employees should not be penalised by the fact that the union application was not in on time.

So basically that's our position, Mr Deputy President, and we would leave it to you to decide the matter. If it please the commission.

DEPUTY PRESIDENT JOHNSON: Thank you, Mr Watson. Ms McMullan.

MS McMULLAN: Yes, Mr Deputy President, if I can just refer you back to part of the submission with the special allowances, where apprentices employed under the federal Furnishing Trades Award received the final increase on the 10th April,, 1996 and apprentices employed under the state Furnishing Trades received the final increase on the 10th April, and the unapprenticed juniors employed under the terms of the federal Furnishing Trades Award received the final increase after the 24th May, '96 made respective to the 10th April, and that the union would see that it only be fair for unapprenticed juniors to be treated in the same manner as their counterparts in this state.

DEPUTY PRESIDENT JOHNSON: Thank you, Ms McMullan. Ms McMullan, my consideration of these circumstances has the advantage of course of considering what was put to me on the first occasion and the substantial submissions that you present are - today - are in brief and in further explanation of the submissions upon which you rely on in the first instance. In those circumstances I think I should indicate to you that I'm of the view that there are no special circumstances as required by section 35, is it, of the act. The mere fact that there is the presence of a perhaps relevant nexus in terms of amounts of wage rates and allowances is not, in my experience, a basis for concluding that there is a similar and like nexus in terms of operative dates, and as a general statement my impression is that there has never been a nexus of that nature formally found to exist by any tribunal.

Accordingly, I propose to reject the application for an operative date of the 10th April. Mr Watson, the proceedings on the 17th September were adjourned at the commission's request and we've earlier dealt with the outcome of that request because among other things I directed the parties to confer. I see no reason why the commission's actions should be taken as being a detriment to the union's application. Accordingly I will vary the award effective from the first full pay period to commence on or after the 17th September. My reasons for this decision will be published as soon as possible.

That concludes the hearing of matter T.6481 of 1996.

HEARING CONCLUDED