TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3865 of 1992

IN THE MATTER OF an application by the Tasmanian Confederation of Industries for an interpretation under section 43 of the Industrial Relations Act 1984, of the Nursing Homes Award

re clause 7 - Definitions

PRESIDENT

HOBART, 16 July 1992

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Could I have appearances please?

MR P. TARGETT: Thank you, Mr President. TARGETT P.E., I appear on behalf of the Tasmanian Confederation of Industries.

PRESIDENT: Thank you, Mr Targett.

MR R. WARWICK: Thank you, Mr President. RICHARD WARWICK for the Health Services Union of Australia Tasmania No.1 Branch.

PRESIDENT: Mr Warwick.

MR L. FOLEY: And LEO FOLEY from the Department of Employment Industrial Relations and Training, seeking to intervene. This matter arose from an investigation undertaken by the department, so the - you may wish to hear some comment on how it arose.

PRESIDENT: Any objection from the other parties to that application?

MR TARGETT: No.

MR WARWICK: No, sir.

PRESIDENT: No? Application is granted, Mr Foley, thank you. Mr Targett?

MR TARGETT: Thank you, Mr President. I guess the first question procedurally, I don't know whether you'd wish to hear the background from the department first before I go into the arguments I seek to put on the interpretation, or whether I put the arguments first and then hear the background second.

PRESIDENT: Well, if -

MR TARGETT: I'm quite happy.

PRESIDENT: - if it's your view that the department's position on this might be helpful as a background, I'm quite happy with that.

MR TARGETT: I think it might be.

PRESIDENT: Are you happy with that, Mr Warwick?

MR WARWICK: Certainly, sir.

MR TARGETT: I think it might put it into context better.

PRESIDENT: Yes. Mr Foley?

MR FOLEY: I'm happy with that, sir.

PRESIDENT: Very good. Okay.

MR FOLEY: Do you wish me to stand, Mr President?

PRESIDENT: Yes, please, that's the normal practice in -

MR FOLEY: Yes. My first appearance before you, Mr President.

PRESIDENT: I'm sure it won't be very traumatic.

MR FOLEY: Yes. Why we're appearing is that this matter arose out of an investigation undertaken by the department, and we came to the view that a year of service is simply a calendar year. And that position has arisen because we believe the award has attempted to clearly state that a year of service is 365 days of employment from a person's anniversary date. But that drives the question then: What are the days of employment?

The award tells us that they include rostered days off, public holidays, annual leave and sick leave; that is all of the days of the year except for unpaid leave. We've attempted to give the ordinary meaning to the words in the award where no legal decision could be found. But we did find some reference in a CCH document, in the Australian Industrial Law Reporter, which I'll come to in a moment, but other than that we have no other legal opinion that we're aware of.

In that absence we looked at a dictionary, and we looked at the `Shorter Oxford', and simply, a year is defined in there, and in `Chambers's Technical Dictionary', it won't come as any surprise to you that it's a space of time with limits necessarily coinciding with those of the civil year, taken between definite dates for some special purpose.

And `Chambers' talks about the civil or calendar year, as used in ordinary life, consisting of a whole number of days, 365, in ordinary years. In a legal definition, `Words and Phrases - Legally Defined', which is a dictionary we hold, edited by John Saunders, the term year, besides denoting the solar year of the calendar, may also mean any like period of time running from a date arbitrarily fixed by statue, contract or otherwise.

And it goes on to say that the expression `in any one year' or `in each year' may refer to the calendar year or to any period of 12 calendar months, according to the context in which an expression is used. So from those definitions we come to the fact that a year is a year as in the normal sense.

Some of the other awards were also helpful to us in that the Public Accountants Award tells us that in the case of part-time and casual employees a year's service shall be deemed to be 1660 hours of actual service. So some awards do actually go to that -

PRESIDENT: Yes.

MR FOLEY: - to define it.

The retail Trades Award recently, not yet printed, but the decision of the retail trades is helpful in that they - in their area of defining a retail employee grade 1, it tells us that people moving from - such employees shall be deemed to - shall be advanced a higher grade or position after 6 months' service, this shall mean 830 hours of actual service. So some awards are helpful in that respect.

The other source I referred to, the CCH document, The Australian Labour Law Reporter, it's talking about New South Wales, but again it talks about - in order to accrue annual holidays entitlement a worker must complete a year of employment, which means: a period of 1 year during which the contract of employment between the employee and his employer remains unbroken. And it's that sort of definition that we used.

The department policy comes from many years ago, we've had no recent queries on this. There have been a couple of letters many years ago, 10 years ago, 10 or 12 years ago in fact, once to - to Calvary, under the old Hospitals Award, but the clause reads exactly the same, saying that - signed by the secretary for labour, saying:

> - I reached the conclusion that the contract of service must be examined in conjunction with the definition of "year of service" -
>
> I advise, therefore, the actual working days are not necessarily all of those taken into account and included with rostered days off, public holidays, annual leave and sick leave when totalling the 365.
>
> In essence, if the contract of employment is fulfilled for the whole 12 months, then this equates with a "year of service".

So that's saying that the actual working days are not necessarily all that those include.

The other letter that is of less importance, because I don't have the originating correspondence, but it was indeed Corumbene Nursing Home, which is where this problem has arisen

this time. And we've written to - in 1981 to Corumbene, we've written on the 11th of August in 1981, and simply it says:

> If this is so, I can confirm the decision you say you were given earlier, because of the definition "year of service" -

And it is in relation to, I presume, the nursing assistants and domestics have worked in a dual capacity throughout the full period of our employment in the nursing home.

I don't understand - I understand that that is not a particularly useful document, because we don't know the question raised. However, taken in context of what we have explained to -

PRESIDENT: No, I must admit I didn't get very much out of that one.

MR FOLEY: No. But taken in context of what we've told Calvary 1 year apart, the department policy certainly would have been that a year of service of 365 days. So those are the - that's the background to it. We saw no reason to change our view.

PRESIDENT: And how did this come to the attention of the department, and what provoked this?

MR FOLEY: We were asked to conduct an inspection on wages at the - at a nursing home, Corumbene Nursing Home, on the basis that a person had moved through more than - past a year of - a calendar year of service. And we lodged a claim on the employer to pay a second year of service at that time. And the employer has taken the view that until that person works 365 days - actually works those time, then they are not entitled to go on to the second year of service.

PRESIDENT: I see.

MR FOLEY: Thank you.

PRESIDENT: I see. Thanks, Mr Foley. Mr Targett?

MR TARGETT: Thank you, Mr President. I guess I begin by briefly saying that the background, as been explained by Mr Foley, certainly the way we understand the background to the origin of which necessitated our lodging an application with this commission for an interpretation.

The facts as presented by Mr Foley in relation to the methodology used by Corumbene in that they determined that an employee should work on 365 days prior to moving up the incremental scale are correct, but before getting into the substantive details perhaps I'd just range over a couple of

ancillary issues which I believe are important to once again put the matters into context.

The current award which - to which Corumbene Nursing Home are required to comply is the Nursing Homes Award. Now the period of time over which the claim lodged by the department against Corumbene certainly goes prior to the establishment of this particular award and would cover a period by which Corumbene were responsible to the Hospitals Award, and I think to put the things in context, the reason we've asked for an interpretation of the clause contained within the Nursing Homes Award flows from the fact that Nursing Homes Award was established by this commission as a result of a decision of Commissioner Watling in T.3478 which was issued on 18th October 1991. And in that decision Commissioner Watling established the title and scope of that award and required by the decision that any employer which would be subject to this award would continue to comply with wages and conditions contained in the Hospitals Award.

A subsequent decision issued by Commissioner Watling on 29th January, the same T.No.3478, and also T.3512 of '91, put in place into the Nursing Homes Award the wages and conditions from the Hospitals Award, Division B, into the Nursing Homes Award. So the provisions which are currently contained within the Nursing Homes Award are identical conditions to those - and definitions and classifications - are identical to those which were contained within the Hospitals Award prior to the Nursing Homes Award establishment, and the period of time under which the claim by the department covers was under the old Hospitals Award. Because of the identical terms in the Nursing Homes Award I believe it was appropriate to lodge the application under this particular award to sort out the difficulties which exist.

I think it's also important for me to say that currently the Nursing Homes Award is the subject of an award restructuring process, and all of the issues within the award, including definitions and this particular definition, are currently the subject of a review between the parties. As to the outcome of that review, I can't foreshadow, but it is being reviewed and the particular definition is - certainly we've put proposals to the union for their consideration on this particular issue to amend the award.

So in any determination this commission may make on this particular application, we would not be requesting the commission to vary the award to fix up any difficulties that it may perceive, it is purely an exercise in attempting to sort out a specific problem related to a claim lodged by the department. It's unfortunate that we've had to go down this path to do so, but in my role as representing the employer, I believe that there are no other options available to us. We - I did have some discussions with a representative of the

department which did not solve the problem and certainly we believe that it's one that has to be solved in relation to this employer and I guess also in relation to any other employers which may receive claims for arrears of wages based on the historical perspective which may flow from the claim that's been lodged and any decision which may arise from this particular interpretation.

The claim that's been lodged by the department against Corumbene Nursing Home for the Aged Incorporated, goes to the question of five employees, one of which is a therapy assistant, two wardsmaids and two nursing assistants, and basically the claim is that arrears have occurred due to increments not received after the employees have completed 365 days of employment.

I propose to commence by honing in to those particular areas of the award in which I'm referring, and firstly I'd refer to clause 8 - wage rates, subdivision (2), ancillary service and clerical employees, and within that subdivision I refer to item 3 - nursing assistant, item 4 - therapy assistant, and item 7 - wardsmaid. That item also includes kitchenmaid, theatremaid, housemaid and waitress, but for the sake of the exercise I'll refer to it as wardsmaid.

Now within each of the items, 3, 4 and 7, there is an incremental scale which moves from the 1st year of service up to the 4th year of service and thereafter and each of the incremental scales are in identical terms to the other, therefore in presenting my submissions, I propose to refer merely to item 3 - nursing assistant, but I'd ask the commission to accept the submissions on the nursing assistant item to apply equally to therapy assistants and wardsmaids because they are - they would be identical submissions

PRESIDENT: Yes.

MR TARGETT: The incremental scale contained in the nursing assistant classification determines the appropriate rate of pay for a nursing assistant by reference to years of service. The 1st year of service commands a rate of $361.80, 2nd year of service commands a rate of 367.40 and so on for the 3rd year of service and for the 4th year of service and thereafter.

In determining whether an employee should receive the 1st, 2nd, 3rd or 4th year incremental scale it must be established which year of service is appropriate, and to do this one must refer to clause 7 of the award, namely, `Definitions'. And the last definition within that clause is the appropriate one which is headed `Years of service'. And that definition states:

> `Years of service' shall mean 365 days of employment in an approved establishment providing care for aged persons, including rostered days off, public holidays, paid annual leave and paid sick leave.

Now in addressing the particular definition that I've just quoted, I propose to look at that definition in three parts. In doing so, the three words `years of service', in my view, do not require the interpretation. It is the definition that follows from those words which require interpretation. And the word `year' or `years' is in fact not used within the definition of the title `Years of service'. The definition itself explains what years of service means, not the heading. So in interpreting this particular matter, I believe that the commission is required to look at the definition itself.

The definition, splitting it into three parts, the first part I wish to speak to are the words `shall mean 365 days of employment'. And I submit that these words are quite clear, precise and unambiguous; 365 days of employment means 365 working days. A person is employed on a day on which they work. If they are not working they are not employed on that day.

The basis of the argument put to me by the industry services division is that 365 days of employment - and this has once again been stated by Mr Foley - means one 12-monthly period equivalent to a calendar year. Whilst acknowledging that a calendar year has within it 365 days, the words in the award make no mention of a calendar year - they are quite specific in the words and their meaning; 365 days of employment means just as the words say, and I don't believe they can be construed any other way - that it is 365 working days. And I think it is appropriate at this point to make the comment that irrespective of what may have been intended originally by the award makers in an interpretation process we are required to look at the meaning of the words unless there is some difficulty with what the words say.

And I quote from the general principles of interpretation that have been established by this commission: It must be understood that in presenting an argument in support or in opposition to a disputed construction relating to an award provision, it is not permissible to seek determination of the merit, that is, on the basis of what one party or the commission believes the provision in question should mean provided the words used are in the general context of the award and in its application to those covered by its terms capable of being construed and in any intelligible way there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage. An award must be interpreted accorded to the

words actually used even it appears that the exact words used do not achieve what was intended. The words can only have attributed to them their true meaning.

And I would submit to this commission that the words `365 days of employment' are once again very clear and precise in their true meaning, and that is, 365 days of work - 365 days of employment.

If I move to the next part of the definition, and the words I'm referring to are, `in an approved establishment providing care for aged persons'. I do not believe that there is any difficulty with those words and I do not believe there is any real dispute between us as to - as to whether Corumbene Nursing Home for the Aged Incorporated is an approved establishment providing care for aged persons. This particular nursing home is a nursing home registered as such under the Hospitals Act 1918 and I would suggest that that, as an element of the submission, is a satisfactory explanation of it being an approved establishment providing care for aged persons. I don't believe that requires any great submissions from me.

PRESIDENT: Did you say the Hospitals Act 1918.

MR TARGETT: 1918.

PRESIDENT: Is that still in existence?

MR TARGETT: Gee, I hope so.

MR WARWICK: It certainly is, sir, it certainly is.

PRESIDENT: It certainly is?

MR WARWICK: Large sections of it have been replaced by the Regional Health Boards Act.

PRESIDENT: Oh, so just substantially amended rather than -

MR WARWICK: That's right.

PRESIDENT: - repealed. Yes.

MR WARWICK: The employment sections of that act in respect of state servants have been taken out, but the rest of it which goes to the question of - principally the question of licences issued by the government to provide health establishments is - is mostly unchanged.

PRESIDENT: Right, thanks, Mr Warwick. Thank you, Mr Targett.

MR TARGETT: I'm very glad to hear that based on the scope of this award which refers to that act.

PRESIDENT: Yes.

MR TARGETT: The last part of the definition which are the words `including rostered days off, public holidays, paid annual leave and paid sick leave'.

Once again, I don't know that there's any great dispute between us on that particular question, but in putting forward an argument on that particular issue I don't believe, once again, these can really be misinterpreted. I submit that the words contained in the definition required that rostered days off, public holidays, paid annual leave and paid sick leave are to be included as days of employment. And as I say I don't believe there's any real issue between us on that. I believe, once again, that is very clear and precise. And we do include those days as days of employment or as days worked for the sake of the exercise.

Now, it would be clear to the commission that on this particular definition the real point of contention is the first few words contained in the definition, as I've previously stated, and that is: 365 days of employment.

I refer - I can only refer back to that which I quoted form in the general principles of interpretation, and that is, we must look at what the words mean. The words that are contained, are they clear? Are they unambiguous? And I would certainly submit to this commission that they are. 365 days of employment, in my view, can mean nothing other than 365 working days.

Now, to put into context this definition and relating to a particular circumstance, I put forward the example of an employee, a part-time employee, who works on 3 days per week. In terms of the definition as I have put forward, and which is subject to this interpretation, this part-time employee must have 365 working days to her credit. And that, if translated into weeks, if the person is working on 3 days per week it would be 365 divided by three to establish the number of weeks that a person must work to obtain the - or to move up the incremental scale by one step.

If I give you - if I could give a simple mathematical example -

PRESIDENT: In terms of the - just before you do - in terms of the five individuals involved, are they part-time employees?

MR TARGETT: Yes, they are, Mr President.

PRESIDENT: Yes. And some of them of 2 days, 1 day?

MR TARGETT: They varied from - they commenced, for example, working 1 day a week, and there were changes during their contract from 1 day up, some of them up to 4 days. So there were variations between 1 day a week and up to 4 days a week.

PRESIDENT: Was it continuous in the accepted part-time -

MR TARGETT: Yes, we are accepting that it was continuous.

PRESIDENT: Yes.

MR TARGETT: In putting forward a simple mathematical example, if we take the 365 days and we assume that the person had five paid sick days, they would be counted as days of employment. If they took 4 weeks annual leave, bearing in mind I'm using the 3-day per week part-timer, that would be 12 working days, 3 days for 4 weeks. If we assumed that seven public holidays occurred on the days on which they were working, then that would be an additional 7 working days.

If they are then subtracted from the 365, that then requires the employee to work 341 days to move up the incremental scale. 365 days at, say, 3 days per week in this particular example would require the employee to work 121.67 weeks to move up the incremental scale, or 2.34 years.

Now, I accept that some people might believe that to be a bit unfair, but in the context of the definition, and also in the context of experience, I believe that that is exactly what is put in place in this particular definition. I could give exhaustive arguments on merit as to why someone should or shouldn't go through that process, but this particular exercise of interpretation does not go to the question of merit, it goes to the question of facts and the words that are contained.

PRESIDENT: How is that definition applied in respect of full-time employees?

MR TARGETT: My view is that the definition should be applied in identical terms to that which I have just stated, and that is 365 days, which would -

PRESIDENT: Yes, but you don't - you don't know how it is applied.

MR TARGETT: I don't know how it's being applied in the field.

PRESIDENT: So -

MR TARGETT: Whether they're providing a benefit in excess of what I'm saying the award provides, I can't answer. Oh, I will say this: I am sure that some people at least are providing for a full-time employee the benefit of the incremental scale after 12 calendar months.

Now, I would put to the commission that that is - that does not in any way diminish that which I'm putting forward, because it is simply a benefit in excess of what the award requires.

PRESIDENT: No, I was just getting at - trying to get some information as to the consistency of application.

MR TARGETT: On the question of full-timers, certainly I would have to say that there are employers providing it after 12 calendar months. On the case of part-timers, there is no question that employers are providing on the basis which I am putting forward. This is not an isolated incident, and I certainly have verified that with other nursing homes.

They are providing on the same basis as what Corumbene are. And that obviously has a substantial impact on the reasons behind having to bring this matter before you.

PRESIDENT: Yes.

MR TARGETT: I must, I guess, say at this stage I feel most uncomfortable in putting short submissions on this, although I guess everyone is quite happy with short submissions. I find it such a simple exercise in looking at the words contained in this particular definition, I'm not prepared to just waffle on for the sake of waffling on, in looking at a set of words.

PRESIDENT: We're all grateful for that, Mr Targett.

MR TARGETT: But, before I stop waffling on, I do intend to just reiterate a couple of comments and refer to section 43 of the act. Firstly, I refer to section 43(1), where the president states:

> At any time while an award is in force, the President may, on the application of the Secretary or an organisation with members subject to the award -
>
> (a) declare, retrospectively or prospectively, how the award should be interpreted; and

(b) where the declaration made pursuant to paragraph (a) so requires, by order, vary any provision of the award for the purpose of remedying any defect in it or of giving full effect to it.

As I stated earlier, I am requesting the commission to interpret the award certainly within the provisions of 43(1)(a), but I'm also requesting that an order not be made under the provisions of 43(1)(b), because of the circumstances relating to a review of the award, and if there are deficiencies they will be correct through this process.

PRESIDENT: And prospectively, retrospectively?

MR TARGETT: I would have say I would like it to be determined retrospectively, because of the claim that's currently being placed on a member of the TCI.

PRESIDENT: Back to what date?

MR TARGETT: Back to at least -

PRESIDENT: The making of the award?

MR TARGETT: No, for the - well -

MR WARWICK: 1946.

MR TARGETT: - that's all it can go back to, the making of the Nursing Homes Award, which is - where is it? Is that - October '91 and the order that issued from that. But I don't believe an interpretation can be placed on a clause within an award prior to the award being established. But in issuing a declaration on that, I believe it then covers the circumstances which has caused this interpretation to be needed, and with that we'll solve all the problems.

PRESIDENT: Yes.

MR TARGETT: The last point I wanted to just refer to goes to section 43(4),and that is the form of the declaration. And without reciting the - the clause from the act, we are - I would request that in issuing a decision on this particular matter that the commission make a declaration to ensure that, for the future, if any of these issues do arise, then that declaration can be utilised by the employers, if we are successful, obviously, to - as a defence against any further claims which may be lodged. Because I would suggest that there is a very strong possibility of that. So I do request that it be made as a declaration. If it please the commission.

PRESIDENT: Yes, thanks, Mr Targett. Mr Warwick?

MR WARWICK: Thank you, Mr President. In addressing Mr Targett's comments, sir, we would seek to put a principal submission and a secondary position. Excuse me. Our principal submission is that the construction that should be placed on the award is that the same provision should apply to part-time workers as they do to full-time workers. That is, they should go up to the increment after the expiration of 1 year after the date of their commencement of employment, and so from there until they reach the top of the incremental scale.

Excuse me again. We say that that is what is meant by the words - the words on all the - on the relevant pages of the award, and we - we believe that there are some other pages that have to be looked at as well.

PRESIDENT: When you say the relevant pages of the award,are you talking about the wage rates clause or the -

MR WARWICK: The award as -

PRESIDENT: - and/or the definitions?

MR WARWICK: Well, in - within the meaning of the interpretation principles, sir, we would say the award as a whole. And we think it's of some significance that Mr Targett hasn't taken you to the part-time employment provisions of the award proper.

PRESIDENT: And you'll be doing that?

MR WARWICK: I certainly will, sir. Our secondary position is that if the commission is not persuaded by that submission, it's our view that if the award is to be - is to operate in a different way then a host of matters going to questions of merit will then jump out Pandora's box. In other words, a host of unintended consequences will arise.

Our secondary submission would therefore be that if the employers wish to pursue the matter they should do so by way of an application to vary. In terms of a dictionary meaning of the words, I would seek to table a document in the first instance.

PRESIDENT: HSUA.1.

MR WARWICK: Thank you, sir. This is an extract from the `Concise Oxford Australian Dictionary', not that I think that these words have a different meaning because of the Australian of the dictionary itself. The first page has a definition of `year'. The second page has a definition of `service'. And in respect to the definition of `year', which appears about a third of the way down the column on the right-hand side, the

first definition states that it's the time occupied by the earth in one revolution around the sum. And that's the definition that we feel that should apply in this case. It's fairly straightforward.

And it's of significance that it doesn't mention any particular date, such as, what's commonly referred to as the new year, so it clearly means that from one point in time to the next point in time in which that revolution has occurred can be considered to be a year. In respect to -

PRESIDENT: Do you think that's the appropriate definition to use for cases of this nature? I mean, I'm just -

MR WARWICK: Well we don't see any -

PRESIDENT: - going down the various definitions and the second one seems to be more appropriate. It goes to `calendar or civil' year and I guess that's for legal purposes.

MR WARWICK: Yes, `period of days'.

PRESIDENT: Which is a `period of days' - `of 365':

> - reckoned from 1 Jan.) used for time-reckoning in ordinary affairs, commencing on a certain day and corresponding more or less exactly in length to the astronomical year -

It doesn't do your definition any harm, but -

MR WARWICK: No.

PRESIDENT: - but is more appropriate to matters of this nature.

MR WARWICK: Well -

PRESIDENT: I would have thought -

MR WARWICK: - I agree that it doesn't harm our position, sir, and I don't think it particularly supports the position position put by the TCI as well.

In respect to the following page, the question of the meaning of the word `service'. The first definition which appears about halfway down the left hand side of the left hand column, the first definition is I think somewhat anachronistic: `being servant, servant's status; master's or mistress's employ:'. That obviously has some relevance to what we're talking, particularly if we consider the history of the employment contract or employment .... law, but we would think that definition 4, which is about, I guess, three quarters of the

way down the page, is probably the one that we should rely on and that says:

> - what employee or subordinate or vassal is bound to, work done, or doing of work, on behalf of employer, benefit conferred on or exertion made on behalf of someone, expression of willingness to confer or make these, performance of functions by machine etc., -

We wouldn't - we don't see that there is anything in that which is different to the common understanding of the word `service' as it's used in employment matters and we wouldn't see that there's anything in that which supports the TCI's argument. We - I guess they believe that the dictionary does throw any great light on the subject other than the words mean what we all know them to mean.

In respect to Mr Targett's comments about the question of definition on page 6, I think - and it's fair to say that in our view, we believe Mr Targett's submission is fairly consistent - inconsistent and I think that was something that was highlighted by your questions to him going to the question of what happens with full-time employees. Mr Targett -

PRESIDENT: Unfortunately, inconsistency isn't a matter that I can direct myself to in an interpretation.

MR WARWICK: Oh, certainly, but I think - in terms of construction it was Mr Targett's view that the meaning of the words in the award is that 365 days of work were involved. He said that: years of service shall mean 365 days of employment means 365 days of work, and the definition definitely does not say that. It says: 365 days of employment, and if service means a state of employment or a contract of employment as specified by the dictionary, there's nothing which - there's nothing, we believe, which can be put forward that says because someone doesn't work on a weekend that their contract of employment expires on Friday night and begins again on Monday morning and even more so in respect to part-time employee. If they finished work on Wednesday night or Thursday night and have a longer weekend, their contract of employment, similarly, does not expire for that period of time while they are not at work and recommence when they return to work. They are employed and they continue to be employed until such time as the employment of contract itself ceases.

We believe that the definition that Mr Targett principally relies on which is the years of service definition, in fact, has very little real meaning and we believe it is extremely ambiguous. It certainly doesn't say, in our view, what Mr Targett asserts that it does -

PRESIDENT: Will you be seeking to demonstrate that?

MR WARWICK: Well, if I may, sir, I take you to the award proper and a section of that which I think is particularly illuminating and if I could refer you to clause 33 - part-time employees and in particular to subclause (f) which states, and I quote:

> Part-time employees shall be entitled to all conditions prescribed by this award subject to this clause and specific restrictions contained in other clauses of this award.

We believe that those words not ambiguous at all. It clearly says that part-timers get what full-timers are entitled to unless there is some specific restriction contained anywhere else - in this clause or anywhere else in the award and we would say that the definition upon which Mr Targett relies clearly does not draw any distinction between full-time workers and part-time workers, and for his argument to succeed we would say that that definition would have to draw that distinction. It would have to be an explicit prohibition. There would have to be something in that definition which said the entitlement of a part-time employee in this circumstance was different to the entitlement of a full-time employee.

We believe that it's really not logical for Mr Targett to suggest that the award means that a full-time worker has to work 365 actual days of work before they receive an increment. That is inconsistent with the ordinary meaning of the words in the award and what the ordinary person assumes year of service to mean.

PRESIDENT: The trouble is, they've defined year of service and for the purposes of interpreting the award obviously you have to have regard to the definition; whether it's - whether it's a bad definition or - or not, it has to be -

MR WARWICK: Well I -

PRESIDENT: - you have to use that definition in terms of understanding what the wage rates clause says because it continually refers to year of service.

MR WARWICK: Well I think that there are - there are two matters that I think are relevant in relation to that in terms of what the words mean. For the commission to decide in Mr Targett's favour, the commission would have to determine that 365 days of employment means 365 days' work.

PRESIDENT: Yes.

MR WARWICK: And -

PRESIDENT: That's the - that's the issue that I'd like to hear you on in respect of what your version of 365 days of employment means.

MR WARWICK: I wouldn't say there's 300 - well employment simply means what is commonly understood to mean and that is a contract to do work in service which is an open-ended contract both within the meaning of the award and within the meaning of common law, and one -

PRESIDENT: Have you - have got a - for example, a dictionary definition of `employment'?

MR WARWICK: That's one thing I haven't I'm afraid put together. But we would principally submit that a contract of employment is not - is not constituted by a group of several contracts which begin and end when the employee leaves and enters the employers premises. By Mr Targett's definition, every day off that's not included in this definition is a day where the employee is not employed - that is, every weekend, because weekends are not referred to in this definition.

PRESIDENT: It would make a mess of the unemployment statistics wouldn't it?

MR WARWICK: Certainly. Well everyone would be unemployed from time to time, sir. And I can only really rely on what's commonly understood by the contract of employment to mean - or the term `employment' to mean. It's commonly understood that you're employed until you are either - you either resign or dismissed. And that - that is the basis upon which, and the common understanding of all people I think, the word `employment' is used and that's the construction that's put on it.

It would - it would be useful, I agree, sir, to have a dictionary definition of `employment' but - however.

PRESIDENT: We - have you got any - just interposing there, Mr Warwick, have you got anything on that Mr Foley?

MR FOLEY: Mr President, I mentioned the `Labour Law Reporter' which talks about a year of - a year of employment as a - as a definition, I guess. In order to accrue annual leave - annual holidays entitlement, a worker must complete a year of employment, which means a period of 1 year during which the contract of employment between the employee and his employer remains unbroken. It goes on then about casual, and so on. I'm happy to table that to the commission if you wish.

PRESIDENT: It might be preferable if it were tabled so that the other side - both sides could have a look at it - so would you arrange to get it copied?

ASSOCIATE: Yes.

PRESIDENT: Yes, thanks, Mr Foley. Sorry, to interrupt you there, Mr Warwick.

MR WARWICK: Thank you, sir. A most useful interruption I think. I appreciate it. Well the principal thing about the definition, as I say, is the construction that should be placed on the word `employment', and also the way in which - the second thing is the way in which this definition works with the prescription made down in clause 33(f), which says that there must be a specific prohibition against the - the entitlements of part-time workers being different - for them being different to the entitlements of full-time workers.

PRESIDENT: It's prohibitions, really not restrictions.

MR WARWICK: Well it's just a slightly stronger word I can see, but I'm happy to use the word `restriction'.

PRESIDENT: And restrictions could mean any - anything that the award contained.

MR WARWICK: Yes. But the - but the terms of 33(f) specifically say that there must be some restrictions for there to be a different provision applying. And if Mr Targett's provision - or Mr Targett's argument that - that all workers should have to work 365 days before they get a - an increment fails on the basis of the definition of `year of employment' that we've just received, then also his argument that part-time workers should receive something other than the entitlement of full-time workers should also fail because there is no specific restriction.

Of course, on the other hand, if Mr Targett succeeds, then everyone will have to work 365 days to get an increment and - and that - that's open to the commission to decide that, but no doubt it would create a few problems, but we - because we would submit that that is not the custom and usage in the industry. But generally speaking, we don't dispute that there are arguments about part-time workers from time to time but generally speaking full-time workers go to the next level after one - well after 1 year after their date of employment, and that is the practice throughout the industry.

And it's certainly the practice generally in relation to part-time workers as well, although, as I say, we do have arguments about that from time to time in specific cases.

PRESIDENT: Just interrupting you again, we'll mark that paper from Mr Foley as DEIRT.1.

MR WARWICK: If I could make some comments in relation to the principles of interpretation, sir, and perhaps quickly run

through each of them. In terms of the first principle, the - the first requirement - if the terms of an award are clear and unambiguous the award must be interpreted according to those terms.

It was Mr Targett's submission that the definition contained on page 6, sir, is not ambiguous; we'd have to say that - that it is really lacking in clarity and - and it certainly doesn't say what Mr Targett suggests to you that it does say - that it means 365 days of work. It certainly doesn't contain that - that meaning. So obviously there is a need for some interpretation in relation to it, or, failing that, some sort of negotiation or arbitration between the parties in a - in a - a different process to this - or through a different process to this.

We would - we would however suggest that there is some ambiguity in the minds of the applicant in suggesting that work and employment are the same thing - a day of work and the meaning - the meaning of the words `a day of work' and the meaning of the word `employment' are the same thing - that - they are clearly not the same thing in our view. There is some ambiguity in the submission of the TCI in that regard.

The second principle that we see before us in the CCH at least is that as awards are framed against a background of custom in an industry, too literal adherence to the strict technical meaning of the word should be avoided. Now quite - quite clearly we say that -

PRESIDENT: Where are you quoting from now?

MR WARWICK: The - oh sorry, the Australian `Labour Law Reporter', sir, page 24123.

PRESIDENT: And did you have regard to the - the principles that had been set down by this commission? They started off I think in T.No.30 of 1985 and they've been varied a couple of times since. I'm not certain that that - and I haven't got mine in front of me I hate to admit - but the second one you mentioned doesn't ring a bell with me. Would you go through it again?

MR WARWICK: As awards are framed against a background of custom in an industry, too literal an adherence to the strict technical meaning of a word should be avoided. And it continues on: Instead, the award should be read as a whole and a meaning given to a particular - a meaning given to particular words that is consistent with the general intention of the parties.

PRESIDENT: Yes, yes. Yes, the latter part of it certainly is -

MR WARWICK: Yes.

PRESIDENT: - relevant.

MR WARWICK: Well, in relation to that, we'd say that notwithstanding the, I guess, question mark which hangs over the first part of that - that sentence, we would say that Mr Targett's submission that 365 days of employment means 365 days of work is too literal and adherence to the strict technical meaning of the words. And we would say that the words - the simple words that we're putting to you that it means a year - 365 days of an employment contract is - is consistent with the general intention of the parties - certainly the parties that made the award and the parties to industrial relations.

In respect to intrinsic material, and I trust that intrinsic matters may be addressed in terms of the commission's principles, I'd seek to table - well perhaps I'll table two documents.

PRESIDENT: I appear to have your original here, Mr Warwick.

MR WARWICK: Oh dear.

PRESIDENT: Do you want these given separate numbers?

MR WARWICK: Yes, please.

PRESIDENT: Which one first?

MR WARWICK: The TIC one firstly.

PRESIDENT: HSUA.2. And the Victorian decision, HSUA.3.

MR WARWICK: Thank you.

MR TARGETT: Could we get a copy of that last one?

MR WARWICK: Oh, I'm sorry. Sir, the first matter - the first exhibit is not one upon which I intend to rely to a great extent other than to say that, firstly, there are a couple of things in relation to Mr Targett's submission that we agree with, firstly, that, as he said - and they are firstly, as he said, that all of these matters are being reviewed as part of the structural efficiency process. That's certainly agreed and we do believe that there is some hope that the matter can be resolved through that process if it's not determined here.

We also believe that the matter shouldn't be resolved by way of an award variation and in that regard, if I may, actually turn to page 2. This is an interpretation which you, yourself wrote, sir, on the 15th of March 1991 which is in respect to a

different matter but coincidentally is not entirely different from the matter that's before you today, but at the third paragraph in this document, sir, you said:

> In addition, the HEF proposed an award variation to remedy the perceived problem. The parties were informed of my reluctance to vary an award as a result of interpretation proceedings and that reluctance is now confirmed.

So in relation to that, we would certainly agree with Mr Targett that an award variation was not the best way to resolve this issue.

In relation to the second aspect, I guess what I'd like to say, pertaining to this decision, is that it was a matter that went to the question of when a person might access incremental payments when working in a higher duties position and the principal question was whether or not broken periods of service in a higher duties position, when accumulated, could entitle a person to access to an increment and it was clearly the case that the commission decided against allowing an interpretation of the award of that sought, and as I say, I don't wish to rely to any great extent on this decision, but I think it is also true to say that, generally speaking, in this decision, the commission did decide against an approach which contemplated counting up hours from year to year or from one year to the next to determine whether an increment should or shouldn't be paid. So in terms of general approach, I think the decision of the 15th of March 1991 does have some very general relevance.

In respect to the second decision, sir, this is I think perhaps far more relevant and this is a decision of a full bench of the Victorian Industrial Relations Commission dated 4th of February 1991 which dealt with precisely the same sort of matter which is before you today, and because it's the same matter I think it would be appropriate that I read the whole thing into transcript. The document starts - or the decision states that:

> The Victorian Allied Health Professionals Association (VAHPA) applied for an interpretation of the Health Professional Services Award (the Award) with respect to Grade 1 Rates of pay, apart from classifications concerning psychotherapy.
>
> Clause 1(iii) of Part 6 of the Award exemplifies the provisions with respect to which the interpretation is sought, and reads (in part): -

- and the decision then sets out the wage rates, and continues on:

VAHPA contended that the provisions should be interpreted in the following manner:

"That the incremental movement for part-timers should not be any different to that of full-timers given that the award explicitly refers to payment being dependant on years after qualification and does not refer to part-timers having to equate to full time work before achieving incremental movement."

The decision continues:

The Award is not specific within its own terms as to the issued raised by VAHPA. By contrast, an award such as the Social and Community Services Award contains a provision in Clause 3(a)(ii) of Part I, which reads:

- and there's a quote -

"(ii) the yearly increments in the case of Class I are based on years of full-time practical experience as a Social Worker from date of qualification, and, in the case of Classes II, III and IV are based on years of full-time experience or service in those classes respectively."

Upon an agreed factual position put to us, employers in both the private and public sectors subject to the Award have applied the Award in practice in a manner consistent with the interpretation sought by VAHPA: they have done this for twenty years (from 1969 to 1989)! This situation continued until late 1989 when the Spastic Society of Victoria decided to adopt a practice in the following terms:

- and there is a quote -

"PART-TIME THERAPISTS YEARLY INCREMENTS.

Managers are to advise all part-time Therapist that future service increments will be calculated on the basis of "full-time practical experience" i.e. a Therapist Class 1 Year 3 working 20 hours per week would need to work 2 years before becoming a Class 1 Year 4 Therapist.

Current part-time Therapists classification i.e. Class 1 Year 3 will remain but on their anniversary date they will not move to the next increment

unless they have worked the equivalent of full-time hours."

Some other employers are now adopting a similar practice to the Spastic Society.

Despite an invitation from the Bench, no party sought to make substantive submissions on the principles of interpretation and with one exception no part could answer a question from the Bench as to whether there were any tribunal decisions concerning the broad conceptual purpose of increments and how they might affect part-time employees.

The one exception was a decision referred to by Mr Maloney for VAHPA in answer to a question: this was a decision of Macken J in the industrial Commission of New South Wales, Re Hunter District Water Board Employees Association (1987) 21 IR 208. At p.213 and 214 Macken J. said:

"Annual increments - part-time officer

The Board seeks to have the standard public service condition relating to annual increments applied to part-time officers. It claims that increments should be paid on the completion of the equivalent of full-time service in the case of part-time officers. The Association claims that each part of a year worked by a part-time officer should count as a year of service on the incremental scale where such part of a year comprises part of the calendar year.

The principle sought to be applied by the Board is that if a part-time employee is engaged for only 50% of the hours worked by a full-time officer for a two year period they should be credited with one year's full-time experience and should, therefore, only receive an increment for one year of service.

The principle is opposed by the union but I can see no reason why such a standard public service provision should not be applied to Hunter District Water Board employees; particularly as increments are awarded for experience. It would not seem to me to be sound industrial principle to award the same experience increments to a part-time officer as would be applied to a full-time officer who, by that very fact, would have so much more experience.

I leave it to the parties to draft an appropriate clause."

> Mr Maloney sought to argue against the relevance of the decision by saying that it was based upon public service provisions. It is arguable as to whether or not the contents of that decision should be necessarily so confined. However, for our purposes it is enough to say that the decision of Macken J goes to industrial merits and what should or should not be a clause in an award.
>
> The rest of the material before us either went to the industrial merits of what should be in an award or was material which could be interpreted in more than one way.
>
> In the circumstances of this case where the award is not specific in terms upon the matter in issue, where the relevant award provisions have been the same for just over twenty years and until recently have been the subject of a twenty year custom and practice in accordance with the interpretation sought we determine the application by giving the interpretation sought by VAHPA.
>
> We shall refrain from commenting upon the industrial merits of material going to what should or should not be in the award as they may involve a consideration by the Commission in a dispute settlement and or an award-making role in the future.

I think that that decision is of some relevance, sir. We believe that, as we've previously indicated, the award and particularly the definition on page 5 is not specific. It is a very ambiguous clause and is not helpful in terms of deciding the matter and I don't believe it assists you in deciding the matter, sir, and we believe that Mr Targett's construction is not there in the award, nor it is in those words contained in that decision - that definition, I'm sorry.

It is clearly the case that the award provisions that are in the award which is before you has been the same. The only difference between this award and the one being discussed by this decision is that the period of time is about twice as long. From memory the nursing - well the industrial coverage by way of an award was first instituted in Tasmania in relation to nursing homes in 1946 so it's a 40-year or more custom and practice or going on - yes, certainly - and we believe it's reasonable for us to put to put to you, sir, that a similar sort of decision ought to be made in this circumstance, having regard to the experience of the - the experience of the full bench of the Victorian Commission has been through.

I think there is one matter that is perhaps worth considering and that is that the award clause that the full bench of the Victorian Commission was considering - spoke about - quite specifically spoke about - 1st year of experience after qualification - we'd submit that that is an obvious difference, but really when it's all said and done, we don't see that it makes a great deal of significant difference to the - what it that -

PRESIDENT: Does it help me in interpreting the -

MR WARWICK: Certainly not, sir. I wouldn't -

PRESIDENT: - what years of service means in the context of the state award?

MR WARWICK: We wouldn't suggest so, sir. It doesn't - it's not a material matter - a matter of material significance.

In respect to matters relating to the history of the award and circumstances under which it was made - the documents associated with the making of an award, Mr Targett has correctly indicated that the award - as it is before you - is quite a fresh award, but - or only less than a year old, but there is a long history of award coverage, as I say, in the sector of the health industry and our examination of the history of the documentation doesn't bring anything to light which could assist you in determining the matter.

PRESIDENT: What about custom and practice?

MR WARWICK: Custom and practice in the industry - in this sector of the industry and the health industry generally is that it's certainly full-time workers access increments on the anniversary date of their employment. The one exception to that rule is that in the public sector the employer does have the right to - to say to an employee, well, we don't think that you have gained the experience or - well, in essence - gained the experience that we think it is necessary for you to go up to that increment. So it is possible for -

PRESIDENT: Is there anything different in the award that enables them to do that?

MR WARWICK: Yes, there is. There's a specific reference that says -

PRESIDENT: Yes.

MR WARWICK: - unless the employee has satisfactorily demonstrated.

PRESIDENT: Yes, but what about in the Hospitals Award?

MR WARWICK: There's nothing which prohibits -

PRESIDENT: It's exactly the same wording -

MR WARWICK: Yes.

PRESIDENT: - as this Nursing Homes Award?

MR WARWICK: That's correct, sir. There is nothing which explicitly prohibits access to the increment after - after 1 year - 1 calendar year of service - and that is the custom and practice in the industry - certainly in respect to full-time employees. In the vast majority of cases, it is also the practice and custom in the industry in relation to part-time employees. But as Mr Targett has indicated, Mr Foley has indicated, there are - there have been problems with that from time to time and disputes about that from time to time.

In that regard we would rely on .... 33(f); if the commission is persuaded by our argument and it says that it cannot be construed from the words in the award that 365 days of employment means 365 days of work and therefore the commission must determine that there is no restriction on the entitlement of part-time workers to annual increments on a calendar basis.

In respect to the question of whether or not the parties have adopted a particular interpretation of an award in the past, there is no letter of agreement or anything to that effect between the employees and ourselves on the issue - there is simply custom and practice, although Mr Foley's comments going to letters which the Department of Labour and Industry has written to employers in the past, I think it does indicate at the very least the department's had - certainly had a policy on the matter.

We would say, sir, that the - the applicant fails on each of the grounds generally recognised in interpretation proceedings. As I indicated earlier, we do have a secondary position, and that is, the adoption of the TCI interpretation would raise a range of matters going to merit. We say there would - their application, if successful, would - well we say that it is really about merit, but that it would raise a range of unintended consequences in relation to merit, the first of those which is that on the face of it at least, Mr Targett's very application seems to address only some classifications in the award and not others. So it would seem to us that he's only asking you to make an interpretation in relation to increments, in relation to therapy aides, wardsmaids, and nursing assistants.

PRESIDENT: That's really not correct, Mr Warwick, because one of the little fundamentals of interpretations is that there must be some factual situation to relate to, and it seems as though these are three specific areas where there is

a particular problem at the moment and they're the facts which enable an interpretation to be made. So I -

MR WARWICK: I appreciate your comments in that regard.

PRESIDENT: - yes, I think, and it's probably is not fair to say that - that it's an inappropriate application because it only deals with three.

MR WARWICK: Right. Well, I guess Mr Targett does have another .... but it's -

PRESIDENT: Yes, fine.

MR WARWICK: - but there's nothing in his submissions that he's put to you to date which lead me to believe other than he's asking you to only make an interpretation in relation to three groups of people.

There's the question of what someone who has got two part-time jobs does. They might even work more than - more hours per week than a full-time employee. They might have two 20-a-week jobs and that will certainly raise some problems for us out in the field, and it's certainly something that wouldn't be addressed by the interpretation as sought by Mr Targett, it would - it would create that problem of merit.

It is the case, sir, that in certain sectors of the public service on the mainland and in other areas there have been agreements negotiated which suggest that people don't automatically go to the next increment on an annual basis when they are part-time employees, but there are limits on the time that they do have to wait ultimately before they do access those - those increments, and that would be something that would I guess come to the surface as a consequence of an interpretation as sought by the applicant.

In short, Mr President, the award says that part-time workers get what full-time workers get, unless there is a restriction to the contrary. And we say there was no explicit restriction to the contrary in this circumstance. And we further say that - that really in the matter of merit that the TCI wishes to raise, and we believe there are several matters of merit in their application, should be dealt with by you or under the provisions of section 23 of the act. If the commission pleases.

PRESIDENT: Yes. And you're - you're attributing to the employers the intention to discriminate between full-time and part-time employees in relation to what is deemed to be a - the period of service necessary to attract an increment. I got the impression from Mr Targett that he was saying that perhaps the employers had been generous to full-time employees

by allowing them to gain an increment after 12 months, rather than have to work 365 days.

MR WARWICK: Well, that raises a number of interesting questions, sir, not the least of which is that this is a paid rates award and they're not entitled to do that. I suppose that they could do that unknowingly.

PRESIDENT: Yes. Well, I don't want to debate with you -

MR WARWICK: No, certainly, sir, but -

PRESIDENT: - whether it's a paid rates award or not.

MR WARWICK: Certainly, but - well, Mr Targett was talking about them as some sort of over-award payment -

PRESIDENT: Yes.

MR WARWICK: - or entitlement.

PRESIDENT: Yes.

MR WARWICK: And he relies, in that regard, in saying to you that 365 days of employment means 365 days of work. And therefore, because employees do generally, and he concedes do generally gain access to increments after a calendar year from the date of employment; because they receive that benefit that that's some sort of over-award entitlement. Now, that's simply not the case.

The words do not say `365 days a week' they say `365 days of employment', which implies a contract of employment which is an ongoing contract. And the practice is that people, as Mr Targett says, go up after the next year - after a year of service. I think that it's true to say that was just a - just a little but unrealistic for Mr Targett to be saying to you that he wants you to interpret the award in a way that says full-time workers will have to work 365 days before they get an increment. I think that's just a little bit unrealistic.

PRESIDENT: But I mean, that's on his interpretation, and that's what the award must imply.

MR WARWICK: I would agree with you if - I would agree with Mr Targett, sir, if the award said `years of service shall mean 365 individual days of work'. But it does not say that. That construction is not possible.

PRESIDENT: Yes, very -

MR WARWICK: If the commission pleases.

PRESIDENT: - very good, thank you, Mr Warwick. Do you want to respond now, Mr Targett?

MR TARGETT: I'm going to be fairly brief, Mr President, I know -

PRESIDENT: Yes.

MR TARGETT: - I know - I'm quite happy to go whichever way you wish to go. Go on?

PRESIDENT: Well, if you're ready to proceed.

MR TARGETT: I will be brief. I'll commence by saying it's amazing that Mr Warwick can say I'm being unrealistic in asking for an interpretation in a particular fashion. I would have thought that the mechanisms for interpretation require a party to put forward the way they read the words, and I certainly wouldn't have viewed that as being unrealistic. Anyway.

Firstly, referring to the submissions of Mr Warwick concerning clause 33(f), where he relies on the clause that part-timers shall be entitled to all conditions prescribed. I'd merely say to that that it does open up within that very clause the ability for restrictions to apply. And, in fact, if Mr Warwick had listened carefully to what I said about the construction of this particular definition he would have heard me say that I believe the application of this definition to full-timers is exactly that which I'm asking for this definition to be read for part-timers.

I'm not suggesting in any, way shape or form that the interpretation be differentiated between the two levels of employees, that of part-time and full-time. In fact, I quite specifically said they should be the same.

He also raises the issue, on numerous occasions, concerning the practice in the industry. I've already quite clearly said this commission that the practice - that there is a substantial practice within the industry that that definition or that interpretation that I'm putting forward is what is being applied within the industry. And if - and I don't concede that custom and practice does weigh heavily in an interpretation matter, I believe it is quite an insignificant matter as far as interpretations are concerned. But if it did -

PRESIDENT: It's one of those things which you're entitled to consider if all other things aren't very helpful.

MR TARGETT: I was certainly going to get to that. And the question of custom and practice being used where the words contained are ambiguous, but I've already stated quite clearly

to this commission that the words contained in that particular definition, in my view, can be nothing but clear and precise. The question of ambiguity just doesn't arise in that particular definition, and for Mr Warwick to suggest it does I find he is stretching a very long bow indeed.

Another thing he referred to quite often, once again, was that the word `employment' in the definition meant `contract of employment'. I once again would suggest quite strongly that that is stretching the bonds of friendship just aphrase too far, because the words `contract of employment' doesn't appear anywhere within the definition that is the subject of this interpretation. It doesn't even mention contract of employment or infer it.

It specifically refers to days of employment. The contract of employment concept is not raised within that definition, which also brings me to the document that was put forward by Mr Foley concerning year of employment. And I guess I'll address that here.

PRESIDENT: Yes, please.

MR TARGETT: That document refers to New South Wales legislation and does state that a year of employment in order to accrue annual holidays entitlement: a worker must complete a year of employment. And it goes on to then explain what, in the context of the New South Wales legislation, a year of employment means.

Which I would suggest doesn't really aid the - the commission in interpreting the definition of year in service - year of service within this award, where it has its own quite specific definition. A year of employment defined within New South Wales legislation could mean something quite different, and I would suggest quite strongly does mean something quite different to that which we are talking about in the definition.

Year of employ in the context of the definition that's contained within this award is not even mentioned. We have year of service and then a definition that flows on from that, and we talk about 365 days of employment. We do not talk about year of employment. So I would suggest that that particular document, whilst most interesting, is not relevant to the definition because of the variation in words and the fact that that legislation has its own specific meaning which is stated within that document.

Mr Warwick also continually mentioned - Oh, I already mentioned about the contract of employment, and I've stated that I don't believe that's in any way relevant. To suggest that I'm saying that there are a continual breaking of contracts et cetera is just a nonsense. I'm not suggesting

that in any way, shape or form. I'm not - I've already stated to - in response to a question from the president, that we are saying it is continuous employment.

The employees that we're talking about are continuously employed, but we have a situation here of a very specific definition to give a very precise meaning to a term for determining a rate of pay.

PRESIDENT: And just while we're on that point, do you - do you consider that that's what was in the mind of the award maker for full-timers?

MR TARGETT: Mr Warwick, I think it was, stated that this award was commenced about 40 years ago, I'm quite happy to say I wasn't even born then so I would not profess -

PRESIDENT: Weren't you really, you lucky, lucky person.

MR TARGETT: I'm not going to try and profess what may have been - may or may not have been in the minds of the award makers, suffice to say that in my experience with the awards that were made 20, 30 and 40 years ago most of them have a lot of intrinsic problems within their words. And I get back to what I said earlier, I don't necessarily believe this was the best way to go about things. I believe it was the only way to solve a problem that has arisen.

We are trying to sort this clause out -

PRESIDENT: Yes. Do you -

MR TARGETT: - through the award restructuring process.

PRESIDENT: But do you think - do think it was intended that the award - the award as worded - should apply to full-timers?

MR TARGETT: I can certainly see a scenario where the award makers intended that a full-timer at the end of the calendar year should go up an increment. That would have been solved - and I suggest that it's a fault in the clause - where they've included rostered days off, public holidays et cetera, by including weekends, and they didn't do that. But that is really the only difference. And I would suggest that's perhaps a drafting error.

If they had of included weekends in that list of things, then it would have quite specifically required a part-timer to still serve out the number of days, but weekends additionally would have been included. So I don't believe that then even becomes inconsistent with the submissions that I'm putting forward.

PRESIDENT: Yes, I mean, but it does - that's if you add the weekends.

MR TARGETT: Yes.

PRESIDENT: Well, why do you think weekends weren't included?

MR TARGETT: I would suggest it's probably a drafting error.

PRESIDENT: And what should the commission do about drafting errors?

MR TARGETT: Well, under normal circumstances tell us to fix it, but because we are already trying to go through the process of fixing it then certainly that will be fixed. But in the context of the requirements for this interpretation it is a dilemma. I can't sit back and say to the commission that we haven't attempted to sort this out, because we have. We haven't been able to so we require a ruling as to what should or shouldn't apply.

If the commission rules that it is 12-monthly, then the full claim by the department applies. If the commission rules in my favour, forgetting the weekends for the moment, then it is a substantially lesser sum of money. There is a definitive problem that must be solved in one - in a - by whatever methodology is available to us. And this is it.

Now, if the words `weekend' have been left out - may have been left out, and that's my assumption from whatever happened before I was born, if they were left out then there is a drafting error in that particular issue. But that, once again, does not diminish the - and I'll paraphrase - the pro rating of experience for part-timers as opposed to full-timers, that still would apply even if that was included.

PRESIDENT: Yes.

MR TARGETT: Mr Warwick presented the Victorian decision, HSUA.3 I believe it was - HSUA.3. I must say I don't believe that that particular decision has any real relevance to the matter that's currently before this commission in that they quite different set of words and they are quite different proceedings with an agreed position put by the parties of agreed custom and practice. Once again, that doesn't exist before this commission on this particular issue, and the words aren't ambiguous. So I don't believe the Victorian decision is of any consequence to the determination of the matter by this commission.

HUSA.2 - once again, I don't believe is of any relevance to these proceedings and I note with interest Mr Warwick's statement that he doesn't rely heavily on it anyway, so I don't propose to worry about that in any real way.

The last thing - second last thing is the definitions that Mr Warwick put forward using the dictionary definitions and that is of the words `year' and `service'. I stated quite clearly at the beginning of my submissions which Mr Warwick didn't seem to even contemplate or address that the real issue before this commission is the definition - the words `years of service' are the title of what is being defined. It is the definition which requires interpretation by this commission, and that hasn't been addressed by Mr Warwick.

MR WARWICK: Well I did the exhibit yesterday, Paul.

MR TARGETT: Sorry?

MR WARWICK: I prepared the exhibit yesterday, prior to your submission.

MR TARGETT: Oh that's okay. The last thing I wish to address is his statement about us not asking for an interpretation on only three items and only addressing those three particular issues. It is - I was quite up front about this at the beginning of the submissions, the claim that has been lodged were against three classifications. I put forward the arguments based on the factual position which requires this interpretation to be performed and I don't believe that there is any other way which I'm able to present the submissions to the commission, other than those things which are laid down in the principles for interpretation by this commission. If it please the commission.

PRESIDENT: Yes. Thank you very much. Mr Foley, I sort of ignored or didn't give you the opportunity to comment on either of the other submissions. Do you wish to say anything?

MR FOLEY: Mr President, no, I think it's up to you to make an interpretation. I may be able to help you with just one thing about retrospectivity and so on, that you mentioned before. If we had not had an interpretation on this matter sought then our next course of action would have been perhaps for a Crown Law opinion and to the Court of Petty Sessions. Now that it has come before the commission, we'll have regard for your decision and it wouldn't matter whether it was retrospective or not. We wouldn't proceed with a matter - if you found a different - formed a different view to us.

PRESIDENT: Yes. Thanks, Mr Foley. I don't think that requires a response from either side.

MR TARGETT: No.

PRESIDENT: Nothing further? Well we'll conclude the matter and I'll hand down a decision after many sleepless nights.

HEARING CONCLUDED