

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, 22 June 1989

TRANSCRIPT OF PROCEEDINGS

(RESUMPTION)

PRESIDENT:

Yes, Mr O'Brien.

MR O'BRIEN:

Mr President, there has been a very brief discussion between myself and Mr Fitzgerald this morning about the fate of these proceedings in terms of how they're conducted.

Mr Fitzgerald has a preference that this matter be dealt with on the basis that the threshold matter be argued and determined prior to the substance of the matter being determined.

I take the view that a lot of the information and material relating to the substance of the matter is coming out in evidence in any case in relation to the threshold matter, and we would be prepared and indeed, would favour the course, following the conclusion of the threshold argument, putting submissions on the substance of the matter so that they can be determined concurrently, if, indeed, that's deemed appropriate by you in the sense that if Mr Fitzgerald's threshold point does not succeed that you may then make a decision on the substance one way or the other.

And I took, from your comments when last we heard the matter, that you'd set aside certain time to complete the matter totally, hence our approach. But obviously, we're in your hands, Mr President, in that regard.

PRESIDENT:

You've taken me somewhat unawares, Mr O'Brien, because my regular associate is not immediately available and she has my calendar, but perhaps we'll see what Mr Fitzgerald has to say on that.

MR FITZGERALD:

Yes. Thank you, Mr President.

It was my understanding that this matter would be determined on the

22.06.89

PRESIDENT - O'BRIEN - FITZGERALD

MR FITZGERALD:

basis of the threshold being determined as a separate issue.

You may recall on the last occasion that I did reserve my rights to make further submissions in respect of the substantive issue, and I have no objection to that reservation or indeed the way the matter should proceed as I suggested, both by Mr O'Brien nor myself, if I recall.

I believe that the matter is of such fundamental importance that the issue should be determined in the first instance as a separate issue. In saying that I am not, in any way - as you'd be well aware of my past record, Mr President - to be attempting to delay this matter in any way and we're happy to bring this matter ...

PRESIDENT:

Oh, unthinkable.

MR FITZGERALD:

We'd be happy to cooperate in bringing the substantive part of the matter on as soon as possible.

However, as I indicated, I think the matter is of such fundamental importance that the question of jurisdiction must be determined as a separate issue.

Mr O'Brien indicated that much of the substantive evidence has already come out. I did indicate that there would be some overlapping, but certainly I have not, nor am I in a position to present all my argument in respect to the substantive issue at this time.

And I understood, mainly because of the lack of any contradictory submission, that that's the way we would be proceeding today to determine the matter as a threshold issue in the first instance.

If the Commission pleases.

MR O'BRIEN:

I don't object to an adjournment for

22.06.89

PRESIDENT - FITZGERALD - O'BRIEN

MR O'BRIEN:

Mr Fitzgerald to put a reply, but all I'm trying to do is to facilitate the hearing of the matter in the time that's been allocated, not any more.

PRESIDENT:

Yes. Well I do incline to the view that this matter ought to be determined as a separate issue only because any determination of the Commission is, of course, subject to an appeal.

And it just occurred to me, Mr O'Brien, when you were addressing me, that in the event I adopted the course favoured or most favoured by you and perhaps in the long term made a finding on the substance that was in accord with your own views, the Commission may then find itself subject to one of two appeals on the one issue.

And whilst I suppose that sort of thing isn't without precedent, I do incline to the view that perhaps if we can dispose of this matter as quickly as possible on the understanding that I'll bring down a finding at the earliest possible convenience, and as a sign of my good faith ... (well I can't really do that, can I?), in the event matters proceed, indicate the dates that there would be a resumption.

I think that's the way I'll have to go, Mr O'Brien.

MR O'BRIEN:

That's completely acceptable. I took from your comments last time some urgency about determining the matter and was prepared to run today if that was your wish.

PRESIDENT:

Yes. Thank you, Mr O'Brien.

Well now, Mr Fitzgerald, where did we get to?

MR FITZGERALD:

Well I understand and you may recall, Mr President, I was some way through my submissions on the last occasion.

22.06.89

PRESIDENT - O'BRIEN - FITZGERALD

MR FITZGERALD:

What I've intended to do this morning was simply conclude those submissions with some supporting material.

For the convenience of the parties and yourself, Mr President, I'd estimate that I'd be no longer than 45 minutes in making those submissions.

PRESIDENT:

Thank you.

MR FITZGERALD:

So if I could proceed with those submissions.

I think, Mr President, I would like to address the question which you raised in respect the section 29 industrial dispute matter and I need to, because I've had some opportunity to look at that question, just to address that in very brief terms. You did raise it and I believe there is some duty on me to respond to that.

I understand - and I did, in the intervening period, do some research - that the reference to contract of service in the Act is, in fact, a hangover of the previous legislation - Industrial Relations Act 1975 - and in my view, the intention of Parliament is not particularly clear within the Act, but it is my submission that it was not intended to create jurisdiction in this Commission to handle disputes for it in respect to contract for services as opposed to a contract of employment.

In my submission, all it does is give to the Commission jurisdiction to hear a dispute which involves an industrial matter which would affect other employees in relation to their work. And I think that's the context of the section in respect to industrial disputes, I think, section 3.

PRESIDENT:

Yes. As a consequence of the

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT:

employer arranging with some other people a contract for services.

MR FITZGERALD:

Well I don't see it that way. I see it as in a situation where an industrial dispute may occur which could affect another group of employees in their employment, and I believe that that is the context of section 3 of the industrial dispute definition (b).

But it doesn't, in my view, give the Commission power to handle disputes in respect to contract for services.

MR FITZGERALD:

Where there is a dispute which would affect another group of employees, then the Commission, I think, has power to look at that dispute but it doesn't per se in my submission, give the Commission power or jurisdiction to, in a dispute settling sense, to handle contracts of services, in my submission.

PRESIDENT:

Just for the purpose of clarifying this, let's discuss briefly a hypothetical situation. Assume that an employer wants some cleaning done and he employs his own cleaners but also decides that he will negotiate with someone for some contract cleaners.

Now, is it not possible in those circumstances that an industrial dispute within the meaning of the Act could arise between the employer, on the one hand, and those representing the employed cleaners, on the other, the subject of the dispute being the action of the employer in employing persons as contract cleaners and those persons hold themselves out as contractors?

MR FITZGERALD:

The situation could occur that way, I would concede that. But I don't believe that is the intention of the provision of the Act. I think it's the intention to protect employees in the truer sense where an industrial dispute involving contractors may in fact have some consequence on them and that's what I believe, very clearly, is the intention of Parliament.

PRESIDENT:

Well, isn't that exactly what I was alluding to in the hypothetical case?

MR FITZGERALD:

I think in some ways it probably was but I think you're suggesting that the employer may wrongly designate these people as contractors rather than employees and I think that was the substance of the dispute which you were getting at. I may have misinterpreted you.

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT:

You see, if it was open to an employer to negotiate with another person or persons on the basis that they will enter into a contract for services as distinct from contract of service and it is agreed that the first mentioned contract for services will involve rates either higher than or lower than what might otherwise be attracted under an award condition prima facie, you do have the ingredients for an industrial dispute arising between that employer and another group of persons.

MR FITZGERALD:

I understand the thrust, Mr President, but I think the pertinent words are, 'which may effect an employee in or in relation to his work'.

PRESIDENT:

Precisely.

MR FITZGERALD:

And that is where the jurisdiction of the Commission lies in respect to an employer-employee relationship, not the contractor-contractee relationship, in my view.

The dispute may overlap to effect that employer-employee relationship and for that reason the Commission can handle that dispute.

But in any event, I obviously differ with the Commission in terms of the view of this particular provision. I don't believe it's necessarily pertinent in terms of the jurisdictional matter which I raise, in that I raise the question of jurisdiction in respect to this application pursuant to section 43.

The Commission's jurisdiction is derived specifically from section 19 of the Act in that regard and refers specifically to an industrial matter.

Now, as I indicated in my earlier submission, industrial matter is very clearly a matter relating to the relations between an employer and employee.

MR FITZGERALD:

So, it's an interesting question you raise, but with respect, Mr President, I don't believe it does any injury to the point which I make in respect to jurisdiction in respect to the section 43 matter.

So, at this time I would simply leave my submissions at that point, sir.

PRESIDENT:

Yes, Mr Fitzgerald.

MR FITZGERALD:

Thank you.

I just wish to bring you up to date with the earlier submissions, Mr President. To summarise my earlier submissions and the import of those submissions there is, in my submission, no direct relationship between the Kingborough council and personal carers, the subject of this application before you.

If there is, and this is where we came unstuck, I have some trepidation proceeding this way but certainly it is our submission in this regard and I mean coming unstuck in terms of the matter you raised last time.

If there is any legal relationship which exists it is, in my submission, that relationship exists between the carer and the client, not the council and the carer, and if that relationship exists, it's one in the nature of a contract for services rather than a contract of employment.

Now, that matter is not within the ambit of this application before you. Clearly, the application of Mr O'Brien's refers to an employee of the council and in that, I would submit, sir, that you can only proceed to hear and determine this matter based on the application.

In respect to the question of the lack of the legal relationship of master-servant, or as it's known these days as employee-employer

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

relationship, it is, in my view, supported by a number of past precedents.

You'd be well aware, I think, of the extent of precedent, Mr President, I'm sure. This matter has been the subject of considerable debate over a number of years both in this country and others and the High Court have, on a number of occasions, utilised a number of tests. The principal test being the so-called control test and I will look at that in detail and how that applies to the subject case.

As I indicated last time, the courts also use a number of other tests including the complex test, the multifactor test and the organisation test.

As I indicated, I will confine, principally, my submissions to the aspect of the control test. However, I will also raise the question of the organisation test and that will be the completion of my submission.

The evidence, in my submission, clearly shows that the Kingborough council exercises no control whatsoever over personal carers in terms of their day-to-day functions and that's where the thrust of the tests applied by the various courts is and I will show you that by a means of precedent later.

MR FITZGERALD:

Prior to proceeding with or producing to the Commission, I will attempt to summarise and review the evidence of Dianne Watson on behalf of the Kingborough Council. The council acts in the role of a facilitator on behalf of the funding providers. And it's clear that there are three major parties involved here.

We have the funding providers who are the Federal Department of Community Service and Health, the administrators of the scheme and also one who would contribute to the scheme, being the State Department of Health Services, and if you like those who deliver the scheme at the ground level, being the council in terms of the coordinating body.

Now the council, in my submission, as clearly shown by the evidence, is acting in the position of an agent. And there is certainly not, and it was shown by the evidence, I would submit, that there is no direct employment relationship. In fact, there is no direct relationship whatsoever between the council and the alleged employee or, in other words, the carer.

I think Ms Watson used the words 'an introductory agency', and it's probably a very good term to use in terms of the council's role. And that introductory agency acts in the role of finding clients in the first instance, requiring that they do meet the guidelines of the scheme.

PRESIDENT:

Not like finding marriage partners, that sort of introductory.

MR FITZGERALD:

No, it's not but it's quite a good analogy. They have a role in both respects in finding clients and ensuring that they meet the guidelines. And the other instance they, in fact, find the carers and ensure again that they meet the

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

guidelines, the Commonwealth Government guidelines.

Now in terms of making a match, and we heard evidence that, I think, on some occasions there were a number of carers referred to a particular client, and ultimately the client would make that choice. It's not the council's choice.

So in the first instance the council doesn't perform that act of recruitment. And we saw also, at the end of any relationship, that the council does not have any power to, in fact, terminate or dismiss that carer. That lies with another body, a body made up of not only carers ... it's not only the council, but carers and clients. So very clearly the council doesn't retain that power and that's one of the tests the court use, whether there is a power of dismissal. And that power doesn't rest with the council.

PRESIDENT:

Who designates the recipients of the service as clients, the council or those who provide the service?

MR FITZGERALD:

That point I would have to take some instructions on. It is my view that the council doesn't ... it would have to administer the guidelines in that regard. But I would have to take instructions on that point.

PRESIDENT:

Yes, well if you were taking instructions perhaps you'd also take instruction as to whether or not these people, those who deliver the service, collectively represent a group, a separate group or do they act individually as contractors and negotiate with persons whom they regard as their clients.

MR FITZGERALD:

Those are two matters which, if I could take on notice, and I will address those at the conclusion of my submission. Excuse me for one moment.

If that is permissible, Mr President.

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT:

Yes. Mr O'Brien may wish to have something to say about it in due course.

MR FITZGERALD:

Yes.

The council's role is to foster community involvement and the only element of control which is exercised is that relating to the allocation of a maximum of 10 subsidised hours.

Now we saw in the evidence from Dianne Watson that, in fact, it was possible that a carer ... sorry, a client would not ... on some occasions would require that those hours be performed. It could be less. In fact, it could be more. We saw an occasion where a client, in fact, required a carer to have more than the 10 subsidised hours and they made arrangements which were outside the knowledge of the council.

And that is very much within the philosophies of the scheme, to provide the potential for additional care facilities, and very much on a community involvement basis.

The critical aspect about the number of hours, and it does relate to 10 subsidised hours, is that the council cannot control how and when those hours are to be worked. That is a matter essentially between the client and the carer. And that is a matter particularly after the carer assessing his or her particular needs. Now if they chose to do all those hours on one particular day, that is open to them. If they chose to do 1 or 2 hours each day over a fortnight, then that is open to them, as long as it doesn't exceed 10 subsidised hours.

Council's only role is to pay in accordance with the information and it's not in the nature of a time sheet, but is information in terms of the number of hours actually performed by the carer and that is

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD: again counterchecked by the client.

PRESIDENT: The council employee actually negotiated the rate of pay, did she not?

MR FITZGERALD: It was determined after looking at a number of facts, including the availability of funds. So it was a question of very much on the ability to pay basis, which that was determined. I think it would be wrong to classify it as a negotiated rate.

PRESIDENT: Well it must have been binding because as I recall ... I may be wrong, Mr Fitzgerald, but as I recall Ms Watson's evidence, in part at least, I thought she said that when a new carer comes into the group that person is told what the rate is.

MR FITZGERALD: I think that evidence was ... from my recall, was in fact the evidence. I think it's only sensible that the rates be designated.

PRESIDENT: If each carer is a contractor it seems that they don't have the capacity to determine their own contract rates.

MR FITZGERALD: Only because it's restricted by the council's ability to ... in terms of funding.

MR FITZGERALD:

The only other form of control which the council could be said to exercise, is that to ensure that the tasks are within the funding providers guidelines. And here I think there has been some evidence. There's a perception by some carers that there are tasks which in fact fall outside the original guidelines and this is where ... sorry, there is some area of concern on the part of the council in that regard.

PRESIDENT:

For example, picking up children.

MR FITZGERALD:

That was one of the incidences I think I was going to refer to.

PRESIDENT:

Yes.

MR FITZGERALD:

Council exercises control in that respect, but it is very much limited control in terms of specifying that that is a task outside the funding provider's guidelines.

But in terms of the control test, the important - and this is where the precedent is very important - the important thing is that the council must have right to specify the actual task and how and when they are to be performed.

The council does not in fact exercise in any way the day-to-day control and supervision. In fact you may recall that Dianne Watson said in her evidence that it would be fundamentally wrong and contrary to the philosophy of the scheme if the council intervened into a client's home in order to supervise the work of the carer.

The other point which was clearly brought out in the evidence was that council does not control where the services are to be provided by the carer. And we saw that in some instances that could be provided outside the client's own home.

Now once again in terms of

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

establishing an employer-employee relationship this is a critical factor in terms of the control test which the courts use.

It may be that the client that the client has a particular need and if I could phrase those ... put those into category of social needs in terms of being involved in the community and the carer in fact facilitates that. And that would not be necessarily in the client's own home.

I indicated earlier that the council does not participate in the initial recruitment selection process in terms of the ultimate decision being made by the client, nor does it have the right of dismissal, and I indicated this earlier in my submissions. And the role of the Community Access Committee is one which is made up of representatives from funding services, carers, clients and council.

Council certainly doesn't have any authoritative position in this committee. It's simply one of the members of that committee in terms of making an ultimate choice whether a carer should no longer provide services then that choice rests with the committee and certainly not solely with the council.

Council of course being a representative on that ... or having a representative on that committee could, in fact, voice its opinion, but the ultimate choice would lie with the committee.

Another very important aspect in terms of the tests used by courts is the attention of the parties. The council does not in any way see or regard these carers in the position of employees.

There are a number of aspects which I believe were brought out in the

22.06.89

FITZGERALD

MR FITZGERALD:

evidence which in fact substantiate this. Certainly council do not in the role of the carers on the payroll as they would with the normal Kingborough council employees.

Normal deductions such as PAYE tax, which would be required if the carer was in an employee relationship is not deducted, nor has there been any requirement by taxation authorities to so deduct.

PRESIDENT:

Well now you've raised it, I was waiting for a convenient time because it's the very question I want to discuss with you if I might and I think this would be a convenient time.

Taxation ruling No.IT2129 deals with this question, and it was issued ... well it came to me via treasury instruction in June 1986 relating to fringe benefits tax and this attachment dealt with this question of contracts or employee, and among other things it says - and the heading is this paragraph 25-26 and I'll read it to you.

"Employee as such (master and servant relationships). Item 25.

If a master and servant relationship exists the recipient of the payment is an employee as such for the purposes of section 221.A and tax instalments must be deducted at the prescribed rates from the remuneration of the employee".

- Paragraph 26.

"The primary test of whether a master and servant relationship exists is control. The presence of a right to control how, where, when and who is to carry out the work in question points very strongly and usually

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT: conclusively to employee status. The greater the obligation of the individual to obey the orders of the principle as to the manner of performance of the work, the greater the relative rate to be attached to the control criteria and the more certain it is that the individual is an employee."

Now if that fits into the ruling of the Taxation Department perhaps all we need to do to shorten these proceedings is to determine who the principle is.

MR FITZGERALD: Yes.

PRESIDENT: If the principle is not the Kingborough council and the principle in all probability ... well it's not singular it's plural, each client becomes a principle and ...

MR FITZGERALD: Yes, I think I ...

PRESIDENT: ... therefore subject to a particular award.

MR FITZGERALD: Yes. If I can comment on the taxation ruling. Certainly I'm aware - very much aware - of the Taxation Department's role in determining from their prospective - and it is only from their prospective - the master-servant relationship, whether that exists and I'm aware - and I have a copy of, not on this occasion - but I think the Taxation Department used something like a 25 point test - the control test being the principle test.

It's a question I think which relates to the issue I raised earlier, where I indicated that there is no direct relationship between the council and carers from a legal prospective. However in terms of the application it is asserted by Mr O'Brien that there is a direct relationship

MR FITZGERALD:

between council and the carers and that is one of an employer-employee relationship, the term employees used in the application.

In that respect I think we can only consider that question as that's the subject of the application, and the question of whether there is a relationship existing between client and carer which is alluded to could only be determined by some other subsequent application, if that's what Mr O'Brien chose to do.

PRESIDENT:

Well just correct me if I'm wrong. Mr O'Brien sought an interpretation of the award, and cited the Kingborough council as the 'employer' involved in the question that gave rise to the request for interpretation.

MR FITZGERALD:

Yes.

PRESIDENT:

If the Kingborough council is found, as a consequence of your challenge, not to be the employer, but that the employer of these people who may be the subject of the award in question is to be found among the clients, then is there any reason why the interpretation could not, and indeed, should not proceed?

MR FITZGERALD:

In respect to the question of whether there is a relationship between the carer and the client. Is that what ...?

PRESIDENT:

Well the Kingborough council is found not to stand at any employer-employee relationship with the carers - I'm using your terminology - ..

MR FITZGERALD:

Yes.

PRESIDENT:

... but that the Commission, on the best evidence available, forms an opinion that there is, in fact, an employer-employee relationship between the carer and client, then is there any reason ... any prima facie reason why this interpretation could not and should not proceed?

MR FITZGERALD:

If the Commission is of the mind that there is no direct relationship between the council and carers in any form, then I believe at that point the Commission should dismiss this application, in terms of the Commission lacking legal jurisdiction to hear it, in that it can only determine the application before it.

And the application ... and I quote from the application:

"The application seeks a declaration that the classification 'domestic' in clause 8 - Wage Rates of the Miscellaneous Workers Award applies to employees of the Kingborough council employed

MR FITZGERALD:

under the job title 'personal care assistant'...

... as Mr O'Brien amended that application.

Now that is the subject of the application.

I don't believe it's open for the Commission to - in midstream - decide that that, in fact, should be not a relationship between the carer and the council as what is asserted in the application, but one relating to the relationship between the carer and client.

PRESIDENT:

But in order to dismiss the application, shall we say, would I not have to find in the alternative that it's not the Kingborough council who is the employer but, in fact, a range of - at this stage - unnamed persons?

MR FITZGERALD:

I don't believe that's open to you. I believe it's open for you, Mr President, to determine that there is no relationship whatsoever, which is my submission, between the council and the carers, but I don't believe it's open for you - in terms of the subject of this application - to go further and say that in your view there is a relationship, be it independent contractor-contractee or be it employer and employee relationship between the carer and client.

That's not the subject of the application, nor do I believe it's open to you to proceed that far, Mr President.

MR O'BRIEN:

This point is about whether the Commission has jurisdiction and whether the people are employees. Now Mr Fitzgerald says they're not. If they're employees of someone, the Commission has jurisdiction.

22.06.89

PRESIDENT - FITZGERALD - O'BRIEN

PRESIDENT:

You see, if I find that there is, in fact, an industrial dispute ... no, I don't have to find an industrial dispute. I simply have to find jurisdiction to interpret the award.

Now it might be that I find that the people who appear to be the subject of this application are not, in fact, employees of the Kingborough council, but employees of someone else.

MR FITZGERALD:

Well we seem to differ there again. In terms of the ... and I would need to research in terms of the Act. I believe the Commission is restricted solely to what's the subject matter of the application, and that ... as I say again, that relates to the asserted relationship of employer and employee between the council and carers.

Now as I indicated earlier, I don't believe it's open for this Commission to proceed outside the subject matter of the application. We have challenged jurisdiction in respect to the subject matter of this application.

The other matter which you raise of the question of the client-carer relationship, is another matter entirely.

Now ...

PRESIDENT:

If the Commission, pursuant to section 20(4) - and this has been judicially interpreted by the Supreme Court of this State - indicates to the parties to take something else into consideration and in so indicated satisfies, prima facie, the natural justice question, then quite clearly, it seems to me that the Parliament intended that that could happen.

MR FITZGERALD:

In determining a matter before it, but in terms of section 20(4) as you indicated, the matter of the asserted relationship between a client and a

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

carer is not a matter before it and therefore it's not open for this Commission ... before the Commission currently.

The matter before the Commission at the moment is the asserted relationship between council and carers, and in that regard I don't believe it is open for the Commission to determine a matter which is totally outside the subject of the application.

PRESIDENT:

Well then if we took that to its logical conclusion, you would have me, in effect, dismiss this application and in the expectation that on the very same day, in all probability, Mr O'Brien would then resubmit an application in almost identical terms, but possibly naming person or persons unknown or, indeed, the clients.

MR FITZGERALD:

I believe that's the only way which can occur, then our arguments in respect to that matter would be very much a different argument to what's ... we have two-pronged argument in this respect.

Firstly, that there is no relationship whatsoever between council and carers.

Sorry, that's the second stage. The first stage is that there is no employer-employee relationship between council and carer.

The second stage is that there is no employee ... known relationship whatsoever which exists.

Now if Mr O'Brien chose to proceed that way, then we will respond accordingly. But I don't believe it's open by some de facto way - and I say that respectfully - for the Commission to include a totally different subject matter within this application, nor do I think it's open

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD: for Mr O'Brien to make that application at this time, sir.

PRESIDENT: Well are you appearing for the Confederation of Industries or simply as agent for the Kingborough council or both?

MR FITZGERALD: Well in matters before the Commission, we would be appearing on behalf of the Tasmanian Confederation of Industries, but quite clearly, in this matter, our client or our member is the Kingborough council.

PRESIDENT: Yes. Well then if I chose, at my own motion, to take the matter further, what would you say to that?

MR FITZGERALD: I'd have to take ... in terms of the proposed course which you're suggesting, is that what ...?

PRESIDENT: And make it an either-or situation. Either these people are employees of Kingborough council - they are contractors - or they are employees of a person or persons unknown.

MR FITZGERALD:

I have to take instructions on that point but I believe if that's the way you proceed then the council would certainly wish to instruct me as to whether remedies would be taken outside this jurisdiction to ensure that the matters before you are legitimately before you.

My initial response to that is, and once again I'd be subject to council instructions, if that's the way you proceeded then that would open the matter to common rule remedies, to direct you to hear this matter with the actual subject matter before you.

For that reason, I don't think it's open ...

PRESIDENT:

You think mandamus?

MR FITZGERALD:

Well, one of the prerogative writs, certainly. As to which one, we'd need to take advice on it.

PRESIDENT:

I'm not refusing to exercise my powers. I'm offering to widen them.

MR FITZGERALD:

You may be acting outside your powers and that would be what we would be contending at the moment. If you chose to embrace a matter totally outside the subject of this application then, in my view, it does leave this Commission open to a common law writ.

PRESIDENT:

Only if the Commission does not indicate to the parties beforehand that it intends to do something. Section 24 surely covers that.

MR FITZGERALD:

Once again, it's not a matter before you at the moment. The matter of the client-carer relationship which has been asserted is not a matter before you.

PRESIDENT:

Well, isn't that ... very largely what is before me an assertion that there is no employer-employee relationship between the Kingborough council on the one hand and the

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT: carers, if you wish, on the other? And for that reason you're saying I cannot proceed to interpret the award because it's not an industrial matter, in short?

MR FITZGERALD: Correct.

PRESIDENT: Now, surely I have a care to consider what's put to me and also to the extent that I have certain powers, endeavour to get to the bottom of the matter and discover for myself whether or not what is put by way of challenge is in fact this situation.

Is the council in those circumstances the employer or is somebody else an employer?

MR FITZGERALD: I'm firmly of the view, Mr President, that the question of the asserted carer-client relationship is not a matter before you. In the absence of any application relating to that matter, it's not open for you to determine it.

You may address it in an ancillary sense, that's possible, but in terms of determining it, I don't believe you have that jurisdiction and I would have to take instructions if that's the way we're proceeding, I must admit.

PRESIDENT: I'm simply asking you the questions because the way you're arguing it, that if I accept your argument on the narrow question of whether or not the Kingborough council is an employer of persons who are called carers and if I find in the negative, that is the end of the matter. This application for an interpretation cannot proceed. In effect, that's what you're saying?

MR FITZGERALD: Yes.

PRESIDENT: Yes.

And you believe that I'm limited in my consideration of that matter to that challenge that you have issued?

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

Well, the challenge which I have issued to the Commission's jurisdiction relates quite clearly to the application and in terms of the Act, as I indicated, the question of the alleged carer-client relationship is not before you.

In terms of natural justice criteria, I don't believe it's open for you to consider that matter which is clearly not before you in terms of the application.

PRESIDENT:

Suppose then, Mr O'Brien simply varied or amended his application and sought a declaration that persons carrying on this work in the employ of anyone were subject to this particular award, what would you say to that?

MR FITZGERALD:

Firstly, the application would have to be amended by your direction and I would, at this time, without the opportunity to address that question because my submissions are very clearly directed towards the asserted council carer relationship, be opposing that application because it puts a totally different position. It's not a simple amendment to correct a word as Mr O'Brien did in the first instance.

It changes the whole thrust of the application. Now, I would be opposing that application to amend and I'd believe a fresh application would need to be made to which the council could properly respond in respect of that application.

PRESIDENT:

The council may not even ...

MR FITZGERALD:

The council may not.

PRESIDENT:

... be mentioned.

MR FITZGERALD:

There may be representation on behalf of clients.

MR O'BRIEN:

Carers.

MR FITZGERALD:

But in any event, yes, of course the

22.06.89

PRESIDENT - FITZGERALD - O'BRIEN

MR FITZGERALD: Commission can regulate its own procedure but to allow an amendment to effectively facilitate a totally new application would be wrong, in my submission, and I would strongly oppose it.

PRESIDENT: Okay. So, you want me to throw this out, dismiss it, and if I did that and Mr O'Brien, on the same day, resubmits, then aren't we back here arguing the same thing?

MR FITZGERALD: No, we're not. If I could just respond to that. We're arguing a very different thing. We're arguing the relationship between a carer and client and our submissions would be very different to those which we would be putting before you today.

PRESIDENT: Yes, I'll hear you, Mr O'Brien on this.

MR O'BRIEN: This is quite a different concept to that which Mr Fitzgerald put when he sought to argue a threshold point. His threshold point was, the Commission didn't have jurisdiction because these people were not employees.

Now, whether they're employees of Kingborough municipal council, the Commonwealth Government, clients, as they've been described in proceedings, or somebody else, the Commission would have jurisdiction to hear it. That's the point that Mr Fitzgerald is arguing, whether the Commission has jurisdiction to hear the matter.

He says it can't be an industrial matter if it's not pertaining to the relations between an employer and employee. Now, if these people are employees the Commission has jurisdiction. Mr Fitzgerald might then argue, well, you can't find in the terms of the application because they're not employees of Kingborough municipal council but he would be forced, in my submission, to go to

MR O'BRIEN:

the merit of that matter in argument
on the merit of the application and
not in the threshold point.

22.06.89

O'BRIEN

156

PRESIDENT: Yes. Mr Fitzgerald, that is the message I've been trying to convey. I may not have been getting it over to you, but that is, in essence, what I'm saying to you.

MR FITZGERALD: Yes.

PRESIDENT: I'm not making a finding ...

MR FITZGERALD: No.

PRESIDENT: ... in relation to your challenge. You understand that, of course.

MR FITZGERALD: Yes. Yes, well I still differ, I'd have to say, Mr President.

PRESIDENT: Well of course, that's your prerogative ...

MR FITZGERALD: That's right.

PRESIDENT: ... and your right to take whatever remedial action you see fit. But so long as you understand what I'm putting.

We have before us an award that contains a classification of domestic. The union, the representative here today, is party to that award. It has requested an interpretation and has cited the Kingborough council as someone involved or subject to that award.

Now I accept it's a valid argument for you to present that maybe it isn't the Kingborough council who is the employer. And any finding that purported to bind the Kingborough council would be wrong, in fact, in law, because somebody else might be the employer or in fact you would argue, as you have done, that indeed, there is no employer. Now I understand that.

It doesn't alter the fact that there is an award of this Commission that Mr O'Brien wishes to have interpreted, to find out whether or not the classification of domestic -

PRESIDENT: he'll correct me if I'm wrong - is broad enough in its scope to cover the work allegedly performed by persons referred to as carers. And if that is the case, they may be subject to the jurisdiction of this Commission and, in particular, that award.

MR FITZGERALD: Yes. Well I can only reiterate my earlier submissions that, in terms of the application, the application relates clearly to the question of the alleged relationship between council and carers.

And I firmly believe that it's not open for you ... you may make comments on the other relationship, but I don't believe it's open for you to determine matters outside the terms of this application. And that's what, in essence, is being suggested.

PRESIDENT: But if I find in your favour, then surely in my reasons for decision it would be open to me to say 'I find that it is not Kingborough council who is the employer, but someone else'. I may find that in fact there is no employer-employee relationship between anyone.

MR FITZGERALD: Well without hearing argument in respect to the question of the relationship between carer and client and whether that constitutes an employment relation of something other than that, I don't believe it is open for you to make that finding, Mr President.

PRESIDENT: Not even on the evidence of your own witness - how the rates were struck?

MR FITZGERALD: I really don't believe so, because as I said, it's not a matter before you that's subject to the application.

Now you may make some comments in that regard, but I suggest that if that is the nature of final determination, then I can only but

MR FITZGERALD: seek instructions in respect to what remedies would be available, because I believe firmly you'd be acting outside your power.

PRESIDENT: If you've called evidence before this Commission and your witness, in her evidence-in-chief, told the Commission that she cast - or they, the council and others - around to find an appropriate award that would cover the work and, after considering one or two, determined or decided themselves that neither was suitable and that a rate of pay of \$10-something per hour would be more appropriate, having regard for the availability of funds, if that isn't evidence that assists me in coming to a conclusion one way or another, I'd like to know what is.

MR FITZGERALD: Well certainly it's evidence, sir, which can assist you in respect to the issue before you. But it's not, in my submission, evidence which can be utilised to make some other finding in respect to another matter which is not before you.

PRESIDENT: Could I not find that, on the basis of that information, there appears to me to be an employer-employee relationship between someone? And that someone is either the Kingborough council or it is ...

MR FITZGERALD: You could make some observation like that, but that question ...

PRESIDENT: Well a finding.

MR FITZGERALD: But in terms of a final determination in respect to section 43, a declaration, I don't believe that's open to you.

PRESIDENT: We're talking about a finding on the challenge that you've issued.

MR FITZGERALD: The challenge relates solely to ... and I can only respond to the application. The challenge relates to the issue of jurisdiction, the

MR FITZGERALD:

lack of employer-employee relationship, which is asserted to exist between the council and carers.

Now, with respect, I'm not sure whether we can get any further into that and I simply finalise my submissions in respect to how I see this Commission can act in respect to that challenge.

But if you made some observation that there appears to be a relationship existing ... an employment relationship, lets say, between a client and carer, then I believe that leaves the Commission wide open to the common law remedy, because that is not the matter before it. That would have to be subject to argument and that argument I'm not putting to you today. I'm putting quite a different argument.

PRESIDENT:

But you're arguing that these people are in fact contractors.

MR FITZGERALD:

Yes. But only in respect to the asserted relationship with the council.

Now if Mr O'Brien chose to make an application asserting that these people are in fact employees and clients, then quite clearly we would have to take a different position; whether in fact to argue jurisdiction at all or argue jurisdiction in a very different way to what I've been doing in respect to the matter before you now.

PRESIDENT:

Yes. I think you're very slowly coming round to my point of view. That there is no prohibition against this Commission interpreting the award as requested by Mr O'Brien - that is to make a finding one way or the other as to whether or not the work performed by these people falls within the scope of the award definition. The only matter at issue might very well be, whether or not any finding was binding upon ...

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT: finding favourable to Mr O'Brien, was binding upon the Kingborough council or someone else.

MR FITZGERALD: Mm. Well, I'm not ...

PRESIDENT: Is that a fair enough statement?

MR FITZGERALD: I really would have to hold very much to my earlier submissions, Mr President. I really think that what's been proposed, if that's the way you propose to proceed, it's not within the Commission's ambit to do so.

PRESIDENT: Where is it wrong, because it says ... you see the application seeks a declaration that the classification domestic in clause 8 - Wage Rates of the Miscellaneous Workers Award applies to employees of the Kingborough council employed under the job title 'Personal Care Assistant'.

Now we've discussed the work that these people do. We've discussed at some length as to how these people come to perform this work and the committee that interviews and how the final choice is made. So there's a good deal of material before the Commission upon which to answer your challenge, is there not?

MR FITZGERALD: Yes. I can only say that the challenge relates to the asserted relationship in the application, and ...

PRESIDENT: Yes. Yes.

MR FITZGERALD: ... no more than that.

PRESIDENT: Yes. Well now if I accept that and say, 'Yes, I am satisfied that the Kingborough council is not, in fact, the employer of these people but that someone else is' then is there anything at law that would prohibit me from proceeding, if Mr O'Brien wishes to proceed, to interpret the award?

MR FITZGERALD: Yes, I do, because the question of the jurisdiction of the Commission in respect to the carer/client relationship has not ... there has been no opportunity for that issue to be aired before the Commission.

And if, in fact, that's a way of proceeding, then application ... if you did dismiss this application in terms of jurisdiction and Mr O'Brien made a new application, I would wish to make ... I would need to take instructions on it, but I could, in fact, make another jurisdictional challenge in respect to the carer/client relationship, where there is jurisdiction in the Commission in that regard. Now I'd need to take instructions on that. It's a different matter entirely.

And I think simply by indicating here that you feel there is some ... there could be a relationship, a contract of employment relationship between the carer and client, would be fundamentally wrong because in terms of natural justice criteria I would not have had an opportunity to address that specific issue.

PRESIDENT: In your capacity as the representative of whom?

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD: I'm not sure how that impacts on it, but quite clearly my instructions are coming from the Kingborough council.

PRESIDENT: I think it's very pertinent because the Confederation of Industry is a party to every award.

MR FITZGERALD: Yes, but in this instance the member who is instructing me is clearly the Kingborough council. You've said in previous interpretations that there's got to be a factual situation applying.

PRESIDENT: I've said I'm most reluctant to ...

MR FITZGERALD: I may have misquoted you there.

PRESIDENT: No, it's fair enough. The most recent addition qualifies that and that's where the Secretary for Labour is the applicant.

MR FITZGERALD: Yes, thank you. Yes, I had overlooked that aspect.

Sorry, I've lost my train of thought for the moment, but ...

I really don't think I can add anything more. That is my submission and that's how I clearly see the position.

If, in fact, there is some determination that there is an employment relationship between carer and client and the Commission makes that determination, then I think the Commission would leave itself wide open in terms of opportunity to address that specific issue. And therefore the natural justice criteria would be lacking because I would not have had an opportunity to address that specific issue. The issue is quite clearly a different issue.

PRESIDENT: Well the only other alternative, I suppose, is that Mr O'Brien, if he is minded to do so, take out prosecution, institute prosecution

22.06.89

PRESIDENT - FITZGERALD

PRESIDENT: proceedings in another place against either Kingborough council or each of the clients, if that's what you want.

MR FITZGERALD: Well that could occur. The same jurisdictional aspects in respect of

PRESIDENT: It's a lot cheaper this way.

MR FITZGERALD: It is, yes.

PRESIDENT: But if that's the way you want it to go.

MR FITZGERALD: I think it might just be opportune to seek a 5 minute adjournment at this stage, given that I said I would be 45 minutes. I think I've extended that. I'm nowhere near through my submissions and there's a couple of issues which you've raised. Unless there are any other issues it may be appropriate that I address those issues plus this one that you raise at the moment.

PRESIDENT: Could we just go off record for a moment?

...

PRESIDENT: Thank you, Mr Fitzgerald?

MR FITZGERALD: Thank you, Mr President.

Yes, I will proceed with my submission.

I was addressing the question of the PAYE tax situation. I'm also advised that carers, in fact, in some instances been concerned about their liability for tax and have, in fact, addressed this question ... they've questioned it with the taxation department.

As I indicated in my earlier submission there has been no requirement by the taxation department for the Kingborough council to, in fact, deduct PAYE tax. And in this instance the carer

MR FITZGERALD:

was advised she was in a position of a contractor and would, in fact, be liable for her own tax.

Clearly the ruling which you read into transcript, No. IT.2129 is very much a guideline. In this instance it appears that certainly the local branch of the taxation department has treated these carers very much as employees.

MR O'BRIEN:

Well this is purely anecdotal. It may or may not be actual and it's a response about facts not in any way proven. I don't think it's substantial proof of anything.

I understand you're responding to something but I just need to make that point.

MR FITZGERALD:

It is for that purpose that I was responding to. I fail to see the objection.

But in any event I think the evidence clearly showed by Ms Watson that the taxation department have made no requirement of the council to commence deductions. And that was my recollection of the evidence.

There is also, of course, the question of insurance and it is clear that in this situation that workers' compensation insurance is not appropriate and insurance in the nature of public risk and public liability insurance has been executed by the council.

It is clear also from the evidence that all the normal conditions which would apply to council employees, both award and non-award, and I think there was an example given by Dianne Watson in respect to participation of carers in council social activities. There was certainly clear indication that in that regard they were not treated as employees. They didn't participate as employees would normally do, not only in terms of

MR FITZGERALD:

those non-award matters, but any other award matters.

Now in terms of the award I think, just to clarify the evidence of Dianne Watson, you indicated in one of your questions that you saw the council striking the particular rate. It was the council finding some guidelines in terms of what maybe an appropriate hourly rate, but it was not the council choosing a particular application to the award. It was simply just there ... they went to some awards to come up with some sort of appropriate rate. But by that action they were not, in fact, attempting to indicate that an award in total should apply.

PRESIDENT:

What about the penalty rates of time and a quarter for Saturday and time and a half ...

MR FITZGERALD:

There was some recognition. And as you would be aware in terms of aligning those with normal award conditions, it doesn't equate to normal award conditions.

MR FITZGERALD:

It's less than in the majority of cases.

But there was some recognition that those hours outside the normal Monday and Friday situation, daylight hours, could deserve some higher recognition in terms of remuneration. But certainly it is in no way ... it was used as a guideline only. There is no way in fact to align them to any award conditions.

The evidence clearly indicates that the sort of relationship is not appropriate in respect to carers. Public risk is provided rather than workers compensation. Payment is in the nature of a fee for services rather than a payment of a wage.

The evidence shows, clearly in my submission, that the council makes it clear that the carer has a personal liability for taxation and that responsibility has been accepted by carers and, I am advised, after advice has been sought from the Taxation Department.

In terms of remuneration, the council's only involvement is that relating to the administration of services. Certainly, the council does provide, in terms of the coordinator, facilities, phone and office facilities, of course.

There has always been maintained a separate account, even though what appears - and I am sure Mr O'Brien will attempt to make some play of this - it appears in terms of the cheque made to carers that it is the Kingborough council who in fact is the employer, and I'm sure that is what Mr O'Brien will be saying.

Certainly it would be appropriate that a separate cheque be made out. But the council does facilitate that through its administration resources, but it clearly comes out of a separately identifiable fund.

22.06.89

FITZGERALD

MR FITZGERALD:

And I understand that in the near future it is intended that not only a separate fund will operate but also a separate account in terms of the organisation which in fact is responsible for the cheque.

The council does not involve any of its own financial resources. That was clearly shown in the evidence. Except, of course, those administration resources. It is simply acting as an agent of the Commonwealth and State departments, and the client, of course, who pays a small contribution.

It is patently clear from the evidence that the council is not the employer exercising control over the carer but is simply an agent in a coordinating, facilitating role.

The evidence is also clear that what existed is in the nature of a contract between the client and carer. Now, I don't think we should go over this ground again, but certainly the evidence which Dianne Watson indicated - and I think also it was indicated in evidence - that the formation of this relationship between client and carer was in fact done on the advice of Ms Shelley, an organiser of Mr O'Brien's union, and a former council employee.

Not only was that advice given by Ms Shelley in respect to how she saw the contract between the client and the carer been established, but other aspects such as public risk insurance.

Now surely, Ms Shelley, in her former capacity, if she believes that there was some employer-employee relationship existing, that normal benefits should be appropriate rather than the benefits which she advised such as public risk insurance, such as that which she advised to Dianne Watson.

In terms of the legal position - and

22.06.89

FITZGERALD

MR FITZGERALD:

indeed it is significant in this respect - I do intend to produce two exhibits which are essentially texts from a well-known industrial text in relation to the matter, and also a precedent of an earlier case ... a more recent case, sorry, and I will get to that very shortly.

In terms of contract of employment, it can be said that the contract of employment is an employment agreement which exists in every individual employment relationship. It is an individual one in the sense that a separate contract exists.

The general law of contract applies, of course, in a contract of employment situation, and there are a number of prerequisites, the principal ones being that firstly there is an offer and acceptance; secondly there is consideration; and thirdly, an intention to create legal relations.

Clearly, in terms of an alleged employer-employee relationship between council and carers, all three prerequisites are missing. In the first instance, the council facilitates a contract to be made between the carer and the client.

The actual offer - it could be said to come from either party - but the offer could come from the client, and the acceptance is made by the carer. The council is not involved in that offer and acceptance process. All it does is facilitate that offer and acceptance to be made between the two contracting parties.

Secondly, the consideration, or in other words the monetary compensation, is not in any way provided by council using council revenue sources. As indicated, the council simply acts as an agent on behalf of the Federal and State Governments and the client.

22.06.89

FITZGERALD

MR FITZGERALD:

I will refer to other precedent in respect to the value of the work and who does it benefit. In this instance it does not in any way benefit the council. And that again is one of the tests in determining whether there exists an employer-employee relationship. The benefit, of course, can only be with the client.

PRESIDENT:

But if the council saw fit to publicise this service and take credit for it, why would you say that successful performance of the service wouldn't benefit the council?

MR FITZGERALD:

I am not sure whether, in terms of taking credit for the service they provide is some sort of tangible benefit. I would submit that in terms of the benefit, it has to be in some tangible form. The only party who could extract some tangible benefit from the service, of course, is the client. There may be some credibility and credence on behalf of the council, but I don't think that in terms of the benefit, in contractual terms, is the relevant factor.

PRESIDENT:

In a collective sense it may benefit the councillors in that they might find it easier to get re-elected if their constituent ...

MR FITZGERALD:

I don't think I should make any comment on that. But certainly, there is very much, as I indicated, a personal relationship which exists between carer and client.

Concerning a rate of remuneration has been struck, and we have discussed ... I have made submissions in that regard, I don't think I should make any further submissions in that regard.

The evidence also show that the

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

clients engaged carers in excess of the 10 subsidised hours. The remunerational consideration struck in that instance was, as shown by the evidence, a matter solely for negotiation between the carer and the client.

22.06.89

FITZGERALD

MR FITZGERALD: Council formed no part in that process. Council had no knowledge of the arrangements which existed there.

PRESIDENT: Yes but, Mr Fitzgerald, I apologise for continually ...

MR FITZGERALD: That's all right.

PRESIDENT: ... interrupting you. It's off-putting I know.

MR FITZGERALD: Mm.

PRESIDENT: In coming to a decision to negotiate a rate, someone must have made a conscious judgment that no award applied unless in negotiating a rate it was intended to negotiate something in excess of an award. People cannot contract out of an award, and you're aware of that.

MR FITZGERALD: Yes, I'm aware of that. The council certainly made a conscious decision that no award applied. They made that decision after considering the philosophy and basis of the scheme and the reason why they made that decision is because clearly they saw that there was no employer-employee relationship and therefore an award could not apply. And a fee for service is the more appropriate mechanism to reward carers for their services.

PRESIDENT: You see what troubles me is again I get back to this income tax ruling 2129, and they deal with the word 'labour'. They say:

"The word 'labour' is designed to exclude contracts which are not contracts to perform work but which, in the main, provide for payment in respect to the supply of goods, materials, or hire of plant or machinery and by any other related costs incurred by the recipient of such payments in the course of performing work under the contract".

PRESIDENT: In effect 'labour' is a word which is capable of including all kinds of work which may otherwise be done by a servant for a master.

MR FITZGERALD: Look, I can only say, Mr President, I'm aware of those tests used by the Taxation Department it is but one of 25 I think they use. There are many instances, and I've had involvement where clearly labour is one of the components but because of the lack of control the employer-employee relationship can't be established.

I know of one which I cite as an example and that relates to deckhands on fishing boats.

PRESIDENT: Well they're referred to in this as well.

MR FITZGERALD: Yes, so then I understand that's an issue with the Taxation Department. But I understand also that they haven't - and also I think the same applies for deckhand for abalone divers - the Taxation Department haven't pursued that because they see quite clearly that there is no employer-employee relationship.

So it's all very well to quote one particular ruling from the Taxation Department - it is but an opinion. What must be considered is all the tests and particularly the control tests and in that instance I believe I have shown and will show further that there is no control which rests in the council and for that reason there is no employer-employee relationship.

It's clear from the evidence that neither the council nor the carers intend to create a legal relationship and the evidence showed from Ms Shelley that there was a ... then Ms Shelley advised Dianne Watson that a contractual relationship was to exist between the carer and client.

It's clear also that - particularly

MR FITZGERALD:

from the council's point of view, and there's been nothing to suggest otherwise from the carer's point of view - there was no intention to create a legal relationship between those particular parties. So in terms of a contractual arrangement there cannot be any contractual relationship to exist - or said to exist - between the council and the carer.

The control test considered by the courts embraces a number of concepts. The main ones I'd like to emphasise to the Commission. I will eventually get to producing exhibits which further describes the control test, but the first ... and one of the aspects which is canvassed in the control test is the place where the work is to be performed. Does the employer - the alleged employer - control the place, or designate, you know, where it should be performed. Clearly the evidence indicated that council in this instance cannot make any such stipulation. In fact it was an arrangement which occurred between the carers and clients. And that could occur outside. There was no necessity for it to occur within the clients own homes.

The next test as part of a control test is - can council control when the work is to be performed?

Now we saw that there ... an average of 20 hours over a fortnight in terms of subsidised hours could be reimbursed, but as to when those hours are performed, council had no control whatsoever as to that aspect.

The third aspect of the control test is the designation of the actual work. Does the council have the right to designate the actual work? It's clear I would submit, Mr President, that council, apart from stipulating the broad parameters in terms of the government guidelines in

MR FITZGERALD: that it should be personal care rather than domestic care, and I think that the secondary aspect of the application where - if it does get to that - Mr O'Brien will soundly fail.

It can do no more than that, but it cannot specify the actual job to be done or the actual services to be provided by the carer with the client or to the client.

PRESIDENT: Then could a client summarily dismiss a carer?

MR FITZGERALD: I understand not. That would need to be referred to the committee access group.

MS : Yes they can.

MR FITZGERALD: Can it?

MS : They can, yes.

MR TARGETT: We can only deregister.

MR : Is that right?

MR FITZGERALD: Yes, I have ... sorry, some contradictory instructions that there is a power there, there is for the client to summarily dismiss.

In terms of registration, which is the council's role, that would occur after I suggest discussion with the Community Access Committee.

PRESIDENT: Registration as a carer?

MR FITZGERALD: Registration as a carer, yes.

PRESIDENT: Is that simply a local requirement or is it a statutory requirement?

MR FITZGERALD: Excuse me for a moment. It's a local requirement, there's no statutory requirement on it.

PRESIDENT: So it really doesn't mean that much.

MS : No.

22.06.89

PRESIDENT - FITZGERALD - TARGETT

MR FITZGERALD: No.

PRESIDENT: Registration for say a ...

MR FITZGERALD: Sure.

PRESIDENT: I mean our.... I don't ...

MR FITZGERALD: - No, not to a great extent.

PRESIDENT: ... mean to be offensive about that. It probably means a great deal to those on the receiving end.

MR FITZGERALD: Certainly.

Evidence was quite clearly given that council in terms of the velocity of the scheme should not and cannot exercise day-to-day supervision as to what work should be done and how and when the work is to be performed.

And the final test which I've already made submissions in respect to is the manner in which the work is to be carried out. Council of course doesn't exercise any control in that respect.

I'll now produce an exhibit which is an exhibit from a well-known text relating to the law of employment and it's titled 'The Law of Employment' by well-known authors James Macken, G.J. McCarry and Caroline Sappideen.

MR FITZGERALD: ... second edition. And if I could, I think maybe that some of my ... in answering your questions, I may have got some of the ... mislaid some of the exhibits. But if you could just bear with me for one moment.

PRESIDENT: You will of course tender copies of the ...

MR FITZGERALD: Oh yes. That's what I am trying to find at the moment.

PRESIDENT: ... of the volume itself.

MR FITZGERALD: It may be wise just to go off record just for a moment if I could, just while I try to find them.

...

PRESIDENT: We are back on record.

MR FITZGERALD: Thank you. Thanks for that. I am sorry, I apologise for ...

PRESIDENT: This will be Exhibit E.

MR FITZGERALD: If the Commission pleases. As I indicated, it is an extract ... it is a number of pages from the text which I quoted. If I could quote - and I will be coming back to, in the middle of the page where Lord Denning is quoted. I will be coming back to that in respect to the organisation test. That's a case of *Stevenson Jordan and Harrison Ltd v. McDonald and Evans*. But I would like to quote the second last paragraph on the page:

"When a contract of service is looked at broadly it will always be seen to contain three elements and the obligation of the servant to obey the directions of his master will be found to lie at the core of all three. It is this obligation to obey orders which usually provides the strongest evidence that there exists a sufficient

MR FITZGERALD:

degree of control in the master to constitute the relationship of master and servant at law".

And further, if I could quote Kitto J. in the case of Attorney-General for NSW v. Perpetual Trustee Co. Ltd and Ors:

"It will be seen that three elements are involved: First, the relationship must entail, on the ..."

PRESIDENT:

Excuse me ... on page what?

MR FITZGERALD:

Oh, I am sorry, I have just continued quoting, on page 10.

PRESIDENT:

Oh, very, well, yes, thank you.

MR FITZGERALD:

"It will be seen that three elements are involved: First, the relationship must entail, on the part of the servant, obedience to orders; secondly, the obedience to orders that is required is obedience to orders in doing work; and thirdly, the doing of the work must be for the benefit of the master, that is, it must relate to his own affairs."

Now, I mentioned that earlier. Certainly, in my submission, the benefit to the council, in terms of 'his own affairs' ... certainly there is some benefit in providing services in terms of the overall banner of community services. However the actual benefit obviously accrues to the client in this instance.

If I could quote further, a few more lines down - I think it is the eleventh line down:

"As to the second element, that obedience entailed must be obedience to orders in doing work, the point which

MR FITZGERALD:

is vital is that the master's authority must extend both to ordering that the work shall be done and to directing how it shall be done."

Now, quite clearly, the evidence in the instant case indicates that there is no power in council to exercise that form of control.

PRESIDENT:

That's a rather doubtful test though, isn't it, because I could set up business as a consulting engineer, perhaps, and employ professional engineers. But not being an engineer myself, I couldn't tell them how to do the work, could I?

MR FITZGERALD:

That aspect is well and truly ...

PRESIDENT:

It wouldn't change... alter the fact that I was the employer.

MR FITZGERALD:

No ... that has certainly been considered by the courts. What the courts say in regard to that is that if the ultimate authority rests in you as the employer, then you have the right to control. Whether you have the expertise to be able to direct the day to day works is irrelevant.

There are a couple of cases - I think it is one regarding a high wire performer, I think, which ... not too many people have that degree of expertise. But nevertheless the circus owner in that instance had the authority ... the ultimate authority rested with him.

PRESIDENT:

I think circus is a good analogy.

MR FITZGERALD:

I continue quoting down in Humberstone's case, which is towards ... you have got that, in the middle of the page?

PRESIDENT:

Yes.

MR FITZGERALD:

Five lines down where Dixon J. - and I quote him:

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but [and this is the point I am making] whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

I return now to, again on this same point quoting Macken and McCarry. On page 12, the second paragraph, four lines into the second paragraph:

"... in such a case as being 'whether ultimate authority over the man in the performance of his work resided in the employer' and 'not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision'."

And further, at the bottom of page 12, and I quote:

"They are very important because it is only by making a balanced evaluation of all the incidents of a relationship that one can determine whether there is sufficient quality and quantity of control in one party over another to indicate the existence of an employment relationship. 'The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under

MR FITZGERALD:

which payment of the reward may be withheld, all these bear on the solution of the question'."

So quite clearly it is broadened there, and I believe in many ways, relates to the instant circumstances. Council just simply does not have the right of control within the control test enunciated within the text of this authority.

I also would like to quote ...

PRESIDENT:

If someone doesn't perform satisfactorily, or doesn't complete the number of hours (to use your term, if you like) contracted for, or indeed does: does the client have to initial the time sheet, because if the time sheets are used, who verifies and vouches for the payment?

MR FITZGERALD:

Well, the vouchers is verified by the client in terms of the hours which have been performed, yes. It is submitted by the carer as to the number of hours work performed, and that would be verified by the client.

PRESIDENT:

And payment is made then on that basis?

MR FITZGERALD:

Yes.

MR FITZGERALD:

I, unfortunately, don't have an exhibit in this respect but if I can quote from another case which I think is a circus case, from memory, and it's a case titled, Zuijs v Wirth Brothers Proprietary Limited and its contained in (1959) 93 Commonwealth Law Reports at 561 and, again, it was Chief Justice Dixon, Justices Williams, Webb and Taylor in a joint judgment said:

"What matters is lawful authority to command so far as there is scope for it and there must always be some room for it, if only in incidental or collateral matters".

PRESIDENT:

Would you say that again, please?

MR FITZGERALD:

If I quote again:

"What matters is lawful authority to command so far as there is scope for it and there must always be some room for it, if only in incidental or collateral matters".

Again, in the Humberstone case which is quoted further in that exhibit, that case in fact held that for a master and servant relationship to exist, the basic question is not whether there is control in fact but whether the person alleged to be the employer has the right to control the alleged employee.

So, clearly, in this instance, there is no right in council in that regard.

I'd also provide another exhibit which is a more recent case on this question and it has some similarities to the subject circumstances before you.

PRESIDENT:

Exhibit F.

22.06.89

PRESIDENT - FITZGERALD

MR FITZGERALD:

If the Commission pleases.

This is a case involving the Scout Association of Australia and the AWU. It's quoted at (1987) AILR at 380. The facts are worth reading. The ultimate judgment was that there was no overall control. In this instance there was, in my view, in terms of the instructing party, there was more instructions given than the subject circumstances.

The alleged employer, who was the Scout Association, did from time to time stipulate what duties should be performed by the alleged employees and you will see that at the second column, second paragraph, there is a letter which was quoted from the committee which says, and I quote:

"The duties you would be required to perform would include mowing, taking camp bookings, banking, liaison with the public, maintenance, cleaning and sale of camp shirts. Naturally, you would need to be available for telephone contacts on a regular basis."

There was a more detailed list of instructions which were issued and there is evidence of that at the second-last paragraph of that second column, and I quote:

"... Mr Maroney requiring the carrying out of certain work, including details such as how and where to store firewood and stores, giving directions for planting grass and trees, that the site was to be watered regularly, to give some illustrations. Apart from on site visits by the camp committee there was no direct supervision of either Maroney or his wife."

So, it has some remarkable

22.06.89

FITZGERALD

MR FITZGERALD:

resemblances in that the Scout Association was the overall body involved in the relationship. In this instance, of course, we have an additional party being the client, the council is one stage removed.

But in this instance, quite clearly, the element of control was considered by the Industrial Commission, Justice Watson, and I quote from his judgment:

"His Honour said that from an overall consideration of the evidence, he was satisfied that the intention to be derived from the initiating correspondence was that no employment as such was created with the association as the employer and the partnership as employees. What was being contracted for was the provision of services by the husband and wife who were also planning to operate, substantially for their own benefit, a kiosk and caravan hiring service as added remuneration in addition to commission on hirings and cleaning fees."

What I say in that respect is in respect to the taxation test which you mentioned before, much of the services provided in this instance were personal services but nevertheless the commission found that there was no employment relationship.

If I go further, at the second page in column 3, towards the end of the second paragraph:

"As to the control, the husband and wife were being paid to produce results in the achieving of which they were not directly supervised. No right to supervise was asserted as to times of performance, actual

MR FITZGERALD:

performance or allocation of function."

And I quote from a few lines down further:

"The relationship created by a contract for services also necessarily required some direction and some control over what was required to be done or the result to be achieved. It did not follow that the relationship of employer and employee was thereby created."

And it quotes some well known cases and particularly the Yellow Cabs case, which I utilised in proceedings before Commissioner King in respect to the Public Vehicles Award.

I can draw some similarities in terms of the council being involved in the personal care service in that there was obviously a right for council to direct what sort of services could be provided within the guidelines but as to directing the day-to-day tasks, that was not with council.

The same exists with the Scout Association of Australia in this instance.

I'll just finalise the judgment:

"This was not a case where the necessary degree and extent of the right to control existed so as to establish an employment relationship".

One of the other tests utilised by the courts is what ... as I indicated in my earlier submission, is what is called the organisation test and that test was ... and unfortunately, because of limited resources in terms of precedents, I was unable to obtain the exact passage from Lord Denning but it was in the case of Stevenson,

MR FITZGERALD:

Jordan and Harrison v. McDonald and
Evans, which is quoted at page 10 of
Exhibit E.

If I can quote Lord Denning in
respect to the organisation test as
follows:

22.06.89

FITZGERALD

186

MR FITZGERALD:

One feature which seems to run through the instances is that under a contract of service a man is employed as part of a business, whereas under a contract for services his work, although done for the business, is not integrated into it but only an accessory to it".

That test was later set by Lord Denning to be dependent upon a person being part and parcel to the organisation.

Clearly in this instance the parties were not party ... the carers particularly were not part of the organisation in the terms of being treated as normal council employees. But there's no intention on the part of council to treat carers as such.

For all those reasons, Mr President, I would urge the Commission, in terms of the Commission's jurisdiction, to refrain from further hearing this matter pursuant to section 19 which gives the Commission the jurisdiction to proceed.

If, of course, the Commission is not favourable to that submission, then I would again reserve my rights to make submissions and produce further evidence as to the substantive matter, if in fact it does proceed that far.

I conclude at that point.

PRESIDENT:

Thank you.

MR FITZGERALD:

If the Commission pleases.

PRESIDENT:

Yes. Thank you, Mr Fitzgerald.

Mr O'Brien?

MR O'BRIEN:

Mr President, we say that the Commission has jurisdiction and that the people in question are employees. To establish that it's

22.06.89

PRESIDENT - FITZGERALD - O'BRIEN

MR O'BRIEN: our intention to call evidence - I have two witnesses waiting outside.

I don't propose to present any lengthy opening but rather argue the matter in the way that Mr Fitzgerald has.

In summary, our position is that the people are employees, which is the subject of Mr Fitzgerald's application. So I would first seek to call Ms Helen Bennett.

Ms Helen Elizabeth BENNETT sworn

PRESIDENT: Please be seated.

Yes, Mr O'Brien?

MR O'BRIEN: Could you tell the Commission who is your employer?

MS BENNETT: The Commonwealth Department of Community Services and Health.

MR O'BRIEN: And what position do you hold there?

MS BENNETT: I'm the Program Manager for Community Care and Health Advancement Section.

MR O'BRIEN: And do you know anything about a personal care scheme over which the Kingborough council has received some support from the Commonwealth?

MS BENNETT: Yes. As part of my job ... one of the areas that I manage is the Commonwealth side of the Home and Community Care Program, which is the program that funds the Kingborough Personal Care Service.

MR O'BRIEN: In relation to that funding, does the Commonwealth have a policy regarding the expenditure of Commonwealth moneys by sponsoring bodies on the provision of services?

MS BENNETT: I'm sorry, I'm not sure I understand the question.

MR O'BRIEN: When a body receives funding to provide services, is there any

MR O'BRIEN: Commonwealth policy as to how it should pay those moneys to people to perform those services?

MS BENNETT: The Commonwealth has a policy that, where applicable, award wages should be paid.

MR O'BRIEN: In relation to the particular funding which has been made available to the Kingborough council, was any research done about the availability of an appropriate award?

MS BENNETT: Preliminary to examining any applications for funding, the Commonwealth get background information to enable us to make a view on what we consider to be a reasonable amount for funding a project.

In the 1987-88 funding round, personal care was an identified priority area for funding by the Commonwealth and State departments in the program.

As we've had several expressions of interest for consideration and there was no comparable services operating in Tasmania, i.e. providing personal care using non-nursing staff, my department wrote to the Department of Labour and Industry on 5 November requesting information regarding awards and payment of penalty rates for employees working in a Home Help service.

The details of the sorts of things that we gave were: to employ carers to assist aged or disabled clients in the clients home with personal hygiene - e.g. washing, food preparation, housekeeping and generally attending to the needs of the client.

The letter said that the service would not be home nursing and it was not expected that qualified nurses would be employed.

Our letter to the Department of

MS BENNETT:

Labour and Industry also provided information on possible hours of service and the requirement to work evenings and on weekends. And specifically asked whether or not there was an award to cover employees or carers who would be providing such a service and would the employees be entitled to penalty rates and, if so, what conditions would apply to the payment of penalty rates.

We received a response on 10 November signed by J. Evans, the chief industrial officer. This letter advised that the classification of domestic in the Miscellaneous Workers Award would be appropriate to the carers referred to. That letter included a copy of relevant clauses of the award for reference.

Now we took that information as being just background information for the purpose of assessing applications when they are received and within the context of project development work.

The information contained in those letters was passed on to several organisations.

MR O'BRIEN: Your department, I take it, received an application for funding in relation to this personal care program from Kingborough council?

MS BENNETT: The Home and Community Care Program is the Commonwealth and State cost shared program. The State Department of Health Services manages the day-to-day running of the program, and under agreed procedures, all applications for funding or expressions of interest are lodged with the State in their capacity as managers of the program, and we receive copies of the applications from the State Department of Health Services.

MR O'BRIEN: Well are you aware of the Commonwealth receiving a copy of an application from the Kingborough council?

MS BENNETT: Yes.

MR O'BRIEN: And does that application detail some sort of costing basis for its application for funds?

MS BENNETT: The original application didn't contain much detail on how costings were arrived at. A more detailed costing was provided at a later date to supplement that application.

MR O'BRIEN: Do you know who prepared or put their name to that costing?

MS BENNETT: That was signed by Rod Mitchell as Community Services ... or it was signed by somebody on behalf of Rod Mitchell for the Community Services Coordinator.

MR O'BRIEN: I see. And did that costing refer to any award or award rates?

MS BENNETT: It made mention of the Miscellaneous Workers Award.

MR O'BRIEN: Would it be fair to say that whoever prepared the costing had assessed the

MR O'BRIEN: cost of the program based upon - amongst other things - obligations which might be laid down in the Miscellaneous Workers Award?

MS BENNETT: Once again, I am not sure I understand your question, I'm sorry.

MR O'BRIEN: Oh, I'm sorry, I'll rephrase that.

The costing referred to rates in the Miscellaneous Workers Award. That costing was, I take it, a justification for the payment to the council of a certain amount of money?

MS BENNETT: Projects are not necessarily approved in the same format at applications. When assessing applications, as I said previously, we look at background information to make a decision on what we think is a reasonable amount to be funded.

I would have to say at this stage that if you wanted me to go into more details of how the amount actually funded to Kingborough council was determined, I'm not in a position to do that at this stage.

MR O'BRIEN: Well I'm not asking that question. I'm asking you this question. If the application for funds sought a certain amount of money ...

MS BENNETT: Yes.

MR O'BRIEN: ... did the costing seek to justify the request for that amount? In other words, were they saying, 'To run the program it will cost us so much, therefore, we need this amount of money'?

MS BENNETT: Yes.

MR O'BRIEN: And was that costing based, at least in part, upon obligations which were derived from the Miscellaneous Workers Award?

MS BENNETT: Yes.

MR O'BRIEN: Thank you. I've got no further questions.

PRESIDENT: Ms Bennett, ...

MS BENNETT: Yes.

PRESIDENT: ... would you, of your own knowledge, be able to tell me whether or not in approving funding for this kind of service, it would be the wish or the intention of the Commonwealth - in your case - to provide that service by means of employed labour or contract labour?

MS BENNETT: We would be of the view that we would be looking at employed labour.

PRESIDENT: Yes. Thank you.

Any cross-examination, Mr Fitzgerald?

MR FITZGERALD: Yes. Thank you.

Ms Bennett, I've just got a couple of questions for cross-examination, if I could.

In terms of the correspondence ... was there correspondence which passed between council and your department in respect to the scheme, initially?

MS BENNETT: I think, as I've already explained, the correspondence is between the organisation and the State Department of Health Services as managers ... as the day-to-day managers of the program.

MR FITZGERALD: You mentioned, I think, it was your policy ... your department's policy that where appropriate and where applicable, I think it was, award wages should be utilised.

MS BENNETT: Yes.

MR FITZGERALD: Was that made known to the Kingborough council, in this instance, by your department?

22.06.89

PRESIDENT - O'BRIEN - BENNETT - XN -
 FITZGERALD - BENNETT - XXN

MS BENNETT: Once again, it gets back to the relationship between the organisations and the Commonwealth and State under the Home and Community Care Program in that the direct project relationship is between the Department of Health Services and the council.

MR FITZGERALD: So there's no condition imposed by your department on the council that it should relate to award conditions?

MS BENNETT: I'm not in a position to comment on that at the moment because I only received the request to appear as a witness at 5 o'clock yesterday and I haven't had time to either go through my own files or confer with my State colleagues on what's in their files to be able to answer that question.

MR FITZGERALD: Well to the best of your knowledge could there have been from, either yourself or some superior officer, a requirement that council - the Kingborough council in this instance - comply with an award of some sort?

MS BENNETT: I would have to go back to whatever was in the formal contract which is sort of the crucial part of the project approval, and I have not ... at this time I would not be able to tell you what was actually in that contract.

MR FITZGERALD: Yes.

I think you indicated that the initial submission from the Kingborough commission was from Mr Mitchell, and I think you indicated also that there wasn't much detail. Did you actually receive that initial submission, or did you sight that initial submission?

MS BENNETT: Yes.

MR FITZGERALD: Right. What about the second submission, I think which you said there was more detail. Did you sight

MR FITZGERALD:

that one as well?

MS BENNETT:

Yes.

MR FITZGERALD:

Was there any direction given by yourself or a superior officer that it may need to be recosted on the basis of an award rates and conditions?

MS BENNETT:

Once again, I'd have to go back to ... I'm not in a position to comment on that at the moment. I don't remember.

MS BENNETT: ... what the process was that we went through in assessing the application and what decisions were made at the joint officers group meeting, who made the recommendations for funding to the Minister.

MR FITZGERALD: How is the Kingborough Personal Care Service different from Home Help? Could you describe that?

MS BENNETT: The Kingborough Personal Care Service is a component ... the personal care service is one of the components of a home help service under the definition of home community care service-types. Home help is defined as directed towards people in the target population and their carers who need assistance in performing household tasks and essential self-care tasks.

For example, services could include house cleaning, washing and ironing, assistance with shopping, assistance to and from banks and appointments etc., general household support such as paying bills and accounts and the final one was personal care services, e.g. bathing, toileting, dressing, feeding.

MR FITZGERALD: What is the essential difference between the two?

MS BENNETT: Well, what I'm saying is that personal care is one component of the home help service-type.

MR FITZGERALD: Is that the way the scheme operates? Wouldn't the two be very much the same then if that's case?

If you say personal care is part of the home help scheme, which I think you said?

MS BENNETT: No, I'm saying home help is the service-type under the Home Community Care Program and within that service-type is a range of tasks that can be performed.

22.06.89

FITZGERALD - BENNETT - XXN

MS BENNETT: The Kingborough Personal Care Service was directed toward one type of tasks which related to things like bathing, toileting, dressing and feeding. That was my understanding anyway.

MR FITZGERALD: I'm not really sure ... from your point of view, are there essential differences between the two schemes and if so what are they?

MS BENNETT: Well, what I'm saying is that the personal care is a subset of the home help, rather than them being two separate schemes.

MR FITZGERALD: I understood from the previous evidence that they were very much separate and distinct schemes. That's not the case, from your point of view, is it?

MS BENNETT: Well, I'm talking about a further type under the Home Community Care guidelines. I'm not sure whether or not you're talking about the actual Home Help Service which is being operated in Tasmania. I may have my wires crossed here.

MR FITZGERALD: You mentioned a letter from Mr Evans, I think, of the Department of Labour and Industry ...

MS BENNETT: Yes.

MR FITZGERALD: Did you communicate that information or give a copy of that letter to the Kingborough council in this instance?

MS BENNETT: In part of project development, yes, we did.

MR FITZGERALD: Right.

Was any direction given in respect to compliance with the Department of Labour and Industry's opinion that an award applied?

MS BENNETT: No. We supplied that to them as background information for the preparation of their application.

22.06.89

FITZGERALD - BENNETT - XXN

MR FITZGERALD: Did you supply that personally?

MS BENNETT: I can't remember now. It would have either been myself or another officer working in HACC at the time.

MR FITZGERALD: You would be aware that the rates paid basis are based on an hourly rate? Are you aware of that fact?

MS BENNETT: Yes.

MR FITZGERALD: And you're aware of the opinion given by Mr Evans of the Department of Labour and Industry saying an award applies?

MS BENNETT: Yes.

MR FITZGERALD: Why then did your department not take steps to ensure that rather than an hourly rate apply, that the award in total applied?

MS BENNETT: In the more detailed costings that were provided, from memory, that provided details of an hourly rate, casual rate and there were also calculations relating to penalty rates because the services would be operating outside of 9.00 to 5.00 and would also be operating weekends.

MR FITZGERALD: What about other conditions contained within an award of this type? Was there any check made of the Kingborough council by your department that those conditions being complied with?

MS BENNETT: As I've said, the Commonwealth is not the project managers in the HACC Program and there has been a number of meetings and discussions with Kingborough council but I just haven't got all the facts with me to be able to answer that question.

MR FITZGERALD: Well, I understand in fact, the council did not receive that information. Could you be sure that they did receive that information?

MR O'BRIEN: That's not a proper way to put that

22.06.89

FITZGERALD - BENNETT - XXN - O'BRIEN

MR O'BRIEN: question. You can put to the witness that the council didn't receive the information but you can't suggest ...

MR FITZGERALD: I'll simply put that question to the witness.

MS BENNETT: Well, are you saying that the council didn't receive the letters that we got from the Department of Labour and Industry?

MR FITZGERALD: Yes, that's what I'm saying.

MS BENNETT: Well, I disagree with it.

MR FITZGERALD: Was there any follow-up in terms of this award obligation?

MS BENNETT: In terms of where we fund projects, it is not ... well, the Commonwealth policy is that award wages should be paid. It's up to the organisation how they manage their funds and as I've said, we're not the project managers in this instance to do that follow-up.

MR FITZGERALD: You said, where appropriate. What does that mean from the department's point of view? I think, 'awards should apply where appropriate'.

MS BENNETT: Where there are appropriate awards. Some of the services that we fund do not have appropriate awards.

MR FITZGERALD: Does the Commonwealth consider carers in this instance to be in the position of employees? Have you considered that aspect?

MS BENNETT: Yes, and once again, I'd have to say that I'm not in a position to fully comment on that because I do know that we have had correspondence with the State Department of Health Services on this issue.

MR FITZGERALD: What about the question of, say, family day carers? Are you involved?

MS BENNETT: No.

22.06.89

O'BRIEN - FITZGERALD - BENNETT - XXN

MR FITZGERALD: Did you and Mr Kline ... is Mr Kline of your office?

MS BENNETT: Yes.

MR FITZGERALD: Did you, on some occasions, visit Mr Mitchell at Kingborough and you requested that the application be recosted in accordance with the award?

MS BENNETT: We would have had several visits to Mr Mitchell to discuss the application. The actual contents of that discussion ... once again, we're talking about December/January '87 and '88. I couldn't tell you ...

MR FITZGERALD: You can't recall. But it's a fairly significant point though. If you were considering the council's submissions on the scheme wouldn't this have stuck in your memory in terms of whether there was a requirement to recost on the basis of an award?

MR FITZGERALD: Did you make some direction in that regard?

MS BENNETT: Well I can't tell you whether or not we made a direction with regards to that. I can say that the more detailed costings to supplement the original application came in on 4 January as against the application coming in on 2 December and that we would have been having meetings during that time.

MR FITZGERALD: Is Mr Kline the husband of Ms Shelley, an organiser for the FMWU?

MR O'BRIEN: I object, unless Mr Fitzgerald can establish some sort of relevance and time.

PRESIDENT: Yes. I mean, you must have some purpose in asking that kind of question ...

MR FITZGERALD: Well ...

PRESIDENT: ... or an implication.

MR FITZGERALD: Yes, I have. I will let it rest at this time though.

No, I have no further questions, thank you.

PRESIDENT: Re-examination?

MR O'BRIEN: No re-examination. I ask the witness be excused.

PRESIDENT: You're excused, with the Commission's thanks.

MS BENNETT: Thank you.

PRESIDENT; You have another witness, Mr ...

MR O'BRIEN: Yes. I'm in your hands, whether you're looking to adjourn at 12.30 or ...

PRESIDENT: Well I'll go a little ... if we can complete the examination of your second witness before 1 o'clock, then so be it.

22.06.89

PRESIDENT - FITZGERALD - BENNETT -
XXN - O'BRIEN - FITZGERALD

PRESIDENT: Will it be a lengthy examination on your part?

MR O'BRIEN: Well I'm not sure. Examination, cross-examination might take some time. Either way, I'm happy to go now or adjourn and come back early. So I'm in your hands - you make a decision.

PRESIDENT: I was with you until the last bit when you said 'come back early'.

MR O'BRIEN: Yes. Look I'll bring the witness in now, if you wish, or later.

PRESIDENT: My concern is that out of fairness to both sides, if she gives her evidence-in-chief and we adjourn for lunch, it does tend to give more time to people who may wish to cross-examine.

What do you think, Mr Fitzgerald? Do you think we should ...

MR FITZGERALD: I think the point is well made. From a fairness point of view, it may be fairer that we adjourn now and come back later ...

PRESIDENT: Yes.

MR FITZGERALD: ... or come earlier. Is that at all possible?

MR O'BRIEN: Yes. Come back earlier would be my preference.

PRESIDENT: Well I think that's fair enough too. If we adjourn now ... it's now 12.30, would 2 o'clock instead of 2.15 be all right?

MR O'BRIEN: Yes, sir.

PRESIDENT: All right, Mr Fitzgerald?

MR FITZGERALD: Yes, thank you.

PRESIDENT: Yes. Very well.

...

PRESIDENT: Yes, Mr O'Brien.

MR O'BRIEN: My next witness is Ms Pauline Shelley.

Pauline SHELLEY sworn.

MR O'BRIEN: Could you tell the Commission your full name and address please?

MS SHELLEY: Pauline Catherine Shelley, 56 Lansdowne Crescent, West Hobart.

MR O'BRIEN: And what is your current employment status?

MS SHELLEY: I am employed by the Miscellaneous Workers' Union as an organiser.

MR O'BRIEN: And when did you commence that position?

MS SHELLEY: On 27 February of this year.

MR O'BRIEN: Right. Did you hold another position prior to that date?

MS SHELLEY: Yes, I did.

MR O'BRIEN: Could you tell the Commission what that was?

MS SHELLEY: I was the family day care coordinator employed by Kingborough municipal council.

MR O'BRIEN: And over what period were you so employed?

MS SHELLEY: From 18 April 1983 until 24 February 1989.

MR O'BRIEN: Have you done certain research into the personal care service which is the subject of these proceedings?

MS SHELLEY: Yes, I have.

MR O'BRIEN: And as a result of that research did you prepare a draft document entitled 'Kingborough Personal Care Service'?

MS SHELLEY: Yes I did.

22.06.89

PRESIDENT - O'BRIEN - SHELLEY - XN

MS SHELLEY: I would seek to tender a copy of that draft document.

MR FITZGERALD : Same one isn't it?

MR O'BRIEN: It's a slightly different one, Bill. That's the one marked 'Original'.

PRESIDENT: That will be Exhibit G.

MR O'BRIEN: Could the witness be shown the original please?

PRESIDENT: Yes.

MR O'BRIEN: There's a copy - a photocopy of it.

Approximately when was this document prepared?

MS SHELLEY: It would have been the week after the week ending 9 June. That won't the week beginning ... it's approximately the 12th or 13 June. No, hang on, it was the week ... I'm sorry, it was before the 9th ... it was the week that ended 9 June, so it would have been the 6th, or the 7th or 8th.

MR O'BRIEN: And was that information prepared from information ... sorry, was that document prepared from information you had ascertained from various sources?

MS SHELLEY: Yes it was.

MR O'BRIEN: What type of sources did you have for that information?

MS SHELLEY: Interviews with persons employed in the personal carers, and also from a small amount of general knowledge that I had myself, but basically as a result of interviews and meetings with personal carers.

MR O'BRIEN: Now there are various annotations, markings and ticks on that document, and alterations. Could you tell us how you came to make the alterations on the document?

22.06.89

PRESIDENT - O'BRIEN - SHELLEY - XN - FITZGERALD

MS SHELLEY:

Yes, I contacted Dianne Watson the personal care coordinator and told her that I had done this researching and prepared this document and that it was in the interests - the best interests - of everybody that the document be as accurate as possible and I would like to go through it with her in detail to confirm it ... to confirm its accuracy and to make any changes if there were any changes that were needed to be made.

MR O'BRIEN:

And what happened then?

MS SHELLEY:

Well I met with Dianne on 9 June and I took the document to the meeting. And at it I went through each paragraph really carefully. I read out loud the content paragraph by paragraph and checked back and said 'Is that accurate - is that a true picture?' And where the answer was 'yes' I marked the paragraph with a tick. Where there was an alteration to be made, I made the alteration and then I checked the alteration with Dianne. The alteration then stood. If you look down the page at the first one it is in paragraph 4. In paragraph No.4 I altered the number of persons that were currently employed from 12 to 16.

Certain insertions were made at Dianne's request. For example, the definition of young disabled persons to be inserted, so I put it in as she dictated.

MR O'BRIEN:

Right. Now are there any ... apart from the ticks in the right-hand side of the page are there any alterations to the document which were made otherwise than on the information of Ms Watson?

MS SHELLEY:

Yes. On page 2, paragraph 2, I was given the exact date. Actually, I'm not sure if I got that exact ... in that instance I'm not sure if I got that exact date from the second person I checked the document with who was Helen Bennett. But

22.06.89

O'BRIEN - SHELLEY - XN

MS SHELLEY:

certainly in paragraph 1, 2, 3 and the fourth paragraph, the statement that says 'Conditions of the grant state that where an award is in place it must be applied' - I got that from Dianne in her presence.

And also the other ... the change from \$280,000 to the crossed out amount of \$162,000 - I got the \$162,000 figure from Dianne and that was subsequently amended after talking to Helen to the precise amount.

The paragraph 8, where the insertion of 'And the money collected is credited to the personal care account through the council's internal accounting system' was also in my discussions with Dianne and the accuracy was double checked with reading it back to her.

22.06.89

O'BRIEN - SHELLEY - XN

MS SHELLEY:

On page 3, apart from the 'perscardoc' at the top, which was done by one of our office staff, the change to the third paragraph - Dianne said that advertisements hadn't been placed but in fact articles were printed in a number of places. She also said that pamphlets were letterboxed. So if you look at the arrow that refers to what is on the back of the page ...

MR O'BRIEN:

I'm sorry, the photocopies won't have what is on the back of the page for Mr Fitzgerald or myself, but it's in the original.

MS SHELLEY:

Oh, right, I'm sorry. Well anyway, I think it will be in the final document. In the final document, not the draft document, Dianne wanted it said that in addition, pamphlets were distributed containing an invitation to people to become personal carers. So that went in. And she wanted 'advertisements' changed to 'publicity'.

And, at the bottom of the page where she did want the point to be made that the tasks were more varied than those listed on the standard diary form which is given to carers. So that alteration was made also.

On page 4, apart from changing 'washing clothes' to 'washes clothes' because there was an inconsistency in tenses there, so that was just a correction of english, the 'changes light globes' was crossed out at Dianne's request.

Also, she wished the comment that they are not covered by workers compensation, to be changed to saying that the council hadn't taken out workers compensation insurance.

The insertion of the amount that 'no shift allowances are being paid' was checked with Dianne, or it was at her request. And the alteration in the mileage rate was changed from 27.88

22.06.89

O'BRIEN - SHELLEY - XN

MS SHELLEY: to 28.77 because Dianne said that's the amount that is actually paid. She said maybe it should be 27.88 but what they were paying is 28.77.

MR O'BRIEN: Can I take you back to page 3. The word, or whatever it is, that appears on the top of page 3, you said was inserted by a member of the office staff. Do you know what that is or means?

MS SHELLEY: I would say it's an abbreviation for 'personal care document'.

MR O'BRIEN: Has it got anything to do with a computer document recall system?

MS SHELLEY: Yes, it would have. That would be the code that we ... that would be the exact letters that would be needed to call it up again from the computer.

MR O'BRIEN: Subsequent to your meeting with Ms Watson, did you discuss the document (I think you have already said so) but with someone else?

MS SHELLEY: Yes, I did. I discussed the document with two people from the Department of Community Services and Health.

MR O'BRIEN: Why did you do that?

MS SHELLEY: Because, when I went through the document with Dianne, although she confirmed its accuracy with the amendments at her request, there was one point that she said she couldn't confirm because it predated her employment with the council. That was the information that is under the heading 'Funding Basis'. So because I wasn't able to confirm that with Dianne, I contacted Helen Bennett and requested a meeting.

MR O'BRIEN: Did anyone direct you to do that?

MS SHELLEY: Did anyone direct me to do that? Not to my knowledge, or not to my recollection. Anyway, I met with Helen and also Alma Quick of that

22.06.89

O'BRIEN - SHELLEY - XN

MS SHELLEY: department was present at the meeting as well. That was on 13 June.

At that meeting we went ... it went on for a considerable amount of time, and quite a number of documentation was checked back on and files and initial grants and so on, and that was how I got the precise figure of \$161,800. And that may have been when I got the precise date of 3 August from too, but I'm not sure if that was from Dianne or Helen; I really can't recall.

MR O'BRIEN: I will just take you back to the meeting with Ms Watson. Was anybody present at that meeting, apart from yourself and Ms Watson?

MS SHELLEY: Yes, Alma Quick.

MR O'BRIEN: No, Ms Watson.

MS SHELLEY: Oh, Ms Watson ... was anybody present at that ...

MR O'BRIEN: Yes.

MS SHELLEY: Yes, there was another council employee present, for not all of the meeting but about I would say a quarter of an hour, the last quarter hour or so of it.

MR O'BRIEN: Would they have been present while you were going through the process of checking the document paragraph by paragraph, or at least for part of that process?

MS SHELLEY: For part of it, yes.

MR O'BRIEN: Would it be fair to say that as a result of those two meetings, you amended a document which is now Exhibit B in these proceedings. I think, if the witness could be shown Exhibit B.

MS SHELLEY: Yes. And I also, after completing that, I made one yet further check. That was that I ... over the telephone with Helen Bennett, I read the amended funding basis section

22.06.89

O'BRIEN - SHELLEY - XN

MS SHELLEY: out to her for further confirmation of its accuracy.

MR O'BRIEN: Thank you. In the course of your research for the preparation of the document, did you become aware that there was a document used by the Personal Care Service which relates to the hours worked by personal carers?

MS SHELLEY: Yes, I did.

MR O'BRIEN: I seek to tender a document headed 'Personal Care Service. Record of Hours Worked'.

PRESIDENT: Mr O'Brien, I have another document headed ...

MR O'BRIEN: I'll come to that one.

PRESIDENT: It is just a question of identification.

MR O'BRIEN: Yes.

PRESIDENT: Right. So this one will be Exhibit H then.

MR O'BRIEN: Would it be fair to say that this is a document which has had details erased to show basically what the original form looks like?

MS SHELLEY: Yes.

MR O'BRIEN: To your knowledge, has that document been used at least up until recent time, if not currently?

MS SHELLEY: Yes, it has.

MR O'BRIEN: And I seek to tender a copy of a letter on council letterhead which is undated and has reference 'Kingborough Personal Care Service, 4 Hutchins Street'.

PRESIDENT: And that will be Exhibit I.

MR O'BRIEN: Could the witness be shown a copy, please.

That also has had personal details erased, Mr President. I understand it's a form letter.

Was that letter brought to your attention through a member of the organisation who is a personal carer?

MS SHELLEY: Yes, it was.

MR O'BRIEN: The documents will speak for themselves and I don't propose to cross-examine about that. Sorry, examine.

Whilst you were an employee of Kingborough council, did you have any discussions with Ms Watson about the Personal Care Service?

MS SHELLEY: Yes, I did.

MR O'BRIEN: Could you tell the Commission what took place or what was discussed between yourself and Ms Watson?

MS SHELLEY: Well there were a number of matters at different times. They related to such things as insurance coverage for

22.06.89

PRESIDENT - O'BRIEN - SHELLEY - XN

MS SHELLEY: the carers and also their employment status.

I made it really clear in my discussions that my view was that it needed to be ... from the very outset that it needed to be clear what the carer's employment status was, that they were employees, and that they were paid and treated accordingly.

Now that was my view and that was expressed in those discussions.

Other discussion that took place was, just advice on how to get such a service up and running because I'd started a fairly similar service, and advice and help where I could give it.

MR O'BRIEN: When you say, 'a fairly similar service', what service do you mean?

MS SHELLEY: The Family Day Care Scheme. There are similarities, but there are also differences.

MR O'BRIEN: Did Ms Watson express any view to you as to the appropriate status for the carers?

MS SHELLEY: I took it that she agreed with what I was saying, but I couldn't say that she ever firmly stated what her opinion was or what they were, in fact.

MR O'BRIEN: Did you prepare any of the documentation which was, to your knowledge, to be used for the establishment or running of the Personal Care Service?

MS SHELLEY: No. No. I gave Dianne examples of publicity brochures and newsletters and those sorts of things, but I certainly didn't prepare anything.

MR O'BRIEN: Were any documents shown to you or forms shown to you with a view to seeking your views or possible amendments to them?

22.06.89

O'BRIEN - SHELLEY - XN

MS SHELLEY: No.

MR O'BRIEN: Did any officer of council or any other employee of council seek any direct input from you as to the Personal Care Service?

MS SHELLEY: No, which surprised me actually, but, no.

MR O'BRIEN: Yes. I've no further questions at this stage.

PRESIDENT: Ms Shelley, have you got a copy of Exhibit H? It's that document.

MS SHELLEY: No. Not at the moment, no.

Thank you.

PRESIDENT: Did you have anything to do with the construction of that document?

MS SHELLEY: Nothing.

PRESIDENT: Would you have any idea who may have?

MS SHELLEY: Who may have ...?

PRESIDENT: Drawn it up in that form.

MS SHELLEY: I would assume that it was Dianne, ...

PRESIDENT: You don't really know.

MS SHELLEY: ... but I don't really know, no.

PRESIDENT: No. Have you ever seen a document filled out ... fully filled out in all the spaces, for obviously, employee's name would be on it?

MS SHELLEY: Yes, I have, yes.

PRESIDENT: Have you seen one with an employee's number on it?

MS SHELLEY: I can recall the name, but I can't recall whether or not it had a number.

PRESIDENT: Would you be aware of why that might

22.06.89

PRESIDENT - O'BRIEN - SHELLEY - XN

PRESIDENT: appear - employee number?

MS SHELLEY: No, I wouldn't know the reason, unless it related to the pay cheques or whatever. I don't know.

PRESIDENT: Well I was just wondering if all council employees have a number. You were a councillor?

MS SHELLEY: Yes.

PRESIDENT: Did you have a number.

MS SHELLEY: Oh, I don't know. I don't know.

PRESIDENT: All right.

Thank you. Yes, that's all.

Mr Fitzgerald.

MR FITZGERALD: Excuse me for just one moment. I'm just trying to locate a document, if I could.

PRESIDENT: Yes.

MR FITZGERALD: Ms Shelley, you mentioned that as part of your research you interviewed a number of carers. How many carers did you actually interview?

MS SHELLEY: I interviewed two, two carers directly. I also spoke to - and Mr O'Brien was with me - a number of carers at a meeting. Plus I addressed a number of people who were in training to be carers, one of whom either just had or was just about to commence employment.

MR FITZGERALD: You addressed, do you say, or interviewed?

MS SHELLEY: I interviewed two, but one of those on more than one occasion. And addressed a group, so there was some question and answer. And also addressed a group of people in the process of training, some of whom had had discussion because they were either about to be employed or had just recently been employed.

MR FITZGERALD: Why didn't you interview more than two?

MS SHELLEY: I interviewed those who were members of our organisation.

MR FITZGERALD: Do you think that is a fair representation of ...

MR O'BRIEN: Objection: irrelevant to the argument Mr Fitzgerald seeks to put. He is talking about whether they are employees, not whether they are union members.

MR FITZGERALD: I am not ... if I had a chance to ask the question, maybe it would have been ... you know, Mr O'Brien could have waited to see what I was going to ask, but I had no chance to ask the question.

PRESIDENT: Well, I will give you that chance.

MR FITZGERALD: Thank you very much. Are you of the view that two is not a representative sample of the duties and functions of

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN - O'BRIEN

MR FITZGERALD: the carers? Is two sufficient?

MS SHELLEY: No. I think that two would give ... two out of 16 would give a pretty accurate impression. I mean, basically they are operating with substantially the same service. I was looking at the way the service operates. They are all within the same service, all operating in the same manner. I would think that that was sufficient.

MR FITZGERALD: The meeting you spoke of, I think with Dianne Watson, was on 9 June, is that right?

MS SHELLEY: Yes.

MR FITZGERALD: Did you arrange that with council representatives, or with Ms Watson direct?

MS SHELLEY: I dealt directly with Ms Watson as the council officer who is in charge of that program.

MR FITZGERALD: Did you, in arranging that meeting, request Dianne Watson that she should not inform council of that planned meeting?

MS SHELLEY: No. That would be entirely up to her. I would assume that she probably did. But that would be entirely up to her to make that decision. I actually left that to her to decide. If she felt that it were ... whatever she felt was the best course to take was up to her.

MR FITZGERALD: You certainly did not make that specific direction that she should not contact other council ...

MS SHELLEY: Oh no, definitely not. I think that she may have ... that it may have been open enough for her to infer from that that it was her choice whether or not she would do that.

MR FITZGERALD: Relating to the document itself when you went through it with her, why didn't you provide her a copy?

22.06.89

FITZGERALD - SHELLEY - XXN

MS SHELLEY: Well, it's a draft document. I would have been perfectly happy to provide her with a copy. She didn't ask for one.

MR FITZGERALD: But in that circumstance, which represented quite a comprehensive description, wouldn't you not have felt it proper to provide a copy?

MS SHELLEY: Well, I didn't actually even think of it. I would have been quite happy to provide her with a copy if she had asked. The photocopier was just down the road. She was welcome to make a copy.

MR FITZGERALD: Can I suggest, by your actions in arranging that meeting, that you were trying to bypass council's view and just trying to get a view, a very brief view, from Dianne Watson.

MS SHELLEY: You can suggest it. I would be fairly offended if you did. But I don't think that it ...

MR FITZGERALD: Well, why did you not inform council officers?

MS SHELLEY: Ms Watson is a council officer.

MR FITZGERALD: A more senior council officer?

MS SHELLEY: Ms Watson is the person who is in charge of that program. That is the level at which I would normally deal. If I were asking for substantial information and confirmation about the detail of a program, the person I would go to would be the person who has the knowledge of that detail.

MR FITZGERALD: Can you tell me how the meeting was arranged and where it was arranged?

MS SHELLEY: Yes. I telephoned Dianne and I said that the case would be heard before the Commission, that I had prepared a document which was a description of the way the service operated, that it was in everybody's best interests if it were as accurate as possible, and

22.06.89

FITZGERALD - SHELLEY - XXN

MS SHELLEY:

also, I felt that it was ... I think I said it was 'fair to you if you see what we are going to say'.

I suggested- once again, I suggested, and it was up to Dianne to say which way she wanted it to go - that rather than it being in her office, it be next door in the Family Day Care office.

MR FITZGERALD:

Why is that?

MS SHELLEY:

A number of reasons actually, one of which is that I worked in the Family Day Care system for 6 years and it was actually quite a ... a surroundings that I am actually quite fond of basically because I painted and decorated the place myself, but also because I wanted to take the opportunity to combine seeing my workmates from Family Day Care.

And I had actually left a message, which would actually be in the Family Day Care logbook, because everything is recorded there, to say that I was going to be down there seeing Dianne - I didn't anticipate that it would take as long as it would - and would stay and have lunch with the Family Day Care staff in that building.

MR FITZGERALD:

I can't understand why, in a meeting in respect to a matter like that, you wouldn't have had it at Dianne Watson's office. Surely that would have been appropriate.

MS SHELLEY:

Well, Dianne Watson's office was next door. I am fairly familiar with the atmosphere, the air, and the way that it works.

The Family Day Care house is a fairly informal place. You can sit in a sunny kitchen, have a cup of tea, it's pleasant, I know the people there, Dianne knows the people there, there's many a time we have sat around the kitchen having cups of tea and discussions. It just, to me, seems a reasonable way, a reasonable suggestion.

MS SHELLEY: Once again, it was up to Dianne - I said, 'Would you prefer it to be in your office? Or we could do it in the Family Day Care office if you wished, and I could stay and have lunch with the Family Day Care people'.

MR FITZGERALD: How slowly and deliberately would you have gone through the document? Would you have gone through it clause by clause ...

MS SHELLEY: - Yes.

MR FITZGERALD: ... and allowed sufficient time?

MS SHELLEY: Yes. It took an hour and a half, which is why I wasn't able to have lunch with the persons that I ... the people that I intended to have lunch with ... I keep talking like an award.

MR FITZGERALD: Referring to the corrections which you made, did you give Dianne Watson an opportunity to vet those corrections?

MS SHELLEY: Yes, in fact a lot of them were in fact in the wording that she suggested.

MR FITZGERALD: Yet you ... did you supply final copy displaying those corrections?

MS SHELLEY: No.

MR FITZGERALD: Why not?

MS SHELLEY: Well I wasn't ...

MR FITZGERALD: You said at the point it was in the best interest of everyone that the document be as correct as possible. Surely you would have supplied a copy to indicate those corrections.

MS SHELLEY: Well a copy ... neither a copy of the draft nor the final were requested at any time. If they'd been requested, then after discussion I guess with other officers of our organisation would have been supplied with

MR FITZGERALD: Sure. You don't think there's an obligation to supply that to her do you?

MS SHELLEY: Not if she hasn't asked for it.

MR FITZGERALD: Okay. Go back to that other question I asked you. You can swear ... affirming on oath that you at no time asked Dianne Watson that she should not inform council of that planned meeting?

MS SHELLEY: I'm absolutely certain that I would not have said that, right? As I said before I left it open enough so that she could decide which path she wished to follow herself.

MR FITZGERALD: Was there some similar comment then, maybe not quite as specific as that?

MS SHELLEY: No, no.

22.06.89

FITZGERALD - SHELLEY - XXN

MR FITZGERALD:

Well you talked about the similarities between family day care which you have had some experience with, and personal care. Can you elaborate on those similarities?

MS SHELLEY:

Well I suppose the basic similarity would be that it's a service that's provided by people working out there in the community within homes, albeit their own or other peoples, rather than coming into a central sort of institution to work each day. Other similarities would be that they were both sponsored by Kingborough municipal council, that they were both funded with government money, that they both employed a coordinator who directed and supervised what happened with the carers, and those sorts of ways there's similarities. The differences - I mentioned that there were differences also. The differences is that with - in this instance - the carers are directly paid by the council, whereas with family day care it's only some of it is or whatever. So there are similarities and differences.

MR FITZGERALD:

What about the philosophical base? Have you an understanding of the philosophical base of the Personal Care Scheme, and if so, could you explain it to the Commission?

MS SHELLEY:

The philosophical base of the Personal Care Scheme, as I understand it, would be that the attempt would be to keep people within the community and within their own homes where they feel at ease and comfortable and relatively secure, rather than within an institution and that the aim of the program would be to provide the supports to those people so that they could remain within their own home.

MR FITZGERALD:

What about the council's role in terms of that philosophy?

MS SHELLEY:

The council's role in the terms of

22.06.89

FITZGERALD - SHELLEY - XXN

MS SHELLEY: that philosophy? Oh well, I'm not sure what the council's role in the terms of the philosophy would be. In terms of the mechanics I'd have an idea of what the council's role would be.

MR FITZGERALD: Well what about the mechanics then?

MS SHELLEY: Well the mechanics would be that they receive the funding in order to provide the program, so their role is one of financial accountability, financial management, the appointment of the persons who were going to fulfil the role as carers, the payment of those people and to comply with all of the things that they're required to comply with by the funding body, to meet all legal requirements and to ensure that it's maintained in an accountable and responsible way.

MR FITZGERALD: Should the council, in your view, intervene in the relationship between carer and client?

MS SHELLEY: Intervene?

MR FITZGERALD: Should supervise that relationship.

MS SHELLEY: Oh yes, I would think that that's a basic part. Well what they do is they'd employ somebody who would have that role of overseeing - and I don't necessarily see it as intervention, I see it as quality control. But yes, their role is to employ somebody as a council officer who would be responsible for supervising the quality of the service.

Now if that's the philosophy thing to ensure that the service that the client receives is adequate, then I guess that's where they fit in philosophically.

MR FITZGERALD: Right. Do you see in terms of the supervisory control any major difference between the Family Day Care Scheme and the Personal Care

22.06.89

FITZGERALD - SHELLEY - XXN

MR FITZGERALD: Scheme?

MS SHELLEY: No, I don't know that there's been a major difference ...

MR O'BRIEN: I don't see any relevance in the question in any case, Mr President.

MR FITZGERALD: Well I mean it was raised in the examination sheet. I've got a right to cross-examine.

MR O'BRIEN: Well as to relevance.

PRESIDENT: Well we'll hear in due course I hope as to relevance.

MS SHELLEY: I'm sorry ... yes ... can you repeat the question please?

MR FITZGERALD: In terms of the daily supervision ...

MS SHELLEY: Mm.

MR FITZGERALD: ... is there a similarity between or are there similarities between the Family Day Care Scheme and the Personal Care Scheme?

MS SHELLEY: Yes, there would be, in that the coordinators of both schemes would draw up a list of criteria that would have to be met by providing the care in order for them to be retained as carers - a level below which they may not fall. Also in the provision of resources and support services and training and also by monitoring the standard of the care there'd be similarities.

MR FITZGERALD: When you controlled the Family Day Care Scheme, how many people did you supervise or how many people are you in charge of?

MS SHELLEY: Well it varied. The number of carers varied between 50 and 85 and the direct staff round about five. Like the direct staff as of working in the building rather than working in the community.

MR FITZGERALD: So the family day carers are regarded

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN - O'BRIEN

MR FITZGERALD: by them as employees were they?

MS SHELLEY: Well that's a matter that ... I do think that probably they are, but that's a matter of argument at this stage that hasn't yet been resolved.

MR FITZGERALD: How were they regarded? How have they been regarded?

MS SHELLEY: Well it depends on where you come from. They regard themselves as employees of the council and they regard the coordinators as their bosses. That's quite clear from all sorts of empirical and anecdotal evidence. The view of the Taxation Department was that they were self-employed because that was the only way they could collect tax revenue, given that unlike the personal carers they weren't on the council payroll, so it's difficult to get PAYE.

The carers themselves view themselves as employees and there's currently a case in which they're stating that and arguing that quite forcefully.

So it entirely depends upon where you're coming from at this stage.

MR FITZGERALD: In terms of the council actually stipulating requirements, can I suggest to you that there was far lesser extent of stipulation in the Personal Care system than there would be in the Family Day Care system. Would you agree with that?

MS SHELLEY: Well, I'm sorry, can you repeat that?

MR FITZGERALD: In terms of actual council directions and stipulations, it's far less in the Personal Care system as against Family Day Care system?

MS SHELLEY: I don't know that I can answer that because I've just recently seen a duty statement that's issued to personal carers and I would think that that is pretty much comparable with family day carers in terms of expectations.

MR FITZGERALD: How then does the council control or supervise the work of a carer?

MS SHELLEY: A personal carer?

MR FITZGERALD: A personal carer.

MS SHELLEY: Through the coordinator's role.

MR FITZGERALD: What sort of matters would you see being subject to the direction of the coordinator?

MS SHELLEY: Well, there'd be core duties, right. They would be determined by the coordinator and they are the sorts of things that would appear in the list of tasks on the daily diary.

MR FITZGERALD: It's the stipulation of the core duties only?

MS SHELLEY: The core duties is a fairly extensive list, right. So they'd be responsible for determining, basically, what the core duties were. They'd also be responsible for the allocation of clients to workers of people who are needing the care to people who are providing it. That would be the council officer's role,

22.06.89

FITZGERALD - SHELLEY - XXN

MS SHELLEY: or the coordinator's role.

Also, if things weren't working out well or there was a complaint or whatever, then the coordinator would take that client away from that particular carer and also would visit, would arrange meetings, would have regular meetings.

MR FITZGERALD: Would visit who and when?

MS SHELLEY: Well, I'm not sure exactly how it works, but I would think that, certainly, the coordinator would be visiting the clients and making sure that the quality of the care was of a sufficiently high standard.

MR FITZGERALD: You made mention in the statement prepared by you ... in fact it was Exhibit B which I think you've seen and I just quote from it at page 3:

"The carers work under the supervision of the Personal Care Coordinator".

MS SHELLEY: Mm. That's as they describe it.

MR FITZGERALD: That's what Dianne Watson has accepted, is it?

MS SHELLEY: Yes. That's what Dianne ...

MR FITZGERALD: Do you think she's had a chance ...

PRESIDENT: Let her finish, Mr Fitzgerald. I meant to pull you up before about that. You're not letting her finish.

MR FITZGERALD: I'm not intending to, but I'll certainly attempt to ...

MS SHELLEY: I would think that that's from Dianne Watson's own duty statement actually, because certainly it was in mine, or words that could be interpreted in a similar manner. I mean, it's quite clear that the coordinator's role is to supervise the quality of care, otherwise it's not really a lot of point in being there.

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN

MS SHELLEY: Yes, that was accepted by Dianne and she did have time to ... and as I say, it took an hour and a half and also that is the understanding of her role as given to me by the people that actually work as carers. That is how they perceive it.

They said that they called her the boss.

MR FITZGERALD: You keep harping back and say this took an hour and a half. Was that the precise time?

MS SHELLEY: I've said it twice. Yes, it was actually and I know that because the meeting was timed for 11.30 and I thought it would take approximately half an hour and that I'd be able to have lunch with my friends. I actually had Leo Brown's car and he needed it by 1 o'clock. I looked at my watch and said, 'I've got to get back'.

PRESIDENT: Now, you can interrupt her if you wish.

MR FITZGERALD: I'm not sure of the relevance of it.

PRESIDENT: No, I'm not either.

MS SHELLEY: Well, that's how I know it took an hour and a half. 11.30 till 1.00. I knew I had to get the car back at 1.00 and I was running late and I got it back late.

MR FITZGERALD: I'll ask the question again, given the importance of such a document, did you indicate to Dianne Watson that it would be used in these proceedings?

MS SHELLEY: Yes, she knew that.

MR FITZGERALD: Why didn't you provide her with a copy?

MS SHELLEY: I think I've answered that.

MR O'BRIEN: That's been asked, I think three times. I don't really think it

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN - O'BRIEN

MR O'BRIEN: serves any purpose.

MR FITZGERALD: I'm not happy with the answers the witness has given.

PRESIDENT: Well, she said, as I recall, that Ms Watson could have had a copy had she asked for it and ...

MR FITZGERALD: As I indicated, I'm not happy with the other answers she's been giving me, so I tried to bring her back to that question. I'm happy not to proceed on that.

PRESIDENT: Well, if you're going to get the same response, it's not going to help me or anyone else, is it?

MR FITZGERALD: Question of advice ... how, in terms of setting up the scheme ... did Dianne Watson consult you?

MS SHELLEY: No, she didn't consult me. She discussed aspects. I suppose it's consulting really. If you're using consult in the sense of seeking approval, no, that's certainly not the case. But if you're using consult in the sense of seeking advice and information and so on, well, yes, she would have consulted on that level.

MR FITZGERALD: You freely offered your advice?

MS SHELLEY: Yes, of course. Yes, I did.

MR FITZGERALD: You gave advice in respect of insurance?

MS SHELLEY: Yes, I did. Given that ... I always made it clear that it was important that the service be set up in such a way that it didn't fall into certain traps that Family Day Care has fallen into that are only now just being sorted out, that they should be employees and have workers' compensation, or really they are employees and therefore should have workers' compensation but whilst that was being sorted out it was very important that they have some sort of

22.06.89

PRESIDENT - O'BRIEN - FITZGERALD -
SHELLEY - XXN

MS SHELLEY: insurance that could act as sort of de facto workers' compensation. I told her of the nature of the policy that I'd taken out for Family Day Care.

MR FITZGERALD: Sorry, one question which I should have asked you before. You mentioned that there was ... at the meeting we spoke of earlier with Dianne Watson, there was someone else present.

MS SHELLEY: Yes.

MR FITZGERALD: Can you indicate who that was?

MS SHELLEY: Well, I could. Her name is June Walker, actually.

MR FITZGERALD: And what role does she play?

MS SHELLEY: She is Assistant Family Day Care Coordinator.

MR FITZGERALD: Did she participate in the discussion?

MS SHELLEY: No, she was sitting at the same table. It was a fairly small table.

MR FITZGERALD: So, she didn't witness what occurred?

MS SHELLEY: Well, she saw and heard. I don't know precisely what you mean by witness. I mean, she didn't witness it in any sort of formal way.

MR FITZGERALD: Did she participate in the conversation?

MS SHELLEY: Maybe just a few asides, general chitchat. I mean, she was perfectly aware of what was going on, but she wasn't involved in any discussion about the detail of the document. She was there eating her lunch, right, and having a cup of tea with us.

MR FITZGERALD: Again I'll take you to another statement and I'll just quote, again, from the Exhibit B, which is the final documentation prepared by you. And I quote:

"Whilst the coordinator instructs the carer in the tasks and duties to be performed ..."

PRESIDENT: What page, please?

MR FITZGERALD: Sorry, page 4, Mr President. It's the second paragraph.

PRESIDENT: Thank you.

MR FITZGERALD: Can you indicate to the Commission what you mean by that?

MS SHELLEY: I haven't got the final document. I've only got my first draft here.

MR FITZGERALD: Well just simply that quote:

"Whilst the ..."

MR O'BRIEN: Well could you ... there's a sentence there. It's part of a sentence.

MR FITZGERALD: Look, I'll read the whole question, if you like, the whole sentence.

"Whilst the coordinator instructs the carer in the tasks and duties to be performed the client's needs and wishes determine the full extent of the work performed."

Can you explain what that ... I was going to get to it in two parts.

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN - O'BRIEN

MS SHELLEY: Yes. That's precisely as it was dictated to me by Dianne Watson, that sentence.

MR FITZGERALD: Can you tell me what it means?

MS SHELLEY: Well is it okay if I refer to my draft notes because what I had was 'tasks performed are more varied than on that list, as actual cases indicate', right?

And Dianne wished it to be changed to 'than those listed on the standard form', and she wanted to put in:

"Whilst a coordinator instructs the carer in the tasks and duties to be performed the client's needs and wishes determine the full extent of the work performed".

Now actually Dianne and I did discuss this. I'm just trying to remember exactly ... because she said that the client has a role to play ... within the system the client has a role to play and needs differ. So whilst the carer has a basic set of tasks to perform - core duties or role or job description, or whatever you call it - there maybe things that a particular client needs that other clients don't need.

And that that can't be accounted for - and these aren't her words, they're now mine - because obviously you'd end up with a 15-page long thing. And I guess an example would be the client who has a prosthesis that needs to be strapped on. I mean, obviously you can't include all of those sorts of things. So that's my understanding of what that means.

MR FITZGERALD: The document which was presented by Mr O'Brien, and it's headed 'Document H' which I think you viewed, which is the 'Kingborough Personal Care - Record of Hours Worked'. Do you know where this document was derived from?

MS SHELLEY: No.

MR FITZGERALD: You didn't assist in its drawing?

MS SHELLEY: No.

MR FITZGERALD: If I said to you that it was derived from the Home Help services document, does that surprise you?

MS SHELLEY: Well I don't know what a Home Help services document looks like. I never seen one.

MR FITZGERALD: Are you aware whether the employee, as is indicated on this form, is given a number and is actually allocated a number?

MS SHELLEY: No, I'm not aware of that.

MR FITZGERALD: Would it surprise you if I indicated there was no number allocated to any of the personal carers?

MS SHELLEY: It wouldn't surprise me. I'd wonder why it's there, but it wouldn't surprise me. I mean, we're only dealing with 16 people, or 12 or whatever the number was.

MR FITZGERALD: When you were involved with Family Day Care, were you aware of the differences between an employee and, say, a contractor?

MS SHELLEY: Yes. I was certainly aware of that. Family Day Care, as you may or may not know, there are some places that have the view that family day carers are contracted and there are other places that have the view that they're employees. So, yes, I'm aware of the difference.

MR FITZGERALD: When ...

PRESIDENT: Was that the real thrust of ... I thought you were asking the witness if she was aware of the difference between a contractor and ...

MR FITZGERALD: No, just aware of the differences between the two at the time that she

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN

MR FITZGERALD: was with Family Day. So I'm happy with that answer, Mr President.

PRESIDENT: But I thought her answer was that there were differences of opinion within the Family Day Care. Is that your understanding of the answer, Mr Fitzgerald?

MR FITZGERALD: Well I think she also said something more than that, but I'm happy with that.

In devising this document can I suggest that someone like Dianne Watson hasn't got the expertise to determine whether the term 'employee' is the correct term or not?

MS SHELLEY: I ...

MR FITZGERALD: Is it reasonable for her to have that expertise then?

MS SHELLEY: Right. I didn't want to say something that would be I think so. There had been a lot of discussion. I mean, there had been a lot of discussion about this with Rod Mitchell and at various levels and with the Commonwealth. And when the council took this on it was a fairly hot issue, right?

And the understanding of a lot of people, including mine, at the very beginning, and the Commonwealth as I know from my discussions, were under the impression that they were going to be employees. And I think, yes, that Dianne would have that knowledge and that expertise, given the position that she was in and given the amount of discussion and the very important nature of that question.

MR FITZGERALD: Did you, when you had those initial discussions with the establishment of the service, advise Dianne on this aspect?

MS SHELLEY: I told her what my personal view was. My advice on this aspect

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN

MS SHELLEY:

wouldn't carry any weight. I told her that my personal view was that they were employees and my understanding was that they'd been funded on that basis, that they were funded according to award rates and it was important that they be employees from the very beginning, to prevent problems in the future.

But that's not advice because I was not in any position to give Dianne any direction.

MR FITZGERALD: Did you ever give any advice on how the Family Day Care contract operated?

MS SHELLEY: Well I don't believe that Family Day Care is a contract.

MR FITZGERALD: You gave no advice whatsoever in that regard to Dianne Watson?

MS SHELLEY: Yes, I did give advice to Dianne ... I'm not comfortable with the word, 'advice', but I did discuss with Dianne the way that it worked in Family Day Care and, yes, she did specifically ask me about what was the position regarding a contract in Family Day Care.

And I showed her our Family Day Care system where we do not have a formal contract and how I'd set it up, that it tended to be user friendly and easily understandable, but in no way had I drawn up a formal contract, right?

MR FITZGERALD: You didn't give her any advice in terms of how to establish ... or did you give any advice in terms of how to establish a contract in the Personal Care system?

MS SHELLEY: No.

MR FITZGERALD: Did you give her any advice in respect to the type of public risk ... public liability insurance?

MS SHELLEY: Yes.

MR FITZGERALD: If you had that view that they were employees, why did you proceed with that sort of advice.

MS SHELLEY: Well employees are also covered by that public liability insurance, are they not?

MR FITZGERALD: Yes. But this was in the absence of any workers' compensation policy.

MS SHELLEY: Why did I give her that advice?
Because actually, by that time ...
you need to sort of separate my views
from my advice.

My views were clearly that they were
employees, and that was expressed
fairly forcefully, but the actual
fact of the matter is that, that
workers' compensation had not been
taken out and I thought it imperative
- and said so, 'imperative' - that
they have some sort of insurance
cover that was going to have the same
or similar effect - all be it not
nearly as good, in fact - but would
have some effect and, yes, I
therefore said this is the sort of
policy that we've got for Family Day
Care, given that they're not covered
at present by workers' compensation.

MR FITZGERALD: I put it to you that you have
misconceived the role of council in
the Personal Care system in that your
view is coloured by your previous
involvement in the Family Day Care
system.

MS SHELLEY: Sorry? Are you putting it me that
...

MR FITZGERALD: That you're ...

MS SHELLEY: ... I have a misconception about
council's role and involvement?

MR FITZGERALD: Involvement, yes.

MS SHELLEY: Well I don't believe that it's a
misconception.

MR FITZGERALD: Is it that council had a greater
involvement in the Family Day Care
system as against Personal Care
system in your view?

MS SHELLEY: I think it has a greater involvement
in the Personal Care system
actually. We were much more
autonomous than Family Day Care than
Dianne was in Personal Care. She
worked very much more closely with
Rod Mitchell - who is head of the

MS SHELLEY: department - than I did. I'd go weeks and weeks and weeks on end without seeing him. But Dianne had a lot more contact.

MR FITZGERALD: I'm talking about the relationship between carers and the coordinators in this instance.

MS SHELLEY: Between carers and the coordinators, that Family Day Care contact was greater, is what you're saying?

MR FITZGERALD: Yes.

MS SHELLEY: I don't know. If you look at the sort of ratios I don't think that it would be. In Personal Care you've got a ratio of one coordinator to, say, 12 to 16 carers and maybe the same number of clients.

Now in Family Day Care when I first started and had been there for ... similar length of time to Dianne and I'd been ... I was the only person for quite a long time, that we were looking at something like 200 children and so, 200 parents and 40 carers and just me. So I'd say that my role there as the council officer would be less than in Personal Care.

MR FITZGERALD: Is the ratios the deciding factor, or is it the philosophy of the scheme in the terms of the council's involvement or non-involvement in the Personal Care system?

MS SHELLEY: Well I really don't understand you. I'm sorry.

MR FITZGERALD: You're saying that because you had more carers that the Personal Care system would have ...

MS SHELLEY: A great amount of contact time with the coordinator is what I'm saying.

MR FITZGERALD: Did you actually instruct Family Day carers?

MS SHELLEY: Instruct them as to what they should do?

MR FITZGERALD: Yes.

MS SHELLEY: Yes.

MR FITZGERALD: What sort of instructions ... what sort of matters were covered under your instructions?

MS SHELLEY: Well there would be guidelines. Guidelines would be issued. Well actually, we had a booklet. I devised a booklet that said, 'These are the guidelines'.

Actually, there's guidelines, expectations and rules of what carer ... as a carer is expected to have A, B, C and D, is expected to do A, B, C and D. And then there's the rules. A carer must do this and the carer must not do that. And that's in a booklet which is about 16 pages long, I think.

But there's a lot of other general information in that booklet as well as the services provided to carers when the playgroups are on, and things like that.

But that's an instruction, obviously, because people know when they apply to work as a carer that they must comply with the expectations, the guidelines and the rules and it would be exactly the same with Personal Care.

MR FITZGERALD: In terms of the clients ... I realise that the age difference is different, but is there any difference in terms of the Personal Care Scheme in that they deal with disabled people ... adults and children? Does that cause any change to the operation of the service, particularly the carer-client relationship?

MS SHELLEY: I don't think there'd be many qualitative differences. There might be quantitative ones. Well, I mean, there's the ... nought to 65 is the age for the personal care, so to some extent the ages may be similar because Family Day Care would have

MS SHELLEY: nought to 12 or nought to 16 in the cases of children with handicaps.

So as far as the supervision and overseeing - I think that's what you're still referring to - goes ...

MR FITZGERALD: Yes.

MS SHELLEY: ... I don't think that it matters whether the person is 60 or 6 months, they're still entitled to quality care, and therefore it's important that they have that supervision.

MR FITZGERALD: A couple of final questions. You mentioned, I think, you had something like 60 employees - as you saw it - under your control in the Family Day Care system and you're regarded, I think, as head of that scheme.

MS SHELLEY: Mm.

MR FITZGERALD: Would you see that Dianne is regarded in the same way by personal carers?

MS SHELLEY: Yes, as the boss.

MR FITZGERALD: Is she titled 'the boss'? Do you know if he's called 'the boss'?

MS SHELLEY: Yes. Not officially, but certainly a personal carer has said to me that that that's what they call her when they're discussing her amongst themselves.

MR FITZGERALD: I mean, you've spoken to two personal carers. What do the majority say?

MS SHELLEY: Well, when she was talking collectively, actually ... when she was talking about it she was talking about the personal carers collectively, 'we call her boss'. She is our boss.

MR FITZGERALD: Can I put it to you that the majority don't see her in that light whatsoever, quite the opposite? They see her as a coordinator and a facilitator.

MS SHELLEY: Well, you can put it to me. I know what's been told to me by the people that I've discussed it with.

MR FITZGERALD: By two employees? Those two persons?

MS SHELLEY: Yes.

MR FITZGERALD: Is that representative of 16 people?

MS SHELLEY: I think it's a fairly good sample.

MR FITZGERALD: A fairly good sample?

MS SHELLEY: Yes.

MR FITZGERALD: I don't agree with you there.

MS SHELLEY: It's an eighth. I think at the time I spoke to them there were 12. So, therefore that would be a sixth.

MR FITZGERALD: Can I put it to you that Dianne Watson could not, in any way, be called that title, boss, because it's very much against the philosophy of the scheme?

22.06.89

FITZGERALD - SHELLEY - XXN

MS SHELLEY: Well, I can assure you that that was said to me, so it may be against the philosophy of the scheme but people use terms that express easily and colloquially what her relationship is and, sure, it may be against the philosophy. Maybe it's supposed to be non-hierarchical etc. but they do, they say, my boss, my mate, whatever the term is, it's an easy shorthand way of describing the relationship. They wouldn't say, 'She's the person who coordinates our scheme under which we're all team members' or whatever.

MR FITZGERALD: Have you any idea whatsoever of what the view of the majority is, apart from those two other employees?

MR O'BRIEN: A question of irrelevance, again.

MR FITZGERALD: Well, it's a very relevant question.

MR O'BRIEN: Well, it's not relevant to the question of whether they're employees, with respect, and that's the question you're arguing.

MR FITZGERALD: Well, the carers, the majority of carers. Have you any understanding of what their view is?

MR O'BRIEN: Well, it's the same question.

PRESIDENT: Yes, I know it is.

MR FITZGERALD: I see it as very relevant.

MR O'BRIEN: I can't.

PRESIDENT: Well, even I can do maths and up to a point and we're talking about a 12.1/2% sample, to have it your way, or something larger. Now, isn't it for me to make a judgment as to whether that's ...

MR FITZGERALD: I'll leave it at that, Mr President.

MR O'BRIEN: It's relevant, yes.

MR FITZGERALD: I have no further questions. Thank you.

22.06.89

PRESIDENT - FITZGERALD - SHELLEY -
XXN - O'BRIEN

PRESIDENT: Any re-examination, Mr O'Brien?

MR O'BRIEN: Just for the sake of clarity. The hourly rates that are mentioned on page 5 of Exhibit B, do they have any relevance to the way family day carers are paid? That is wage rate \$10.50 an hour.

MS SHELLEY: No.

MR FITZGERALD: Mr President, I can't recall that being brought up in examination.

PRESIDENT: No, that was not.

MR O'BRIEN: Well, he didn't ask this point. He asked for comparisons between the family day carers, the supervision of the service and the similarity of the duties and in that sense I believe that it arose.

MR FITZGERALD: I can't recall it in that way at all. There was no reference to hourly rates at all.

MR O'BRIEN: No. You didn't ask about hourly rates, you asked about other similarities and for completeness, I believe, a further question ...

MR FITZGERALD: A long bow, Mr President, I would have to suggest.

PRESIDENT: Well, look, I'm sorry, gentlemen. You're making me very tired now because we seem to be quibbling over relatively minor matters instead of getting down to the nitty gritty of what this is all about.

I don't think the question of rates, the actual quantitative amount of money they're paid is going to help me make up my mind one way or the other, but it is not irrelevant in the sense that we already have before us some evidence not yet challenged, that the DLI, in its wisdom, have expressed a view that certain award rates should apply.

MR O'BRIEN: I'm prepared to deal with it by

22.06.89

PRESIDENT - O'BRIEN - SHELLEY - RXN - FITZGERALD

MR O'BRIEN: submission, but it was for completeness for the comparison between the services. There was suggestion that there was, as I thought, was put through the question, some general comparison.

Now, there was evidence about the question of whether the family day carers were employees, for completeness ... are there proceedings in the Australian Industrial Relations Commission where the question of whether they're employees or not is being heard or questioned or determined?

MS SHELLEY: Yes.

MR O'BRIEN: I've no further questions.

PRESIDENT: Thank you. You're excused, Ms Shelley.

MR O'BRIEN: Could I have the lectern back, please?

MR FITZGERALD: Go ahead.

PRESIDENT: I would like all people who have business before this Commission to be made aware of the fact that we are working on that problem. I apologise for the inconvenience.

MR O'BRIEN: I'm prepared to swear myself to give evidence to the effect that, firstly, I had a discussion with Mr Rod Mitchell in late 1987 about the terms and conditions of the Miscellaneous Workers Award when responding to a telephone message that asked me to call him and asked for details on the conditions in that award, insofar as it's relevant, or if Mr Fitzgerald wishes to cross-examine on that and I think there is already evidence that on a date which I've identified from my diary as 15 August, I met with Ms Watson to discuss the same matter.

PRESIDENT: What do you say, Mr Fitzgerald?

MR FITZGERALD: I don't think we'd have any problems

22.06.89

PRESIDENT - O'BRIEN - SHELLEY - RXN - FITZGERALD

MR FITZGERALD:

with Mr O'Brien putting it by submission.

PRESIDENT:

Thank you for that.

MR O'BRIEN:

I put that for completeness, so that it's not only the Commonwealth who have some interaction with the council about the award in the early days but there was interaction with my organisation about the terms and conditions of that award.

I might say that Mr Mitchell wasn't the only representative of an organisation who contacted me at that time.

MR O'BRIEN:

But I must admit I can't detail all of the names of the people who contacted me, and I gather it was in relation to applications for funding which were then being lodged.

But coming back to the substance of the matter now before the Commission, and that is the question of whether the Commission has jurisdiction to hear and determine an application pursuant to section 43 of the Act.

Section 43 of the Act gives certain power to you, Mr President, to, on the application of an organisation, declare how the award should be interpreted and you also have certain powers to vary an award, and subsection (2) of section 43 allows ...

PRESIDENT:

The Secretary for Labour.

MR O'BRIEN:

I'm sorry, I'm not looking at the amendments to the section. That's one of the problems, isn't it?

Yes. Well the amendments allow the Secretary for Labour and every organisation with members subject to the award to be heard in relation to that matter, so in relation to the question of whether the Kingborough council or the Tasmanian Confederation of Industries is before you, I think only the Confederation of Industries may be before you in these proceedings by virtue of section 43.

It was in relation to those proceedings that Mr Fitzgerald announced his preliminary point. And as I understand it, he refers to the definitions, definition of 'industrial matter' which is contained within section 3 of the Act and says that the persons in questions are not employees of Kingborough council and therefore, the Commission does not have jurisdiction to hear the matter as it is not a matter relating to an

MR O'BRIEN:

industrial matter because it doesn't pertain to the relationship between the employer and employee.

I interpose there, of course, that those stated examples of employer ... of matters pertaining to the relations of employers and employees are not the exclusive list of matters which might fall within that definition.

However, suffice to say, we would accept for the purpose of the argument that the Commission, when faced with this challenge, might satisfy itself that it was being asked to make an interpretation as to a group of employees.

It's our view, which I think I've put previously, that once the Commission is satisfied that there is an employer-employee relationship it has jurisdiction to hear the application.

It is only when the Commission is satisfied that there is no such relationship, and that by virtue of its powers under the Act it has no rights, that it may or, indeed, should refrain from hearing the matter.

Now Mr Fitzgerald, as I understand it, is saying, 'Well if they're not employees of Kingborough council, then the matter ... we must succeed'. In my submission, that cannot be the case because for Mr Fitzgerald to succeed, he must successfully argue that the Commission has no jurisdiction to hear this matter, and to do that, in my submission, he must show that there isn't any question of an employer-employee relationship existing.

Now Mr Fitzgerald, as I understand it, falls back on the terms of the application, and says, 'Unless they're employees of Kingborough

22.06.89

O'BRIEN

MR O'BRIEN:

council then the application ... the Commission has not got jurisdiction to hear the section 43 matter. It's only got jurisdiction to hear it if they're employees of Kingborough municipal council'.

Now that's a separate question. In fact, in the interpretation proceedings ... and Mr Fitzgerald has chosen this course, and that is to proceed down the course of arguing the question of whether they're employees or not first, rather than dealing with that concurrently with the substance of the matter.

Once we get to the point where the Commission is satisfied there is an employee, then the substance of the application comes into play.

Now we have asked for a declaration in relation to certain people, whom we understand to be employees of Kingborough municipal council. In the course of these preliminary proceedings or in the course of proceedings on the substance of the application, the Commission might arrive at a view that the people were not employees of Kingborough municipal council.

Now if the Commission arrived at that view, but that the people were employees, the Commission could interpret, 'Yes, the award applies to those persons, but we are not prepared to make the declaration that they're, in effect, employees of Kingborough municipal council for these reasons'. And that's the way, in my submission, this matter can be determined.

The alternative would have been to argue all matters before the Commission to make an all-embracing decision on the question of employment status, and if there was employment status, to formulate a decision as to applicability of the award to those employees.

22.06.89

O'BRIEN

MR O'BRIEN:

And I said, when Mr Fitzgerald outlined his preferred approach, that there were three ways that this matter could have proceeded. And we were aware that there was a suggestion from the council that the persons were not employees, but were contractors, and, indeed, that's contained within Exhibit B.

So we were not surprised in that regard, but we did hold the view that if the Commission could deal with that ... if the Commission wished to deal with that ... if it was the parties wishes the Commission deal with that, it could have dealt with it in a number of ways or the matter might have been dealt with elsewhere. For example, by virtue of a prosecution pursuant of section 48 of the Act.

MR O'BRIEN:

So what we say is for Mr Fitzgerald to succeed he must establish that the persons are not employees, and if the Commission is of the view that the carers are employees, then the Commission can clearly entertain or hear an application. The fact that as to one material matter contained within the application that the Commission might agree, it's open to the Commission of section 43 proceedings to say 'Well yes, we don't agree with your view that these people are employees of Kingborough municipal council, therefore we're not prepared to find as you aren't'.

But as I say that would arise once we get to the substance of the matter, and if people are employees then we ... one would expect we'll get that to substance and there's no reason why the Commission shouldn't hear the application.

So that's our view as to how the matter can be dealt with.

As to the view we have on Mr Fitzgerald's application, we say that the carers are indeed, on any objective test, employees and indeed employees of Kingborough municipal council. It is not our view that the people described as clients are employers of the carers separately in relation to each engagement.

And I think going through the evidence we say there is ample support for that proposition.

If you look at Mr Fitzgerald's exhibit - Exhibit A - the first thing that you will note is that it is a duty statement.

A duty statement is ordinarily understood to be a statement relating to the duties of an employee.

A duty statement relates to duties to be performed by employees under their

MR O'BRIEN:

contract of service.

A contract for services firstly would not normally have a duty statement - it would have specifications. And so in it's own terms Exhibit A is, prima facie, an indication that certainly as at 22 August the intent was to create an employer-employee relationship.

The fourth word in the duty statement - 'carers will be appointed' - and if you recall there was some attempt in verbal evidence to downgrade that word and any reference to the word 'appointed' appearing in this or other exhibits by Ms Watson.

But we read the first paragraph:

"Carers will be appointed by the coordinator under the supervision of the Kingborough Access Committee ..."

and there's been evidence by Ms Watson about the Kingborough Access Committee - some sort of community client organisation or their based committee which could just as easily be an appeals committee under the Public Service. In other words, someone vetting applicants for a job and deciding upon whether the person was suitable. It's certainly not inconsistent with the concept that the persons were ultimately appointed by the coordinator on behalf of the council, and not appointed by the access committee and certainly not appointed by the client.

No more could it be said that an employee of the Commonwealth is not an employee of the Commonwealth because there is some committee established within the employer's organisation to vet employment, promotion, et cetera.

And then it goes on:

MR O'BRIEN:

"... after having met the criteria established for personal carers".

And there's supposed to be an attached statement that we haven't been given the benefit of.

The first dot point in the document says:

"Carers will receive direction and supervision from the coordinator ..."

Direction and supervision from the coordinator. One could hardly want clearer terminology. And I remind the Commission that this is Mr Fitzgerald's document.

"... and/or carry out duties required at times organised through the coordinator".

Then the second dot point - quite important:

"Carers will receive task instructions from the recipients in accordance with the guidelines for the service".

Now Mr Fitzgerald, I take it, is trying to assure us that because the recipients place some role in task instruction that that puts the person beyond the control test in relation to an employer-employee relationship with the council.

But those task instructions - if you read in the definition - must be in accordance with the guidelines for the service.

Who prepare the guidelines? We're not sure. I think from the evidence of Ms Watson, in relation ... sorry, having regard to the aims of the service and the basis of funding of

MR O'BRIEN:

the service. I think that would be a fair way of putting it having regard to the evidence.

And then if we go through the duty statement we see a number of items listed - items that could be described as duties. And I won't go through each of them but there's a whole range of things that the carer might be required to do. It says:

"Carers will be required to attend to all soiled clothing, bed linen, et cetera.

Beds need to be made.

[It says] Washing is not the personal carer's duty. Some clients need frequent changing.

[It goes on] Carers will contact doctors, make appointments on behalf of the client, and use telephones on behalf of the client at request."

And then on page 2, the second dot point.

"The carer will be required to keep accurate records of types of services being provided and regularly provide these to the coordinator.

The carer will act as a liaison between the client and the coordinator and between the client and the community particularly when the client is home bound."

It talks about the possibility of having more than one client, but understandably not wanting that situation to interfere with the services intended for providing adequate backup for each individual client.

MR O'BRIEN:

Nothing inconsistent in that with the concept that the people are employees.

A list of duties - a duty statement, that is what Exhibit A is, consistent with the concept that the people are employees.

Now I know that Ms Watson attempted to play down the impact of this document, and indeed, Exhibit B.

When we come to Exhibit B we have the evidence of Ms Watson that there's a lot of problems that she has with Exhibit B.

However, we have the evidence of Ms Shelley that Exhibit B is derived from Exhibit G and follows a lengthy discussion with Ms Watson where, point by point, the document G was checked for accuracy.

And bearing in mind that in these proceedings the Commission's view is that there ought to be a set of circumstances ... that an identifiable set of circumstance is to be tested, there is nothing - notwithstanding what Mr Fitzgerald may suggest - untoward with seeking to prepare a statement, seeking to check it with a person from the other side and to bring it before the Commission so that we're in a position to table a document - as I would have sought to have done in the normal course of events had this matter proceeded in its normal way - on the basis that this is a statement of duties which we understand to accurately reflect the situation as it is.

And so, what we have is a bit of a conflict. On the one hand Pauline Shelley is adamant that she went through a lengthy process, checked off parts of the document, paragraph by paragraph, and then following ... and accepted suggested amendments to

22.06.89

O'BRIEN

MR O'BRIEN:

the document, made those amendments which are now reflected in Exhibit B.

And when Exhibit B was put to the witness, Ms Watson had all sorts of difficulties with it.

I think there are a couple of points that I would seek to make which will, I think, lead the Commission to the view that Exhibit B is to be relied upon in its unamended form.

One of those points - and I think this is significant - is that when I was asking Ms Watson to go through the document and we came to - on page 3 - the part headed, 'Appointment of Personal Carers', a check of the transcript will reveal that Ms Watson read that and immediately said, 'We didn't advertise for carers'. The Commission may recall that.

PRESIDENT:

Yes.

MR O'BRIEN:

And indeed, I pointed out to Ms Watson that that's not what the document said. I put to Ms Watson that that's what the original document might have said and she thought that that might have been the case.

If you look at page 3 of Exhibit G, indeed, the words crossed out are, 'advertisements were placed in'.

Now it's my submission that what happened is Ms Watson assumed something from her recollection with the document that she'd heard about and had gone through on 9 June and transferred that to her understanding of the document when it was put before her when the matter was last before the Commission.

It's my submission that the Commission take the view that indeed, on all of the objective evidence, what Pauline Shelley said happened, happened. That we checked

22.06.89

PRESIDENT - O'BRIEN

MR O'BRIEN:

Exhibit G, made corrections based upon an entirely proper consultation and put that before the Commission, and at that time everything in the document, which I might say is inconsistent entirely with Exhibit A and other documents but which might be seen not to be of assistance to our case, seems to be problematic.

There are some other matters that I think are able to be tested on the basis of the objective evidence.

If you go to the question of ... on page 3 of Exhibit B you may recall that I was told - in response to a question of whether there were any problems with that section - that respondents to the publicity were notified by the coordinator that training was a prerequisite for employment. Ms Watson was adamant ... adamant that that was not the case.

We look at Exhibit I. It's a letter, and if you read through it, it says:

"As you've expressed an interest in becoming a personal care assistant with the Kingborough Personal Care Service I am writing to inform you that a training course is due to commence and to invite your participation. Assistants will be selected from those who have successfully completed such training."

And it goes on to describe how they'll be equipped, when the sessions will be, that there's no fee. It goes on:

"Please note that neither this letter nor attendance at the training sessions in any way constitutes an offer of employment. However, should you wish to be considered for employment by the service,

MR O'BRIEN:

such training is seen as a necessary prerequisite.

[And asks that] For inclusion in the training program or further information please contact me not later than 28 October.

[Signed by] Dianne Watson"

1988 I should have said. I interpose there. It's obviously not '87 or '89, although there's no date there.

So when we received that evidence that training was not a prerequisite, that evidence flies in the face of the document signed by Dianne Watson.

Which do you accept, Mr President? My suggestion; you must accept Exhibit B.

It doesn't really go to a lot. It may go to credit. The thing in that letter which does count, in my submission, is the word, 'employment'. It's not stated in that letter that people who complete the training will be considered ... will be ... may be offered contracts to service clients.

MR O'BRIEN:

We go to page 4 and 5. There are two points I make about a passage on page 4 and 5 that relates to payment and working conditions of personal carers.

Firstly, if it's suggested that there's some comparison between the family day care situation and this personal care situation, there's no evidence that there is some compatibility, some similarity in approach between the two, not that it would be all that relevant, I guess.

What we do have - and it's uncontested - is a rate of pay which talks about a base rate of \$10.50 an hour and payment at some sort of penalty rates for Saturday, Sunday and public holiday work. It's an hourly rate.

If this was a fee for service contract situation why strike an hourly rate, having reference to an award which appears to me (in fact it is 18 cents less than the casual rate for day work, that is \$10.50 is 18 cents less than the casual rate for day work for a domestic under the Miscellaneous Workers Award, that is for an adult) why strike an hourly rate - reference between whatever awards - for a contract for service? Why do you pay by the hour if a person is there to service a client for a maximum of 10 hours? It stretches the credibility, frankly.

If we look at the article in the press by Nicholas Turner, Nicholas Turner got his information from somewhere. Ms Watson was at pains to say he was unreliable and that he couldn't have got that understanding from Ms Watson. But, indeed, the words 'employment' - although full-time employment may or may not have been used - are consistent with the words which appear in a number of other exhibits: Exhibit D, Exhibit I, Exhibit H, each of which was drawn up by Ms Watson.

22.06.89

O'BRIEN

MR O'BRIEN: And then we come to Exhibit D, the 'Care Assistant's Diary'.

PRESIDENT: Did Ms Watson draw up Exhibit H?

MR O'BRIEN: Yes, Ms Watson gave evidence that she drew up all documentation in relation to Personal Care Service. She answered affirmatively in relation to that question which I asked her. That was, 'Did you draw all the documents for the Personal Care Service?', and she said, 'Yes'.

You'll see that each of those documents has a code note: CSR:247, on D; CSR:245, on H; CSD:595. I understand that they're codes which are identification codes and used within Kingborough council's computerisation document record system.

So that's the objective evidence, the evidence that is not, as I understand it, contested in the sense that there's no suggestion that any of these documents are counterfeits. They're the documents prepared by Ms Watson - certainly one of them is signed by Ms Watson - which leads you to the view that employment was ... employee and employment and words of that ilk were in the mind of the coordinator.

And, indeed, a set of circumstances, a duty statement which, in my submission, can only apply to employees, and sets of duties which specifically the first of those dot points in the duty statement establish control by the carer ... sorry, of the carers by the coordinator, how can one come to the view that these people are independent contractors?

Let's deal with the question of whether ... if they have signed something, something we haven't seen, what that might mean.

I'll refer the Commission to a

MR O'BRIEN: decision reported in the Australian Industrial Law Review, 30 March 1989, so it is relatively recent. It's the Victorian Industrial Relations Commission in court session.

PRESIDENT: This will be Exhibit J.

MR O'BRIEN: I apologise for my underlining in the document. It's an occupational hazard when you see something you want to note. But I'll refer to those points anyway.

The first thing I would say is that as in this case there is no suggestion that the carer can delegate their client to another person. And there is a relationship established between the carer and the client. The carer can't ... well it's not suggested anywhere, by Mr Fitzgerald, that the carer can say, 'Well I can't go today. Flo, the next door neighbour will go and perform my contract for me'.

Indeed, the evidence given by Ms Watson is, that if someone was sick - and she said it hasn't happened yet - her evidence was that she would find someone to replace them. That's the evidence I wrote down. Her words were, 'I would find someone who can go in lieu'. That's what I wrote down.

Now if the contractor can't delegate to another person for the performance of a contract of service, it's not a contract of service. And, indeed, it was one of the factors which mitigated against a finding that the relationship reported here, in the matter of Caleca and others against an assessment by the Construction Industry Long Service Leave Board.

PRESIDENT: Did you mean not a contract of or contract for?

MR O'BRIEN: Contract for, I'm sorry. Thank you for correcting me. You understood me better than I understood myself.

22.06.89

PRESIDENT - O'BRIEN

MR O'BRIEN:

And if you read the facts - and I won't read them into the record - it was clear that Mr Caleca was employed in that sense even though he had signed a document saying that, and received payments made by the appellants to himself and his wife, as if it were a partnership. The finding was that there was, in fact, no ability by Mr La Magna to delegate his work to another.

And that was one of the factors which allowed the Deputy President to form a view that the person was, in fact, an employee.

MR O'BRIEN:

And even though that document was signed, if you look at the last full paragraph in the first column of page 95, it says:

"It was true that both Messrs Caleca and La Magna intended that Mr La Magna should not be an employee. While the intentions of parties to a contract was a relevant matter in characterising their legal relationship, it was not decisive."

And it gives an authority for that.

"Nor was the intention of the parties to make payments to Mr and Mrs La Magna decisive. Such payments did not establish a business partnership between Mr and Mrs La Magna. Even if Mr and Mrs La Magna were said to be in a partnership in the relevant period, it would be necessary to consider more matters. The question to be asked was: what was the true relationship between the appellants, who were trading in partnership, and Mr La Magna? The fact that a person who performed work was in a partnership might be a strong indicator of a principal/contractor relationship, but it could not be determinative. One would need to look at the activity of the partnership, vis-a-vis the other contractual party.

The Deputy President concluded that in reality the contract in the present matter was between the appellants and Mr La Magna. There was no basis for the assertion that the appellants contracted with both Mr and Mrs La Magna. And Mr and Mrs

MR O'BRIEN:

La Magna did not carry on business in a real or genuine sense in the assessment period. The payments made to Mr and Mrs La Magna were made merely to enable them to split the income which Mr La Magna derived as a result of his employment by the appellants."

Certainly the evidence in this matter is comparable in the sense that there is no suggestion that once a carer is contracted to service a client, that the carer can put any person that they wish with that client for the purpose of performance of a contract. In fact, the evidence is that if a carer was not able to attend that Ms Watson would provide the replacement. Implication: the carer is the person who must perform the duties. What duties? The duties contained in Exhibit A, another factor which goes to control, which goes to the bona fide relationship between the council through it's personal care coordinator and the carers.

But let's come to Mr Fitzgerald's Exhibit E. One point that I thought Mr Fitzgerald was seeking to make was that there was no direct benefit to the council as a result of the carer providing services to the client. And I understood you to be suggesting some political advantage to councillors, but that's as it may be.

In the passage on page 10-11, reporting the decision or part of the decision by Mr Justice Kitto, in the matter of the Attorney-General for New South Wales and the Perpetual Trustee Company, it is said if you go on to page 11 - and I don't think any of that passage harms our view. But coming to the third element, it's not underlined. If you start at the last part of underlining, the end of the last part of the underlining of that part of the decision, it reads:

MR O'BRIEN:

"As to the third element the statement that the doing of the work must be for the benefit of the master does not mean, of course, that the direct benefit from the work itself must necessarily accrue to the master. He may, without altering the relationship, direct his servant to do work which will benefit another."

And so frankly, the argument that the test is failed because there is no direct benefit to the council is really knocked out of the water by that passage from that decision.

But I really think that Mr Fitzgerald has tendered has tendered an exhibit which could be quite helpful in the determination of this matter.

On page 12 there's a passage which is put by the authors and not a quotation, not a full quotation, talking about Humberstone's case and it says:

"The case is not authority for any general proposition that lorry owner/drivers are independent contractors, a matter to which we will return. But it is important in that it exemplifies the application of the control test in such a case as being 'whether ultimate authority over the man in the performance of his work resided in the employer' and 'not whether in practice the work was in fact done subject to a direction and control exercise by an actual supervision'."

And what we say is that the ultimate authority, as is specified in Exhibit A, lay with the coordinator. The first dot point.

PRESIDENT: Is that consistent with Ms Watson's response to a question from me as to who would have the power to dismiss?

MR O'BRIEN: Which question? There were two responses to that question.

PRESIDENT: The response I recall was, 'The client'.

MR O'BRIEN: Well that was the second but the first answer was, indeed, that she couldn't ... and I made notes as to this response.

MR O'BRIEN: She said, 'I can't dismiss or terminate a carer, that can only be done by the Access Committee'. Now, there's two answers.

PRESIDENT: Yes, I remember that too. Or was that in relation to a dispute?

MR O'BRIEN: I beg your pardon?

PRESIDENT: Or was that in response to a question regarding settlement of disputes?

MR O'BRIEN: Well, I can't remember the precise question, but that was a response in relation to the power to dismiss and I think ...

PRESIDENT: Well, it may have been.

MR O'BRIEN: ... it arose from Mr Fitzgerald's examination.

In fact I'm pretty certain that it did. It wasn't a matter that arose under cross-examination.

So, that's consistent with the leading paragraph in Exhibit A, as to appointment:

'It'll be under the supervision of the Kingborough Access Committee".

And there's no reason to believe that termination or dismissal mightn't also be dealt with in the same way.

Now, let's not get confused with the question of whether a client no longer wishes to be attended by a particular carer and separate that from the question of whether the person is terminated or whether they're not allocated that work.

PRESIDENT: Come to think of it, Mr O'Brien, as I understand the law, according to the Acts Interpretation Act, a person who has the capacity to appoint also has the capacity to dismiss.

MR O'BRIEN: I'm indebted for that piece of

MR O'BRIEN:

knowledge.

PRESIDENT:

I was engaged in a recent matter of some prominence that ...

MR O'BRIEN:

Yes, wonder what you can pick up in the Commission.

So, I think we were dealing with Exhibit E and it's our position that insofar as any client dismisses a carer it is, in our view and our understanding of the relationship, a situation where a client might request that a carer no longer attend and properly, as any employer would do in those circumstances, particularly a sensitive circumstance, that client-carer relationship might be ended but it was a contractual relationship, a contract with the council which was alluded to but we've never seen. How could the client terminate that contract or relationship?

If these people are contracting and I don't understand Mr Fitzgerald, what he's saying, that there's an employer-employee relationship with the clients, nor do I understand him to have said that there is a contractual relationship that is a fee for service relationship with the client.

What I understood him to be saying in his submissions was that there was a contract for services between the council, as an agent for the funding bodies, and the carers but things have been muddled a bit by the role of the client, I will concede, but they're not muddy to the extent that we can't establish that in reality the carers receive direction and supervision from the coordinator and that's Mr Fitzgerald's exhibit.

On the bottom of page 12 of Exhibit E, the page marked 12, there is another passage which may be useful in determining this matter. It says:

"This is not to say that

MR O'BRIEN:

particular incidents of a relationship are not important. They are very important because it is only by making a balanced evaluation of all of the incidents of a relationship that one can determine whether there is a sufficient quality and quantity of control in one party over another to indicate the existence of an employment relationship, the nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question."

- And we go to that little quotation which comes from an English case, Barnes v Dawson (1962):

"The nature of the task undertaken as subject to direction and supervision in accordance with the guidelines of the service."

The freedom of action given insofar as the relationship between the council and the carer within the confines of the guidelines for the service.

The magnitude of the contract amount, the contract amount is an hourly rate with penalties for weekends. It doesn't envisage a service of providing care of up to 10 hours. It says you'll be paid by the hour. It says you'll be paid a rate which is very similar to an award rate which is prescribed for domestic work. The manner in which it is to be paid, paid weekly, as I understand the evidence in accordance with a pay report by a body which we say is the employer.

22.06.89

O'BRIEN

MR O'BRIEN:

The powers of dismissal by evidence under oath through the Access Committee. Circumstances under which payment of the reward may be withheld - none reported.

In those circumstances it is our view that the overwhelming weight of evidence points to an employer-employee relationship.

This wouldn't be the first time, I might say, that an industrial authority has been faced with a suggestion that certain people were independent contractors, nor that the courts have been faced with that question, and hence the amount of law that exists.

The position of course is that sometimes actions are taken which are designed to seek to avoid the impact of an award.

Now I think that on the evidence this matter must be said to go very close to that. One considers that we have evidence from Ms Bennett that funding for this program, or the costing provided for the funding of this program, was based upon the Miscellaneous Workers Award - evidence which has not been contradicted.

We've got a number of documents which show that whoever drew the documents - and the evidence appears to be that it was Ms Watson - was drawing them in relation to employment and employees.

We've got a statement that I make which has not been contradicted that the union was contacted in relation to the appropriate rates and conditions which apply to the work in question.

We've got some information that the Department of Labour and Industry has communicated that information to the

22.06.89

O'BRIEN

MR O'BRIEN:

Commonwealth and that information was passed on to the recipient of the funding - the Kingborough council.

We've got the fact that as late as August - 15 August - an officer of the council contacted me and arranged a discussion - I'm sorry, prior to 15 August I was contacted - and on 15 August there was a discussion - according to my diary - of the applicability of the Miscellaneous Workers Award and certain other industrial matters.

On the whole we have a situation where up to a certain point there is very little doubt about the status of the people that what was going to happen, and somewhere along the line someone made a decision - and we don't know who - to seek to establish that these people were not employees - they're independent contractors.

Exhibit B refers to a document which we're told that they were required to sign. I've not heard anywhere that it suggested that if there is a document which has been signed that it was signed otherwise and because that people were required to sign it.

We have not seen the document and I asked in relation to the cross-examination of Ms Watson that as I would be disadvantaged as to the cross-examination if it was to be produced could it be produced then. It was not then and has not since been produced.

The Commission is not in the possession of such a document and must in the circumstances assume that it's either not helpful or it doesn't exist. And in the circumstances, the Commission can only look at the evidence before it and as I said the overwhelming weight of evidence is that there is an employment relationship, that control exists. And I say again my authority is

22.06.89

O'BRIEN

MR O'BRIEN:

Exhibit A - Mr Fitzgerald's exhibit - and to the extent that Exhibit A is sought to be watered down in relation to those aspects of it which would help our case.

I say that in view of what's happened about the evidence and particularly in view of what's happened about the exhibits B and G that the Commission would have to take the view that Exhibit A ought to stand on its face that it not be. The Commission ought to view it as the duty statement and not to seek to give it any other meaning other than that which is available on its face. And if the Commission pleases, our concluding submission is that Mr Fitzgerald would therefore fail to have established that there is not an employer-employee relationship and the Commission could then - or it didn't find - that it may proceed with the application pursuant to section 43.

If the Commission pleases.

PRESIDENT:

Yes, thank you, Mr O'Brien.

Now there is a matter - I don't right of reply ...

MR O'BRIEN:

Yes - no I understand that.

PRESIDENT:

... but I'm just mindful of something else that no-one has alluded to and it may or may not have a bearing on the eventual outcome of these proceedings.

I'm prepared to do it off record if you wish, but it might be a good idea if I do it on record.

PRESIDENT:

The source of the funding for these people, be they contractors or employees, is both Commonwealth and State Government based, as I understand it. That being the case, the question arises, are these people 'employed' or 'engaged' in private industry or is their employment, however described, paid for by a State authority?

Do you know what I'm driving at?

MR O'BRIEN:

I know what you're getting at and that wouldn't arise until we got to the section 43 matter.

PRESIDENT:

That's true. It's a question then of the relevance. If it was held that the Kingborough council, for example, was an employer or it was simply an agent of a State government, and therefore these persons were employed, for example, by a State authority then this private industry award would not apply and the whole exercise would be frustrated.

MR O'BRIEN:

Well, it would be open ... if I might intrude there, for the Commission to so find when we are dealing with the proceedings under section 43, but a State authority is defined and my understanding of the Kingborough council is that it doesn't fall within the definition of a State authority as prescribed in the Act and indeed, if everybody in receipt of Commonwealth or State funds were held.

Let's say, for example, an employer who received a Tasmanian employment program grant, which is a State funding and some sort of Commonwealth employment subsidy, might fall in a similar position and it would be our submission that it's the determining factor is whether the employer would be covered by awards made under 33 unless the employer was clearly a government department or a State authority within the definition as prescribed in the Act.

22.06.89

PRESIDENT - O'BRIEN

MR O'BRIEN: The rest are covered by 33 ...

PRESIDENT: The question would be, in a nutshell, if they were employees, would they be employees of a private employer or a State employer? Then that boils down to whether or not employees of Kingborough council are employed by a private employer.

MR O'BRIEN: Well, our submission would be when the matter arises ...

PRESIDENT: They can be one or the other.

MR O'BRIEN: Yes. Well, that they are in fact private employers, because Kingborough council represents private citizens and it's not a State authority as prescribed.

PRESIDENT: And yet under the Local Government Act I presume, without going to it, there is capacity in certain circumstances to convert them into State employers should it become a Commission.

MR O'BRIEN: If it became a State authority, yes. I'm not sure the words 'if it became a commission' are relevant.

PRESIDENT: I recall the Clarence Council became Clarence Commission and I believe there is one other. That may require specific legislation. As I say, I'm not conversant with it.

I just thought I'd raise it with you at the time because the definition of State authority is somewhat complex.

MR O'BRIEN: Yes. Except it comprises person or persons appointed by the Governor, a Minister or another State authority.

PRESIDENT: But does the Local Government Act exercise extreme control and a lot of their funding comes from Government sources?

MR O'BRIEN: I would say it would fail that case in any case.

PRESIDENT: Well, that's all right. I've raised it with you.

MR O'BRIEN: But, again, I would say that it doesn't arise in the preliminary point.

PRESIDENT: No. I've raised it anyway. Mr Fitzgerald?

MR FITZGERALD: Could I just request a 5 minute adjournment, Mr President. It would only simply be that time, no longer than that, but I can also answer the question which you raised with Mr O'Brien just a moment ago and I would agree that the Kingborough council falls within the definition of a private employer under the Act.

For that reason, I can't see ... and I think it's very much in the same vein as Marine Boards, who have a private sector award and for that reason I wouldn't wish to pursue that line.

PRESIDENT: Well, I certainly won't pursue it further if both parties are happy about that.

Five minutes. You will finish tonight, won't you?

MR FITZGERALD: Yes, very clearly.

PRESIDENT: Very well.

...

PRESIDENT:

Yes, Mr Fitzgerald.

MR FITZGERALD:

Yes. Thank you, Mr President and Mr O'Brien for that adjournment. I will be very brief in reply.

One of the major thrusts of Mr O'Brien's submission is based on the so-called duty statement and terms used in a number of exhibits which Dianne Watson prepared, and correspondence which indicate the term 'employment'.

My instructions very clearly indicate, and with the evidence, bore it out that this is a pilot program ... very much a new program.

Dianne Watson is not in a position of an expert to be able to identify the correct terms in every instance, and in retrospect, of course, with some of those exhibits the term, 'other than employee' would be used.

In terms of the control test, what is stated in terms of documentation is not the determinate factor. It's what ... the form of control or the lack of control which I indicated in my earlier submissions, is the determining factor.

And I think Mr O'Brien clearly, in quoting my exhibit ... and I can't remember the exhibit number. I didn't write it down at the time, but the one from the northern employment.

MR O'BRIEN:

'E'?

MR FITZGERALD:

No, the actual exhibit related to northern employment.

MR O'BRIEN:

E.

MR FITZGERALD:

Thank you.

On page 13 of that exhibit or the page 13 as shown, he failed to continue on the Barnes and Dawson

MR FITZGERALD: case which is mentioned in the second paragraph, and I quote from that:

"The employer has power not only to direct what work the servant is to do, but also to direct him as to the manner of doing it."

Now, clearly, in terms of the council, there is now power in the council, in Dianne Watson particularly, to direct the manner in which the work is done.

The statement A which is my original statement in the form of a duty statement was again set up very much in the early days of the program, and it was simply to give some guidelines ...

MR O'BRIEN: Is this new evidence?

MR FITZGERALD: Oh, it's in response to ...

MR O'BRIEN: It's new evidence.

MR FITZGERALD: ... Mr O'Brien's submission, I thought, quite clearly.

PRESIDENT: I think you did refer to Exhibit A.

MR O'BRIEN: I did, but I didn't ... I mean, saying what it is and isn't now rather than giving weight to it is a different thing.

PRESIDENT: I think we'll be a little tolerant with him, Mr O'Brien.

MR O'BRIEN: Right.

MR FITZGERALD: Thank you.

PRESIDENT: It's late in the day.

MR FITZGERALD: Yes, I was going to say, it's very late.

But this statement is more in the nature of a description to establish the philosophy of the scheme and it is not in the nature of a

MR FITZGERALD: prescriptive duty statement as we would know it in the employer-employee relationship.

PRESIDENT: Notwithstanding the fact that it's described as such.

MR FITZGERALD: Look, as I indicated earlier, Mr President, some terms which Dianne Watson has used ... I'm sure, in terms of the development of the program, the further it goes on other terms will be used.

And it is an unique program. It is the first time this particular program, based on personal care rather than domestic care, has been set up in Tasmania, and obviously there's a few things which have been utilised on a trial and error basis, and my instructions are that Dianne Watson indicates that she admits quite freely that a number of errors have been made.

I think we're all human in that regard and certainly industrial advocates commit more errors than most, but in this instance, in retrospect, some different terms would be utilised. But it's not the term which is the important aspect, in my view. It's the form of the relationship and the lack of control which the council has in respect to the client-carer relationship.

Clearly, the carers are not on the payroll. They're not on the payroll as they would be in terms of a normal employee. What does exist is a registration.

Now Mr O'Brien made some play about the requirement for training. The requirement for training is really only to pass the first test to indicate or to be in a position where they can be registered as carers.

The dismissal or the act of dismissal on the evidence was quite clearly an

MR FITZGERALD: act which, in terms of the client-carer relationship, was one only which the client could undertake.

MR O'BRIEN: That's not the evidence.

PRESIDENT: I ...

MR FITZGERALD: Well, look, I just ...

MR O'BRIEN: Not the evidence.

MR FITZGERALD: ...Mr O'Brien continues with it. I can recall very clearly that it was the evidence which Dianne Watson produced. Quite clearly, that the ...

MR O'BRIEN: Wasn't in transcript, I'm sure of that.

MR FITZGERALD: I mean, only the transcript will bear that out. But ...

PRESIDENT: Well I recall this question of dismissal, and I raised it with Mr O'Brien a short while ago, but proceed.

MR FITZGERALD: Thank you.

It's very difficult, particularly responding to submissions in that vein.

But the other point which was made in terms of the exhibit which Mr O'Brien produced from AILR - there is no power to delegate. Well there was evidence, again by Dianne Watson, where, in fact, carers could delegate between themselves with that personal arrangement. And that could be done without the control or guidance or instruction of her as coordinator.

So clearly there is a power to delegate, and in any event, it is only one of the tests utilised by the courts. The major test ...

PRESIDENT: I'm sorry, now it's my turn to interrupt. But I don't recall it being put in that way. I think I asked Ms Watson a question ... it

PRESIDENT: arose out of a question I asked Ms Watson yesterday, 'What would happen if someone took ill??', and I think she said, 'No-one has taken ill yet', or something to that effect. Is that what you're referring to?

MR FITZGERALD: - That's what I was referring to. I understood that there was, in fact ...

PRESIDENT: Yes. But I don't her response what that they had the power to delegate or ...

MR FITZGERALD: Well that's how I understood it, Mr President. There was personal arrangements between carers - and in this instance I think she referred to two carers - where they could, in fact, delegate that function to one of the other carers, and that's how I recalled it.

PRESIDENT: Where would they get that authority from?

MR FITZGERALD: They don't need to go to the council to get that authority, if that's what you're suggesting. It's simply a matter which they would work between themselves.

PRESIDENT: And how would the time sheet ... of course, the time sheet would be adjusted accordingly, would it?

MR FITZGERALD: Yes. Yes, it would.

If I could move onto another matter. I believe that the meeting which was referred to between Pauline Shelley and Dianne Watson was ... even though I haven't had an opportunity to contradict that evidence, but clearly in my view, the circumstances of the meeting was such that it could only be said that Dianne Watson was trying to get some token acceptance.

In a matter of importance such as this, I believe there is some obligation that Dianne Watson be provided with that copy. But a point by point oral examination, in my view, is not satisfactory and I think there's only ... what can be gleaned from that is there was some attempt to get Dianne Watson to accept statements which clearly she would not have that opportunity to contradict, and there would be much more opportunity if, in fact, a copy statement was provided.

Even though I haven't had that opportunity my instructions indicate that Pauline Shelley went through the statement very quickly, and as I indicated, on a matter of such importance and such comprehensive document like that I believe there needs to be further analysis and at least a copy provided.

In terms of the hourly rate. Yes, there is, I would concede, some element which indicates that the council recognises that services

MR FITZGERALD:

provided out of their normal hours should be remunerated at a higher rate.

There is no other way but to set some sort of hourly rate. The hourly rate was not established by reference to the Miscellaneous Workers Award despite evidence from the department indicating there was some requirement.

My instructions indicate that that advice from the Department of Labour and Industry to the Federal department was never provided to the council.

PRESIDENT:

I thought Ms Watson said that the hourly was struck having regard for parameters established by reference to at least two awards.

MR FITZGERALD:

Yes. But there was no specific ... I said there was no specific reference to the Miscellaneous Workers Award domestic classification, particularly.

PRESIDENT:

Home help was one that she referred to, and I presume that was out of a hospitals award.

MR FITZGERALD:

I can't be certain of that.

PRESIDENT:

Well I wrote the classification in.

MR FITZGERALD:

Yes.

Clearly the submissions which I made earlier today in respect to the lack of control which council could exercise which ... or council cannot exercise still holds. In terms of what duties are done and how they're done, it's very clearly the responsibility of the carer-client and under that relationship.

For those reasons, Mr President, I would urge you to uphold the threshold argument which I've put this Commission, and in doing so,

MR FITZGERALD:

find that the ... I would urge that when you're considering the question of jurisdiction ... it's clear that what has been put to you today indicates that there is no employer-employee relationship, and given that situation, the Commission has no legal jurisdiction to proceed and determine this matter.

If the Commission pleases.

PRESIDENT:

Yes. Thank you, Mr Fitzgerald.

I will, of course, reserve my decision on this and bring down my finding as soon as possible.

The parties may have been somewhat frustrated on a number of occasions today when technical objections of one kind or another were taken and overruled, but I'm afraid that I am very mindful of the fact that the Commissioner is not bound by the rules of evidence.

And whilst it might be frustrating to some parties if they think someone is taking licence, on balance, I think there's a rough kind of justice meted out to both sides.

But I'm only concerned with the facts, and if we have to go by some circuitous route sometimes to get to the nub of the situation, then so be it. I think it would be a rather sad day if we did find ourselves bridled by the strict rules of evidence as are understood and practices in the civil jurisdiction.

I don't know that I necessarily owed you that explanation, but it can be frustrating, particularly toward the end of the day if one finds someone taking licence and not being able to make the point as strong as one would like.

As I said, my decision is reserved.

HEARING CONCLUDED

22.06.89

PRESIDENT - FITZGERALD