

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T No. 1919 of 1989

**IN THE MATTER OF** an application  
by the Federated Miscellaneous  
Workers Union of Australia,  
Tasmanian Branch for  
interpretation of the  
Miscellaneous Workers Award

**re clause 7 - Domestic**

PRESIDENT

HOBART, 15 June 1989

**TRANSCRIPT OF PROCEEDINGS**

PRESIDENT: I'll take appearances thank you.

MR O'BRIEN: If the Commission pleases I appear on behalf of the Federated Miscellaneous Workers Union.

PRESIDENT: Thank you, Mr O'Brien.

MR FITZGERALD: Yes, sir, if the Commission pleases, I appear on behalf of the Tasmanian Confederation of Industries, FITZGERALD W.J.

PRESIDENT: Thank you, Mr Fitzgerald.

Yes, Mr O'Brien.

MR O'BRIEN: Mr President, the first matter I ought to attend to is correction of part of the application. I spoke to Mr Fitzgerald about this yesterday. It's not substantial in terms of proceedings today, but in the details of the provision of the award to be interpreted there is reference to a job title in the first full paragraph there - personal care. It says attendant, it should be assistant - personal care assistant. So we'd seek to amend the application in those terms.

PRESIDENT: Personal care assistant is it?

MR O'BRIEN: That's right.

PRESIDENT: Instead of attendant.

MR O'BRIEN: Yes.

PRESIDENT: No objection to the application to amend, Mr Fitzgerald.

MR FITZGERALD: No, no objection. It may be appropriate and I intended to at some stage, prior to Mr O'Brien actually proceeding with submissions, to indicate that I have a threshold issue which I'd wish to raise, going to the question of the Commission's jurisdiction, and I'm of a view that that matter should be heard and determined by this Commission

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APPEARANCES - PRESIDENT - O'BRIEN - FITZGERALD

MR FITZGERALD:

prior to the substantive matter contained in the application being heard.

If the Commission would permit me at this stage ... at this time, I would seek to make further submissions in that regard, at least in the outlined form, and if you agree with the basis of my submission, I would then seek to substantiate that by means of evidence.

PRESIDENT:

Were you aware of this, Mr ...

MR O'BRIEN:

Not precisely. I don't object to Mr Fitzgerald running the argument, the proviso being that if I'm surprised by any material he produced I might seek some time to respond.

PRESIDENT:

Of course. Yes, very well.

MR FITZGERALD:

Yes, thank you. I'd expect that to be reasonable. This matter has been on my desk only for a very short time and I've had only a short time to consult, Mr President, hence the matter ... the shortness of the notice relating to this matter this morning, and I think it's only reasonable that Mr O'Brien would seek some time to either respond today or respond at some other time.

I do indicate to the Commission at this time, Mr President, that I'm of the view that the application before you relating to the subject matter does not fall within the Commission's jurisdiction, and for that reason I would seek that this Commission not proceed any further with the application.

I do intend to substantiate my submission, to call evidence and make further submissions in support, and as Mr O'Brien indicated in his earlier submission that it may be appropriate and it would depend very much on the response of Mr O'Brien, that Mr O'Brien would respond at that

MR FITZGERALD:

time or some further time.

However I'm of the view that given the fundamental importance of this question of jurisdiction that the Commission should adjourn once submissions have been made in respect of this matter and determine that matter as a separate matter, and once that is determined then the substantive matter contained within section 43 should then ... or contained as a matter of the application pursuant to section 43 should be then determined.

I make that submission, sir, because if I'm in fact successful, which I believe I will be in respect to the question of jurisdiction, then it seems pointless to hear the matter fully as it would be very much academic on the question of the substantive matter within the application.

I will outline the structure of my submissions and it may be appropriate that at that point we pause very briefly for some initial response from Mr O'Brien.

The Commission would be aware that this is an application pursuant to section 43 of the Industrial Relations Act 1984.

The question of jurisdiction as I'm sure, Mr President, you'd be well aware ... the issue of jurisdiction is derived from section 19(2)(b) of the Act and if I could read that. Firstly ... and at section 19(1) which I believe is of the most significance in this question of jurisdiction. Section 19(1) of the Act says and I quote.

"Subject to this Act, the Commission has jurisdiction to hear and determine any matter arising from or relating to an industrial matter".



MR FITZGERALD:

Now I stress the term 'industrial matter' and I will come back to that.

And section 19(2) and once again I quote.

"For the purposes of subsection (1) the Commission may ..."

And it refers to a number of aspects - specific aspects - of the Commission's jurisdiction, but in respect to this application subsection (b) has relevance and I quote.

"... make a declaration for the purposes of section 43".

So it's clear that the Commission's jurisdiction specifically is derived from 19(2)(b) ... it is clear in my submission that the overall jurisdiction must relate to an industrial matter and that is the substance of my objection to this Commission proceeding today.

PRESIDENT: Well, technically I think you are a little bit incorrect, aren't you? The jurisdiction is to be found in 19(1); the power is in 19(2) ...

MR FITZGERALD: Yes, well ...

PRESIDENT: .... Jurisdiction tells you what you may do, but power tells you how you may do it.

MR FITZGERALD: Yes, well, I wouldn't disagree with the way you look at that matter, sir. Certainly the basis of my objection is in respect to section 19(1) and specifically the term 'industrial matter' which I will substantiate shortly.

The term 'industrial matter', there is in fact, as you would be well aware - and I don't think there has been many occasions in which this issue has been debated before this Commission. I can recall one in respect of the taxi industry where the question relating to the employee-employer relationship was debated there without any particular finality or the Commission ruling upon it. But nevertheless it is of a similar vein.

The term 'industrial matter', under section 3(1):

"... means any matter pertaining to the relations of employers and employees and without limiting the generality of the foregoing includes ..."

and I won't go any further because what I simply rely on is the question of the relations of employers and employees.

It will be my submission that the relationship of the personal care assistant, the subject of this application, with the council, again the subject of the council, was not one of an employer and employee, and therefore is not an industrial matter

MR FITZGERALD:

and therefore, sequentially, as it is not an industrial matter, the Commission then, pursuant to 19(1), does not have the legal jurisdiction to proceed and determine this issue.

In the event of the Commission not finding favour with my submission going to jurisdiction, then I would of course seek to reserve my right to make further submissions in respect to the issue contained within the application.

Much of the evidence which I will produce this morning will in fact overlap and relate to both the question of jurisdiction and also the question of the duties which are in fact performed by the personal care assistants. For that reason I would simply reserve my right to make further submissions in that regard.

In summary, Mr President, I will show by means of sworn evidence that because there is a critical element which is essential in any master-servant relationship or employee-employer relationship, and that is the element of control, that this element is absent in the relationship between the Kingborough Council and the personal care assistant.

Because of the lack of this very much critical element, therefore there is no master-servant relationship, there is therefore no employee-employer relationship and therefore it doesn't fall within the ambit of the term 'industrial matter'. The logical extension of that is that the Commission has no legal competence to hear and determine this matter.

I have at this point of time, Mr President, just simply given an outline of what I intend to produce to the Commission by means of evidence and by means of submission. I will be guided by you. It may be appropriate that some initial response be given by Mr O'Brien, or

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MR FITZGERALD: would it be more appropriate that I proceed to call my witness, and make some submissions in support?

PRESIDENT: Well, Mr Fitzgerald, at this stage you haven't told me anything that would suggest to me that I should not proceed. I don't know, frankly, what you are talking about, until I ...

MR FITZGERALD: I understand that.

PRESIDENT: ... get some facts and figures of ...

MR FITZGERALD: I have only given a brief outline, sir.

PRESIDENT: Yes, well, 'brief' is the operative word.

MR FITZGERALD: Yes, well, I intended that to be. Because our position was only ... in respect to this matter, was only determined fairly recently, we ... I felt that it was opportune, at least, to give an opportunity to Mr O'Brien to respond initially. I will intend ... I do intend to in fact produce some substantive evidence on this question, particularly going to the control.

PRESIDENT: I mean, if you were to say to me, the person concerned has a contract for services and is in no sense covered by the terms of an award, then prima facie I would have some idea what you are talking about. But you haven't told me that at all.

MR FITZGERALD: Well, I would be getting to that at the conclusion of my submissions, certainly. That is effectively the basis of my submission, that there is no employer-employee relationship in this instance, there is in fact a contract for services and therefore that they are not covered by an award. Although I haven't specifically submitted that, that's the basis of my submission, sir, and I will seek to prove that by evidence.



PRESIDENT: Would that preclude this Commission from entertaining this application in any case on the basis that an industrial matter means any matter pertaining to the relations of employers and employees? Couldn't Mr O'Brien come along and seek an interpretation of the award on those grounds alone, whether or not a person happens to be involved or not?

MR FITZGERALD: It's open for Mr O'Brien to seek that at any time, but it's also open for me to raise the question of jurisdiction and I don't believe that there is a proper master-servant relationship existing here and given that the absence of that relationship, then it doesn't fall within the industrial matter context of the Act and therefore given the overview contained in section 19(1), the Commission can't proceed to interpret what is contained within the application.

MR O'BRIEN: Can I assist, perhaps, the Commission and Mr Fitzgerald?

PRESIDENT: Yes.

MR O'BRIEN: There are two ways of looking at this matter and I understand what Mr Fitzgerald is putting is that there is not an employment relationship between the personal care assistant and Kingborough municipal council as is stated in our application. That's the correct view, is it not?

We have understood that there might be some wish to put that matter somewhere and we weren't sure where that might best be put. It could be dealt with in the way that Mr Fitzgerald suggests. Alternatively, it could be dealt with in the substance of the matter, namely, that Mr Fitzgerald's case might be that notwithstanding any other duties that if there wasn't an employment relationship then the Commission couldn't interpret that the award applied to those persons because they

MR O'BRIEN:

were not employees.

So, they're a couple of alternative ways of pursuing that matter here.

The third option is in fact that the Commission doesn't have jurisdiction to make that determination under section 43, in which case the interpretation could proceed but that matter would remain outstanding to be tested, perhaps elsewhere if the Commission did not have jurisdiction to deal with it.

I'm happy for Mr Fitzgerald to proceed with the way he is now, or alternatively, for the matter to be dealt with in the substance of the matter.

PRESIDENT:

Yes.

MR FITZGERALD:

Yes, thank you. That is very helpful, Mr President.

My preferred position is, because of the logical sequence in the first instance to establish the Commission's jurisdiction, and I believe that this matter should be determined as a threshold separate issue and as I indicated in my earlier submissions and I'm sure Mr O'Brien will want to respond to that, that submissions should, from both sides, be completed in respect of that issue and then that threshold matter decided by this Commission as a separate item.

PRESIDENT:

Well, I'm inclined to agree Mr Fitzgerald. I think there being no major objection from Mr O'Brien ...

MR O'BRIEN:

Well, I hadn't responded on that point but I was going to say that I didn't want to see this matter inordinately delayed and I'm ready to proceed on the substantive matter today and as Mr Fitzgerald's indicated his evidence in relation to the substantive matter can be put now, depending on the mirror view, Mr

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MR O'BRIEN: President.

I might be prepared to proceed at the end of the first part of the proceedings but I'd prefer to keep that option open.

PRESIDENT: Yes, thank you. Well, I've reserved the whole of today. We'll see how we go.

MR FITZGERALD: Thank you.

At this point then, Mr President, if I could call Ms Dianne Watson who's the coordinator of the personal care scheme at the Kingborough council.

Dianne Raye WATSON sworn

MR FITZGERALD: Thanks, Ms Watson. Could you, for the purpose of the record, state your address?

MS WATSON: 7 Woodlands Drive, Blackmans Bay.

MR FITZGERALD: Who are you employed by?

MS WATSON: I'm employed by the Kingborough council, the Kingborough municipal council.

MR FITZGERALD: What period have you been employed with the council for?

MS WATSON: I commenced work on 3 August '88. So, it's 10.1/2 months.

MR FITZGERALD: What position do you occupy with the council?

MS WATSON: I'm employed as the coordinator for the personal care service.

MR FITZGERALD: Could you outline to the Commission the overall responsibilities of your position?

MS WATSON: I have the responsibility, first of all, to set up a personal care service for people with disabilities, resident in the Kingborough municipality, recruit, resource and

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MS WATSON:

train care assistants to locate the client group to match carers and clients and to provide facilities, resources and on-going training so that they are able to perform a satisfactory ... so they can build a satisfactory relationship with each other.

I'm also responsible to represent both clients and carers and the personal care service to other services to promote that service.

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MS WATSON: And to report to such committees as exist and to report to the funding bodies.

MR FITZGERALD: Thank you.

Can you briefly describe how the care service operates?

MS WATSON: Yes.

MR FITZGERALD: Would you like to ...?

MS WATSON: Where do you start?

MR FITZGERALD: Yes.

MS WATSON: First of all, personal care as we are attempting to do it ... and this is a pilot program that has funding subject to ... ongoing funding subject to evaluation in January next year, and this program was set up to provide a way in which people who had disabilities or who have disabilities - be they physical, emotional or intellectual disabilities - could receive personalised care and could receive that care from carers of their choice.

So that for the first time an effort is being made to provide a program where people with disabilities have some control over the service that they receive, and it's my responsibility to see that people have the right training, to provide appropriate care, to facilitate the relationships.

It's a program that we also devised so that it would be the community caring for itself, and that's quite a different approach in that all of the carers are drawn from the same community and preferably very close locality to the person that they are going to be developing that working relationship with.

And that the person ... I mean, the program then seeks to be, not only

MS WATSON: involved in a particular range of tasks - and there are specific tasks - but also to be the ally and friend and the way in which that person not only physically lives in the community, but has access back into the community in terms of relationships and in terms of friendships.

It's just basically a program to assist the community to care for those less able members of the community.

MR FITZGERALD: Does the council play an active part in controlling the relationship between carers and clients?

MS WATSON: No. No.

MR FITZGERALD: Can you describe the role that the council played in that regard?

MS WATSON: The council itself is the sponsor of the program. I should have pointed out that the program is funded under the Home and Community Care Program which is a joint State and federal ... or commonwealth initiative and that under that program it looks for community groups like Kingborough council, in this instance, to administer the monies and administer the funds and to appoint a coordinator to develop and to oversight the program.

MR FITZGERALD: Right. Okay. How then is the council involved in the appointment process of carers and clients?

MS WATSON: The council, as in myself and ... there's another component to this that come in at that stage in that there's a ... there is - in terms of there was and there will be (at this present moment it's suspended) - a community access committee which has, as part of its function, developing policy but also it helps in the

MS WATSON: process of locating carers ... potential carers and in establishing the guidelines for the service.

I think I've gone off track. Can you give me that question again?

MR FITZGERALD: Yes, that's fine. I was looking at just how the appointment of ... or what role the council plays in the appointment of carers and clients particularly.

MS WATSON: Okay. All I do is that I receive applications from people who are willing to care for someone. I explain to them what the service is about and present the philosophy for the service to them. I offer them training so that they will be able to do that work. I then also receive applications from persons with disabilities who require the service.

Each of those groups are asked to fill out forms which are match-up forms basically. I then try act as a negotiator and a match-up agency, if you like, to put a suitable carer with a person with disabilities who needs a carer.

And the choice as to who that will be rests with the client. I don't send anybody in without the client having said, 'Yes, this is the person that I want'.

MR FITZGERALD: You mentioned training. What sort of training would you offer to assistants?

MS WATSON: The training has ... because this is a pilot program, that we're still in the developmental stages and the training has undertaken three different courses so far.



MS WATSON:

... the first group of carers, the first group of people that I recruited were people who had come in on the basis of publicity and asked could they be carers and every one of them was offered the opportunity to undertake some fundamental training. That training was a very very brief overview of care giving skills, as in making sure that they knew how to lift someone and making sure that they knew what it was in that sense.

But there was also a lot of time spent talking about the development of a contract - teaching people how to say Yes, how to say No and how to negotiate - so that when they went to their client to establish the working relationship that would exist, then they would be able to negotiate the work that took place and what they were prepared to do and what they weren't prepared to do. That was part of the training.

Now we have made an arrangement ... because there was funding available, we made the arrangement with Department of Employment, Education and Training - I think that's right; I'm not sure - that we would recruit ... on behalf of clients, we would recruit people who had done a personal care training course that is completely outside of our jurisdiction whatsoever. But if they were prepared to fund such a course, then we would see that people from that course would certainly satisfy the requirements of our clients.

MR FITZGERALD:

You mentioned about the working relationship between the carer and the client and the negotiating aspect there. Is that how your council sees the relationship, is that where the relationship exists?

MS WATSON:

Oh, definitely. In the sense of what we are trying to do - and this is really important to the whole program - is that we see that the people with disabilities that we are looking

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MS WATSON:

after or we are helping to function in a community sense, we see that that group of people, have, in the past, had services foisted on them over which they had no control. The delivery of such services, the way you received those services was on the basis of an intrusive assessment. All of that kind of thing was happening.

We set about creating and listening to people with disabilities and creating the opportunity for those people to control that situation themselves so that we were giving the power over what happened to them, back into their hands.

And that is the really important fundamental difference as I see it: that those people with the disabilities have the right to say what sort of a service they require, how it is that they will receive that service, when they will receive it, how much they can afford to pay for it. And we act as an agency to find people who are prepared to act in that way.

MR FITZGERALD:

Do you monitor the relationship between carer and client?

MS WATSON:

Yes, I do. I monitor it on the basis that ours is a very small service. We are talking about ... in the past week ... in the past fortnight we cared for 16 people with 12 carers being paid - in that way.

When I say 'monitor', in that fortnight I attempt to see each carer and I am always available to clients and carers for them to discuss what is happening. So it is not that I go and check up on anybody; it is that they come to me for advice and for information. I know each one of the people personally and I know each of their situations.

The things that have been happening have been mostly about: 'How is it

MS WATSON: that I can do this for this person?  
This is what this person is asking  
for; how can I do this?'

MR FITZGERALD: Would you actually direct what duties  
are to be performed by a carer?

MS WATSON: On the basis that personal care is  
about caring for someone and their  
person, that is the direction. It is  
not about the specific tasks. Each  
individual has a different range of  
tasks that they will require. I  
mean, it is not up to me to direct  
that. I don't know that; the person  
does. It is up to the client, as in  
the person with disabilities, to  
direct the tasks in that way.

Mine is a different role in that my  
direction comes in terms of keeping  
within the guidelines of what is  
personal care.

MR FITZGERALD: Would you at any time, say, intervene  
in a client's home to monitor that  
relationship?

MS WATSON:

I have never been to any person's home to check out, as it were, what's happening. I have never felt the need to go to a home to check to see what was happening in that sense.

What I do do is make sure that that client has access to me and is telling me about what's happening and whether they're satisfied with it.

MR FITZGERALD:

Are there any circumstances in which you would intervene in a relationship between a carer and a client?

MS WATSON:

In the fact that I act as a facilitator and I act as an advocate on behalf of clients, if I could see a situation where, for either party, the relationship was clearly exploiting then, yes, I would begin a mediatorial role.

MR FITZGERALD:

Could you briefly outline the nature of duties performed by carers?

MS WATSON:

The nature of duties, as I said, vary through individual to individual.

There's a list of tasks that we have that I present to clients and say 'Do you think you would need these'. They range from things like: assisting somebody to have a shower or a bath; helping someone get out of bed; get dressed; the reverse at night; maybe preparing a meal for that person - not for the family.

But we have found that what actually happens is that in the majority of cases that we have, it's the social needs and it's the relationship needs that seem to be highest focus, and yet much of the carers time is spent ... with some clients, for example, the carer doesn't even go into the home and it's spent in doing things like assisting that person to learn social skills - getting them involved in community organisations, being the personal ...

I'm not sure whether I should use examples, is that all right?



MR FITZGERALD: Yes, that's fine.

MS WATSON: A person with an emotional disability that we have, for example, calls the carer from time to time because she feels suicidal. Nothing else takes place except emotional support.

MR FITZGERALD: Who decides where the services are going to be offered?

MS WATSON: The client. The client. I mean, obviously they give me a home address and the match-up takes place at that home. For the person who needs a bath, of course that's going to take place at home. But for the person who needs social support or needs to attend a meeting and those with intellectual disabilities, for example, taking them out into the community is vital to their being able to stay residents of that community.

So in those instances it's out in the community.

MR FITZGERALD: It might be appropriate, Mr President ... we have a duty statement and I'd like just to confirm with Ms Watson, would you wish to facilitate the evidence by speaking to this duty statement?

MS WATSON: That's fine.

MR FITZGERALD: Right. If I could produce that at this time?

PRESIDENT: Do you want it marked as an exhibit?

MR FITZGERALD: If I could, thank you, Mr President.

PRESIDENT: We'll mark this Exhibit A.

MR FITZGERALD: Thank you, sir.

Firstly, Ms Watson, could you describe how this duty statement came about? Who devised the statement?

MS WATSON: It was my duty statement. I mean, this is part of it, that personal

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MS WATSON:

care in the way we are doing it has never been done anywhere else in Australia like it is in Kingborough. This is a completely innovative program.

There were no resources to draw on. There was nothing that we could find anywhere else in Australia that correlated with what we were trying to do. And every piece of document from our service has been devised by me and ratified, in this instance, through the access committee - the Kingborough access committee.

MR FITZGERALD:

Is there any particular emphasis in respect to the carer's duties? Is there an emphasis in respect to personal care, or is it household care?

MS WATSON:

It is definitely personal care. We can't enter into household care. That is the responsibility of another Government-funded service.

MR FITZGERALD:

Could you outline that to the Commission?

MS WATSON:

Certainly.

MR FITZGERALD:

Could you ... thank you.

MS WATSON:

The Home Help service, which is funded by the Department of Health - it's another HACC program, so it is funded in the same way - and administered by Community Health, is provided for people with disabilities - the same - and the frail-aged group, who are the HACC client groups.

It's provided to provide in-home care and care of the property, care of belongings. They do things like vacuuming, dusting, laundry, doing the laundry, things like that. We can't do that because we would be cutting across the lines of the Home Help service.

MR FITZGERALD: Could a client conceivably receive both home help and personal care?

MS WATSON: Yes. In fact in several instances that happens. One particular instance, for example, while our person is in that home helping to assist this man with his showering and his own personal toilet the home help person is also there taking care of his flat, cleaning out his fridge. And although there's sometimes a crossover in the terms that in this particular one the man lives on his own, and there aren't other family members so everything could be said to be taking place for this man, the home help has very specific duties, that as far as I know, we don't do.

MR FITZGERALD: Who actually administers the Home Help scheme?

MS WATSON: The Community Health.

MR FITZGERALD: Okay. Are there any particular aspects you'd like to emphasise or speak to in the duty statement in terms of the overall philosophy of the scheme particularly?

MS WATSON: Okay. The first thing that I need to say is that we were faced with a situation - I mean I'm not going to speak to any particular point there - but we were faced with a situation where nurses and the nursing profession were saying personal care is a nursing duty. And we argued very strongly that personal care was a non-nursing duty; that it was that range of things that would be provided for a person by other family members or by other members of the community who had concern for that person.

And in the light of that we had to undertake that we certainly wouldn't do anything that related to nursing and that we certainly wouldn't do anything that related to the dut'

MS WATSON: of the home help in that sense. So that we're there to care for the person. We're not there to do anything for that home.

MR FITZGERALD: You mentioned, I think, at point 2 on page 2 of the statement ...

MS WATSON: Mm.

MR FITZGERALD: ... that the carer will be required to keep accurate records of the types of services being provided and regularly provide these to the coordinator. Is that there for any particular reason?

MS WATSON: Yes it is. Part of the data collection that the Commonwealth require for its records is that they need to know how their funding is being spent, and they are the ones who provide the funds for the program, so they require that somehow the data be collected and in terms of keeping accurate records it's simply for that data collection process.

MR FITZGERALD: Is it used by yourself for any specific reason?

MS WATSON: No, no.

MR FITZGERALD: Thank you. Are there any other points you'd like to make about the duty statement? If not, we can pass on?

MS WATSON: I don't see that there is anything particularly. No.

MR FITZGERALD: Thank you. Are you aware of the Family Day Care Scheme operated by the council?

MS WATSON: Yes I am.

MR FITZGERALD: Yes? Can you briefly describe that to the Commission - how that operates?

MS WATSON: Certainly. Family Day Care is another government - State and Commonwealth - I believe - I'm not

MS WATSON:

sure on that - funded program that is sponsored by a community organisation. In Kingborough it's also sponsored by Kingborough council. It provides an in-home service for parents who want their children to receive care in a home rather than in a day care centre.

MR FITZGERALD:

Right.

MS WATSON:

I mean it operates, and we thought that it was a good model around which to base our service, with a very clear distinction between client groups always being kept in focus. That in terms of our clients, they are people who are either adults or are parents with a child with disabilities who have specific needs and who, in most instances, are adult clients, who have a right to self-determination, whereas children don't.



MR FITZGERALD: Okay. You mentioned the term 'sponsor'. Is that a term which is used for your scheme as well?

MS WATSON: Yes.

MR FITZGERALD: Can you explain what you see that term as meaning?

MS WATSON: Sure. The Commonwealth and State are funding bodies. They also have policies about how services ought to be delivered and they look for community groups, whether they be councils or otherwise, who will administer the program, who will take over the function of making sure that the moneys are spent appropriately.

In terms of sponsoring, that's what council does for this program. It provides me with an office and a phone and heating, it provides a place for me to conduct training, it provides the administrative back-up so that I don't have to do all the hack work of drawing up any of the financial part of it.

They act in that oversight way.

MR FITZGERALD: Thank you.

Just going back to the Family Day Care Scheme, are the two schemes similar, in your view?

MS WATSON: They're similar in that sense. However, with that input and distinction, that our client group is self-determining.

MR FITZGERALD: Are there any major differences between the two schemes which you can perceive?

MR O'BRIEN: If it's determination on the Family Day Care Scheme, I don't mind, but he might be getting into water he's not supposed to.

MR FITZGERALD: The reasons, for Mr O'Brien's information, this matter is already subject to proceedings before the

MR FITZGERALD: federal commission.

MR O'BRIEN: I'm .... with that.

MR FITZGERALD: Can you see any difference between the two?

MS WATSON: In the way that they're administered, no.

I mean, in terms of clients, yes, but in the way that they're administered ... but it's not my role to know all the ins and outs of family day care.

MR FITZGERALD: Do you know whether they're treated as employees.

MR O'BRIEN: I object. This really doesn't go to the point of whether these people are employees or not. The comparison with the Family Day Care Scheme is totally irrelevant.

PRESIDENT: Yes, I accept that, Mr Fitzgerald.

MR FITZGERALD: I'll refrain from that line of questioning.

MS WATSON: Can I answer something there?

PRESIDENT: Well, you're Mr Fitzgerald's witness. You can only answer questions that are put to you.

MS WATSON: Right.

MR FITZGERALD: Well, the carers in your scheme, are they treated as employees?

MS WATSON: No.

MR FITZGERALD: Do they see themselves as employees?

MS WATSON: No. It's interesting. I knew that question and I was trying to answer that, in the sense that some of the people that came to us seeking work wanted to be employees and we had to tell them that we were not in the business, in that we were not doing that, and that it was up to them to enter into a contract to provide services to a particular person.

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MR FITZGERALD: The contract is with whom?

MS WATSON: The contract exists ... it's exactly the same as the present one that exists for the Family Day Care Scheme in that we register them as suitable people to be carers. That's our function, to find out that they are appropriate people to send into someone's home.

However, from then on the contract for the services is between the client and the carer.

MR FITZGERALD: Thank you.

Is insurance provided by the council in respect of counsellors?

MS WATSON: Inasmuch as the insurance is paid for out of the Commonwealth and State grant, yes, but the council doesn't pay for anything, apart from moneys provided in the grant.

We do insure the carers. //

MR FITZGERALD: Could you detail that for the Commission, please?

MS WATSON: Certainly. They're insured for personal accident and public liability and the personal accident cover is exactly the same as that for family day carers as well. /

MR FITZGERALD: Do you give any particular advice to carers when they're engaged, in respect of insurance?

MS WATSON: This question came up recently when a carer and her husband came to see me. They were not convinced that there was adequate cover in terms of either the personal accident or the public liability and they were advised by myself to seek out ways in which they could further cover themselves.



MR FITZGERALD: Has anyone ever requested, say, a  
X policy akin to a workers' compensation  
policy?

MS WATSON: No.

MR FITZGERALD: Thank you. In respect to the payment  
of fees to carers, can you describe  
the role the council plays there?

MS WATSON: I receive from each carer once a  
fortnight a worksheet which details  
the number of hours of care that they  
have provided. On the basis of that  
worksheet, I work out how much  
subsidy is to be paid and I provide  
that list to ... I'm not sure what  
her title is. I provide that list to  
the council. They take that money  
out of our account. In some  
instances it is electronically  
transferred to bank accounts. In  
others, a cheque is drawn up and sent  
to the carer.

MR FITZGERALD: When you say they take the money out  
of that account, which account is  
that?

MS WATSON: That is out of the personal care  
account, the moneys that are held for  
personal care.

MR FITZGERALD: So it is a separate account, not one  
which is coming out of council's  
general revenue?

MS WATSON: Totally separate.

MR FITZGERALD: Does the client make any payment at  
all to the carer?

MS WATSON: Not directly to the carer. // They pay  
the personal care service. That //  
money is put into that same account.

MR FITZGERALD: Right. What is the reason, or why  
does this occur?

MS WATSON: That occurs because most of the  
people with disabilities that we see  
are on pensions or benefits. They  
have therefore low or fixed income.  
We believe that having a disability  
is in fact itself a financial



MS WATSON: disadvantage.

And if you are employing someone or if you have someone come and do work that you know has a higher value than you can afford to pay for and you are handing over - as most of our people do, if you are handing over something in the range of 50 cents an hour, that immediately destroys the relationship that we are seeking to maintain between client and carer.

MR FITZGERALD: Thank you. Can you describe what controls there are in terms of the number of hours worked by carers?

MS WATSON: The Commonwealth and State Joint Officers committee who fund ... who make the conditions of grant, have put on us that clients should receive 10 hours a week of care, a maximum of 10 hours, with extension in emergencies. So they have specified that each client should have maximum 10 hours except in emergencies.

MR FITZGERALD: Can you stipulate when those hours are to be worked?

MS WATSON: No. Those hours are completely determined by the client and the client's needs.

MR FITZGERALD: Could the client in fact wish to have less than 10 hours' care provided?

MS WATSON: Yes, yes, they can wish ... they can say that they only want a block of say 4 hours a week. We have a couple of clients like that. They also can say that they want to use maybe 15 hours one week and 4 hours or 5 hours the next week, so long as they are ... in any given fortnight, it doesn't exceed 20 hours of care. They completely manage those hours themselves.

MR FITZGERALD: What happens in the event of, on an average week it is less than 10 hours? Is the carer still paid those 10 hours of subsidised care?

MS WATSON: No, no.

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MR FITZGERALD:

Can the client request more than the 10 hours of subsidised care?

MS WATSON:

Into the guidelines that we have it is written that we provide subsidised care for 10 hours, however, in the sense that we allocate 10 hours ... when I say we 'provide', we allocate 10 hours.

However, if a client is prepared to pay for extra hours, or to negotiate with their carer for additional hours, then that is not up to me at all. I am only there to make sure that the 10-hour part of it is administered. The rest of that is not up to me at all.

In fact, we have one client who has just commenced doing exactly that. She has received her 10 hours from the service, received the subsidised 10 hours, and she has then negotiated independently with the present carer, and is in fact receiving another 10 hours at a rate that I have no idea what is negotiated between them.

MR FITZGERALD: How can you monitor whether, in fact, the hours of service are actually being provided?

MS WATSON: How can I monitor that? That's what the work sheet does basically. When they bring in that sheet to me that tells me that a certain number of hours of caring having taken place.

MR FITZGERALD: So you rely totally on that work sheet?

MS WATSON: Yes.

MR FITZGERALD: There are no checks in the work place, so as to speak?

MS WATSON: No, none at all.

The other way that work sheet works is that the client also signs that work sheet so, that the client is the one who monitors that that took place, not the ...

MR FITZGERALD: Thank you.

Can you ... and you may have answered this earlier, but I wonder if you'd just reiterate. What's the relationship of the council to both State and Federal Governments. Can you just reiterate how the three parties fit together?

MS WATSON: Right. The commonwealth and the State are looking for ways - I mean, this is my interpretation - to provide community-based services.

In the past, the way the commonwealth has provided services is to set up its own independent services which have not been cost-effective and have certainly not met the needs of the rural populations in that they're usually based in capital cities or large cities.

And a way of meeting the needs of

MS WATSON: people to be able to live in their own communities was to look for already established groups who could sponsor - by way of funding and administration - programs so that they could get services into community areas.

So the council acts as a facilitator to having commonwealth and State services in a community area, as I understand it.

MR FITZGERALD: Do any of those funding bodies specify on what terms carers should be engaged, particularly where they should be engaged as employees?

MS WATSON: Yes, they do.

MR FITZGERALD: Right. Can you detail that?

MS WATSON: HACC has national guidelines and the national guidelines specify that all normal conditions should apply where appropriate.

They don't go about investigating each and every program to find out, and it's up to actually the people who put in the submission, it's up to that group to identify how that program will look in their particular locality.

MR FITZGERALD: You described, I think, earlier a body called, 'The Community Access Committee'. Can you again described who makes up that committee and what role it has?

MS WATSON: Right. The Community Access Committee is drawn from people in the Kingborough region particularly who either provide services to people with disabilities or who have disabilities themselves, therefore, they represent the client group.

There are people like myself and the community services coordinator on that committee, but there are also people from bodies such as Disabled



MS WATSON: Peoples International, so that they have an oversight role to see that programs develop in accordance the wishes of disabled people.

MR FITZGERALD: Would that body intervene on any occasion in a carer-client relationship?

MS WATSON: When I have applications from people wishing to be carers those names are submitted to that group. They act as an appeal body. They act a policy making body, but in terms of if there was ever a dispute ... it's obviously not logical for me to have that much power over clients or carers in the sense of what they do, and they would ... any disputes would have to go to that access committee.

MR FITZGERALD: Would you, yourself, have the power to dismiss or terminate a carer.

MS WATSON: No.

MR FITZGERALD: Who has that power?

MS WATSON: The access committee.

MR FITZGERALD: You mentioned that the carers see themselves as employees. Do you know whether they support the principle of this application?

MS WATSON: On the basis that I know everyone of those carers, and I feel that I can speak ... because this has been ... they've been aware of what's been happening and they have sought my advice, I would say that in almost every instance - with very few exceptions - the carers presently caring have not supported the idea of being employees.

MS WATSON: Certainly not. They've certainly, in every case that I know of, objected to the idea that they were domestic workers.

MR FITZGERALD: Why would they object to being seen as employees? Could you ...

MS WATSON: Because that means that they would have to be receiving instructions from me. They would have to see me as a boss. They would have to then ... the relationship that exists presently would be very changed.

It would mean that the consultation that goes on with them wouldn't take place. It would mean that the power relationships would be altered for them and it certainly wouldn't be the way that the people that we are providing a service for would want it to happen.

MR FITZGERALD: Are there significant differences between a Kingborough council employee, in the truer sense, and carers? Are you able to highlight those?

MS WATSON: Well certainly.

MR O'BRIEN: Well I object. If they're employees on one hand and carers ... is he trying to say, on the one hand they're comparable employees and on the other they're not employees. And at the same time ....

MR FITZGERALD: I'll rephrase my question. Take an outside work force employee of the council ...

MS WATSON: Yes.

MR FITZGERALD: ... and take a carer. Can you draw any similarities or differences between the two in terms of the relationship of the council?

MS WATSON: Well I can think of some, but I'm not sure they're appropriate to talk about here. Just even in terms of

MS WATSON: having ... that would mean that the council became the boss. It would mean that even their standard of dress would be directed by the council. It would mean that they would be subject to the same regulations as everyone else who works for the council and at present, they're not.

MR FITZGERALD: Thank you.

Are there any other matters you'd like to raise for the information of the Commission?

MS WATSON: Not that I think of.

MR FITZGERALD: Right. Thank you, Mr President, I have no further questions.

Thanks very much, Ms Watson.

MR O'BRIEN: Before cross ... do you intend to produce a contract?

MR FITZGERALD: I will later on.

MR O'BRIEN: Is this witness able to give evidence about the contract?

MR FITZGERALD: Which contract, sorry?

MR O'BRIEN: The contract that you say exists between the service and the carers.

MR FITZGERALD: No, I'd have to ask her.

MR O'BRIEN: Well I'm in difficulty if there's a contract that's going to be tendered that this witness knows about and it's not available now. So I'd ask that it be produced now, if it is to be produced.

MR FITZGERALD: Well can I suggest we have a 5-minute adjournment just to discuss it. I'd need to take some instructions from my members too, sir.

PRESIDENT: Well now, before I grant the adjournment, I had some questions. They'll probably cut across all of those you're going to ask, Mr

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PRESIDENT: O'Brien, ...

MR O'BRIEN: May well do, sir.

PRESIDENT: ... and we'll discuss this contract business later.

Ms Watson, do you do anything about social trainers?

MS WATSON: No. No, sir.

PRESIDENT: Have you ever heard of social trainers?

MS WATSON: Yes. Yes, I have.

We have a social trainer. A previous social trainer ...

PRESIDENT: Yes.

MS WATSON: ... is now a personal carer.

PRESIDENT: Yes.

MS WATSON: He sees his role as quite different now that he's doing personal care than what he was doing as a social trainer.

PRESIDENT: You'd be aware though that social trainers are trained to assist handicapped people?

MS WATSON: Yes.

PRESIDENT: Would learn particular skills, among other things?

MS WATSON: Yes.

PRESIDENT: And you've already addressed in your evidence the role and function, as you see it, of home help.

MS WATSON: Yes.

PRESIDENT: And as I understood your evidence, you were saying that these people whom you described more or less complement. Would that be a fair observation? Complement the home help people?

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MS WATSON: Well they don't work in conjunction with the home help person, so complement is maybe not a right word. They do both work ostensibly on behalf of the same person. They don't have any way in which their work is ever linked together.

In fact, the guidelines for HACC - the Home and Community Care program - insist that a person should have access to both home help and personal care and that one shouldn't stop anyone from receiving the other one.

PRESIDENT: Yes. But you'd be aware, from your own background, that home help people will perform a number of the functions that are set out on Exhibit A. Not all, but a number of them. Right?

MS WATSON: That's ...

PRESIDENT: Including some shopping, if necessary; running messages.

MS WATSON: Yes. I'd like to answer that one the other way round. In fact, some of the things that the home helps do, now that personal care is a distinct category, they're not suppose to be doing, in the same way that we're not supposed to do their job.

PRESIDENT: Yes.

MS WATSON: So that some of the functions that they presently do, particularly in country areas, is because there hasn't been a personal care service to do those things. And, in fact, we have an instance ... and I'd like to quote that instance because it relates ....

MS WATSON: In one of the further out community areas where we have a client, the person that knew that client best was her home help, and we recruited her to do personal care in the sense that ... and to do to that she had to give up being the home help, because those duties were too easy to overlap and in a sense of looking after the house that can take priority after looking after the person. So in that particular case she made the choice that she would rather look after the person than the home, and we made the distinction that she could not be both at the same time.

PRESIDENT: Right. Now supposing a hospital-based social worker ...

MS WATSON: Mm.

PRESIDENT: ... made an assessment in relation to an aged person with a disability and decided that person might need so many hours per week home help ...

MS WATSON: Mm.

PRESIDENT: ... right, that's about the way it goes isn't it?

MS WATSON: Mm. Well first of all, can I answer one of those things? We only look after the group of people termed 'younger disabled'. We aren't allowed to deal with the frail aged as in people over 65.

PRESIDENT: All right. Well then let's ...

MS WATSON: Right.

PRESIDENT: ... it's a younger disabled person ...

MS WATSON: Right, fine.

PRESIDENT: ... and a hospital-based social worker has decided - or those people in authority at hospitals - have decided that so many hours of home help would be appropriate. How would

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PRESIDENT: that social worker or the person making that decision be aware that the disabled person is not already in receipt of some - I'll call it - home help? Some of this caring activity?

MS WATSON: Right. If the person lived at home, the assessment that's done is normally done through Community Health and we have made great attempts to set up ways that Community Health nurses working with particular clients in Kingborough would liaise with us, and in fact most of the requests apart from ... some were referred to us by themselves - clients were referred by themselves - most of the requests have been through Community Health and they're aware of how many hours of home help are going into that home and how many hours of nursing are going into that home.

PRESIDENT: Would it be a fair observation to suggest to you that if the public purse can't run to, say, 4 or 5 hours a week home help then it might be possible to augment that requirement through this body?

MS WATSON: No. In the category that it comes under in terms of home help, it comes under the broad category in the national guidelines of home help, but what they're seeking to do is to provide opportunities for people who have disabilities to receive care for themselves.

What's happened in ... I mean this is a really important distinction, because what's happened in the past is that a nurse has come when a nurse could come on a roster basis and has been responsible for putting in - and it's usually around about half an hour a week of home help, or an hour a week - not four or five hours - they put in some time allocation of home help and then the nurse then comes and does the medical side of things and has in the past also given



MS WATSON:

baths, showers, whatever. And people with disabilities have been saying 'Hey this further restricts our lifestyle to access to normal community living'. For example, I'm sure you've read in the newspapers about, you know, some of these people and one of these people is saying 'If I have to have my bath at 3 o'clock in the afternoon, because that's when the nurse comes, and if then she comes back at 7 o'clock, that's not a very long day for me to exist and I can't get dressed until she comes and I've got to get undressed when she comes back, that's not a normal lifestyle. I want someone that I can tell when to come into my house, when to give me my bath, when to help me to get dressed. I can choose what that person will do me for me. If I need to go out I can ask that person to go with me. I don't want somebody to go shopping for me, I want to go shopping myself if it's possible'.

And that's what they're ... they're just screaming for it. They're saying 'We want control over our lives'. And this service was set up to see if that were possible.

PRESIDENT:

Right. Do the carers get paid?

MS WATSON:

Do the carers get paid? Yes, they do.

PRESIDENT:

What do they get paid?

MS WATSON:

At the present point in time, out of the subsidy that we have, I set a rate ... after consulting around, I set a rate that I thought was appropriate, of \$10.50. Now I set that rate in consultation, and took it back to the Access Committee - \$10.50 for a standard hour, a slight increase for hours that were abnormal hours. I took it back to the committee who were concerned that in the terms that are in our minutes, the term was that the element of volunteerism was what they talked about didn't go out of this, in

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MS WATSON:

that the Commonwealth has made a decision that it will not fund clients to employ people. They don't want to be in the basis of handing people with disabilities an amount of money to employ people.

They're looking at setting up services who can oversight the kinds of people and the way in which their money is spent.

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PRESIDENT: All right. So \$10.50 an hour was settled upon as fair and reasonable. At the end of this financial year will those carers receive a group certificate or a certificate of earnings?

MS WATSON: No.

PRESIDENT: They won't.

MS WATSON: No.

PRESIDENT: Then no tax is deducted.

MS WATSON: No, no tax is deducted. On the basis of the request of one carer, what I now do fortnightly for them is, as I work out the amounts that have got to come out of that grant, I prepare a statement of what it is that they have received for that fortnight. And I prepare those pieces of paper and put them beside the box where the forms go into and they collect them whenever.

PRESIDENT: And you draw the cheques?

MS WATSON: Do I draw the cheques?

PRESIDENT: To pay them.

MS WATSON: No, the council does.

PRESIDENT: The council does, from the grant.

MS WATSON: From the grant, yes.

PRESIDENT: Now if a carer is taken ill and cannot attend, is that just too bad for the carer, for example? No sick leave; not given any.

MS WATSON: At this stage, yes, in the sense that we actually haven't had anybody be taken ill. I mean, it's going to happen; I realise that. But in that sense what would happen is I would find someone who could go in, in lieu of ... yes.

PRESIDENT: Well when you settled on this \$10.50 did you take that kind of thing into consideration? What did you take

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PRESIDENT: into consideration?

MS WATSON: At the time when that \$10.50 was arrived at what we looked at, or what I looked at particularly, was the rate that home helps were paid for doing housework; the rate that nurses were paid for doing nursing; and we were saying 'Okay, they are neither of those two things'.

And I negotiated with both of the unions that seemed to have awards that came the closest, and it didn't seem appropriate. There didn't seem to be an appropriate award in place. And so what I did was settle out a rate and take it back to the committee who ratified it, that was in between those two rates.

It was, in fact, higher than a home help and lower than a nurse. And we are in the position where our funding is fixed and the funding was decided on, the level of funding was decided before ever any of this took place. So we have a limited amount of funding. I had to look at what we could support in terms of the amount of moneys available without clients contributing a fee which would make the service beyond their reach.

And on that basis we went from 50 and as I understand it until the next funding round that's not able to be renegotiated.

PRESIDENT: Now when a carer comes to you and offers his or her services, do you tell them that the fee, or the pay - I don't know how you describe it - is \$10.50 and they say 'Yes, that's acceptable', or 'No, it's not acceptable'?

MS WATSON: I tell them that that is the amount that is ...

PRESIDENT: That's the rate.

MS WATSON: Yes, that is the hourly rate.

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PRESIDENT: And it is not negotiable.

MS WATSON: We almost tested that this week in a different way. A carer came to me this week and said 'Look, I would like you to take the 50 cents that my client has to pay, out of the money I receive, because I don't want my client to have to pay anything'. That's the only negotiation that's ever happened.

PRESIDENT: So have I missed the point? The client pays 50 cents.

MS WATSON: Yes.

PRESIDENT: I see. But not directly to the carer.

MS WATSON: No.

PRESIDENT: Right. Mr O'Brien would love to know the two unions you spoke with. I imagine one was the Nurses Federation.

MS WATSON: No, it wasn't actually.

PRESIDENT: It wasn't?

MS WATSON: It was his union and then the Municipal Employees.

PRESIDENT: I see. And Mr O'Brien agreed to the \$10.50, did he?

MS WATSON: No. I asked him about awards and conditions and the implications of and how these people were seen. And the only thing that he could offer was a domestic award, which we saw as inappropriate in that we did not see that it was domestic work.

PRESIDENT: Had it been seen to be appropriate you'd have been happy enough to have applied that award then. Or had it had a classification in it that more correctly described the work that you described, you may have found that satisfactory.

MS WATSON: Well I have to answer that on the

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MS WATSON: basis of the national guidelines, that it says 'Where an appropriate award exists, then people who are doing this kind of work will be paid in that way'.

PRESIDENT: So the only reason that you've settled \$10.50 is because, in your considered opinion, there is no appropriate award covering them.

MS WATSON: No, that's not the only reason. I mean, the other reason is what we've just been talking about in the sense of while the client can't directly employ, the client must have control over what happens. So that's the second part of it.

PRESIDENT: But that would be going against the guidelines, wouldn't it? You've already told me that you're bound by the guidelines. The guidelines said, among other things, 'Where an appropriate award exists', or my words perhaps.

MS WATSON: In terms of moneys, yes.

PRESIDENT: Yes.

PRESIDENT: Yes. I don't have any more questions, but I'm sure Mr O'Brien will.

MR FITZGERALD: Could we just have that 5-minute adjournment which I originally requested, Mr President, just to discuss ...

PRESIDENT: You don't wish to cross-examine at this stage, Mr O'Brien?

MR O'BRIEN: Well I will, and Mr Fitzgerald can get instructions subsequent to that. That'd probably save some time ... and we'll come to that issue.

PRESIDENT: Yes.

MR O'BRIEN: But I just feel that if there's a contract ... the witness had given evidence, in part, about some contract and if it's in writing and it's part of the case, then I ought to have the opportunity to cross-examine in relation to it. That's all.

But, yes, I'll cross-examine now, if it please the Commission.

PRESIDENT: Yes. If the witness has to be recalled to be cross-examined on the contract - if there is a contract - then I hope that she'll be available.

MR O'BRIEN: Mr President, I seek to tender a document which I proposed to tender in any case.

PRESIDENT: This will be Exhibit B.

MR O'BRIEN: Could a copy of that document please be shown to the witness. I want to take the witness through the document, Mr President.

I wonder if you'd read the first section of 'Description of Person Care Service' in that document on page 1.

Is that a fair description of the



MR O'BRIEN: personal care service?

MS WATSON: It is, with a couple of exceptions.

MR O'BRIEN: What are those exceptions?

MS WATSON: The word, 'appointed', which appears, I think, twice. Appointment depends ... I mean, appointed isn't a right word. They're selected on the basis of their suitability to be carers, and we act, I guess, in a screening capacity there, but they're not appointed in any way at all. They're ... what happens there is that people are matched with clients and that's the basis of how they work. There's no appointment as such, and they don't then become people who forever are personal carers as such or whatever. I mean, that's the best way I can put that.

MR O'BRIEN: The reference in the document to the organising body being the Kingborough municipal council. That properly reflects the fact that the Kingborough municipal council is the sponsor of the scheme, does it?

MS WATSON: They haven't ... in the steps of ...

MR O'BRIEN: Well are they the sponsor of the scheme?

MS WATSON: They're the sponsor of the scheme, certainly.

MR O'BRIEN: And they employ you?

MS WATSON: I mean the organising body is better ... I mean sponsoring body would be a better word.

MR O'BRIEN: Well do they employ you?

MS WATSON: They employ me, yes.

MR O'BRIEN: Yes. And you're acting under the direction of the council clerk, I presume?

MS WATSON: I guess so, yes.

MR O'BRIEN: Yes. And you organise the service?

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MS WATSON: I organise the service, but I also act under the direction of the joint officers committee.

MR O'BRIEN: You take some guidance from that body, but you're actually employed and required to act under the directions of the council clerk, aren't you? In legal terms.

MS WATSON: I mean ... look, to be honest, I don't know the answer to that because I'm required by the joint officers committee to take their direction as primary ... in the terms of organising the service. I have not consulted with the council about how to organise the service. I've consulted with the joint officers and not the council in that sense.

MR O'BRIEN: Well are you ... perhaps we'll come back to that point. Could you read the second section of the document entitled, 'Origin of the Service'.

Now from your knowledge, do you know whether that's a fair reflection of the facts as to the origin of the service?

MS WATSON: I can't comment on the number of the submissions received because that's outside of my knowledge.

MR O'BRIEN: Yes.

MS WATSON: I do know that they ... I can't even comment ... I mean, I can say that I don't know that they have a preference for local government. In fact, I would say that they don't have a preference for local government. They'd simply look for people who can effectively administer funds.

MR O'BRIEN: Yes. Well then, with those two exceptions, would you accept that that's a fair description of the origin of the service?

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MS WATSON: Yes.

MR O'BRIEN: Okay. In relation to the third section there, Funding Basis, would you read that section please?

Now, are you aware ... apart from the first paragraph, which I think you've already given evidence about, of the circumstances which led to the application for funding on the funding basis?

MS WATSON: I'm only aware inasmuch as the community services coordinator has told me some of what he did in preparing an application and I have the documents in my personal care file that he submitted for funding.

MR O'BRIEN: Okay.

MS WATSON: Both the handwritten and the typed documents.

MR O'BRIEN: Well then in the third paragraph you've seen copy of the application for funding dated 4 January 1988, have you?

MS WATSON: Have I seen it?

MR O'BRIEN: Yes.

MS WATSON: The application?

MR O'BRIEN: Yes.

MS WATSON: I have seen that application, yes.

MR O'BRIEN: Well, did it in fact state that the Municipal Officers Award would apply for the coordinators and the domestic classification, Miscellaneous Workers Award would apply for the personal carers?

MS WATSON: No.

MR O'BRIEN: That's the document dated 4 January 1988.

MS WATSON: No, it doesn't state that at all.

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MR O'BRIEN: Okay. Could you produce that document to the Commission if the Commission wanted that?

MS WATSON: I certainly can produce that document. I can provide both. The handwritten document in Mr Mitchell's handwriting says, 'A fee of approximately \$9 an hour' and that's the only thing that's on that document and the one that was typed up says exactly the same. It mentions nothing about an award.

MR O'BRIEN: It doesn't mention the Municipal Officers Award?

MS WATSON: It certainly doesn't.

MR O'BRIEN: Right. Do you know of any discussions with the Department of Community Services and Health, or the Department of Health Services about award application to the personal care assistants?

MS WATSON: The only way to answer that is, I know ...

MR O'BRIEN: Or do you personally know of any discussions?

MS WATSON: Do I personally know? No.

MR O'BRIEN: Were you present at any discussions?

MS WATSON: No.

MR O'BRIEN: Has someone told you about discussions that took place?

MS WATSON: Yes, they have.

MR O'BRIEN: Right.

MS WATSON: But, no, I don't personally know of any discussions.

MR O'BRIEN: Well, is the person who told you about those discussions Mr Mitchell?

MS WATSON: Yes.

MR O'BRIEN: Could you go to the next section,

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MR O'BRIEN: that is the Operation of the Service and could you read that section please?

Do you have any difficulties with that part of the document?

MS WATSON: The first one is my difficulty in terms of, yes, I am a permanent officer of the council and my terms of employment are subject to the continuation of the Personal Care Service. I'm only an officer of council in terms of the Personal Care Service.

MR O'BRIEN: Well, that wouldn't be much different from an outside worker who was on a garbage collection run when the garbage collection run was contracted out and the service ceased.

MS WATSON: Okay. Yes, I have some other difficulties.

MR O'BRIEN: Go on.

MS WATSON: Can we keep going?

MR O'BRIEN: Yes.

MS WATSON: I mean, billed by council ... the accounts that have recently gone out state, Personal Care Service.

MR O'BRIEN: Sent out by the council?

MS WATSON: Well, they were sent out by me, by our service.

MR O'BRIEN: Okay.

MS WATSON: I mean, how specific do you want to get? There are now six people who receive payment by cheque.

MR O'BRIEN: That's fine. I don't mind any actual correction to the document.

MS WATSON: Right. They're not required to keep a weekly diary. From time to time, for data collection purposes I request that a diary be kept. Unless its intrusive and can't be done with the clients' knowledge.

MR O'BRIEN: Can't be done with or without the clients' knowledge?

MS WATSON: With the clients' knowledge.

You see, I don't want to keep records and it's been the philosophy that we don't keep records about key situations in that people shouldn't have records kept about when they take a bath. That's fairly intrusive stuff and that's why we don't ask those sorts of things.

It's not something that we would ordinarily want to know. However, we do need to know that such and such number of people were provided with such and such services in terms of data collection for the Commonwealth.

When you say they're required to attend one meeting per month, they are invited. I set up ongoing training sessions and carer meetings. The basis for that has been to facilitate ...

MR O'BRIEN: Where does it say in the document

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MR O'BRIEN: that they're required to attend one meeting per month?

MS WATSON: Okay they attend.

MR O'BRIEN: It doesn't say required.

MS WATSON: Okay, fine.

What I do and what I have advised them to do, is to form themselves into an association and that has been part of the reason for holding those meetings. The other part of the reason is to hear from them what it is that they ... in fact they give me instructions at those meetings.

MR O'BRIEN: What sort of instructions do they give you?

MS WATSON: Okay. Instructions in terms of when there was some more funding made available recently, it was at one of those meetings that I put it to the group that they should decide how that money should be spent so that they can better do their caring.

They selected first aid kits, library facilities and things for them.

MR O'BRIEN: It's hardly an instruction, is it? It's rather a participation in the management of the service, isn't it?

MS WATSON: Well, that's the point. Yes, they do.

MR O'BRIEN: Thank you.

MS WATSON: Okay. I don't allocate the work to the carers.

MR O'BRIEN: Well, those words might be wrong, but you manager client and carer, that's how you put it.

MS WATSON: Yes. I facilitate a match. I don't allocate the work.

MR O'BRIEN: Well, do you say to the carer, 'I think we ought to match you up to Mr Smith?'

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MS WATSON: No. What I do is, they have a pink ... the clients fill out a yellow form which has details about them. The carers fill out a pink form which has details about them. When I'm talking to clients I give them the yellow forms and they go through and say, 'I'd like to meet this one and this one'. I then talk to the available carers and available according to their specified times that they want to work and I try and find someone who will be willing and I introduce them.

The client then has the power and I always do it this way, I say, 'Look, I will introduce you to one, or two or three' and in one case it was three carers. 'I want you to ring me back and tell me which one it is you want'.

MR O'BRIEN: So, you would then tell that carer that you've been selected to assist?

MS WATSON: I would ask them whether they were happy to go to that place, whether they were prepared to go.

MR O'BRIEN: I see. If they don't want to go, then you wouldn't establish any carer-client relationship?

MS WATSON: No.

MR O'BRIEN: If the client didn't want a particular carer, you wouldn't obviously refer them?

MS WATSON: No.

MR O'BRIEN: And what happens if a client or the carer say to you, subsequent to the establishment of that client-carer relationship, for the want of a better word, that one or other says, 'Well, I don't get on very well with that person', what can you do about it?

MS WATSON: Subsequent to or before?

MR O'BRIEN: Subsequent to.

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MS WATSON:

Right.

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MS WATSON: First of all, before ... I would have to be satisfied in terms of that they were both happy with attempting the thing. It's always that either of them can back out. It's got to be. You can't have someone going in to give someone a bath that obviously the relationship's broken down between the two of them, and that they've both got the right to back out of that.

MR O'BRIEN: Right. Okay. Are there any other things in that document ... that part of the document ... cause you any problems?

MS WATSON: Well, I mean, the same thing about ... you know, they're allocated more than one client. It's the same thing. They may have more than one client only where that does not affect the relationship with their primary ... and I've developed using the term, 'primary', relationship because that's the whole basis of the program, that we don't want to get involved in rosters and they don't get involved in having people having to wait for the services they need.

MR O'BRIEN: While we're talking about rosters, et cetera, the rates of pay that you've struck, they have reference to ... they've been compared to casual rates, haven't they? That is, the \$10.50 an hour is drawn with reference to casual rates in the awards.

MS WATSON: No. It was midway line between ...

MR O'BRIEN: Yes. I understand you haven't taken a particular rate ...

MS WATSON: Right.

MR O'BRIEN: ... but you've taken a midway line between casual rates, that is, hourly rates for people who have irregular engagements.

MS WATSON: Well in that casual relates to employment ... and this was ... I mean, I can't answer that in that sense.

MR O'BRIEN: Well where did you take the rates from? Which particular rates did you take?

MS WATSON: Which particular rates.

MR O'BRIEN: Yes.

MS WATSON: Okay. We looked at the home help, as I said.

MR O'BRIEN: Yes.

MS WATSON: We looked at nursing. The home helps at time were receiving around about \$9.30 an hour and nurses were receiving around about \$14.00 and somewhere in there ... and a nursing assistant, which was the closest that we could come to but was still not appropriate because that nursing assistant took instructions from a nurse, was probably the closest that we could find - the nursing assistant - and it was modelled on that and that was all that was done.

MR O'BRIEN: Well which rate did you look at, when you look at the award? Did you look at the weekly rate or ...? How did you arrive at an hourly rate?

MS WATSON: Simply on that basis.

MR O'BRIEN: I'm not sure what you mean.

MS WATSON: There was no basis on casual, permanent or ... all we did was look at ... that this was ...

MR O'BRIEN: So you looked at the hourly rate that was paid to home helps, did you?

MS WATSON: Yes.

MR O'BRIEN: And did you look at the hourly rate that was paid for nurses?

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MS WATSON: Yes.

MR O'BRIEN: Right.

MS WATSON: And then we also looked at how much can we afford in terms of the subsidy we have and stay within budget, and that was the amount that we came up with.

MR O'BRIEN: Could you look at the next section of the document, please?

MS WATSON: Yes.

MR O'BRIEN: Any problems with that section of the document?

MS WATSON: First of all, people came into the service ... came into the front office of where I was sitting in a room by myself for quite some time and said that they had read about the personal care service not about ... we never advertised for carers in terms of newspapers or articles. People came in and said that they'd heard about the service. They would like to do that sort of thing.

At the end of about ... now that was from August. The first training took place at the end of October. In that time 16 people had come and I had put everyone of those 16 people's names on a list. And, yes, I did send them out a letter saying that we were going to do some training and they were invited to take part.

The pamphlet that we distribute does have, 'If you're interested in being a carer on a contract basis, then please contact me'.

MR O'BRIEN: Well I'll stop you there and I'll tender this to you. It's a copy of the article that's referred to there, I think.

MS WATSON: Right.

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MR O'BRIEN: I'm sorry, I don't have the date.

PRESIDENT: Exhibit C.

MR O'BRIEN: I believe that's an article from the  
Community Express section of the  
'Mercury'.

MS WATSON: Right.

MR O'BRIEN: That would be an article that was printed in a newspaper ...

MS WATSON: Mm.

MR O'BRIEN: ... uses the word 'attendants' in the article.

MS WATSON: Yes, it does.

MR O'BRIEN: And apparently you were interviewed in relation to that article.

MS WATSON: Can I make the point, that being interviewed by Nicholas Turner and getting the facts right are two quite different things.

MR O'BRIEN: Mm.

MS WATSON: And that in fact Nicholas Turner did not hear what we were trying to say, and we have subsequently given up trying to put articles in the press for that very reason.

MR O'BRIEN: Were you saying you didn't say the scheme would create full-time employment?

MS WATSON: I couldn't say that, because it's never been a possibility.

MR O'BRIEN: It's never been a possibility?

MS WATSON: It's never been a possibility ...

MR O'BRIEN: Were you employed full-time?

MS WATSON: ... not from ... am I employed full time?

MR O'BRIEN: Yes.

MS WATSON: Yes, I am. I'm the only one ...

MR O'BRIEN: Mm.

MS WATSON: ... and that's to administer the program, not to employ carers. It's never been a possibility in that the original submission specified one-to-one care, and the 10 hours maximum was put on us from the very first

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MS WATSON: submission.

MR O'BRIEN: Right. Well the article says that ... the document says that articles were printed in the newspaper. It doesn't say that you advertised for staff.

MS WATSON: Right. No.

MR O'BRIEN: Right.

MS WATSON: Okay, we didn't advertise for staff.

MR O'BRIEN: Well I didn't say that you did. I mean ...

MS WATSON: Right.

MR O'BRIEN: ... you made the point of saying that you'd never advertised, and I'm just drawing your attention to the fact that that is not said in the document is it?

MS WATSON: Well it does say calling for people to become carers.

MR O'BRIEN: Mm. Well it doesn't say you advertise for them.

MS WATSON: No. Respondents to the publicity or however else ...

MR O'BRIEN: Mm.

MS WATSON: ... were notified that they would need for their own benefit, some training.

MR O'BRIEN: All right. Well does that mean that if they decided not to undertake the training that they could still be carers?

MS WATSON: Yes, in that we also ... I'll think you'll find it in the duty statement, it says that ... no, maybe it's not there, sorry. I'll have to make sure ... find out where it is. They would need background notes in that description of carers that we have. That they would need a background in

MS WATSON: caring for people, or, be willing to undertake the training that would make sure that they could perform what they were asking to do, so that we recruited people who had skills already, who did not need ...

MR O'BRIEN: Right, fine, people who didn't have those skills ... however in all likelihood would have been required to train wouldn't they?

MS WATSON: On the basis that the training is about how to do the job, yes. How to do what they want, what they're asking to do, in the sense of, you know, how to lift someone, yes.

The fact that it was clients .... the fact that it was on Kingborough council letterhead, it was simply because that took place in a very short space of time before we'd actually devised any of our own letterhead or whatever, and the pamphlets were the only thing that had been printed at that stage, so I believe apart from ... the training was also provided through Multiple Sclerosis to those first five people. What happened, and the form that we used with people who are asking to be carers ... what happened in terms of how ... in fact it doesn't happen in any one way.

I have a carer right now - who is caring for someone - who is still undergoing training. Right? It wasn't a prerequisite. It's that we knew that these people would need training and resources.

They were given certificates, certainly, which mentioned the word 'contract', in terms of the certificates that they're given say that we recognise that they have the skills to undertake contract employment.

They were given exactly this duty statement in terms of we have got ...



MS WATSON: they were given no duty statements, they were given that piece of paper. In every training course that's been run, people have been told that they're the sorts of things that we think the service should be about.

MR O'BRIEN: Since when has that occurred?

MS WATSON: Well that's dated 22 August '88.

MR O'BRIEN: Mm.

MS WATSON: And it's been given out all the way through. Every single carer that we have ...

MR O'BRIEN: Right.

MS WATSON: ... has that statement. It certainly has been stressed that they weren't to do nursing duties, in that that contravenes the parameters of the service itself.

Adult Education provides a building, nothing else, in terms of training. Hobart Technical College or TAFE provide a personal care training course now.

MR O'BRIEN: So it's provided at the Adult Ed. building by Hobart Technical College.

MS WATSON: Yes. Well by TAFE. I mean, I'm not sure that ... it's the special programs person.

MR O'BRIEN: Okay, sorry.

MS WATSON: I'm not sure who ... that's Hobart Tech.

MR O'BRIEN: Technical and Further Education.

MS WATSON: Yes.

MR O'BRIEN: It might be that the person is based at the Hobart Technical College.

MS WATSON: A specific person was appointed who's funded under DET. The people selected are selected by a group of three people to do that training on the basis that the CES has a direct link into DET. And they wanted to increase the likelihood of people finding some employment. And they were interested on the basis that they could see that this kind of training would fit people for all kinds of ways of being employed, not just by our service by any means.

MR O'BRIEN: Is there anything else from that part of the document?

MS WATSON: In that section, no.

MR O'BRIEN: Would you look at the next section, please - 'Duties of Personal Carers'.

MS WATSON: Okay.

MR O'BRIEN: Do you have any problems with that part of the document?

MS WATSON: Well I've got one very significant one. When I get down to the case study that comes up, or the case.

The tasks on the diary sheets are to do with what the client needs and what ... there's a similar form. We actually use the diary sheet in two

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MS WATSON: ways: to collect the data for HACC, and we also give that same ... have you got a copy of the diary sheet?

MR O'BRIEN: Well I'll assist and I'll tender one for the witness.

PRESIDENT: Exhibit D.

MS WATSON: We use this sheet in two ways. The sheet is for data collection as in terms of the HACC, and we cut out the Monday, Tuesday, Wednesday, Thursday, Friday and give that to prospective clients and ask them to indicate if any of those things are appropriate to them. That is in the information gathering about the sorts of things that I am looking for a carer to be willing to do. Okay?

MR O'BRIEN: Is that this document, now Exhibit D?

MS WATSON: Yes.

MR O'BRIEN: Who prepared that?

MS WATSON: I did.

MR O'BRIEN: Now in relation to the duties of the personal carers in document B, what's the relevance of the diary, again, to the specific cases here?

MS WATSON: Okay. The relevance in that ... there's basically no relevance except in data collection. It's only relevant ... you see that's the next part of it. It says 'Whilst the coordinator instructs the carer'. I don't instruct the carer; the client does, on the duties to be performed. That's the very important difference, that I don't instruct them; I don't go and say 'Go and give Mr So-and-so a bath'. I say 'Go and find out what this person needs from him or her and receive that instruction and work out whether you are willing to or not'.

The second part that's a really big concern to me now is a two-part concern. Firstly, we're a small service and this person is readily identifiable. Therefore I know who

MS WATSON: these carers are and carer A, in terms of ... no, sorry, carer B in case A that you have mentioned, came to see me yesterday with great concern and did not want what she does with her clients to be made part of some industrial action, which she is opposed to. She was very distressed, she's not ...

MR O'BRIEN: Well we'll come to that because you've called in all of the carers, haven't you, recently to talk to them about this application?

MS WATSON: No.

MR O'BRIEN: You say you haven't.

MS WATSON: I say I haven't.

MR O'BRIEN: Have you requested them to come and see you?

MS WATSON: No.

MR O'BRIEN: Have you said ... you haven't requested any carer to come in and see you about this matter.

MS WATSON: No.

MR O'BRIEN: Have you spoken to any carers about this matter and made any suggestion that the establishment of award rights might prejudice funding?

MS WATSON: No.



MR O'BRIEN: You say you haven't done that either.

MS WATSON: I mean, can I answer that another way round?

MR O'BRIEN: No. Well would you answer the question that ...

MS WATSON: I will answer that, that I have said to them that it may prejudice funding and it certainly will.

However, what happened was ...

MR O'BRIEN: Can you tell us why it will prejudice funding because the ...

MR FITZGERALD: Mr President, I just wonder whether the witness can finish the answer.

MR O'BRIEN: Well the witness just said that it will prejudice funding. I asked that to be clarified before another statement was made.

MS WATSON: Okay.

PRESIDENT: Yes.

MS WATSON: It will prejudice funding in terms of there is not the capacity within the grant that we have to conduct the service that we conduct in the same way with the escalation in funding that any award, of the nature that we're talking about, would impose.

And it would then be back to the Commonwealth to decide, and they have indicated that they probably would not go ahead with personal care in this State in the next 5 years at least on the basis that it's beyond their budget under HACC.

Now can I ...

MR O'BRIEN: Who's told you that from the Commonwealth?

MS WATSON: Veronica Sakell.

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MR O'BRIEN: And what's her position?

MS WATSON: She's one of the joint officers from the Department of Health, Tasmania.

Can I return to your original question?

MR O'BRIEN: Sure.

MS WATSON: What happened was - and I think it's fair to answer it this way - Pauline Shelley, working for your union, approached me and asked for access to my carers in terms of ... and once again, if I had been their boss I could have said, 'No'.

And I said, 'It's not up to me to give you access or not. You can approach the carers yourself', which she and you did at a meeting ... one of these carer meetings. You discussed it with them. Afterwards I discussed the implications for the carers of what was proposed to them that night. That is the only meeting that has taken place with carers.

MR O'BRIEN: Mm.

MS WATSON: Of course, individual carers have come ...

MR O'BRIEN: As a group you mean?

MS WATSON: As a group.

Individual carers, but by no means all of them, have come to me. Pauline Shelley also went to see the trainees. I did not go anywhere near those trainees - in fact, Mr Lovell from the council did - in terms of I think it is fair if the carers are looking at unions that they know that they have options or that they may have options. Right?

MR O'BRIEN: Mm.

MS WATSON: And those options were presented to them, and I haven't spoken to ... I would say that I've only spoken

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MS WATSON: where a carer has come to me now feeling unsettled and concerned that they may not be able to continue caring.

MR O'BRIEN: How many carers have spoken to you and discussed this matter today?

MS WATSON: This matter today?

MR O'BRIEN: This application.

MS WATSON: Let me think. The two mentioned here ... five.

MR O'BRIEN: Right.

And you've ascertained from talking to those five that it's a view about the application today that they don't support it? Is that your previous evidence?

MS WATSON: Out of those five, there is only one who sees that they want to pursue this in any way. The other four for mostly reasons of their own - not to do with me - aren't union-type people and do not want to be part of unions, do not want that level of intervention in what's happening. They're very concerned. In fact, it's had a very unsettling effect on the whole program.

MR O'BRIEN: So five of the 16 carers ... of the five out of 16 carers that you've spoken to about this, four have said something to you which you'd construe as negative to this application and one has said something which you'd construe as positive to this application?

MS WATSON: Yes. Except that at the meeting that you attended and also from feedback through the coordinator of the training course ... the unanimous decision at the training course of 16 trainees was, 'No, we don't want this to happen', and the feeling at the meeting was overwhelmingly, 'No, we

MS WATSON: don't want this to happen'.

MR O'BRIEN: Well you are talking about a meeting at which I wasn't present.

MS WATSON: No. Yes, the meeting that you came to.

MR O'BRIEN: I see. Well perhaps we can personally disagree about what the feeling was whilst I was there.

MS WATSON: Fine.

MR O'BRIEN: Getting back to the document ... or part of the document headed, 'Duties of Personal Carers'.

MS WATSON: Yes.

MR O'BRIEN: Are there any other problems that you see with that? I'm not sure you've mentioned anything specific as to that part.

MS WATSON: In the terms of the cases that you have brought up. Some of these things I'm not even aware of. That indicates to me that, in fact, those carers have not sought supervision; have not sought direction because some of those things they would have been instructed - if I were giving instructions - that were outside of their duties.



MS WATSON: For example, washing his clothes, going and folding his clothes, that's outside of what ... because there's a home help there, it's outside of what they needed to do.

The showering him, those sorts of things ...

MR O'BRIEN: Can I take you to your duty statement. Your own duty statement on page 1 talks about attending to soiled clothing etcetera. What does that mean?

MS WATSON: Right. Soiled clothing, right, ...

MR O'BRIEN: You're only referring there or attending to refer to not just dirty clothes?

MS WATSON: No.

PRESIDENT: Incontinent clients?

MS WATSON: Yes.

In the second case, case B, there are several things in there that I have, on behalf of that same carer, attempted to negotiate because both the carer and I perceived that they were wrong and that they were not ever part of agreed work conditions that were agreed between the client and the carer and in fact that was the closest thing we've come to someone being exploited by a client and intervention has taken place on the basis that we can't care for a sibling, that's Family Day Care's job.

We can't enter into things like that that are way beyond what we should be doing.

MR O'BRIEN: Okay. You say that a person, carer A in case B, shouldn't be caring for the sibling, supervise the whereabouts of the client's older sibling when he returns from school?

MS WATSON: No. In fact she came to me with her concerns, that that was becoming more

MS WATSON: and more of what she was doing in that home and asked me for assistance to go back to that family and say, 'This is beyond what we should be doing'.

MR O'BRIEN: And that's the heart of that statement, that may have been corrected or whatever, since we prepared this document?

MS WATSON: What in effect happened, was that carer A no longer cares in that family because that could not be resolved between the two parties and carer A said that she would no longer continue in that family.

MR O'BRIEN: And has that carer been allocated another client?

MS WATSON: At the moment she shares the care of one client, on the basis that we have to allocate in terms of ... we have to find matches from people that are available. No, she hasn't. However she hasn't ceased to be someone that I would call on should there be another client wanting her services.

This is just in terms of definition, that certainly what family members would perform or other interested and concerned members of the community.

MR O'BRIEN: Or friends?

MS WATSON: Or friends, right.

MR O'BRIEN: Okay. Well, could we go to the last section in the document, Payment and working conditions of personal carers.

Any difficulties with that part of the document?

MS WATSON: Lots.

MR O'BRIEN: What are those difficulties please?

MS WATSON: Okay. Where we're talking about paid, once again that assumes that we

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See Ex. 1

MS WATSON: pay them and I don't see ... all I do is reallocate subsidy, if you like. I mean, the subsidy is sitting there. We allocate it on the client's behalf.

The rates are right. The hours change even during the daily rate. I'm not sure that you can talk about a shift. If you're asking someone to call in on someone for half an hour at night, I'm not sure that that constitutes a shift.

MR O'BRIEN: That maybe industrial terminology rather than the terminology you would use, of course?

MS WATSON: Right. Yes. I don't understand that word, for example, in that sense.

MR O'BRIEN: Right. Engagement, or work period, or period of care of whatever. There are a number of terms that might be used.

MS WATSON: I mean, the only person that I can think of that ... let me think that I've got this accurate.

MS WATSON: There is no-one right now who is required to go out and visit a person twice in the one day. However ...

MR O'BRIEN: Might they visit ...

MS WATSON: ... they may.

MR O'BRIEN: ... two different clients in the one day?

MS WATSON: Yes, they might. However that's not usual because that means that they've got more than one client and normally that doesn't exist. However it is there that they may be asked to do that on the basis of the same carer, if they were willing, could be the person who came in in the morning and bathed and showered and got someone up and at night put that person back to bed.

However that's part of the original form. When you say that they're required to sign something, the form that they're required to sign is termed 'An application to become a carer'. And in that there is a whole section that specifies 'What times are you prepared to work?' I will not contravene the times that they've said they will work.

So it's not very usual for someone to say 'Okay, I'm available 24 hours a day', on someone's behalf. That's, in fact, a difficulty we've addressed with the service.

No, they're not paid those sorts of things. When you go down further they've been told they are independent contractors. They've been told that the care is on the basis of the contract, and they have been told that they are not employees of the council.

When you say they are not able to set their own fees, they're only not able to set their own fees for that subsidised 10 hours. They can set any fee they like for any additional



MS WATSON: care that takes place. They do determine ...

MR O'BRIEN: Can I just qualify that because I don't think you mean that if they have a period of emergency care in addition to the 10 hours, that they could set their own rate for that.

MS WATSON: That came up recently and, in fact, the carer did. So I have to say that the answer to that is 'Yes, they can'.

MR O'BRIEN: They can charge what they wish.

MS WATSON: Well when I say to somebody 'Are you willing to go', then it's according to that agreed amount. But when it's ...

MR O'BRIEN: You put it as an agreed amount. It wasn't agreed with individual carers, was it?

MS WATSON: Well it was agreed on the basis that this is the amount that we can afford to pay. Are you willing to work for that? And they have signed .... saying 'Yes' in the terms of the contract.

However they do determine their own work with their client. They are and have recently, as in when the last group of trainees finished training ... they came to us with their own personal idea that they would like to start advertising for clients and they would like to do it corporately.

And they were told 'Go right ahead' on the basis that ... I mean, some of our carers did recruit their own clients. They went out and they knew someone; they came to me and they said 'We know this person. I'd like to go and be that carer. Will you take them on the program so that they can have this subsidised care?' And the answer was 'Yes'.

They don't collect fees on the basis that we act in that capacity for the

MS WATSON: reasons that I mentioned, that the people concerned cannot afford to pay what would be anywhere near a reasonable rate of payment for the service that they require.

And we consider it to be demeaning and to be destructive of good care, that that 50 cents be handed over. In terms of paid by the council, they're paid ... yes, true the council sends a cheque. It's got the council's name on it, but only because the council don't have another cheque form. I mean, how can they do anything else. They're there to administer.

I can't answer about the member ...

MR O'BRIEN: Yes, I understand you wouldn't know what they'd said to us.

MS WATSON: Exactly. I mean, that member can see herself in any way she chooses, but whether she's right to or not is a different thing. She has not, in fact, asked me for tax deductions to be taken out of the money she receives. It has never been a possibility.

PRESIDENT: When we get to a convenient point in the cross-examination, Mr O'Brien.

MR O'BRIEN: Well I guess any point is convenient in cross-examination. Could I ask for a later resumption of this matter?

PRESIDENT: I think it will be granted. It will suit me fine, Mr O'Brien. How much later?

MR O'BRIEN: 1.45 ... sorry, 2.45.

PRESIDENT: 2.45. Well it is your application.

MR O'BRIEN: Yes, well it's Mr Fitzgerald's application at the moment.

MR FITZGERALD: We just have some slight problem with times. I just wonder whether, in fact, it may be better to see whether

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MR FITZGERALD: we could resume on some other day. Certainly my instructing members have difficulty with that time and I think later on this afternoon will too.

PRESIDENT: Well Mr Fitzgerald, this matter is set down for the whole of the day.

MR FITZGERALD: Yes, I understand that.

PRESIDENT: It is your threshold application.

MR FITZGERALD: It is my threshold application but it could cause some problems, the later start, with the availability of one of my instructing members.

PRESIDENT: Well how long did your instructing member think that this witness was going to be in the witness box?

MR FITZGERALD: Well it certainly was a lot longer than we expected. I know it is very hard to tell with these matters, but certainly cross-examination has taken longer than we expected.

PRESIDENT: Well you've heard the request.

MR O'BRIEN: I am only concerned if it does go into another day that it be shortly.

PRESIDENT: Well so far as I'm concerned I am prepared to hear this thing today. You've made an application for a later start ...

MR O'BRIEN: Yes.

PRESIDENT: ... that doesn't concern me, but I'm ...

MR O'BRIEN: I'm happy to go later today.

PRESIDENT: ... in the hands of the parties. Yes, well I'm not prepared to sit much beyond the normal ceasing time either. But ...

MR FITZGERALD: Well I just have taken some further instructions. It appears that we can make some other arrangements, although inconvenient. I just wonder if we do finish cross-examination today, which if Mr O'Brien can give us some indication of how much longer it will be, and then I can proceed with re-examination. What is the order from thereon? Do you require me to complete my submissions at this time? Would Mr O'Brien be intending to call evidence to contradict what I've put before the Commission? I just need some guidance in that respect.

PRESIDENT: Well that would be up to Mr O'Brien, but as you have taken this threshold objection, I'd expect you to argue it in full.

MR FITZGERALD: I'm happy to do that.

PRESIDENT: You of course having a right of reply ...

MR FITZGERALD: Yes.

PRESIDENT: ... in the circumstances. I imagine



PRESIDENT: we're going to be in the hands of Mr O'Brien. You may be able to assist Mr Fitzgerald, Mr O'Brien, as to whether or not it's your intention to call some rebuttal evidence on this threshold is it?

MR O'BRIEN: Hard to say at this point. It's hard to say at this point, because I haven't completed cross-examination.

PRESIDENT: No, of course not. So I'm afraid we'll have to wait for the answer until after lunch.

MR FITZGERALD: That's fine. I reconfirm that I'm happy to proceed to finality today.

PRESIDENT: Yes, thank you. Well we'll resume promptly at 2.45.

...

PRESIDENT: You're on your former oath. Yes, Mr O'Brien.

MR O'BRIEN: Thank you, Mr President, and thank you for that indulgence of a later start. Hasn't done me much good, but we'll manage.

You gave some evidence before lunch in relation to a question or number of questions that I asked you pertaining to the document that you've been looking at. I'm not sure if you've still got it there - the section relating to funding basis.

MS WATSON: Mm.

MR O'BRIEN: We were talking about an application for funding dated 4 January 1988.

MS WATSON: Right.

MR O'BRIEN: You mentioned an hourly rate that you'd seen in that document. Can you tell me what it was?

MS WATSON: From memory ...

MR O'BRIEN: Well you mentioned it this morning ...

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MS WATSON: Mm, yes.

MR O'BRIEN: I didn't put one to you.

MS WATSON: From ... I mean, to be honest, I think that it's \$9. I think the wording on the original says approximately \$9.

Mr Mitchell has offered to bring in that document this afternoon.

MR O'BRIEN: Well that will be helpful. Thanks.

MS WATSON: Right.

MR O'BRIEN: Now that funding that's mentioned there it's subject to review isn't it? Annually?

MS WATSON: No.

MR O'BRIEN: It's not?

MS WATSON: It's on a recurrent basis, and we've been instructed to stay within 15% of what we said we would need. Of course this year we're way under budget. I don't know about next year. But I don't know the actual structure for that. I honestly don't know that bit.

MR O'BRIEN: All right. That's not something that you've dealt with. That's Mr Mitchell's baby.

MS WATSON: Well it hasn't been anybody's baby. It hasn't been ... it hasn't come up as yet because we haven't needed to seek a change in funding.

MR O'BRIEN: Mm.

MS WATSON: And I understand that what has to happen ... I can answer that from the point of view of how that if we wanted to change the funding, we would have to submit a new application and that would be subject to the ... exactly the same as a whole new program starting up.

PRESIDENT: But presumably the Commonwealth and

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PRESIDENT: the State for the time being at least have agreed to some recurrent funding?

MS WATSON: Only to the point of ... the grant says recurrent funding, subject to evaluation, and the evaluation has been set from 12 months from the time we took on the first clients and that will take place in January next year, so that if they say that 'No, it's not successful, it's not working how we envisaged it', they could terminate the program at that time.

PRESIDENT: Yes, I was only concerned, thank you ...

MS WATSON: Right. Sorry.

PRESIDENT: ... to establish ...

MS WATSON: Yes.

PRESIDENT: ... whether or not on this occasion there had been agreement between the State and the Commonwealth.

MS WATSON: Whether ... yes, yes.

PRESIDENT: To the best of your knowledge and belief, yes. Thank you.

PRESIDENT: Yes, Mr O'Brien.

MR O'BRIEN: Just as a matter of clarification, did you prepare the carers' duty statements or did someone else prepare that?

MS WATSON: I did.

MR O'BRIEN: Right. Had that been vetted by anyone or was it just left to you?

MS WATSON: In terms of vetting and in terms of what the content of the statement is, it was shown to a meeting of the joint officers and it was also ... it was formulated so that we had a way of proceeding in terms of looking for a particular group of people, and the access committee have seen that document.

In terms of changing any of it, no, it's as it was.

MR O'BRIEN: No, I didn't suggest ...

MS WATSON: Right. I wasn't ...

MR O'BRIEN: ... that it had been changed.

MS WATSON: Yes. I wasn't sure what you were ...

MR O'BRIEN: I just wanted to know whether it was simply a matter entirely in your control or whether someone else had any input, either before or during or after its creation.

MS WATSON: No. No.

MR O'BRIEN: But you showed it to people ...

MS WATSON: Yes.

MR O'BRIEN: ... I take it, to allow them to satisfy themselves that everything was running properly.

MS WATSON: Yes.

MR O'BRIEN: You gave some evidence, I think, which I might describe as being your view of the applicability or otherwise of the domestic



MR O'BRIEN: classification in the Miscellaneous Workers Award.

MS WATSON: Yes.

MR O'BRIEN: And you gave some evidence about speaking with me about that.

MS WATSON: Yes.

MR O'BRIEN: Can you tell the Commission why, if these people are employees - and I know that's an issue that has to be determined - but why that award is not applicable to the work that's been performed?

MS WATSON: Right. Why it's not applicable to the work?

MR O'BRIEN: To the work that's been performed.

MS WATSON: Right. In the sense that we are caring for people rather than their homes; in the terms that we are not baby-sitting them. We are entering into a relationship with them and that's the fundamental philosophy of the program, that we wanted people to create relationships and not ... it's not about ... now looking ... it's not cases that simply doesn't happen. You know, the relationship is very poor.

In most of the cases the relationship goes far beyond the bathing, the showering, the ... whatever that takes place.

MR O'BRIEN: I understand your service is under budget at the moment. I think you just said that recently.

MS WATSON: Yes, I did.

MR O'BRIEN: Yes.

MS WATSON: Under budget in the sense of we have funding for 30 carers to care for 30 disabled people in the Kingborough Municipality. We were funded to commence at 1 July - I wasn't

MS WATSON: appointed until August - and I spent up until January in the establishment phase of designing the paper work, finding out about other services, and if any existed and whatever ...

MR O'BRIEN: Mm.

MS WATSON: ... and then we took our first clients on in early January, and we've only, so far, attracted about half of the client population that we need.

MR O'BRIEN: So in terms of the overall budget that you have, it hasn't really been stretched to date?

MS WATSON: No. That money - as at the 30 June - returns to HACC monies.

MR O'BRIEN: Mm.

I think you gave some evidence that said that there was no similar program anywhere in Australia.

MS WATSON: Yes, I did.

MR O'BRIEN: Are any services, to your knowledge, providing personal care services as distinct from the sorts of services that are provided by home helps in this State and in any other part of Australia?

MS WATSON: To my knowledge, in any other part of Australia, there is not a distinct personal care service.

MR O'BRIEN: No. Well that may well be so. Do you know whether any services provide personal care services in conjunction with home aid services or something like that?

MS WATSON: Yes, that exists.

MR O'BRIEN: Right.

MS WATSON: In terms of every State is different. New South Wales, for example, under their home care scheme or home care service provide people who do both personal care and home

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MS WATSON:

help for the one person, and theirs is quite different in the sense that those people were originally home helps and when personal care became able to attract a HACC subsidy, then they were allowed to do that.

Whereas Victoria operates quite differently again, for example. Queensland operates differently. Red Cross run a home care service in the Northern Territory. Silver Chain Nursing do, and all around the country - apart from Tasmania so far - they've been tied up in industrial disputes with nurses about whether personal care is a nursing duty.

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MR O'BRIEN: What do you mean by industrial disputes?

MS WATSON: Right. In Victoria, for example, the Nurses Federation prevented any training from being developed for personal carers. They prevented anybody from doing personal care unless it was a nurses' aid and under the supervision of a nurse. The same exists in South Australia and Western Australia.

That's been the dispute as to whether it was a nursing duty.

MR O'BRIEN: Right, I see. So, there's a dispute about a matter not some sort of industrial action?

MS WATSON: I believe industrial action has been taken in some States to clarify whether they are nursing duties or not.

MR O'BRIEN: In New South Wales and Queensland those matters ... well, do you know anything about the New South Wales and Queensland situation with regard to home personal care matters?

MS WATSON: The only thing I know is the document that Pauline Shelley showed me last Friday about the case and I know that in that particular instance they were classified in a certain way and that is because they primarily had the dual role of home help and personal care.

In fact, in New South Wales, to circumvent that, in some ways where people don't need the home help component, they've gone onto a community options or brokerage model which is about contract care.

MR O'BRIEN: That's not been the case in Queensland, has it?

MS WATSON: I don't know the case in Queensland.



MR O'BRIEN: The document that you've got in front of you, did Pauline Shelley show you a document similar to that when she saw you?

MS WATSON: Yes, she did.

MR O'BRIEN: And did she ask you about any difficulties with the document?

MS WATSON: She asked me to read it and to see what your case was so that I would be informed, was my understanding. She asked me for statistics and figures which I gave her. She had a wrong figure in terms of funding and I gave her that information. She had a wrong figure in terms of numbers of carers and I gave her that information.

It was a meeting that was held at Family Day Care with other family day carers present and it was presented in terms of, this is what we're going to say.

I mean, it doesn't really mean that she asked me to agree to it, I don't think, because I couldn't have.

PRESIDENT: Are we talking about Exhibit B?

MR O'BRIEN: I am. Sorry, yes, Exhibit B. There are certain matters in it that you drew her attention to at that time.

MS WATSON: Mm.

MR O'BRIEN: And one of them was the question of the appointment of personal carers, whether you'd advertised for them, wasn't it?

MS WATSON: Yes.

MR O'BRIEN: I think in the document that you first saw there was a suggestion that you'd advertised for carers?

MS WATSON: Yes.

MR O'BRIEN: And you drew to her attention that you hadn't advertised?

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MS WATSON: That's right.

At that time ... am I allowed to do this, or not?

MR O'BRIEN: You can expand upon that answer, yes.

MS WATSON: At that time she asked me to check through for those and, I guess, that's what I was looking for, those sorts of things.

That was all it was about, as I understood it.

MR O'BRIEN: Well, if Pauline Shelley thought that you were checking for the accuracy of the document in total, you didn't understand it that way? Is that what you're saying?

MS WATSON: Well, I think Pauline already knew that I was bound by where I am in this thing. In fact, up until that time no negotiations had taken place on what was going to happen.

Pauline presented it over the phone as she would like me to know what was going to happen and would I please meet her without the knowledge of council. I met her with the knowledge of council because I can't do that. That's unethical for me to do that and I then read the document and understood that that was her case.

In terms of agreeing to it, I couldn't agree to it as such in that I didn't have the document for long enough to see it, clearly. I'm not in a position to do that negotiation. It's outside of my jurisdiction.

MR O'BRIEN: I understand that. The only thing that I put to you is that if she had asked you that, you didn't understand that? Would that be a fair way of putting it or do think that question was asked at all perhaps? That's another way of ...

MS WATSON: I don't think it was asked at all. I mean, I might be wrong there. I'm not sure which of those is the right answer to give you because she may have asked it but I'm not sure.

MR O'BRIEN: Well, I think we can leave that document for the moment.

No, I have no further questions.

PRESIDENT: Thank you, Mr O'Brien. Re-examination, Mr Fitzgerald?

MR FITZGERALD: Yes. Thank you, Mr President.

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PRESIDENT: Ms Watson, do you have some water there?

MS WATSON: Yes, I do, thank you.

MR FITZGERALD: Yes, you mentioned that Pauline Shelley, who is an organiser with Mr O'Brien's union, in fact prepared that document and gave it to you to vet. What was Miss Shelley's previous position?

MS WATSON: She was the coordinator of the Kingborough Family Day Care Scheme.

MR FITZGERALD: And do you believe that there may be some similarities in terms of this document and the tasks she previously performed?

MR O'BRIEN: I don't follow how this follows from ... arising from cross-examination.

MR FITZGERALD: Well, it certainly has ... no, I withdraw that question at this stage, thanks, Mr President.

PRESIDENT: Well, that saves me ruling on it, Mr Fitzgerald.

MR FITZGERALD: The question of meetings was raised during cross-examination. Is there any compulsion to attend these meetings?

MS WATSON: None whatsoever.

MR FITZGERALD: What would occur if a carer didn't attend? Would you take any action on it?

MS WATSON: I can't take any action; I don't have that ... I mean, I am not sure what action I could take. There is no action I could take. If I organised these meetings and saw myself as a boss, then I would see - and maybe I am wrong - but I would see that I should pay these people to come. In fact, we run a meeting, invite people to come, and if they want to know what went on at the meeting and they weren't there, then they're quite at liberty to come to me. In fact, that

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MS WATSON: is happening. A carer can't come to the next meeting, and she has already set up a time to come and express her views to me at a different time.

MR FITZGERALD: Okay. So if you were in the situation of an employer, you would treat the meeting in this instance differently than you do in the position you are in at the moment. Would that be the case?

MS WATSON: Certainly. These meetings have ... to clarify that a little bit, these meetings have an agenda that comes out of the caring. I don't go in there ... sometimes I prepare some training.

For example, one of the issues that has come up for virtually every carer is: 'how do I relate to other family members, how do I work alongside of and with other family members for the benefit of my client?'. And that is what our next ... the substance of our next meeting will be: 'let's discuss this, let's pool our ideas, let's find ways that we can work with family members'.

MR FITZGERALD: So you are acting as a facilitator in those meetings ...

MS WATSON: Yes.

MR FITZGERALD: Rather than an instructor?

MS WATSON: Yes.

MR FITZGERALD: You mentioned also about the selection process of carers. Could you just reiterate that - who makes that choice.

MS WATSON: That is via the forms, the pink and the blue ... not the pink and the blue - the pink and the yellow forms, the match-up forms. I give those forms to the client. I give the carer forms to the client, and I give ... the client forms are handed around at carer meetings.

If I can't find someone just by

MS WATSON: negotiating with the people I know are available or think might be available, then at carer meetings that is likely to come up. And someone can say, 'Well, I'm prepared to do that one'. And in terms of the clients, they get two or three to choose from, normally.

MR FITZGERALD: You are aware of the conditions of the grant from both the State and Federal funding authorities.

MS WATSON: Yes.

MR FITZGERALD: Is there any mention in there about the need to recognise award conditions?

MS WATSON: None at all. The conditions of grant don't say anything about employment or about awards or any of that at all. In fact, I'm not sure whether this applies, but I think it does - the Canberra person who is responsible to oversight programs from the Commonwealth's perspective and to check out new programs, visited us not long after I commenced at the Personal Care Service.

She questioned us in terms of how it was that we intended to proceed, and took lots of notes, and said that she would be interested to see whether that model worked. There was never a suggestion, and there has never been any instruction about any of that sort of thing.

MR FITZGERALD: So she was aware that these carers were not in fact employees?

MS WATSON: Yes.

MR FITZGERALD: And equally, from the State Government's point of view, has any instruction been given in that regard?

MS WATSON: Never. In fact they are probably even more aware of the day-to-day running of the program because they administer on behalf of the

MS WATSON:

Commonwealth, the funding, and they have ... I have much more frequent contact with them. We have had regular meetings with them.

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MR FITZGERALD: Would you believe it would be desirable to work within an award structure?

MS WATSON: From the carers and the clients points of view ... I mean I'm not quite sure I'm qualified to answer that as such. I know that from the clients point of view, it would mean that the kind of care and the way the care is being provided now could not take place.

MR FITZGERALD: Can you elaborate?

MS WATSON: No.

MR FITZGERALD: Be more specific?

MS WATSON: Look I'm not sure I understand. I mean, because we never went this far and I didn't see that it was up to me to go this far, I'm not sure I understand all the ramifications and all the terminology of an award anyway.

MR FITZGERALD: Yes.

MS WATSON: I do know that in this document we talk about the split shift and minimum call outs and I know that both of those things would mean that a very different method of service delivery would have to be found in that it would make it impossible to provide care on a half-hour basis, for example.

MR FITZGERALD: Right.

MS WATSON: And that's all that some clients require.

MR FITZGERALD: It could be half an hour for one particular day - could it work that way?

MS WATSON: We have ... I mean, I'm going to use an example here. We have a man who lives in a caravan who has no living relatives - I'm not trying to make this into a sob story. This is actually what exists - and there's a

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MS WATSON: woman in the same small town who is willing to go and call on him every day of the week and her visit is only to make sure that he doesn't spend another 4 days on the floor of his caravan like he did before.

She doesn't actually do anything for him, except that she calls to make sure that he's okay.

MR FITZGERALD: Thank you.

MS WATSON: And now that couldn't happen.

MR FITZGERALD: It could happen?

MS WATSON: It couldn't happen if we were tied into a minimum call out.

MR FITZGERALD: Right. Okay.

MS WATSON: I would have to employ her for ... I'm not sure how many hours - a period of time.

MR FITZGERALD: For a period of hours. Whatever hours it could be.

MS WATSON: Yes.

MR FITZGERALD: Yes. Okay.

Mr O'Brien asked you about, I think, the casual component of rates and I think you had some confusion about that concept. The casual component is in fact awarded in awards mainly to take account of conditions such as annual leave, which casuals don't get.

Was that consideration which you had in mind when you came to striking the rates?

MS WATSON: No. No.

MR FITZGERALD: Could you again just ...

MS WATSON: You see, I didn't ... I mean I have to answer that I didn't look at it that way. And when we were talking as a committee we didn't look at it

MS WATSON: in that sort of sense of employment at all. We looked at it in terms of, can we find a neighbour who is willing to get involved in the care of ... or someone who lives close to that is willing to get involved in the care of this person and give the other family members a break or, substitute for non-existent family members.

MR FITZGERALD: Right. Okay.

The President, I think, asked you a question about award rates. Are you not confusing award wage rates with the application of an award as a whole? Would that be so?

MS WATSON: Well I mean, that's very possible in the sense that I'm not sure I understand all of the implications. My background is, I'm a teacher and a welfare background and I don't have any expertise in an industrial sense.

MR FITZGERALD: It might be an advantage actually.

PRESIDENT: She may not be the only one.

MR FITZGERALD: Thank you.

Okay. You mention also in an answer to Mr O'Brien about the concept of union involvement and I think it was also award structures and you, I think, answered by saying the concept of union involvement is foreign in this area. I may have misquoted you. Could you expand on that, the answer which you gave to Mr O'Brien?

MS WATSON: Well I don't know ... I mean, I'm not sure in that sense. I'm not sure that foreign in this area is probably the right way to put it. It's just that I'm not sure that it's appropriate to talk about community care in terms of employment. No-one in the program has ever been led to believe that there was any possibility of a career involved in this care.

MR FITZGERALD: Right.

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MR FITZGERALD: So it's not seen as an ongoing relationship necessarily with the care?

MS WATSON: It's seen as an ongoing relationship. Yes, it is, in terms of that carer being willing to be part of that person's life, I guess, and that person's support group ...

MR FITZGERALD: Okay.

MS WATSON: ... in the community. In fact, one of the carers that's mentioned in this document - Pauline's document - she came to me and she said 'Look, the doctor has told me that if we weren't there this man would have to go to an institution'. And in fact the doctor would have been willing to put that man in an institution. And so she's saying 'I want to keep him out. I see that I want to be involved in this person's life.'

MR FITZGERALD: Thank you. You mentioned ... I think it's at page 3 of the document. Have you still got the document there in front of you?

MS WATSON: Yes.

MR FITZGERALD: The second last paragraph of the first ... sorry, I'd better describe. Just prior to the next section, 'Appointment of personal carers', it starts:

"The carers work under the supervision of the personal care coordinator".

Do carers work under your supervision? Is that a correct description?

MS WATSON: I have a supervisory role in terms of the program and its guidelines, and in terms of keeping the program within those guidelines, and what happens within the guidelines that have been set for personal care.

I have never once gone into a person's home and supervised work that takes place. I've never once given specific instructions about what work. That's just not ... I mean, I do a completely different job. I don't even understand a lot of what it is that they do. No.

MR FITZGERALD: Okay. The last paragraph of that section, it says:

"The personal care coordinator allocates the work of carers".

Is that again a correct statement?

MS WATSON: No. I think I already answered that, that I try and match up clients and carers and on the basis of that ... the work that's done is on the basis of that match up and who is willing to do what for whom.

MR FITZGERALD: Could it be that the cases which



MR FITZGERALD: Mr O'Brien quotes in this exhibit on the next page, in fact, the carers in this case are working outside the guidelines or perceive their role outside the guidelines?

MS WATSON: Look, I mean, the answer to that is a very explicit 'Yes', in that although the tasks may stay the same the philosophy that we have developed upon which the whole of the program is founded is not reflected in the tasks.

And the philosophy is: become the ally; become the person who helps this person to live in the community; be the person who helps them in an advocacy role; be the person who helps them to become what they should be if the community were all carers.

MR FITZGERALD: Thank you.

I think you mentioned, in answer to one of Mr O'Brien's questions, that these carers were not seen as employees. Are there any instances which you can cite to substantiate that statement?

MS WATSON: Employees of council?

MR FITZGERALD: Yes, employees of council. I beg your pardon.

MS WATSON: Well I would be very angry if they were employees and they were missed out of all the things that happen at council, like they are now. They're never invited to a council beer and bite or any other function of council. They are never given any instructions in terms of memos or being informed about the things that a normal employee of council would. They're not included in the general workings of council.

MR FITZGERALD: One final question. I think ... once again it was one of Mr O'Brien's questions about pay and a pay advice slip. Is that a term which you meant to use?

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FITZGERALD - WATSON - RXN

MS WATSON: Mr O'Brien hasn't actually asked me that.

MR FITZGERALD: I thought he did. I'm sorry. I thought he did.

PRESIDENT: No, I did.

MR FITZGERALD: I'm sorry. Yes, it was.

PRESIDENT: Well in effect it wasn't a pay advice. I asked if they were given a group certificate or a statement of earnings.

MR FITZGERALD: Yes, I beg your pardon. That's where I was getting confused.

Yes, I think you answered the President in saying there was no group certificate. Is that correct?

MS WATSON: No, there's no group certificate. There is a hand written statement. I mean, look, every different time I've used different words on those things. And on some of those pieces of paper I may have written 'Pay advice', in fact.

That's me and my terminology. I'm not trying to wriggle out of anything there. And I think at the bottom of almost everyone of those I have put 'Total amount claimed'. And that's the intention that ... and the reason for that piece of paper even being in existence, because I didn't originally set out to do that, was that a carer said to me 'How am I going to distinguish between that money which I have to pay tax on and that money which I don't as in travel, for example. And I said, 'Okay, then I will prepare this for you so that you can know how to pay your tax'. And that was the reason for that document.

MR FITZGERALD: But the statement is in the nature of a fee for service. Is that how you regard it?

MS WATSON: Well it has to be a fee for service.

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PRESIDENT - FITZGERALD - WATSON - RXN

MR FITZGERALD: Okay, I have no further questions.  
Thank you, Mr President.

PRESIDENT: Yes, thank you.

Before I excuse you; you're almost at that point. Did you want to say something, Mr O'Brien?

MR O'BRIEN: Right to reserve in relation to the other matter anyway, as I understand it, a recall. I haven't ...

PRESIDENT: This is the contract?

MR O'BRIEN: Yes. I'm not sure ... there was something a little new about pay advices at the end there. I'd have to take some instruction on that.

PRESIDENT: Well I'm going to raise something with her now that you may each wish to pursue a little.

PRESIDENT:

Correct me if I'm wrong, but I thought I understood you to say very early in your evidence in chief, that one of the reasons why you put aside the notion of these people being covered by an award, was the fact that if that were to be the case and you could find an appropriate award, in all probability that would impact adversely on your funding and you may have to curtail services.

I'm paraphrasing, but in effect, I thought that was what you were saying. I could paraphrase still further and say, in short, you thought it might cost a bit too much.

I wondered if you had looked at this particular award that we have before us today in any detail and if so, did you discover that if you selected that classification that appears to be repugnant to these people, that's domestics, if you just put that aside for the moment and look at the rate which is \$294.00 per week and compare that, that's for a full week of course, with the rate that's been agreed upon by you of \$399.00 per week, you'd see that on face value you're paying them considerably more than the award rate.

The award also permits part-time work which carries a 15% premium, but would still fall far short of the \$10.50 per hour. It permits casual work, which means a 33.1/3% increase but by agreement with the union it would be possible, I note, that a minimum less than the 2 hours could be negotiated.

I just wondered if you'd looked at all of those things before reaching the conclusion that perhaps award coverage may have been too costly. Now, that's just this award and that's that classification which I understand you reject anyway, or the carers reject.

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PRESIDENT



PRESIDENT: Were you aware of those things?

MS WATSON: No. I mean, in a sense of ... not all of those things and in fact ... I'm at a loss in how to answer that, in that the process was slightly different.

PRESIDENT: Well, don't worry about it too much. I didn't want you to leave this place labouring under the apprehension that awards are totally inflexible. They aren't.

MS WATSON: When I saw Mr O'Brien ... I mean, I can't even remember the other gentleman's name, from the Municipal Employees. They both told me that awards ... I mean, this was the first I'd ever had to do with unions and awards and they both told me that an award had various classifications.

PRESIDENT: Yes.

MS WATSON: And that it had other than payment requirements in terms of ...

PRESIDENT: Penalty rates, afternoon shift, overtime, Saturday penalties, yes, that's correct.

MS WATSON: And both said to me that they ... as far as I can recollect, I didn't make any notes because it was just part of a discovery exercise at that time. Both said to me that they were not prepared to look at negotiating anything in terms of split shift until in fact an award were in place, that that was a futile exercise.

PRESIDENT: There was no discussion regarding a special agreement, for example?

MS WATSON: No.

PRESIDENT: I see.

MS WATSON: No. And the other part of that was that when we went back to the committee, and that's how I recall what happened pretty soon after those negotiations, it was very much

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PRESIDENT - WATSON

MS WATSON:

felt that where do the clients fit into this and how are they then deemed to be in control, rather than the council or me or the structure of the program? How are the clients in control? And it was on that basis, more than on amounts ... I mean, look, that \$10.50 was just a figure.

The intention was exactly as you say, higher than a domestic award because we see that when you work with people you require more skills than when you push a vacuum cleaner or whatever.

PRESIDENT:

Well, gentlemen, have I opened a can of worms?

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PRESIDENT - WATSON

PRESIDENT: Anybody wish to follow-up?

MR FITZGERALD: I'd just ask one question in relation to that. Could it be said, Ms Watson, that it's not so much the cost impact of the award which may be of concern, but the inflexibility created by awards?

MS WATSON: Yes.

MR FITZGERALD: Right.

MS WATSON: I mean, that's why we didn't proceed any further because we could not do what we were receiving instructions to do from disabled people in that manner.

MR FITZGERALD: In any event, had it always been considered by yourself that there was ... an award structure was inappropriate because, effectively, there was no employer/employee relationship?

MS WATSON: Well that's part of it. This has never been done ... I mean, that's where you come back to. This has never been done before, and what we're actually instructed in the guidelines to do is to create a management structure which allows the clients and their carers to participate in the management of that process and it's never been that anyone was deemed to be employer in either my understanding or in any understanding that's been undertaken, you know, by the committee, by council, by anyone.

MR FITZGERALD: And because of that situation was it then that awards generally were considered to be inappropriate?

MS WATSON: Yes.

MR FITZGERALD: Thank you.

Thanks, Mr President.

PRESIDENT: Anything that you'd want to follow-up on that, Mr O'Brien?

MR O'BRIEN: I guess I'm obliged to put it as we might have to evidence it. And that is, that I put to you that when you spoke with me we discussed the question of minimum engagement and the provision in the award which allow a lesser engagement than 2 hours. I'm putting that to you that that's the fact.

MS WATSON: Well to be honest, I can't remember in the sense of I remember that you told me and that so did ... I mean, what came out of it was that neither the miscellaneous workers or any other union were prepared to enter into any kind of negotiations into that while we were at that stage.

There was ... I mean, it was at that point. It was ... I was trying to find out how best to proceed in that matter and, in fact, what happened was there was no point in discussing that because it didn't exist in terms of there wasn't an award in place.

MR O'BRIEN: Well I put it to you that, in fact, we also mentioned the existence of awards for home care services in other States and that my organisation was party to those awards.

MS WATSON: Yes. Can I answer that in another way too? Very quickly, I saw you and I saw the municipal employees person within a matter of a couple days of each other. It's pretty grey in my remembrance.

However, at that time I also got hold of a copy of the local government award from Victoria and it had the same conditions and it had the same sorts of things. The document's in my filing cabinet, and I don't understand that either to be honest, but I don't find ... what I didn't know was how this applied on the



MS WATSON: basis that all of my early setting up of this service was done in conjunction with Pauline Shelley who instructed me that this was the way Family Day Care ran, and the instruction from council, if there were any, was to proceed along the same lines as Family Day Care.

And Pauline, in fact, instructed me in insurance, in how to make and create a contract. It was all under Pauline's ... she gave me copies of every document she had and I plagiarised the lot.

MR O'BRIEN: So all of the documents that have been used have been created by you in the personal care area?

MS WATSON: Yes.

MR O'BRIEN: Nothing ...

PRESIDENT: Well, thank you, Ms Watson. I think the Commission appreciates your candour, at least, in answering the questions.

You may be subject to recall in the event we hear some more about a contract. Is that right?

MR FITZGERALD: That's my understanding. I think it's Mr O'Brien's understanding.

MR O'BRIEN: Mm.

MR FITZGERALD: But it would only be a very brief recall I suggest.

PRESIDENT: Yes. Meanwhile, you're excused. You may retire or you may remain, as you wish.

MS WATSON: Thank you.

PRESIDENT: Thank you, Ms Watson.

MR FITZGERALD: Mr President, I'm quite happy to proceed and finalise my submissions at this point, but Mr O'Brien did indicate - and I just picked it up a moment - ago about the possibility of

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PRESIDENT - O'BRIEN - WATSON - FITZGERALD

MR FITZGERALD:

raising evidence in rebuttal.

It seems logical, if that is the case, then submissions should be made once all that evidence is heard rather than ... otherwise I would seek to reserve the right to make further submissions in respect of the evidence raised by Mr O'Brien.

I just wonder if I could get some response to that point at this time.

PRESIDENT:

Yes.

MR O'BRIEN:

Well these proceedings have in a direction that ... this direction at Mr Fitzgerald's behest. I've got to ... obviously, I can't call evidence today bearing in mind the time. Depending on the times available, I might be able to call some evidence at the next hearing.

PRESIDENT:

Tomorrow?

MR O'BRIEN:

Tomorrow it might be possible. I know one of the potential witnesses is in the north of the State with commitments tomorrow, but that might be able to be reorganised.

But in terms of the evidence as distinct from Mr Fitzgerald's submissions on the merit, if there's any other material that is to be intruded now that goes to Mr Fitzgerald's case, that can certainly be put in and then if he wishes to hold a final submission ... he hasn't even outlined his case by the way, so I'm not really in a position to respond fully anyway.

But if he were prepared to outline his case and put in the material that's going in, I'm quite happy to proceed on the basis he suggests.

PRESIDENT:

Mr Fitzgerald, for one awful moment I thought you were going to attempt (I say, 'attempt') to persuade me to

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PRESIDENT - FITZGERALD - O'BRIEN

PRESIDENT:

change the normal procedures of the Commission in favour of a civil procedure and apply the rules of evidence and you have been doomed to this appointment, had that been the case.

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PRESIDENT

PRESIDENT: I think, as you have seen fit as your right to challenge the Commission's jurisdiction, the onus is upon you to prove your case.

MR FITZGERALD: Certainly.

PRESIDENT: Now, at this stage, until Mr O'Brien has heard your case, it'll be very difficult for him to reply. Do you have more material that you wish to ... of a documentary nature?

MR FITZGERALD: Only in the form of past precedents in respect to the aspect of control.

PRESIDENT: I'd have been disappointed if you had a few precedents.

MR FITZGERALD: Yes. But in respect to any further material relating to the factual situation I can say, not.

PRESIDENT: You would be in a position to put, shall I say, your primary case? You'd have a right of reply.

MR FITZGERALD: Yes.

PRESIDENT: Because until such time, I imagine, as Mr O'Brien hears your case, he would find it difficult to decide whether or not he should call rebuttal evidence. He may have already made a decision to call oral evidence, or some other evidence.

So, are you in a position to put, what I'll call your primary case? But then there would have to be an adjournment.

MR FITZGERALD: Yes. I understand that. I would reserve my right to make further submissions depending what Mr O'Brien produces in terms of evidence. That's the normal order of events, as I see it, in this Commission. The evidence is proceeded with totally and then submissions are made once that evidence is completed.

PRESIDENT: Well, isn't that the civil procedure?

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MR FITZGERALD: Well, it's one which I'm well used to in this Commission.

PRESIDENT: Not before me.

MR FITZGERALD: It may not be, but in terms of the logical sequence of it, I think it has some logic in that respect.

PRESIDENT: You're suggesting that you should be in a position to call rebuttal evidence or make ... I certainly wouldn't allow you to make rebuttal submissions twice.

Are you saying that you feel that if Mr O'Brien chooses to call rebuttal evidence, then you should be able to make submissions on that and then ...

MR FITZGERALD: Well, I should at some time be able to have that right.

PRESIDENT: You must have a right of reply and in your right of reply you would be entitled to ... if Mr O'Brien calls oral evidence and that introduces some matter that you haven't dealt with, you'd be entitled to call rebuttal evidence.

MR FITZGERALD: I understand that and I can certainly handle that in my right of reply.

PRESIDENT: Are we at cross purposes?

MR FITZGERALD: It seems to be a little bit. Yes, I can certainly ... in reserving it, I can understand that I'd have that right in my right of reply in any event.

PRESIDENT: Of course you do. Now, are we at cross purposes?

MR FITZGERALD: We may be.

As I indicated, I am prepared to proceed to finality at this time with my submissions.

PRESIDENT: Well, having already been carted off to the Federal Court on allegations of denial of natural justice, I wouldn't want the process to be

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PRESIDENT - FITZGERALD

PRESIDENT: repeated. So, if you think that you're being denied natural justice ...

MR FITZGERALD: No, I don't believe so. As all with all these matters, I was only ever aware very recently of the fact I was handling this case, but that doesn't cause me too much concern. I have had time to prepare what I believe to be a proper case.

PRESIDENT: So long as the parties to these proceedings are aware that the Commission is not bound by the rules of evidence and its procedure is up to the Commission, I would hope that I am consistent in that regard, Mr Fitzgerald, that the applicant puts his case, the respondent replies, the applicant has a right of reply.

As it happens, strangely enough, Mr O'Brien is the applicant but you have challenged the Commission's jurisdiction.

MR FITZGERALD: Yes. I understand that I accept the role of applicant in this threshold matter.

PRESIDENT: Yes. It's not much difference, if I've understood you, in the procedure that I think you are suggesting, namely that all the oral evidence is in and then you would put your final submission, to be followed by Mr O'Brien with final submissions, with a limited right of reply available to you if required.

That is squarely in line with civil procedure. Civil procedure does not apply in this jurisdiction.

MR FITZGERALD: Well, I understand that the Commission has that right to regulate it's own procedure and I'm happy to comply if that is the wish.

PRESIDENT: Well, would you look happy?

MR FITZGERALD: I always look happy.

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PRESIDENT - FITZGERALD

PRESIDENT: Well, it's such a rarity to have you here, Mr Fitzgerald.

MR FITZGERALD: All right. Look, I will then proceed in respect of final submissions.

PRESIDENT: No, not your final submissions.

MR FITZGERALD: Well, in substantive submissions at this stage, if I can put them ...

PRESIDENT: Yes, you put your primary case.

MR FITZGERALD: Yes.

Okay. Mr President, the evidence of Ms Dianne Watson is indeed compelling and, in my submission, clearly shows that an employee-employer relationship is lacking.

The evidence was of course lengthy and was the cross-examination and I don't believe to any degree the cross-examination in any way did show that there is in fact an employer-employee relationship.

The role of the Kingborough council is one, in my view, of a facilitator. I think Ms Watson described it as the introductory facility or an introductory agency and a mediator, on occasions, when the relationship between the carer and the client may not be working satisfactorily.



MR FITZGERALD:

It is certainly not one of a direct employer relationship with an employee, the employee in this case being the carer. The council is acting as an agent, in my view, as a legal agent for a federally initiated program, State administered and council delivered.

The council, because it is involved in local community affairs, is in the best position to be able to assess the relative needs of clients and is able to justify the care within the terms of the Commonwealth guidelines. It is also in the best position to assess whether carers meet the guidelines.

But ultimately the final choice of carers is one which lies with the clients not the council. That was quite explicitly explained by Ms Watson in her evidence. She gave evidence that a number of carers may be presented to one particular client and the ultimate choice is left with that client.

It is clear that the council merely facilitates a contractual relationship between the carer and the client.

PRESIDENT:

Could I just ... I'm sorry, Mr Fitzgerald. You said ... I was writing down 'compatibility'. You didn't use the word; I did. But you said the client decides.

MR FITZGERALD:

Yes.

PRESIDENT:

I thought Ms Watson said, among other things, the carer also decides.

MR FITZGERALD:

Yes, obviously there is an element of mutuality there. But in terms of - and I think in evidence, in cross-examination, Ms Watson said that a number of carers would be sent to a client to ultimately make that decision.

PRESIDENT:

The client decides what services he

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PRESIDENT:

or she requires but the carer also has a say as to whether or not the carer wants to work ... with or for ...

MR FITZGERALD:

Yes. In any event, what I am saying, Mr President, is that the council takes no part in that process.

The relationship between the carer and the client - which is not at issue in these proceedings, but I believe that is the contractual relationship which exists - is one in the nature of a contract for services rather than a contract of employment.

Certainly the evidence, in my submission, clearly shows that there is no legal relationship which exists or which could exist, between the council and carers. The council's role is simply to foster community involvement.

It could involve, as the evidence has shown, that carers could make additional arrangements outside the subsidised hours provided. I think there is evidence where additional hours above the 10 hours of subsidised care was provided with a private arrangement between the carer and client.

And I think that also the philosophy of the scheme was quite clearly shown that there was an element of volunteerism in the carer providing over and above that provided in respect to the subsidised care.

The aim is also to foster involvement from other community organisations. I think there are a number, which the evidence clearly showed.

The element of control - and it is one which is borne out in the evidence - is clearly the critical feature. There are a number of precedents, of course, which the Commission would be well aware. Both courts at the Supreme Court level in

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PRESIDENT - FITZGERALD

MR FITZGERALD:

the various States and the High Court, have adopted a number of tests. But the test which they ultimately come back to is the so called control test.

This is an element which we have shown in the evidence where the council just does not have the control over the relationship between the carer and the client. There is no control whatsoever.

The main role of the council in that regard is simply to ensure that the tasks performed and every other aspect, are within the Commonwealth guidelines.

As I indicated, a client may ... in terms of hours, there are ... of course there has to be some sort of limit on hours. But as was indicated in evidence, the hours may not be fully utilised and the hours may not be fully worked. In that case the carer does not receive a minimum payment such as what would be imposed in an award situation.

It is open, of course, for the client to request more hours and the carer provide those hours. But of course, in terms of subsidised care, a maximum of 10 hours is the number of hours which is provided.

The tasks to be completed are essentially determined by the carer and the client. As to what tasks and when those tasks are performed, that matter is essentially a matter between the carer and the client again. The council does not exercise any day-to-day supervision.

MR FITZGERALD:

It think Ms Watson indicated that it would be clearly against the philosophy of the scheme to intervene and supervise the carer-client relationship.

Again, it was indicated that - and unlike an employment contract - it was free for the carer and client to decide when those hours, in fact, are performed, and it could be that they average 10 hours over a fortnightly period, and there's nothing to prevent those hours being performed at different times of the day on a number of different occasions.

It's clear ... once again, it's another aspect which is more akin to an employment contract that the council has no power of dismissal. That, if it needs to be exercised, could be exercised by the Community Access Committee and that committee is made up of, not only of the council representatives, but carers and clients.

The council is not, in the traditional relationship of a master, giving the servant directions. In fact, no directions in the normal sense of the word - in terms of the employer-employee relationship - are given by council whatsoever.

It's clear for a number of reasons - and I'll touch on a couple at this stage - that both parties do not see themselves in an employer-employee relationship, and from a contractual point of view, the intention of the parties is critical. They do not intend to enter into an employer-employee relationship.

It's clear that, in terms of insurance, workers' compensation insurance is seen not to be appropriate, but given the fact that there is a contractual relationship entered into and monitored by the council, there is need, of course, for public risk insurance rather than workers' compensation.

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MR FITZGERALD:

In terms of remuneration, it's clear that the hourly payment is more in the nature of a fee for service than an hourly wage rate.

The council, in this instance, as it's not providing any of its own financial resources in terms of payment. It is, as Ms Watson indicated, providing the office facility and the infrastructure facilities generally, but in terms of the actual payment, it is simply acting as an agent for both the Commonwealth and State Governments, and also as an agent for the client who pays a small amount varying from 50 cents to \$3.00 a week.

The council, given this factual situation, is acting as a coordinating body rather than an employee.

As you'd be aware - although I think probably this is only the second or third jurisdictional matter coming before this Commission - the courts, in looking at the question of whether an employer-employee relationship exists ... whether that relationship exists or whether it's some other form of relationship, imposes a number of tests. The principal test, of course, is the control test.

There's another test called the 'complex test' which I'll touch on later. Another test called the 'multi-factor test' and, finally, the 'organisation test'.

It's clear that the Kingborough council did not, particularly in terms of the control test, exercise any form of control whatsoever over carers.

In terms of the control tests, there are a number of other factors which need to be taken into account. The expressed intentions of the parties as to the type of the relationship.

As I indicated, I believe that it's

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MR FITZGERALD:

quite clear that the parties did not intend that there be an employer-employee relationship, and whether there are terms and conditions which will involve detail control and supervision over the manner in which the work is to be carried out. Now that, essentially, is the control test.

Certainly, there's nothing within the documentation in terms of the engagement of carers which would indicate that the council exercise detailed control and supervision over the manner in which work is to be carried out.

PRESIDENT:

Well then what of the clients? Do the clients have any say at all in the manner in which the service being rendered by the carer is performed?

I note from Exhibit A, for example - just to take something at random - 'carers will wash, shower, bathe, dry'. Now do the clients have any say in that?

MR FITZGERALD:

I believe so, sir. In terms of the working relationship, it's necessary that they have some power to direct, yes.

PRESIDENT:

Yes. Well that ...

MR FITZGERALD:

But it's an element which has been worked out mutually, and there's a mutual involvement in terms of determination of duties.

MR FITZGERALD: Very distinct from the employer-employee relationship where, particularly in the council's case, where the council could in fact direct the carer as to what particular tasks are to be performed and how those tasks are to be performed and when those tasks are to be performed.

PRESIDENT: Well is there an employer-employee relationship between that carer and the client, and that relationship is arranged, shall we say, through the agency of the coordinator?

MR FITZGERALD: I don't believe there is. It's very much in the nature in my submission. It's not one which at issue here, but it's in my submission it's one in the nature of a contract for services rather than a contract of services.

PRESIDENT: Well, if it's in the nature of a contract for services and you challenge this Commission's jurisdiction to entertain the union application, what do you have to say about the definition of industrial dispute - and I'll refresh your memory - that says:

"A dispute relating to an industrial matter and includes a dispute relating to the entering into, execution, or termination of any contract for services in circumstances that affect or may affect an employee in or in relation to his work".

MR FITZGERALD: Could you take this particularly to that section?

PRESIDENT: Yes, it's in the definition - section 3.

You see you have to read that or section 85 - Awards to Prevail over Contracts of Service.

MR FITZGERALD: Yes. I still believe that the

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MR FITZGERALD: jurisdiction of this Commission relates specifically to an industrial matter which relates to the relations between employers and employees and that quite clearly is a contract of services rather than a contract for services.

PRESIDENT: No doubt about that. But what I'm suggesting to you, Mr Fitzgerald, is that there can be an industrial dispute about an industrial matter if it appears that someone has entered into a contract for service and in doing so has created an industrial or potential ...

MR FITZGERALD: I see.

PRESIDENT: ... industrial dispute ...

MR FITZGERALD: Yes.

PRESIDENT: ... with someone else - an employee if you like.

MR FITZGERALD: Yes.

PRESIDENT: In short, Mr O'Brien's members ...

MR FITZGERALD: Yes.

PRESIDENT: ... employed elsewhere under the terms of this award might say 'Well now, there is an industrial dispute, or a threatened industrial dispute because of this contract for services' ...

MR FITZGERALD: Yes.

PRESIDENT: ... if it is that. And if it's not that, if it's a contract of service, then we run foul of section 85 don't we?

MR FITZGERALD: Yes, yes, I understand what you're saying. The application relates to section 43 of the Act which refers specifically to engagement - and if I just look at the application again - and I'll just quote from the application.

"The application seeks a



MR FITZGERALD: declaration that the classification 'Domestic' in clause 8 - Wages Rates of the Miscellaneous Workers Award applies to employees of the Kingborough council employed under the job title 'Personal Care Assistant' as amended by Mr O'Brien".

PRESIDENT: Yes, but you won't let me agree with Mr O'Brien or disagree with him because you say I have no jurisdiction to hear him - it's not an industrial matter.

MR FITZGERALD: I'm sorry, I'm not following your train exactly, I must admit.

PRESIDENT: Well isn't that what we're debating this afternoon, whether or not this issue is an industrial matter, thereby conferring upon this Commission the jurisdiction to exercise its power to interpret an award?

MR FITZGERALD: That's precisely as I see it, yes.

PRESIDENT: So you're saying none of this is an industrial matter. I have raised with you the question of whether or not the fact that, as you have suggested, the fact that you've suggested that this in fact is a contract for services as distinct from contract of services.

MR FITZGERALD: No, I'm suggesting that, you know - I think that's where we could run off the rails - I'm suggesting that if there is a contract, the contract is not with the Kingborough council. There could be said to be a contract between the carer and the client. That is not the issue of the subject of this application. It's the alleged contract of employment between the council and the carer. I, by my threshold point, opposed that application by challenging the jurisdiction of the Commission in terms of whether there is in fact an



MR FITZGERALD: employment relationship between the council and the carer.

PRESIDENT: Yes, and for that reason you're saying it's not an industrial matter.

MR FITZGERALD: Well the basis of the Commission's jurisdiction derives from industrial matter, yes.

PRESIDENT: Yes, I agree, yes. And in turn I say to you then, let's assume that Mr O'Brien lodges a section 29 and says there's an industrial dispute because someone has entered into a contract for services which appears to be contrary to the provisions of the Miscellaneous Workers Award, therefore I would like the award interpreted. Clearly I couldn't do that on a section 29. All I could do would be to - if I was minded to do so - would be direct Mr O'Brien, having found an industrial dispute existed regarding an industrial matter, direct him to seek an ... lodge an application for interpretation of the award, and we would be back to exactly the position we're in today.

MR FITZGERALD: Well the question is, as I understand it, and it's one which I'm used to in the taxi industry matter, an application for a dispute was lodged within that award spectre as well.

PRESIDENT: In what award?

MR FITZGERALD: In the Public Vehicles Award, and we challenged the Commission's jurisdiction to handle that question of a dispute because of the lack of the matter not being an industrial matter.

PRESIDENT: Is that the one about taxis? The taxis is it?

MR FITZGERALD: The taxi industry, yes.

PRESIDENT: Who was handling that? Commissioner King, as he then was?

MR FITZGERALD: Commissioner King, yes.

PRESIDENT: Has that been finalised?

MR FITZGERALD: No, it hasn't been finalised at this time, but it's in the throes of being finalised.

Under section 29 we took a similar argument that an organisation can make an application in respect to an industrial dispute. The definition then refers on to an industrial matter and that's where we again challenge the Commission's jurisdiction in that regard.

PRESIDENT: Yes.

Well, I'm sorry ... All I'm saying to you is, that if the only common ground between us today is that someone may have entered into an arrangement which might be described as a contract for services, not of services, for services, someone ...

MR FITZGERALD: Yes.

PRESIDENT: ... and because of that there appears prima facie to have arisen an industrial dispute with an organisation who claims that that is not a contract for services, that is a matter that needs to be dealt with under the terms of the Miscellaneous Workers Award.

Now, haven't you got, in accordance, with section 3 of the Act, all the ingredients for an industrial dispute about an industrial matter? But of course the Commission could not proceed to interpret the award in those circumstances. What it can do is direct, pursuant to section 31 in settlement of that industrial dispute, that an application for interpretation be made.

MR FITZGERALD: Yes. I'm still not quite sure, Mr President, I must admit. I may have

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MR FITZGERALD: to leave it at that, but I would believe that if the union in fact does challenge whether it is in fact a contract for services or should be subject to an award, that would be subject to the jurisdictional test which we're running before this Commission today under section 29. The same would apply as it would under section 43, I would believe.

PRESIDENT: Yes, but what you're arguing is that there is no employer-employee relationship in existence, therefore it's not an industrial matter.

MR FITZGERALD: That's right.

PRESIDENT: Yes. But you could get caught up under section 3 of the Act, couldn't you?

MR FITZGERALD: I don't believe so.

PRESIDENT: Because it's possible to have an industrial dispute existing between, say, the Miscellaneous Workers Union and someone else.

MR FITZGERALD: Well, only that an industrial dispute in terms of jurisdictional terms must relate to an industrial matter and, again, the industrial matter comes back to the definition that it relates to the relations of employers and employees and that would, again, have to stand that test.

PRESIDENT: But it can also mean a dispute relating to the entering into or execution or termination of any contract for services.

MR FITZGERALD: It must, in my submission, Mr President, relate to an industrial matter which it refers to in the first part of it.

PRESIDENT: Well, industrial matter, Mr Fitzgerald, would be the relationship between an employer and his employees because of something that someone has done.

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MR FITZGERALD: I can understand what you're saying ...

PRESIDENT: Another group of employees.

MR FITZGERALD: It would then need to be tested against that jurisdictional argument which we're presenting here today. That's my view.

PRESIDENT: Well, what do you think the Parliament meant then, if it's envisaged an industrial dispute being created when a contract for services has been entered into?

MR FITZGERALD: I'm really not too sure and looking at it now it's unclear, but it's clear in my mind ...

PRESIDENT: Well, let me suggest to you what it might mean. I don't say it does, but it just might mean that some groups or some union or some employer might feel that it was wrong of someone to enter into a contract or a purported contract for services when in truth it ought to be a contract of service ...

MR FITZGERALD: Yes.

PRESIDENT: ... thereby bringing into existence a real threat and/or probable dispute about an industrial matter effecting the relationship of employers and employees.

MR FITZGERALD: The Act could be so. I would have to concede that, but the Act is unclear, in my view, because industrial dispute clearly relates to a dispute concerning an industrial matter. An industrial matter clearly refers to an employment relationship.

PRESIDENT: It means any matter pertaining to the relations of employers and employees, any matter.

MR FITZGERALD: Yes, but relations to employers and employees is, in my view, a contract of service.



PRESIDENT:

Yes, but Mr O'Brien is asking that the award be interpreted. I mean, the interpretation, if given, might find that these people are not employees of the Kingborough council. They might be found to be employees of somebody else, but you won't let me proceed yet.

MR FITZGERALD:

Well, it may be that Mr O'Brien, if you do find in favour of the jurisdictional argument, you may have to take a different tack. That's up to Mr O'Brien.

MR FITZGERALD: I'm not sure where we're headed with this, but ...

PRESIDENT: Well we're headed for an adjournment, I think. Did you have a commitment at 4 o'clock, Mr O'Brien?

MR O'BRIEN: Yes, the same one continuing from lunch time.

PRESIDENT: Yes. How much further have you got to go?

MR FITZGERALD: I've got a fair bit further to go in terms of precedence.

PRESIDENT: Have you? Well ...

MR FITZGERALD: It may be best if we do adjourn at this time, and then I can consider what you've put in respect to the industrial matter because I'd like to consider it more fully.

PRESIDENT: Well it'd be a good idea if you did.  
It's an interesting question ...

MR FITZGERALD: Yes.

PRESIDENT: ... and you might find that there are a number of persons supposedly on contract in the non-private sector who may be regarded by some as having contracts of service, but by others as contract for service.

MR FITZGERALD: I think what you're saying is that the Commission has got that power to consider matters relating to contract for services. Is that the basis of your ...?

PRESIDENT: Where someone has entered into that sort of relationship and in so doing bought about an industrial ...

MR FITZGERALD: An industrial dispute.

PRESIDENT: ... a real, threatened or probably industrial dispute. Not necessarily with those very persons, but with somebody else. It could be with

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PRESIDENT: other ... it could be with all employees - to take a hypothetical case - covered by this award. They could say, 'Look this is not right. They should be covered by this award. They are employees'.

MR FITZGERALD: Yes.

PRESIDENT: In those circumstances, prima facie, you have an industrial dispute about an industrial matter, the resolution of which may require an interpretation of the award.

MR FITZGERALD: Well I'd have to take that on notice, Mr President, and certainly consider it before the next occasion we convene.

PRESIDENT: Yes. Well when will that be?

MR O'BRIEN: Tomorrow?

MR FITZGERALD: It can't be for me tomorrow, I'm sorry. I've got three commitments tomorrow which is not possible to ...

PRESIDENT: Off the record.

...

HEARING ADJOURNED