

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 384 of 1986

IN THE MATTER OF an application
by the State Fire Commission to
interpret the Fire Brigades
Award

re holidays with pay

PRESIDENT

HOBART, 27 May 1986

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: I'll take appearances, thank you.

MR CREW: Mr President. Sir, the State Fire Commission ...

PRESIDENT: Appearances, thank you.

MR CREW: I'm Sorry. I'm sorry. **PAUL CREW** of the State Fire Commission.

PRESIDENT: Thank you, Mr Crew.

MRS HERBERT: **MRS S. HERBERT** appearing on behalf of the United Firefighters' Union, assisted by **MR LES WILLIAMS** and **MR K. TOMES**.

PRESIDENT: Thank you, Mrs Herbert.

Yes.

MR THOMSON: **MR THOMSON** - State Fire Commission.

PRESIDENT: Thank you, Mr Thomson.

Now Mr Crew, you were going to ...

MRS HERBERT: Could I ...Excuse me sir. Could I raise just a small threshold matter or correction, sir?

PRESIDENT: Yes, Mrs Herbert.

MRS HERBERT: In the application for this interpretation it is stated there that it is the United Firefighters' Union opinion that there is an entitlement to 49 days. I think that should be corrected. It is the United Firefighters' Union opinion that there is entitlement to 50 days, sir.

PRESIDENT: Yes.

MRS HERBERT: 49 was an agreed matter.

MR CREW: I've no objection to that, sir.

PRESIDENT: Very well, thank you.

Then can we alter this?

MR CREW: Certainly.

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PRESIDENT: Thank you, Mr Crew.

MR CREW: Thank you, Mr President.

The State Fire Commission seeks an interpretation as to the total number of consecutive days' annual leave which a shift worker employed under the Fire Brigades Award is entitled.

It is the Fire Commissioner's view that such a worker is entitled to 46 consecutive days' annual leave. For this calculation I refer to the following parts of the Fire Brigades Award: Clause 10., 'ANNUAL LEAVE', section (a), subsection (i) wherein it is stated that day workers are entitled to 28 consecutive days.

Subsection (ii) provides for an additional 7 consecutive days for shift workers.

And clause No.21 dealing with 'HOLIDAYS WITH PAY', section (a) defines additional days which shall be allowed as paid holidays. These defined public holidays total 11 days per year.

Therefore the addition of 28 days' annual leave, 7 days for shift work and 11 days for public holidays total 46 days.

The Commission did seek an interpretation from the Department of Labour and Industry back in November 1984 and a reply was received from D.L.I. confirming that shift workers are entitled to 5 weeks' annual leave, plus 11 days in lieu of public holidays.

And I would like to table that, with your permission, sir, as evidence for that.

Now this question of interpretation has been ...

PRESIDENT: Exhibit C.1, Mr Crew.

MR CREW: Sorry. Thank you.

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PRESIDENT - CREW

MR CREW: Yes, this question of interpretation has been brought to the Commission because confirmation of leave entitlements under the award is essential to the negotiations which are currently in train for the introduction of the 38-hour week.

And that's all I have to say at this stage, sir, if I may.

PRESIDENT: Yes.

Mr Crew, could I just take you back. You referred me to, is it section (b) (i) 'Annual Leave Exclusive of Public Holidays'?

MR CREW: No, sir. It's clause ...

MRS HERBERT: Mr Commissioner, I have an exhibit here which outlines the two clauses. It might be a little easier to follow.

PRESIDENT: Well, thank you.

That will have to be Exhibit H.1. Thank you.

It's clause 10 ...

MR CREW: Clause 10.

PRESIDENT: ... (i) and (ii) ...

MR CREW: Yes, sir.

PRESIDENT: ... sub-clause (b) (ii) 'Shiftworkers' :

"Notwithstanding the foregoing provisions, a shiftworker shall have added to his period of annual leave one day for each statutory holiday mentioned in Clause ..."

MR CREW: 21.

PRESIDENT: 21?

MR CREW: Yes.

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PRESIDENT - HERBERT - CREW

PRESIDENT: That doesn't seem to ring a bell.
It's not clause 21 is it?

MR CREW: Yes. Yes, sir, it's clause 21,
'HOLIDAYS WITH PAY'.

Under the original award of the Fire
Brigades Industrial Board No.1 of
'80, it was clause 9 (d) - subsection
(d).

PRESIDENT: Yes, that's the one I'm looking at.
There's a consolidation somewhere, is
there?

MR CREW: Yes, sir. Yes.

PRESIDENT: Right. That explains it, thank you.

MR CREW: Thank you.

PRESIDENT: Yes. Yes, thank you ...

MR CREW: Thanks.

PRESIDENT: ... Mr Crew.

Now, Mrs Herbert?

Is it Mr Crew or Cruise?

MR CREW: Mr Crew, sir. C-r-e-w.

PRESIDENT: Yes, thank you.

MRS HERBERT: Thank you, sir.

I'd like to draw your attention to
that exhibit just put forward with
the annual leave clause.

The annual leave clause that is
spoken about there, makes the
situation very clear. As far as the
first accounts, we have :

"(a) Period of Leave

(i) Dayworkers

A period of 28
consecutive days' ..."

And in the second place we have :

In addition to the leave hereinbefore prescribed shiftworkers shall be allowed 7 consecutive days' leave including non-working days."

And I submit that that's made very, very clear and we have no objection whatever to those first two lots of 28 days and 7 days.

And we would draw your attention there to the fact that it is felt necessary to include non-working days to allow for the 7 consecutive days.

We then move down to the period of annual leave in lieu of holidays.

I think we should draw your attention very clearly here, sir, to the actual wording of that clause 10., 'ANNUAL LEAVE'. According to my Collins Australian Dictionary 'leave' is given there as the noun 'Permission to be absent from duty.'

There are 11 public holidays in the claim there. And as set out there, the only difference to the other part of the award would be that Easter Tuesday is not included.

Therefore if leave is as defined there, 'Permission to be absent from duty.', one therefore must assume that one is on duty.

Day workers which that clause, specifically 'holidays with pay', applies to, sir, the public holidays there are granted during the weekdays - just forgetting Anzac Day at the moment, sir. Should Christmas Day or Boxing Day fall on a day at the weekend the day worker is given one day off during the week in lieu of that, because they are the 5 days that the day worker expects to be at work.

MRS HERBERT:

It's not quite so easy when we get into the shift work area.

Day workers are given under this award 11 days off work; off duty; leave. And that's the definition we feel that should be put on this clause.

If you say, as the Fire Commission wishes us to say at this stage, that there are only 7 days applying to a shift worker ... If you were to give a shift worker 11 consecutive days off - 11 consecutive days off - you would in fact only, in the normal situations, be giving him 7, because there would be 2 days in that 11 days ... there would be 4 days which he would have had as rostered days off; the days that a day worker takes off at the weekend.

So the interpretation must be that a shift worker is granted these days - they are not consecutive, they are days and they are on leave.

The shift worker is granted these days' leave on days when he would reasonably expect to be at work.

I would seek leave of the Commission here, to not address them on the merit clause (at least I hope they would have had, with permission of the Fire Commission here), but more a little bit on the history and background of the consecutive days and public holidays.

I believe, sir, that approximately 7 years ago you asked me to do this on the Miscellaneous Conditions of Service Award. It has taken me 7. I knew the time would come and here we are.

When the shift workers in the public service area ... and I'm sorry to go to the public service area, but the custom and practice regarding the number of days was derived from the public service area, as we have another award that goes along with

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MRS HERBERT:

this which is the Office of the Fire State Commission, which is a public service area.

So I seek to do this, although it might be a little bit outside your guidelines, sir.

When it was first granted, round about '70/71, there was a problem which occurred with a situation very similar to the one here. The Fire Brigades roster I believe has been brought to your notice before, sir, in interpretation hearings and it's very complicated. I did draw one up here, if you are interested at all, just to see how it goes.

The Fire Brigades roster here ...

PRESIDENT:

Exhibit H.2.

MRS HERBERT:

If you follow that from the top down, the first week they work the shifts of 2 days, 2 nights; the day shift being 10 hours, the night shift being 14 hours. And then after that they have the 4 days off.

I only tender that exhibit as a guide to yourself to see the complications that could arise with regard to this. I will speak later on that a little further, sir.

As you see there, it gives you 2 days at 10 hours and 2 nights at 14 hours - 7 tours of duty in 8 weeks.

The problem occurred, as I said earlier, for shift workers when the 5 weeks' extra annual leave was given, and one area in particular gave concern to the public service. And that was a very similar problem which would occur at the Royal Derwent Hospital.

The problem there of course was the long and the short days - the 2 days on and the 2 days off. And at that stage it was the work of the unions and the Public Service Board, expected to sort out how many days

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PRESIDENT - HERBERT

MRS HERBERT:

would be given.

They worked from the 37 days' annual leave and converted them to consecutive days - 37 days at this stage we're talking about - that is 20 days' leave, 5 for a shift worker, 12 for public holidays come to 37. That is 37 days' annual leave - leave off work.

But to convert it to consecutive days for a shift worker gave a lot of problems, especially in the area where it was first looked at in this context, and that was at the Royal Derwent, because of the problem of the long and the short day and 2 days on and 2 days off, 2 days on and 2 days off.

So it was decided at that time that the 12 days would be divided to 5, to take them back to weeks. That's a working week ... whether they work on shifts or any ... are presumed to work 5 days and have 2 rostered days off.

So it's divided by 5. Take the 10 days there, convert the 10 days to 14, which makes 2 weeks - 2 x 7's.

Right. We've got the 12 days, we divide it by 5.

PRESIDENT:

It comes out 51. That's what you're going to finish up ...

MRS HERBERT:

I'm going to tell you that, sir, yes.

PRESIDENT:

Yes, yes. Yes, you don't have to tell me Mrs Herbert, I know.

MRS HERBERT:

I'm just making sure that it's very, very clear to you, because I don't know whether the Fire Commission have had this explained to them before.

It comes out 14 days plus the 2 days, in the Public Service area where Easter Tuesday is when the Fire Commission has the trouble. And it comes to 51.

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PRESIDENT - HERBERT

MRS HERBERT:

As you are very well aware now, I presume, the Fire Commission, but just in case we aren't in here, this has been a custom and practice since, I believe, '72, sir. I know it was '73 when I first became aware of it, that it was in existence then.

Since that time, in all shift work areas, it has been adopted as the custom and practice for 51, and in the Industrial Board areas I believe there are about 4 who automatically assume the same, which are aligned to other awards in the Public Service area.

All of those take it as the 50 days, because of the Easter Tuesday, sir, which was not in the Hospital Industrial Board area or State Fire Commission area for this.

I just ... For the information of anybody who hasn't seen it before, the Public Service Administrative Guide where it states there :

"The quantum of thirty-seven working days is recorded as fifty-one consecutive days recreational leave entitlement for shift workers."

I mean, if that's not been ..

PRESIDENT:

That's in the Administrative Guide, is it?

MRS HERBERT:

The Administrative Guide, sir.

PRESIDENT:

Yes.

MRS HERBERT:

I'm sorry, but I do realize that ...

PRESIDENT:

No, I'm interested in it, because I fail to see how it can be regarded as annual leave.

Thank you. It will be Exhibit H.3.

MRS HERBERT:

Up to the present time the State Service's administrative instructions

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PRESIDENT - HERBERT

MRS HERBERT: haven't got as far as recording the annual leave ones so I couldn't bring that one, sir.

PRESIDENT: No.

MRS HERBERT: No.

I believe that's dated '84 there.

PRESIDENT: Yes. I'm curious to understand how the whole period could be regarded as recreation leave when everyone knows that recreation leave was either 20 working days or 25 working days. This leave that you're speaking of is lieu leave or additional leave, but not recreation leave.

MRS HERBERT: Yes, sir. Well I would be guided by the Public Service.

PRESIDENT: Don't be.

MRS HERBERT: But I'm just saying that it's custom and practice ...

PRESIDENT: Yes, that's Exhibit H.3, Mrs Herbert.

MRS HERBERT: Yes, thank you sir.

I think adding to that, that I can only suggest now that the interpretation must be for days off when one can reasonably appear to be ...

If we refer back again to the Fire Brigades roster, sir, I think we would have great difficulty in interpreting that back to days off.

MRS HERBERT: ... because if you look at that roster for the first week we have one, two, three, four days on so that is four of your eleven. We have the second week with another four and the third week with another four; we would have to come back to work on one of those days.

We presume that should the Fire Commission feel that the interpretation for the extra days is reduced to seven, it would be seven days that an officer of the Fire Brigade would be on duty.

I put to you, sir, that the Fire Commission would be up for about three weeks extra. That is all I have to say at this stage sir.

PRESIDENT: Mrs Herbert, I am afraid I didn't follow you in your last submission.

If I am understanding this roster that is in H.2., the first week is day, night, followed by three days off. The second week is ...

MRS HERBERT: Day off.

PRESIDENT: Day off and four days on and two days off.

MRS HERBERT: Yes, sir.

PRESIDENT: I thought you would be saying if the Fire Commission's contention is the correct one, the person wished to take his 11 days off from the Monday in the first week, he would in fact receive, for the 11 days, seven days' pay.

MRS HERBERT: Nearly three weeks.

PRESIDENT: Seven days' pay.

MRS HERBERT: Seven days on which he would have been at work.

PRESIDENT: Yes, that is right, in lieu of 11 statutory holidays. That is what you are saying, isn't it?

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PRESIDENT - HERBERT

MRS HERBERT: Yes. Well, that is what I am saying but it would result in having nearly three weeks ... nearly 21 ... 15 days off ... it would then result in them having 21 days off - it must do - nearly three weeks, because you cannot differentiate between the pay you are going to give ... you are going to pay a person for being off on a public holiday who is a day worker therefore you must pay a person the same - a shift worker.

PRESIDENT: Yes, but taking the example given - if we could just for the moment assume that one of your members is going to take the 11 public holidays (consecutive days as submitted by the Fire Commission) and he was going to take all of those days off in the first and second week of Exhibit H.2, he would receive only seven days' pay, would he not?

MRS HERBERT: No, sir. When you have your public holiday off during the week, sir, you would not expect to be deducted pay for that week, would you?

PRESIDENT: No, I am just saying, if we are testing this, because in the first week there are four working days followed by three days off.

MRS HERBERT: Which he has earned by being at work on those four days.

PRESIDENT: So that is a total of seven days of which only four would have been paid.

Now, in the second week ...

MRS HERBERT: I would presume he would be paid for five days' pay or his fortnightly salary, sir, because he has earned those days off, sir.

PRESIDENT: You are obviously not following me, Mrs Herbert.

I think I am agreeing with you but you're not following me.

MRS HERBERT: Well, if you agree with me, sir, I will stop.

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PRESIDENT - HERBERT

PRESIDENT: Am I right or wrong in my belief that the State Fire Commission is saying that you add 11 consecutive days to the period of annual leave for a shift worker and that makes 46?

MRS HERBERT: Yes, sir.

PRESIDENT: Right. And I am putting that to the test. Let's take 11 consecutive days and apply them to that roster and we would find in those circumstances that the person concerned in 11 consecutive days would only pick up seven days' pay.

MRS HERBERT: Seven paid public holidays. That is what I said at the beginning, sir. Therefore we would only get seven out of that 11.

PRESIDENT: Yes, out of 11. Yes, that is all I was suggesting to you that ...

MRS HERBERT: Thank you, sir. I thought we were having a decrease in pay along the line.

PRESIDENT: No, Mrs Herbert, we are not. It might be arguable, of course, that a 14-hour day in those circumstances is something more than the award envisages.

MRS HERBERT: Yes, well I could see that that problem must have occurred to Mr Matthews when he had the problem with the Royal Derwent with the 12 and that. We will be endeavouring to sort out the award with regards to the definition of a day within the award very shortly.

PRESIDENT: On the other hand, of course, had work been done on a public holiday it would still have been a 14-hour day or a 10-hour day.

MRS HERBERT: Yes.

PRESIDENT: As the case may be. Mr Crew or Mr Thomson, are you totally confused yet or ... ?

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PRESIDENT - HERBERT

MR THOMSON:

No, Mr President. I would just like to point out though that on Exhibit H.2 (Mrs Herbert's exhibit), down the side, on the right-hand side, she has got the hours worked per week. I think that also explains ... down the bottom in the eight-week cycle there are 336 hours worked divided by eight gives an average of 42 hours per week. It depends whereabouts in that eight-week cycle that those 11 days are taken off as to whether some weeks ... you can see down to 34 hours, other weeks they are working 48 hours.

So it averages itself out in the end. That is just a point I would like to make.

PRESIDENT:

Yes. I am not entirely certain that Exhibit H.2 adds very much to this debate. It is simply a graphic example of how rosters work.

What I would like you to tell me, if you would, is whether or not I am asked to interpret the award by indicating the number of consecutive days' annual leave and lieu leave a shift worker is entitled to or am I requested to indicate the number of paid working days a shift worker is entitled to, having regard for the provisions of clauses 9 and 10.

MR THOMSON:

Mr President, consecutive days is what we are after. At present there is a leave roster and it works out today that every 224 days shift personnel get an average of 30 days. One cycle you get 28 days off, the next cycle you get 32 days off and that is the roster that has been working for some time now.

However, as Mr Crew indicated, negotiations are continuing on the proposed introduction of a 38-hour week and, really, what we are saying is we want this situation of the number of consecutive days per annum that the shift-worker personnel are entitled to so we can continue our negotiations.

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PRESIDENT - THOMSON

MR THOMSON:

Really, obviously the State Fire Commission would prefer it to be 46 but if it is 50 or 51, so be it. We can then continue with negotiations.

PRESIDENT:

Yes. Well, you see, it is not a simple matter to answer your question in the way that you would like it answered because when one talks in terms of consecutive days, you must inevitably be talking in terms of one seventh of a week's pay for each consecutive day. If then you are to apply your mind to the value of each day that is credited in lieu of a public holiday, you are immediately made aware of the fact that a public holiday is a fifth of a week's pay, so that if you argue that 11 public holidays simply means 11 consecutive days, it is apparent that that would be an incorrect calculation.

I am sure you would agree because had employees been able to either take the day off or in fact instead of taking leave in lieu of working on those days being paid, you would have to pay them double time, would you not? In other words two fifths for each day.

So you would find some difficulty I believe in trying to persuade this Commission on the wording of the award that each lieu day that is added to recreation leave in substitution for public holidays could only be counted as one seventh, or one consecutive day.

In a sense it could be if in an extreme case each of those lieu days was taken off at different intervals and each day taken off was a working day. You could get 11 fifths and that in fact would be just 11 days, but if you aggregate them as the award would suggest to me that that should happen, then clearly 11 fifths can only become two weeks and one day. Two weeks and one day would be 15 consecutive days - 15 consecutive days added to 46. Is

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PRESIDENT - THOMSON

PRESIDENT: that right?

MR CREW: No, it's 35 I think.

PRESIDENT: I am sorry - add 35 becomes 50. If Easter Tuesday became a holiday of course it would be 51. I am afraid that is the way it is going to come out. If you wish me to commit that to writing I will, but it can't be any other way.

MR THOMSON: Mr President, we, as I indicated before, are quite happy to accept that ruling - we are not fighting against it - but we want to make, I suppose, if you like, it official so that we can continue negotiations.

PRESIDENT: Yes. Then I will interpret the award accordingly. I can do it no other way, I regret to say, for the reasons I have just given and I am sure if you put it down on paper you must agree with me.

What I don't agree with is that it should be regarded as recreation leave - it is not.

Recreation leave for shift workers is, if you wish to have it in sevenths, 35 consecutive days to which period may be added 15 consecutive days' lieu leave in compensation for public holidays. I don't think it matters whether work is done on the public holiday or whether it is not done. If you reason it out, as I am sure you have done, you will find that every shift worker must receive credit for every public holiday whether he works it or he doesn't, provided he is not paid any extra for working on that day, and I take it they are not?

MR THOMSON: They are in fact, Mr President. They are paid ... in their loading they are paid an extra 3.75 percent for work on public holidays.

PRESIDENT: Well, that's an exception and not the rule. All other shift workers, so far as I am aware, receive their

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PRESIDENT - THOMSON - CREW

PRESIDENT: ordinary rate of pay for working on a public holiday because, clearly, if they receive another day in lieu that is double time and you can't get any more than double time.

MR THOMSON: Perhaps I didn't explain. The 3.75 percent is part of their average weekly pay salary. So they don't extra for when they actually work, it is just ...

PRESIDENT: It just goes on.

MR THOMSON: It goes on all year, yes.

PRESIDENT: Yes. I follow. Thank you.

Well, you don't get a second bite at the cherry today, Mrs Herbert. By the smile on your face you are not looking for one.

Do you understand that, Mr Crew?

MR CREW: Yes, sir.

PRESIDENT: I will bring down an interpretation.

You want me to express it in terms of consecutive days, not paid working days?

MR THOMSON: I think that would be appropriate, sir, yes.

PRESIDENT: It can be sticky but the award says consecutive days. I suppose I shall have to interpret it in that way, but I think today's transcript should be a guide as to what it really means.

MR THOMSON: Thank you, sir.

HEARING CONCLUDED