

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

**T. No 530 of 1986**

**IN THE MATTER OF** an application  
by the Hospital Employees'  
Federation of Australia,  
Tasmanian Branch No.1, for  
interpretation of the Hospitals  
Award

re payment of part-time and  
casual employees

PRESIDENT

**HOBART, 10 December 1986**

**TRANSCRIPT OF PROCEEDINGS**

(CONTINUATION)

MR FITZGERALD:

Just proceeding, in respect to the matter before Mr Imlach objected, as I indicated the Shipbuilders Award interpretation does have some great significance in terms of the general principle inherent in this matter and the submissions made by my learned colleague, Mr Edwards, in that matter I think are very appropriate to these proceedings, notwithstanding the differentials in verbiage between the two awards.

But I will, as indicated, sir, concentrate my submissions on the dispute provisions within this particular award.

PRESIDENT:

I sincerely hope that I don't have to go to the lengths I found it necessary to go to in the Shipwrights Award, to come to a conclusion. Are you familiar with that award?

MR IMLACH:

No. I'm not, Mr President.

MR FITZGERALD:

I understand that had some fairly severe historical complications and the decision was ...

PRESIDENT:

That was an horrific exercise.

MR FITZGERALD:

I understand that, sir, and I share your views after reading that decision, particularly. It's a difficult one to come to grips with but in any event the general principle was in respect to overtime - that penalty should be applied on the base rate and margin at that stage as it was and exclude all those extraneous payments and I draw some similarities between that situation and what we have in this situation, sir.

I just wish to refer to the guidelines which formed part of your decision in matter T.30 of 1985 because I think they are very important. This is my third interpretation, so I should be cognizant of them.

Ironically, it's my third

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MR FITZGERALD:

interpretation involving the Hospitals Award. As yet I haven't had any other interpretation involving any other awards and I believe there has been another one in the public sector awards. So to some degree, I would submit, sir, that does indicate some problems with drafting of this award, if the major number of interpretations before the Commission involve this particular award.

I'm aware of those seven or eight guidelines described in matter T.30 and I would suggest that they are soundly based, based on those of other tribunals and based on common sense and rationality and I think that is most desirable.

I am also cognizant of what was described by my colleague, Mr Edwards, as the 'doctrine of generous construction', which is generally recognized by tribunals.

PRESIDENT:

'Generous' or 'beneficial construction?' Generous?

MR FITZGERALD:

Generous construction, sir. And I'd like just to quote - use the quotes which Mr Edwards used in the Shipbuilders Award interpretation and explain the rule and believe in explaining the rule, sir, I believe that that rule has implicitly been accepted by this Commission in an earlier decision relating to an interpretation, which I'll come to shortly.

The rule is explained in the C.C.H. Australian Labour Law Report, Volume 2 at paragraph 30-275, which deals with the interpretation of awards principally by the Federal Court, or by other judicial authorities. I will just quote from the particular paragraph from the C.C.H. volume:

"Despite the fact that awards are statutory instruments to be interpreted in the light of

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MR FITZGERALD:

the general principles relevant to the interpretation of such documents, the tribunals usually take a generous rather than a literal approach. Tribunals will strive to give that interpretation to the terms of an award that will accord with the intention of the parties as gathered from a consideration of the entire award.

This generous approach to interpretation has been acted upon for a great many years. The classic declaration of that attitude was expressed by Street J. in *Geo. A. Bond and Co. Ltd. (in liq.) v. McKenzie* (1929) 28 A.R. 499 at pp. 503-4:"

And I'll just go on to quote Justice Street.

"Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relation as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament."

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MR FITZGERALD:

I just highlight that word 'expects', sir. We don't always find precise drafting in Acts of Parliament. I will continue:

" I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of the words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award."

So, in that regard, sir, I believe that that doctrine is most pertinent and I submit, sir, that it has in fact been picked up, if I can use that phraseology, by this Commission in section 43 proceedings in matter T.91 of 1985, which as you'll probably appreciate was once again involved in this award and I quote from page 9 of transcript, where you said:

"One should also be satisfied that the result is not otherwise out of step with the general provisions of the award as a whole."

And I further quote from that page:

"... that unless the intention of the award-maker permitted no other conclusion the interpretation would not sit comfortably with the framework of the award and would therefore be regarded as suspect."

Now, they are your words, sir, and I think very much consistent with the words used by Mr Justice Street, and once again I think it indicates a rational commonsense approach to

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MR FITZGERALD:

this particular section.

So, in my view this is a further rule or guideline which this Commission should use in the interpretation matters pursuant to section 43.

Certainly in matter T.189 of 1985, the Shipbuilders Award interpretation, there was no hint or suggestion that you felt that that proposition put forward by Mr Edwards was inappropriate.

I will, Mr President, clearly show by my later submissions, that the position taken by the applicant union - or union and supported by the R.A.N.F. - is at odds with, or you used the words, 'out of step' with other provisions of the award and we've already mentioned one. That was in respect to part-timers and casuals working on a public holiday and I will refer to a decision of Mr Pamplin, the former Chairman of Industrial Boards, in that regard.

I'd now like to make some specific submissions in respect to the application before you, sir.

The actual application is confined to Section III, however there are similar provisions, I believe, in other sections of the award. But Section III of the award, as you are well aware, sir, by now, after having canvassed the Hospitals Award at length in previous interpretation matters, relates to the establishment for the care of the aged of which Mr Stokell's establishment is subject to and is a member of our Chamber and of which some 50 other establishments of similar nature are also subject to and are also members of our Chamber.

Specifically, the application relates only in my submission to clause 18, which Mr Imlach was notable by the lack of submission this morning - that's overtime.

Clause 19 - Part-time Employees,

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MR FITZGERALD:

which Mr Imlach made submissions on and I'll also do likewise this morning. Clause 23, and he referred to (c), (d) and (e), Shift Allowances for afternoon and night shifts, which is clause 23(c); 23(d), Shift Allowances for Saturday work and 23(e), Shift Allowances for Sunday and holiday shifts. /

Now, they specifically form part of the application before you and it is my submission, sir, that they should be considered as a whole, rather than separately.

I make further submissions in support of that, sir, in that the expressions used by Mr Imlach in the application states and I quote:

"... for all purposes of the award."

Now, I understand that expression and I understand that what he's trying to get at is that for all purposes including shift penalty periods and overtime periods, the rates should be on the loaded 20% rate and I would refute that. I will be making further submissions in that regard.

So, simply put, sir, as that expression is used, notwithstanding Mr Imlach's lack of submission in respect to clause 18 - Overtime, I would submit that this application should be considered as a whole. /

We would submit that the proposition inherent in this application, particularly the words "for all purposes", is fundamentally wrong and not only is it at odds with provisions of this award contained within the application and I refer particularly to clauses 18, 23 (c), (d) and (e) and clause 19, but it is also out of step with other provisions of the award. }

We will also be showing, sir, that within the terms of the Commission's guidelines in respect to section 43

MR FITZGERALD:

matters, guideline 3, which refers to the English usage of words that are referred to in the application are capable of being construed in an intelligible way which in fact refutes the position taken by the applicant and we'll concentrate around this word 'ordinary', which you yourself have previously raised with Mr Imlach before.



MR FITZGERALD:

We believe that the construction of the word ... the normal English construction, usage construction of the word 'ordinary' in fact very much supports our position.

We would also show by using the doctrine 'Generous Construction' that the position taken by the applicant is generally out of step with other provisions within the award.

I'd like to take you through the award, sir, and commence with clause 18 (vii). And I quote that particular section - and certainly Mr Imlach was obviously very keen to avoid it, because I think it does great damage to his particular position in respect to his application.

And I quote section 18 (vii) :

"The calculations of the overtime penalty prescribed in this sub-clause in the case of an employee in receipt of a loading in lieu of sick leave, annual leave and public holidays shall be based upon the relevant award rate (as defined)."

Now I take you further, sir, to the relevant award rate definition, which is in clause 34 (t), I believe - yes it is.

PRESIDENT:

Just bear with me, because ...

MR FITZGERALD:

I'm sorry.

PRESIDENT:

... I can't find it, 34 yet. Yes, I have it now, thank you.

MR FITZGERALD:

Well I'll quote from clause 34 (t):

"'Relevant award rate' is the rate specified for the appropriate year of service applicable to the employee is the appropriate classification in Part I of this Award, excluding all allowances, loadings etc."

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MR FITZGERALD:

Now, the final words of that definition, in my submission, are most significant in terms of this application. And I would submit, sir, that the words 'allowances, loadings etc.', particularly by the use of the word 'etc.' as it is an all-embracing term; in award drafting, I suggest a term to be avoided but, nevertheless, it's there. And I would submit, most strongly, sir, that it includes the 20% casual loading.

So, in respect to overtime - going back to clause 18, Mr Imlach's argument must surely fail. Clearly on the definition of a relevant award rate, when calculating that rate for overtime purposes, the casual loading is, in fact, specifically excluded.

The same argument applies directly to shift workers - clause 18 (b) (ii) (can I take you to that, sir) where a similar provision exists ... similar to clause 18 (a) (vii). Sorry, I did miss out the (a) in that, sir. It relates to day workers as you can see. Part (a) does and part (b) relates to shift workers.

So, it's very clear that it's to all classes, both day and shift work, within the award.

Therefore, in my submission, this aspect of the union's application relating to the assertion that for the purpose of clause 18 - overtime: 'that 20% casual loading should apply for all purposes' must surely fail.

I'd now like to take you to clause 23 (c) (i), (ii) and (iii). And as you indicate, in response to some of Mr Imlach's submissions, we really have a nightmare here in terms of verbiage. We have a number of differentials in clause 23 (c), (d) and (e). We have reference to an ordinary rate. We have reference to a normal salary rate and we have straight double time; double time of

MR FITZGERALD:

what, I pose the question?

So no wonder there is some considerable doubt when there is a great lack of consistency between provisions within one particular clause.

I wish to make some submissions later, sir, as to the construction of the word `ordinary` and in that regard I'll be particularly referring to clause 23 (c) (i).

The options available to this Commission, I would submit, sir, are for those people who are in receipt of the casual loading is the ordinary rate is the flat base award hourly rate plus the 20% loading rate or whether it is exclusive of that rate. It is my submission that the latter option is the most appropriate in view of other provisions in the award.

I'd just like to refer to the clause 23 (d) again where it refers to `normal salary rate`. The words `normal` in this award (and I would suggest in many other awards of this Commission) are very strange and vague I would suggest, and the normal verbiage is, in fact, `ordinary`. And using a doctrine of `generous construction`, which I put forward to this Commission earlier in my submission, I would submit that the word `normal` does, in fact, mean `ordinary` or should mean `ordinary`.

PRESIDENT:

Ordinary rate for that particular individual or ordinary rate for individuals, the generality of employees?

MR FITZGERALD:

The latter, sir. Ordinary rate for the generality of employees.

PRESIDENT:

Why wouldn't it mean for the individual concerned?

MR FITZGERALD:

I'd like to come to that later, sir, because at this stage I haven't analysed the definition of ordinary,

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MR FITZGERALD:

but I'd like to analyse that in terms of its normal English usage and I think my position will become clear once I've completed that exercise.

But I submitted earlier, sir, that the word 'normal' does or should, in fact, mean 'ordinary' and I use the doctrine of generous construction in the words used by you in Matter T.91 of 1985 where you suggested that one should be, and I quote:

"One should also be satisfied that the result is not otherwise out of step with the general provisions of the award as a whole."

And I would submit, sir, that that phraseology 'normal' is most clearly out of step with other provisions and, therefore, should, in fact, mean 'ordinary'. The words 'normal' do not sit comfortably with other provisions of the award which specify the ordinary rate. Not only this provision, but other provisions within the award which, at this stage, I won't turn to, sir.

I now turn to clauses 23 (d) and (e). Sorry. I beg your pardon, 23(e) - that relating to Sunday holiday shifts which simply refers to the rate of double time, without specifying double time of what.

Once again using the doctrine of 'generous construction', I would submit that this provision should be read in conjunction with other provisions within clause 23 and other provisions of the award and double time, in my submission, should mean double the ordinary rate and I will come onto what I would submit ordinary rate in fact means later, sir.

That completes an analysis of the clauses, which is subject to this application, sir, and I would now like to examine the meaning of ordinary rate because I believe, sir,

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MR FITZGERALD:

that this is really the nub of the issue - the subject of this application.

You are probably waiting for this, Mr President, but the submissions of my esteemed colleague, Mr Edwards, in matter T.189, the Shipbuilders Award are very useful, particularly that relating to the definition of the ordinary rate.

As you would be aware, this Commission has used the Macquarie Dictionary as reflecting the term I think you used, 'Australian English' and I think Mr Edwards said that he hadn't convinced the Chamber to purchase one. Is that still the case? But we are working on that submission at this stage and I simply use the words quoted by Mr Edwards, which were in fact quoted by you in matter T.91, the Hospitals interpretation and use that dictionary to define the ordinary pay and it is as follows - the ordinary pay means:

"...remuneration for an employee's normal weekly number of hours fixed under the term of his employment, but excluding any amounts payable to him for shift work, overtime or other penalty."

MR FITZGERALD: It is my submission that, within the terms of this award, the phrase `other penalties` in fact, includes the casual loading. Certainly, that was the view which ...

PRESIDENT: Would that be a penalty? I would have thought that a penalty was something that is awarded as a deterrent or in compensation for the disagreeable nature of the work or something of that order.

MR FITZGERALD: That position could be taken, sir, but I think it's worded in such wide terms that the penalty to be assessed is something in addition to the normal rate. In this case, the 20% loading is something additional or extraneous to the normal award rate, and that would be my submission, sir.

PRESIDENT: Would you regard compensation for sick-leave, annual leave, public holidays, et cetera, as a penalty?

MR FITZGERALD: Certainly I can see what you're getting at sir, but in terms of the rate it's an addition to the normal base rate (if I can use those terms) and, I would submit, a penalty. And in that regard, it is encompassed by the Macquarie definition of `ordinary rate`.

Just to ... as I indicated, very much consistent with the submissions made by Mr Edwards, in similar circumstances in the Shipbuilders Award, the ordinary rate in my submission is the basic, essential wage rates payable to an employee for ordinary work, but excludes shift or other extraneous payments. And those extraneous payments are those additional to the basic hourly rate. And, in these proceedings, the casual part-time employee loading is awarded in addition to the hourly rate, in my view, is an extraneous payment.

PRESIDENT: You don't feel that the ordinary rate for a casual working normal hours, shall we say, would be the minimum

PRESIDENT: permitted award rate for that work?

MR FITZGERALD: No, I wouldn't agree with that, sir.

PRESIDENT: Wouldn't that be a logical conclusion though, Mr Fitzgerald?

MR FITZGERALD: There's nothing to necessarily support that within the award provisions but I would refute that most strongly in that 'ordinary' must be considered in reference to other award provisions which refer to ordinary time, et cetera. And, for that reason, I would submit most strongly that excludes that 20% loading.

PRESIDENT: But, you see a full-time employee cannot be paid less than the award minimum ordinary rate for his classification.

MR FITZGERALD: Yes.

PRESIDENT: So, you would obviously say: 'Well that is the ordinary rate'. But a casual could not be paid that ordinary minimum award rate that is payable to a full-time, he must be paid something more by law, do you agree?

MR FITZGERALD: Yes.

PRESIDENT: Wouldn't that then be the ordinary minimum award rate for a casual?

MR FITZGERALD: I would suggest not sir, in terms of this current application and the application of shift and overtime penalties, and that's the subject of these applications, sir.

PRESIDENT: I'm not talking about shift. I'm just trying to discuss with you what the meaning of 'ordinary time rate' for working ordinary hours would be when considering the question of a casual.

MR FITZGERALD: Yes, well that's a view you hold, sir, I don't necessarily agree with it. I think ...

PRESIDENT: Could you tell me why you disagree

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PRESIDENT: with it?

MR FITZGERALD: Well, I did take you to the relevant award rate, for instance clause 34 which excludes those payments, in my view. And if we take that in conjunction with clause 18 - `Overtime`, then I would submit very strongly, sir, that that supports my position in this matter.

PRESIDENT: Yes, but we're not talking about overtime, we're talking... Is it your submission then that you could validly pay a casual, per hour, one fortieth of the prescribed award rate for a full-time individual?

MR FITZGERALD: No, it's not my submission, sir, no. Quite clearly there is a 20% loading to be added to that one fortieth rate.

PRESIDENT: So that becomes the minimum hourly rate payable to a casual for working ordinary hours.

MR FITZGERALD: Yes, yes.

PRESIDENT: So it's possible to have two ordinary rates, in the context of this award.

MR FITZGERALD: It could be, yes, but I would be submitting sir, that `ordinary` should be considered in terms of the overall meaning of `ordinary` within the award and I think my further submissions will assist in that regard.

PRESIDENT: Thank you.

MR FITZGERALD: It's my submission, sir, that the draftsman of the award intended that this 20% loading was, of course, to be awarded in lieu of entitlements which normally full-timers or part-timers over 20 hours would receive - in lieu of those normal entitlements for the ordinary hours worked. But I would submit very strongly, sir, that that was never the intention of the draftsman to increase the value of that loading during the periods of overtime or shift loadings because,



MR FITZGERALD:

in my view, that would increase the standards applying to casuals and part-timers under 20 hours against those employees who work on a full-time or regular part-time basis over 20 hours and are awarded normal entitlements for annual leave, public holidays and sick-leave.

Those employees' entitlements do not increase simply because they work overtime periods, nor can I believe - nor do I submit that the casual part-timer under 20 hours entitlements increase during those periods also.

In other words, full-timers and part-timers who work over 20 hours do not accrue entitlements to annual leave, sick-leave and public holidays at an accelerated rate whilst they are performing work in overtime or other penalty periods.

PRESIDENT:

I think I've heard that submission before.

MR FITZGERALD:

I think you probably would have, sir, yes, and I don't believe it has any great difference to what was put in the Shipbuilders Award. Simply there is no logic to casuals receiving an accelerated rate for those ... for a penalty awarded in terms of those entitlements ... in lieu of those entitlements as against a full-time employee.

PRESIDENT:

Would there be any logic in paying a casual who worked only Saturday and Sunday a 20% loading at all?

MR FITZGERALD:

That certainly has crossed my mind.

PRESIDENT:

Since neither Saturday nor Sunday can ever be a public holiday and they're not normal working days and therefore the question of sick-leave wouldn't arise and you wouldn't take annual leave on Saturday or Sunday.

MR FITZGERALD:

Yes, I understand what you're getting at, sir.

PRESIDENT:

I think that came out in that

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PRESIDENT: Clayton's interpretation.

MR FITZGERALD: Yes, it may have done. But, certainly that is our submission in respect to this class of employee subject to these applications as against their full-time counterpart.

PRESIDENT: You would include no (and this may be going to merit, perhaps I'll rephrase it). You don't believe that the award envisages continuity of the 20% loading because these people work irregular hours and different days of the week.

MR FITZGERALD: I don't believe that the award envisaged the continuity of the ... I'm sorry, I misunderstand the question, sir.

PRESIDENT: Well, a full-time employee works regularly Monday to Friday and enjoys sick-leave, annual leave, public holidays and so on. One who works less than full time is compensated by way of 20% loading for the sick-leave, annual leave, public holidays but is not compensated for having to work at the pleasure of his employer on different days of the week and ...

MR FITZGERALD: I understand what you're saying, sir. The 20% loading rate in the award is specified in all of those three benefits. Certainly, sir, I would submit, sir, that the itinerancy of such a position is, in fact, still compensated by that 20% rate, even though not specifically mentioned, just by the inherent nature of the work of a casual where it's on a required basis in many instances. And I believe that 20% loading does, in fact, compensate for that as well, sir.

PRESIDENT: Well then, if it does, why shouldn't it be paid for all purposes?

MR FITZGERALD: Yes, I'd have to just reconsider that position, sir.

PRESIDENT: Yes, I wasn't trying to trap you, Mr Fitzgerald. As I said, it perhaps goes to merit anyway.

MR FITZGERALD: Yes.

PRESIDENT: Maybe it does indicate that it's high time someone had a good look at penalties for casuals and why they're awarded and when they're payable.

MR FITZGERALD: Yes. In terms of this award?

PRESIDENT: Well, generally, I think ...

MR FITZGERALD: Well, I can say ...

PRESIDENT: Certainly this award.

MR FITZGERALD: Yes, there's no doubt about it. I can indicate that I believe that that process is going on now with other awards of this authority. Certainly I don't think it's a problem which has been confined to this award solely.

PRESIDENT: One might even enquire if there is any component for ... do they call it 'leave loading' these days?

MR FITZGERALD: Yes, that's true.

PRESIDENT: For the casuals.

MR FITZGERALD: Yes, that's true. My view is the fact that it's specifically stated in lieu of those 3 benefits doesn't necessarily preclude other factors being taken into account, sir.

I would like to, once again, talk about this concept of generous construction and take you to clause 6 of the award.

PRESIDENT: That's clause 6 of Section III, is it - 'Casual Employees'?

MR FITZGERALD:

Yes, it is. If I can make it clear at this stage that I won't be going outside Section III of the award in my reference to the award..

Clause 6 of the award stipulates the rate payable to a casual working ordinary time. I stress the words 'ordinary time' and it further specifies that the 20 percent loading is a payment in lieu of annual leave, sick-leave and public holidays.

There is no stipulation that the overtime or other periods attracting penalties, that these penalties should be calculated on the loaded rate.

In my submission it would be, indeed, illogical to do so as the 20 percent loading is stipulated to apply for ordinary time ... not for those penalty periods.

Taking clause 18 now of the award, clause 18(ii) and clause 18(vi) - I would like to consider the 2 in tandem. These clauses specify the overtime calculation for day workers and shift workers who perform work outside or in excess of ordinary hours.

Once again I stress that the rates specified are 1.5 or time and a half and double time the ordinary rate.

For those particular classes of employees, there is no special provision awarded to accrue holiday or other entitlements at a faster rate simply because they perform the work during these periods of time.

I take you now to clause 20 of the award and Mr Imlach has already made reference to it and I take you to precisely the same paragraph - the last paragraph in clause 20. I would like to tackle it from a different perspective. I quote from it again:

"The allowances prescribed in this Award other than higher

MR FITZGERALD:

duty allowance, certificate and/or diploma allowances, shall not be taken into consideration in the computation of overtime and other penalty rates prescribed in this Award."

Once again it depends very much on the construction of other penalty payments and we take a very much consistent position with our previous submissions.

Clearly, read in conjunction with clause 6, the 20% loading is an allowance awarded in lieu of other entitlements. The 20% loading is an allowance, as I indicated, awarded in lieu of those other entitlements and that's envisaged by that last paragraph of clause 20 in my submission.

If the 20% loading was intended to be excluded just as higher duty allowances and/or diploma allowances then that in fact should have been the case, but in my submission, it's inherent in this particular section and is therefore excluded.

The final provision of the award which is also diametrically opposed, or doesn't sit comfortably with the union's application, is that one which we've already made reference to and I hope that by producing a copy of this decision it will correctly explain the position which, despite Mr Imlach's normally excellent memory, unfortunately he's got a very hazy recollection of this decision.

But that's relating to an employee who receives a loading is paid at 1.7 times the relevant award rate for work on a public holiday and that is to be found in clause 19(c). This provision has its genesis in matter A. No. 5 of 1980. Unfortunately I wasn't anticipating the R.A.N.F.'s attendance at this matter. I only have one copy for the Commission, if I could, sir. I could get another copy later if necessary.

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FITZGERALD

PRESIDENT: We could have one run off now, if necessary.

MR FITZGERALD: Thank you.

PRESIDENT: This will be Exhibit C, is it?

MR FITZGERALD: Yes. Thank you. If the Commission pleases.

Just by way of explanation, sir, the decision was a composite decision, if you like. There were a number of matters which were left to determination by the then chairman, pursuant to section 24(2) of the Industrial Relations Act 1975 and just to show the validity of the matter, I have produced the front page only and the decision relating to the matter at hand.

So that explains the absence of pages 2, 3, 4 and 5. But they do relate to other matters also determined at that time.

I'll just quote from page 6 of that decision and it is very significant that Mr Simmonds is putting his viewpoint and indeed there didn't appear to be any separate viewpoint put forward by Mr Imlach at that time and I quote - this is at the bottom of page 6, stating Mr Simmonds:

"A part-time employee working less than 20 hours per week receives a loading on all days that they work of 20% of their salary in lieu of sick leave, annual leave and public holidays and it is our submission that they should receive that 20% of their rate on all days that they work, otherwise they would not be compensated.

When working on a public holiday, it is also our submission that they should receive an additional 50% for the purpose of compensating for work on that public

MR FITZGERALD:

holiday over and above the other amount. Not compounded on the 20%" (a fairly significant phrase) "but added to it and thus the point of issue is whether it is to be 1.5 of salary or 1.7 of salary. If it is to be 1.7 of salary then it puts the 50% loading on the base rate not on the base rate plus the 20%.

Not to do it at 1.7 of salary would be to deny the employee working on a public holiday of the loading that compensates them for not receiving paid public holidays off work and it would deny them receiving a loading that compensates them for not receiving annual leave and sick leave. In other words, on that particular day they would not be receiving anything towards their annual leave or sick leave. But not to give them the 20% would be to deny them their entitlements in lieu of sick leave and annual leave and to absorb, if you like, that 20% into the 50% loading. It would therefore mean that a part-time employee working on a public holiday was worth less than a full-time employee working on that day and that, in our submission is incorrect too. So therefore the two must be not compounded, in other words you do not multiply the 20% loading by 50%, but by taking 50% of the base rate and adding it to the 20% then one achieves the appropriate and logical reward for working on that day."

Now, I just make mention that that is the position which was proposed by the union in that regard.

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FITZGERALD

MR FITZGERALD:

I'd strongly submit that that position taken by the applicant union in this case where there appears to be, in the absence of any opposition, consent to the position taken by Mr Simmonds, it is not open now for the applicant union to argue something different than what was put forward by Mr Simmonds.

On page 8 of the decision itself, the decision appears, and Mr Pamplin in fact found in favour of the employee's claim.

So there is the genesis - it is not as Mr Imlach stated - it is an employee application. And for the union to do a complete about-face and argue for something different is, in my view, something completely wrong to do so sir.

The effect of clause 19(c), which I was referring to, is as stated by the Chairman of the Industrial Boards at that time, Mr Pamplin, is to allow the multiple of 1.5 the relevant rate as defined, then add .2 or the equivalent of the loading - not as suggested by this application to multiply the relevant award rate plus 20% loading by the multiple factor of 1.5.

I would now like to - and I can indicate for the information of the Commission, sir - I will be no longer than another 5 to 10 minutes, sir, in finalizing my submissions.

I would now like to look at some of the submissions made by both Mr Imlach and Mr Heapy.

Mr Imlach indicated that it would contravene ... if an interpretation were found in favour of the position of the employer, then it would contravene the universal practice of that carried out in the public sector.

We have heard matters of merit, and that, in these matters (as you have

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MR FITZGERALD: been well and truly aware) are not relevant, and I would submit, sir, that that has absolutely no relevance whatsoever - we are looking at the wordage (sic) contained within the award, the subject clauses in the application and any other clauses which would impinge on the particular award provisions.

I simply make the observation that just because it is done as asserted by Mr Imlach in the public sector, it doesn't necessarily make it right.

Just to take you to clause 19 which Mr Imlach made some submissions on - 19(b) - (and I must admit I have trouble making out my notes on this one, sir), ... I would like to come back to that one, if I could, sir, I am just having difficulty making some sense of my argument in rebuttal.

Mr President, is it possible to seek a 5-minute adjournment to gather my thoughts at this stage?

PRESIDENT: Well, yes - just bear in mind the time of the day, Mr Fitzgerald.

MR FITZGERALD: Yes, well once again, I think I will finish within the normally recognized hours - depending upon the right of reply by Mr Imlach and Mr Heapy - but I think we would finish pretty close to the stipulated time of the Commission. I think 5 minutes would be sufficient, certainly, sir.

PRESIDENT: Yes, very well. Well I think we will remain, Mr Fitzgerald.

MR FITZGERALD: Right, thank you.

...

PRESIDENT: Yes, thank you, Mr Fitzgerald.

MR FITZGERALD: Mr Imlach has submitted in respect to clause 23(c) that the ordinary rate must mean the rate for that particular class of employee - that being in respect to casuals - the loaded rate.

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PRESIDENT - FITZGERALD

MR FITZGERALD:

There is no award provision, or definition to in fact support that view. In fact it is logical in many ways, as I submitted in respect to the normally recognized dictionary definition, that the ordinary rate is in fact the base rate.

So in the absence of any definition, Mr Imlach's submission that the ordinary rate means the ordinary rate for that particular class of employee, I would suggest is totally baseless.

He also referred to clause 23(d) `Saturday Shifts`, even though he indicated that it may be in respect to merit argument, that there is a specific exclusion in that regard. I will just turn to clause 23. I won't pursue that submission, sir.

PRESIDENT:

Is that because of the proviso, which says:

"The provisions of this sub-clause shall not prejudice any right of an employee to obtain alternatively any higher rate in respect of that work ..."?

MR FITZGERALD:

No, I wasn't going to refer to that, sir. I will leave it at that point in time, sir, except to briefly look at some of the submissions of Mr Heapy.

I would submit that they are not very helpful to determining this matter before you. He talked about his understanding from various people I assume. Well, once again, they are opinions and I don't think it has any relevance whatsoever to how matters made pursuant to section 43 should be interpreted.

And principally I would suggest that the total of Mr Heapy's submissions were based on merit, which I would submit sir, should be discounted totally by yourself.

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PRESIDENT - FITZGERALD

MR FITZGERALD: In finalizing my submission, sir, ...

MR HEAPY: I'd like to object, sir.

PRESIDENT: Why, Mr Heapy?

MR HEAPY: Well I would like to say my understanding of the award - if I did say it on transcript - and secondly, I notice one of the comments made by my colleague over here was that (and I'm not sure whether he was quoting me or not) when I mentioned on transcript the matter that in the areas I checked this morning they were paying the loading on top of the flat rate and then the penalties on top of that. That was not the public sector, sir.

PRESIDENT: No, I was wondering what he was talking about when he mentioned the public sector.

MR HEAPY: I just wanted to make that clear to you, sir. I don't want to pursue the matter.

PRESIDENT: No, I think what Mr Fitzgerald was alluding to, Mr Heapy, was that you hadn't actually drawn the Commission's attention to the specific language used in the award and drawn conclusions from that, but had instead indicated your understanding of what custom and practice was. I suspect that's what you were driving at Mr ...

MR FITZGERALD: I can certainly confirm that. Certainly, there was no personal innuendo in respect of Mr Heapy. Simply, I did indicate, as I said, I don't think they were very helpful for that reason.

PRESIDENT: These are quite different proceedings, Mr Heapy, and sometimes people have some difficulty coming to terms with this class of hearing. Where one is normally accustomed to putting merit submissions you find that it's quite different and, since Mr Fitzgerald is interrupted, I say again, I sometimes feel that it's

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PRESIDENT:

unfortunate that applications of this kind come to the Commission because, invariably, one finds that the matter of concern to one side or the other, could better be addressed on merit than on strict interpretation of the award. But, it seems to me these pleas of mine or observations of mine fall on deaf ears.

MR HEAPY:

Well if I could just say, on my part, sir, I didn't know anything about these particular guidelines, firstly, and they won't fall on deaf ears again.

PRESIDENT:

No, don't worry, I wasn't suggesting that you're not hearing. I'm suggesting that other advocates, sometimes, if they hear they don't take heed because, obviously, and one of the guidelines ... or, at least one of the guidelines would suggest that if there is a perceived deficiency in the award, the more appropriate approach to remedy that defect is by way of an application so both sides can present argument on merit, rather than debate the meaning of words.

MR FITZGERALD:

Thank you, Mr President. Mr President, for all the reasons submitted to you this morning I would seek that an interpretation in favour or declaration in favour of the position put forward by myself this morning be handed down. To make a declaration in terms sought by the applicant union in respect to overtime and periods attracting penalty payments would, in my submission, be illogical and be fundamentally at odds with the majority of other provisions of the award.

I would submit sir, that my position is based on solid ground. So in summary: Firstly, those relating to guideline No.3, enunciated by yourself in matter T.30 of 1985, based on an intelligible way of construing the term `ordinary pay` or `ordinary rate`, and its acceptance in accordance with ordinary English usage.

And secondly, that relating to the doctrine of `Generous Construction` enunciated or picked up (if you like) by you in matter T.91, and I quoted you previously where you indicated that it should not be out of step or you should be satisfied the result was not otherwise out of step with the general provisions of the award as a whole.

*- Be shake this.*

To make a declaration in terms of the application would, in my submission, be directly opposed to the proper construction of the plain English meaning of `ordinary time` and would be fundamentally at odds with a number of provisions in the award.

I further submit, sir, that the general principle expounded by you in matter T.189 - the Shipbuilders' interpretation - in respect to the ordinary rate of wage, notwithstanding the differences in wording between the two respective awards is a further compelling reason to find in favour of the employer position and to refrain to make a

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MR FITZGERALD: declaration in the terms sought by the application.

If the Commission pleases.

PRESIDENT: Thank you.

Do you have any view on Mr Imlach's request for retrospectivity in the event I don't accept your submission?

MR FITZGERALD: Yes, sir. I think in general terms it's certainly, if you accepted my submission sir, I'd be seeking retrospectivity, which is an unusual occurrence, but I would submit sir, that the normal principles should apply in this Commission, and any declaration should apply prospectively, sir.

PRESIDENT: Thank you, Mr Fitzgerald.

Mr Imlach.

MR IMLACH: Yes, Mr President.

If the Commission pleases, I take the point made by Mr Fitzgerald. I did omit to refer to the overtime, and it was a mistake on my part, an omission (the overtime clause) and I concede that what Mr Fitzgerald said is correct, that the interpretation we are placing on the clause - shift work and the part-time clause - does not apply in relation to overtime; it's quite clearly in that sub-clause 7 there excluded, but I submit that that does not in any way detract from my submission as to the interpretation for part-time employees as to how their base rate would be ... their normal rate would be calculated.

PRESIDENT: So that I'm following you, are you suggesting, Mr Imlach, that sub-placitum (vii) of clause 18, should be interpreted to mean that a casual, or if you wish a part-time employee working overtime, would be entitled to be paid for the overtime at a rate ascertained by dividing the award rate for that classification by

PRESIDENT: forty, that would then be the hourly rate, and applying to that hourly rate the appropriate penalties - say time and a half or double time?

MR IMLACH: That's how I interpret that sub-clause, yes.

PRESIDENT: You are conceding that?

MR IMLACH: I am conceding that.

PRESIDENT: ... for overtime?

MR IMLACH: Yes, for overtime only.

PRESIDENT: But not for shift work?

MR IMLACH: Not for shift work, as I put in my submissions relating to penalties and allowances for these part-time employees.

PRESIDENT: This is for time worked outside or in excess of ordinary hours?

MR IMLACH: That's correct, yes.

PRESIDENT: If the ordinary hours for a casual happen to fall on a Saturday or a Sunday, what would you say?

MR IMLACH: The submission that I put forward; in other words, the one fortieth plus 20% plus the double time on top of that, would apply because it's not specifically excluded as overtime is. Well, it applies because that's the interpretation, we submit, ought to be applied. In other words, their hourly rate is ascertained by taking one fortieth plus 20%. Then, if that person works on a Saturday or a Sunday the penalty applies on top of that ordinary hourly rate as so assessed. That's how we interpret it.

If you look at overtime on such a day, if that would ever occur, it's specifically - that method is ...

PRESIDENT: What I'm driving at, Mr Imlach, (I apologize for interrupting you) is that would you consider a casual, who

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PRESIDENT - IMLACH

PRESIDENT: works regularly, say, on Saturday and Sunday between the hours of 8.00 and 4.30, if you wish, to be a person working ordinary time or overtime?

MR IMLACH: Ordinary time, Mr President.

PRESIDENT: Yes. But a day worker, a full-time day worker working Saturday or Sunday would be working overtime?

MR IMLACH: That's correct, yes.

PRESIDENT: That opens up another can of worms, in a sense doesn't it. I'm afraid Mr Fitzgerald's going to ask if he can respond to that, I'm sure he will.

MR FITZGERALD: I'm not sure how I can, sir.

PRESIDENT: Pardon?

MR FITZGERALD: I'm not sure how I can at this stage.

MR IMLACH: Yes, well it's another can of worms in another context, I submit.

PRESIDENT: But it arises out of consideration of that sub-placitum, doesn't it?

MR IMLACH: That overtime sub-placitum?

PRESIDENT: Yes, because it says ... one then has to decide what is overtime for a casual.

Unfortunately Mr Imlach, you haven't given me a specific case or a specific set of facts that would allow me to interpret the award in relation to those facts. For example, employee (a) worked on such and such a day and for that was paid 'X' number of dollars, so I could then interpret the award in relation to those facts. I think one of the guidelines suggests that that's what should happen. I realize that letter to Guilford ...

MR IMLACH: Yes, I believed I was doing that Mr President. On the basis of that guideline, I had to establish a case and perhaps I've used ...



PRESIDENT: But, you're really only asking me to interpret the award, you're not asking me to say: 'In relation to our member Mrs A., who worked these hours and was paid that amount of money we feel she has been incorrectly paid.'

MR IMLACH: Well Mr President, I agree I haven't done that, but what I'm saying is that at the Guilford Young Grove, prior to 1 July this year (I believe that's the exact date), the employees were being paid (all of the employees) were being paid, that were attracting these provisions, were being paid in the manner outlined in the correspondence in 1984. And, since that date, all those employees ... the manner they were being paid was changed, in that this previous system was discarded, and so I believed I was giving you ...

PRESIDENT: I understand it now. So I can assume that all employees at that particular establishment are now being paid in the way outlined by Mr Fitzgerald in his submissions ...

MR IMLACH: Yes.

PRESIDENT: ... and not in the manner that was stipulated in one of the earlier pieces of correspondence?

MR IMLACH: Yes, or in both actually. The hours in Exhibit A ...

PRESIDENT: Well, Exhibit A.

MR IMLACH: ... and also in the manner the Secretary for Labour indicated ...

PRESIDENT: Yes ...

MR IMLACH: ... in Exhibit B.

PRESIDENT: Yes, I follow you now.

MR IMLACH: I'm sorry, I could have easily taken a specific example and produced that, but I felt ... in retrospect, I felt I was complying with that very point in producing this evidence to show you that there is a case in hand - the whole establishment.

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PRESIDENT - IMLACH

PRESIDENT:

Yes, well I accept that now Mr Imlach. What I don't accept is someone coming along and saying: 'Look there's an issue between management and union over this clause, what does it mean?' I don't think the Commission should be asked to interpret the award in those circumstances. I think you need to have a specific case where there is a genuine issue relating to specific people or a specific person and interpret the award accordingly.

MR IMLACH:

Yes, I take your point and I agree with that Mr President, and I shall refine my future interpretations (which will be none, I hope). But, I believed I was complying with it.

PRESIDENT:

Well, I think you probably are on reflection, by telling me that you're seeking ... that one should ... that I should consider your submissions in relation to all part-time and casual employees and Guilford Young Grove.

MR IMLACH:

That's correct Mr President.

So, what I'm saying is that when Mr Fitzgerald (if I can return to the point) mentioned that I'd omitted reference to overtime, I agree I did omit it and I should have mentioned it. But, I submit it doesn't affect the strength of my case in that I would have used it in saying: 'There is another clause where it is specifically excluded'. The interpretation I have given ... submitted, is correct; is, in the case of overtime, specifically excluded. Therefore, if my interpretation was incorrect that would be excluded as well.

MR IMLACH: So I submit, whilst I admit the omission, I submit, it does not really affect the strength of my submission as to interpretation.

PRESIDENT: Yes.

MR IMLACH: Then, also the same applies to the decision that Mr Fitzgerald kindly provided in 1981 and I must agree, my memory is bad. If you had have asked me I would have said it was closer to 10 years than 5 years away. So, I agree it wasn't very good memory at all.

However, again Mr President, without elaborating, I submit that that is a specific provision applying specifically to public holiday worked by these people, therefore not directly relevant to the submission as to how this clause - part-time employees and how their ordinary rate is calculated and how they are paid for penalties - shift penalties and allowances - is to be applied.

Finally, two other items - one in particular - I note, Mr President, that you picked Mr Fitzgerald up when he was on about clause 23 sub-clause (d) Saturday shifts, and you pointed out that if he had have continued, he would have got to these words:

"The provisions of this sub-clause shall not prejudice any right of an employee to obtain alternatively any higher rate in respect of that work by virtue of any provision of this Award."

It's a bad day today with omissions. These are the notes that I had and down here, note 6, `23. SHIFT WORK`, plus `the provisions and so on` - I did mean to mention it. So, I just take up that you pointed it out and bring it in in that context - that I submit that that means that whilst the afternoon shift allowance and the Saturday penalty shall not be cumulative, it

MR IMLACH: does - this specific sentence means it does not mean that other provisions in this award will allow an employee to accumulate provisions, meaning the 20% plus the shift penalty.

Have I made myself clear?

PRESIDENT: I'm not entirely certain that you have. Are you saying, yes, they can get more, or no they can't?

MR IMLACH: I am saying, yes - that means they can get more even though they are excluded from accumulating in this particular case in other areas. So, I submit, that adds to our interpretation.

And finally ...

PRESIDENT: And to my dilemma.

MR IMLACH: Yes. I submit, no dilemma, Mr President. The interpretation's quite clear.

I do take your point about 'deaf ears' in relation to it's better to seek a variation, but as I suppose whenever we take an interpretation it's because we are fearful of the result of a variation that we'll lose what we've already got and that's what we are afraid of in this particular case.

If we sought to vary, it indicates that we are not too sure of what it means, whereas we say it's quite clear what it means - always has been - and that's why we come for interpretation, which I agree with you, Mr President, is not a satisfactory way of doing things but when you come to a dispute and I submit, the evidence has been that this place accepted that situation for quite some time - many years, obviously, and in June/July this year changed to a different interpretation. If the Commission pleases.

PRESIDENT: Yes. Thank you.

MR FITZGERALD: Mr President, recognizing that I haven't got a right of reply, I just wanted to make one comment, if I could, in respect to Mr Imlach's concession in respect to overtime because I think it does fundamentally change the application. Would I be able to make some comment on that, sir? It would only be, I'd suggest, no longer than 30 seconds, in fact.

PRESIDENT: Yes. Go on, Mr Fitzgerald.

MR FITZGERALD: Mr Imlach submitted that it does his case, in respect to the other periods other than overtime, no harm. I would submit, sir, that that is not the case. In fact it does his case some great harm in that the interpretation he seeks is for all purposes of the award. So by conceding the overtime provision - my interpretation of the overtime provision is correct - I believe it has some great implication in respect to the shift loadings as well, sir. If the Commission pleases.

PRESIDENT: Do you want to have a 30-second response to that?

MR IMLACH: Yes. Thanks, Mr President. For all purposes - first of all I acknowledge that those words are not in the award, so it was my terminology to try and explain that if there were no other exclusions, that it applied - for all purposes - and I still stick to that. If the award had in it that would be the variation sought, which Mr Fitzgerald would oppose vehemently - for all purposes - those specific exclusions would still apply.

PRESIDENT: Yes. I think you made certain acknowledgements as you went through your arguments, didn't you, Mr Imlach?

MR IMLACH: Yes.

I think it is unfair of Mr Fitzgerald to take advantage of me when I make

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MR IMLACH: concessions in all honesty. If the Commission pleases.

PRESIDENT: Now, let's not get too heated about all this. You don't want to say anything, Mr Heapy, do you?

MR HEAPY: I'm staying out of this.

PRESIDENT: No. Well, the only thing I want to say is that that concludes this hearing and I will reserve my decision. Thank you.

HEARING CONCLUDED