TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4042 of 1992

IN THE MATTER OF an application by the Australian Workers' Union for interpretation, pursuant to section 43 of the Industrial Relations Act 1984, of the Clay and Mud Products Award

re clause 19 - Hours, subclause (a) Dayworkers

PRESIDENT

HOBART, 19 October 1992

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Could I have appearances, please.

MR G. COOPER: If the commission pleases, I appear on behalf of the Australian Workers' Union, Tasmanian Branch, COOPER G.

PRESIDENT: Thank you, Mr Cooper.

MR T. EDWARDS: If it please the commission, EDWARDS T.J. Appearing with me **MR M. RAYNER AND P. ARMITAGE** for the TCI.

PRESIDENT: Thank you, Mr Edwards. Mr Cooper?

MR COOPER: Mr President, with respect to this matter I think it is important to outline to the commission that this interpretation we are seeking will clarify a number of matters that in the past have led to a recent dispute.

I think it is an important thing that we are asking the commission to do this morning.

I think what would be important to start with is to tender an exhibit of the actual clause that we're seeking to have interpreted so that we all know exactly what we're on about.

PRESIDENT: Yes. Thank you. We'll mark this document AWU.1.

MR COOPER: I think what would be important to point out, too, Mr President, is that this award was varied to give effect to the structural efficiency prior to my commencement with the AWU, and since I submitted the application I have researched as best I can the intent the parties had when they did include this clause; and I must say with respect to our files I have been unable to find anything with respect to the award restructuring process.

So what I will have to do this morning is take the commission through the clauses as I see it and advise the commission of how I see that clause having application in its present form. Is that the way the procedure is?

PRESIDENT: Well, you do understand that for the purposes of interpretation, intent really only becomes an issue when it is not quite clear from the words precisely what they mean, and the commission is required to attach to those words their normally accepted meaning and to try and interpret what they would mean, given the normal usage of those words.

Intent may be introduced at a later stage if it is absolutely impossible to attach an ordinary meaning to those words.

MR COOPER: Alright. Well, having understood that, Mr President, thank you.

PRESIDENT: I hope that wasn't too rambled.

MR COOPER: No, no, that was good, because it suits me. What I will do, Mr President, the clause is clause 19, it is an hours of work clause. The subclause that we are seeking you to give advice on is subclause (a)(i).

I think it would be appropriate to read it. It is headed up, `19. HOURS'. Subclause (a) is `Dayworkers'. At (i) it reads:

> The ordinary hours of work per week shall be an average of 38 to be worked between 6.00 am and 6.00 pm on any day Monday to Friday inclusive.
>
> PROVIDED THAT the provisions of this subclause may be varied by agreement between the employer and the majority of employees in the plant or section or sections concerned.

What the provision does, Mr President, is I think it addresses three parts of hours of work, days of the week, and the span of hours. I think it does it in three parts.

Quite clearly what it is stating is, the ordinary hours of work shall be an average of 38. So the first part is that the hours shall be averaged over a 38-hour week, which would allow for people to work more in one week and less in another, provided that the average of the week will be 38.

The second part of the clause at (i) is the hours, and they are clearly between 6 o'clock in the morning and 6 pm in the evening, so that we have an average of 38 to be worked between 6 o'clock in the morning and 6 pm in the evening, and they are to be worked on any day Monday to Friday inclusive.

Now the proviso is the important part, and it does state:

> PROVIDED THAT the provisions of this subclause may be varied by agreement -

So, when we are looking at the provisions we are looking at the provisions of the subclause, and as I have just outlined the subclause is in three parts - hours of work -

PRESIDENT: Are you sure?

MR COOPER: The subclause?

PRESIDENT: What is the subclause?

MR COOPER: Well, I would assume that the subclause is (i).

PRESIDENT: Not (a) `Dayworkers'?

MR COOPER: Well, if that was the case, it would really have - it wouldn't have any difference. That wouldn't matter. If it was to be the whole clause, then it really wouldn't have any difference, because if it was, well why would we have the (ii)?

I mean, I don't disagree that it may not be, and it could very well in a liberal interpretation be applied to the whole clause. But, at (iii) it is quite clear that by agreement again. It is stated that, `By agreement between the employer ... and the majority of employees' for 12-hour shifts.

Now, if the proviso was to have application to the whole clause, then the award is unnecessarily duplicating with respect to (iii).

There is a further proviso with respect to (iii), and there is also a further proviso in (iv).

So, I would suggest that on my reading of the award, that the proviso does have application to subclause (a) but only to that part provided for in (i).

PRESIDENT: Yes. I understand what you are saying.

MR COOPER: Now, I may be wrong in that, and I will be guided by the commission with respect to any decision that you make, Mr President.

So, what I am saying is, the proviso goes to the provisions of this subclause, the provisions of the subclause goes to three parts - the average of 38 hours, how the hours are to be worked between the hours of 6.00 and 6.00, and the days they are to be worked, Monday to Friday.

So, if we have a proviso that says it will have application to the provisions of the subclause - that's providing three parts - and then the crucial part of the interpretation I believe is, `the provisions of this subclause may be varied by agreement between the employer and the majority of employees'.

And the reason I say that is important is that I have outlined to the commission that the subclause does have three provisions and those provisions only may be varied by agreement.

And I think it is important to put that into perspective, because the award was restructured and it did become a more facilitative award with respect to the restructured process, and I think this subclause demonstrates the degree of understanding the parties had when they restructured with respect to facilitative provisions and arrangements that will be made by agreement.

And I think it is important for the commission then in considering our application to look at the clause, to look at the three parts that are included in (i), and then to look further at the way those parts of that award can be varied; because the award does not say that provided agreement cannot be reached the award shall be - the hours of work or the days of work shall be changed by the employer giving such and such notice.

It doesn't state that; it doesn't state anywhere in the hours clause that that should occur.

What it clearly states is that those provisions shall be varied by agreement.

Now, the employer would therefore in order to change the hours of work or in order to change the average, or in order to change the days of work to be worked, would have to go to the employees and have a majority of employees agree before any of those provisions could be changed with respect to the current arrangements.

And I understand that would be indicative of what's happened at K&D - not that it is relevant, really - with respect to what you have to decide, Mr President, but I understand the hours of work at K&D have been similar for a number of years now.

PRESIDENT: It would help me if you explained the practical problem without going to the merit of the issue. Just explain to me what is the problem that's given rise for the need for an interpretation.

MR COOPER: If I could highlight that? Basically, as I understand it, the company and the union met, it would be 7 or 8 weeks ago, to discuss a number of proposals with respect to making the plant more efficient. One of those was to stagger the start and finish times in some sections of the plant.

In the manufacturing section the company wish to have - it starts at I think it is 7.30 to 4.15 at the moment - I understand they want to start earlier and have a split shift come in at 9 o'clock.

PRESIDENT: Outside the span -

MR COOPER: No, still within -

PRESIDENT: - that's in (a)(i)?

MR COOPER: - still within the span, still within the hours of 6.00 to 6.00, still within the hours Monday to Friday, and still within an average of 38 hours.

Now, what the people are concerned about is that the ordinary hours of work that the company normally start at 7.30 in the morning, they want to change those hours to start at different times. So you will have a split shift arrangement which will allow the company to produce for 2 or 3 hours longer per day.

So, what we were saying was, that the ordinary hours of work which is the first part of that subclause, shall be an average of 38 and they shall be worked between those hours, and the provisions of this subclause may be varied by agreement.

So, once you have got your hours set, then you come back and -

PRESIDENT: Well, is that right, or is it more to do with the actual hours that are contained in the award? I mean, surely wouldn't you have read the words `provisions of this subclause' to mean those either 38, 6.00 to 6.00, or Monday to Friday?

MR COOPER: That's quite right.

PRESIDENT: So they are the provisions, as you have already submitted.

MR COOPER: That's right.

PRESIDENT: Are they being varied?

MR COOPER: The start time is being varied.

PRESIDENT: What, but I mean, there is a 12-hour span there, 6.00 to 6.00.

MR COOPER: Yes. There's a start time in respect to the average. The average of 38 hours, right, is to be worked between 6.00 and 6.00 any day Monday to Friday, and what the company seeks to vary is how the people will actually work those 38 within the hours 6.00 to 6.00, Monday to Friday.

At the moment they work it from 7.30 to 4.15. What the company wants to do is start them earlier and later, depending on which shift they are on.

PRESIDENT: Yes, I follow that now, as to what the company is intending to do.

MR COOPER: So, what we are saying is, that any change to the ordinary hours of work shall be done by agreement. And this led us to our making the application, because we understand that if they do want to change the provisions of work they will do it by agreement, otherwise they don't have the ability under the award to do it at all.

PRESIDENT: Yes, I follow what you are putting to me.

MR COOPER: So, I don't know how much I should say. I mean, I really don't see any point in saying things just for the sake of filling up the record.

I think I have outlined that there are three parts to the provision; that it is our understanding that it is by agreement; and we are asking you to look at those provisions and advise us accordingly. If the commission pleases.

PRESIDENT: Yes. Alright, thanks, Mr Cooper. Mr Edwards?

MR EDWARDS: Thank you, Mr President. Mr President, our understanding of the provisions, the subject of this interpretation, is a little at odds with that that has been presented by the AWU.

And I might start, Mr President, by indicating that of the interpretations I have been involved with before the commission, as currently constituted, and before the previous present, this would be one of the more difficult; because the question, the actual subject of the interpretation, doesn't have a specific provision going to the question within the award itself.

The question of the establishment of start and finish times and the variation of start and finish times is one on which the award is fundamentally silent and, is to a large extent, unhelpful.

I have already indicated, Mr President, that the award makes no mention at all within its terms of the requirement to establish actual start and finish times, and instead provides a 12-hour span within which ordinary hours may be established.

The award also makes no provision for varying start/finish times once they are established, even though the award doesn't require they be established. And, therefore, as I have indicated, this is a particularly difficult question of interpretation.

In our submission, it is probably extremely important in considering this question of interpretation to go to that doctrine of interpretation which requires the consideration of the award as a whole in trying to make sense of the various parts of the award.

That doctrine, as you are fairly well familiar with, Mr President, is the doctrine of `generous construction' as it's often called, and maybe in the form of my submission I may be even overly generous at times in the way I construe things.

In our opinion -

PRESIDENT: It would be lovely to hear Mr Cooper say that about you, Mr Edwards.

MR EDWARDS: Well I am sure he probably will. It is important, in our view, Mr President, in considering this question to go to more than just subclause 19(a)(i) which is the provision that Mr Cooper has taken us to.

Going first to that provision, I don't in fact have too many quarrels with the construction placed on the words used in 19(a)(i) by Mr Cooper, with some exceptions, which I will come to.

If one goes to clause 19(a)(i), as Mr Cooper has rightly pointed out, that goes to three separate issues all relating to the definition of the ordinary hours of work; and they are that they be an average of 38; secondly, that they be between the hours of 6 am and 6 pm; and, thirdly, that they be worked on any day of the week Monday to Friday inclusive.

They are the three issues which are established fairly clearly by 19(a)(i).

Mr Cooper then takes us to the proviso, and it is at this point that I start to part company a little from the construction placed on the wording in the award by Mr Cooper.

And that provision reads:

> PROVIDED THAT the provisions of this subclause may be varied by agreement between the employer and the majority of employees in the plant or section or sections concerned.

Firstly, it would be my submission that the subclause referred to is subclause (a). It would be overly generous to restrict the use of the word subclause to 19(a)(i) but, in any event, I believe with Mr Cooper that nothing turns on the question of whether or not we consider the entirety of 19(a) or whether we consider only 19(a)(i), except that will be a submission I'll make later that goes outside of 19(a)(i).

The proviso that I have just read, Mr President, in my view must be read to mean that the provisions contained in 19(a) can only be varied by agreement.

I have already indicated, and I repeat, that nowhere in clause 19 - let alone clause 19(a) - is there established a criteria for either the establishing or varying the daily start and finish times of employees.

And I think it is important at that point to indicate that that is the real crux of the issue that has been the catalyst for this interpretation, and that is as Mr Cooper has pointed

out, the employer. In this case, it is K&D Brick Company, have an intention to vary the employees' start and finish times. And they wish to do that in the context of providing for some employees an earlier start and for others a later start, and thereby a later finish.

It is our submission that the award doesn't provide in specific terms for that action by the employer or, indeed, by anyone else.

But, we would also submit - and do so quite strongly, sir - that the proviso in 19(a)(i) does not in any way inhibit that, because there is nothing the employer is endeavouring to do in this instance which, in any way, impinges on those three issues which are identified in 19(a)(i) - they being, the 38 average, the 6.00 to 6.00, or the Monday to Friday.

The hours which the employer seeks to implement clearly fall well within the confines of those three provisions and, as such, in our view, the employer is entitled to take the action that he does.

The question at issue is how the employer may go about securing that change, not whether or not the change can, or should, occur. Bearing in mind this is a question of interpretation not merit.

In our opinion, it is appropriate to also have a look at the provisions of clause 13(a) of the award which is the contract of employment clause.

I say that, sir, on the basis and in that regard I refer you, sir, to Variation No. 4 of 1991 of the Clay and Mud Products Award which in fact varied the provisions of the contract of employment clause which as previously clause 37 - Termination of Service but is now known as clause 13(a) - Contract of Employment.

PRESIDENT: Are they the same words?

MR EDWARDS: Down to subclause (b) they are, as I understand it, Mr President.

PRESIDENT: Because I don't have - I wasn't anticipating you going to those other clauses, Mr Edwards. Do you have copies?

MR EDWARDS: Well, not with me. I could perhaps give Mr Cooper one for the moment, but -

PRESIDENT: Yes; okay.

MR EDWARDS: But I think clause 37 of the consolidated award -

PRESIDENT: Well, I have got clause 37.

MR EDWARDS: If you will just bear with me for a moment, sir, I'll find my privately printed copy.

PRESIDENT: Copyright.

MR EDWARDS: No, we typed this ourselves.

Mr President, the contract of employment clause we believe is somewhat pivotal to the question at hand, and clearly provides that the employment contract of employees covered by the terms of this award is a weekly instrument.

And I take you, sir, to clause 13(a) - well, I would if you had it -

PRESIDENT: I'll make a note of it, Mr Edwards, thank you.

MR EDWARDS: Perhaps we could adjourn for 2 minutes, Mr President, and just get a photocopy of it?

PRESIDENT: That might be the simpler way to proceed, and we've all got it that way, and it can be on record.

MR EDWARDS: If I could ask for a 2-minute adjournment just to get it photocopied?

PRESIDENT: We'll adjourn briefly.

SHORT ADJOURNMENT

PRESIDENT: Thank you, Mr Edwards. This exhibit, TCI.1.

MR EDWARDS: If it please the commission. Exhibit TCI.1, Mr President, is a photocopy of page No. 3 of Variation No. 4 of 1991 of the Clay and Mud Products Award which arises out of Matter No. T3220 of 1991, which I think from memory was the application of the 2.5% state wage case increase.

The contract of employment clause, as I was saying before the adjournment, Mr President, in my view is somewhat pivotal to the question of the variation of an employee's contract of employment which is what we submit the exercise by the employer of varying start/finish times is in reality.

Clause 13(a) - Contract of Employment, subclause (a) says:

> All employees (except casual employees) shall be engaged by the week for a minimum period of 8 weeks and may be terminated by either side by the payment or forfeiture of a weeks wages should such notice not be given.

In our submission, what that subclause establishes, Mr President, is that the employment contract brought into being through the engagement of an employee under the terms of this award is a weekly instrument, and can and is renewable on a weekly basis.

That's probably an overly strict interpretation of contract law but it is, nevertheless, clearly established in our view that an employment contract once established can be varied by the giving of a week's notice.

PRESIDENT: We are getting into deep water here, aren't we, Mr Edwards?

MR EDWARDS: I don't believe it is that deep, Mr President,. The employment contract as I have indicated has a duration established by the award of 1 week, and to vary that employment contract - which is to in fact terminate that contract - any variation to an employment contract is a variation of the existing contract, and it is then for the parties to establish a new contract which, again, would be covered by the terms of clause 13(a) inasmuch as it would be a weekly instrument.

It would therefore be our submission that an employer seeking to vary the ordinary start and finish times of an employee which are within the parameters established by clause 19, subclause (a) could do so by the giving of 1 week's notice in accordance with the provisions of clause 13(a).

That would have the effect of terminating the existing employment contract and the employer would then be making an offer of a new employment contract which the employee would obviously have the right to accept or reject.

As I have said, that is probably an overly strict way of looking at the contract of employment provisions of an award but, nevertheless, I would submit that it would clearly stand any scrutiny.

The clause enables the contract to be terminated on a weekly basis.

The important - or one of the -

PRESIDENT: Would that mean that nothing could be done within the first 8 weeks?

MR EDWARDS: That's a possible interpretation, Mr President.

PRESIDENT: Given, 13(a).

MR EDWARDS: Yes. But, in fact, someone within their first 8 weeks of employment -

PRESIDENT: Every time they are re-employed they are re-employed for 8 weeks?

MR EDWARDS: I don't know that that's necessarily the case, given the continuity of employment provisions contained elsewhere in the award, and most particularly in the annual leave clause.

For example, are we arguing, for instance, that an employee who has his ordinary hours changed as a result of the employer exercising his options under clauses 13(a) and 19 must start again for accrual purposes of annual leave.

I suspect that's not the case. There would be certain continuity of employment provisions which would come into play, and I think you and I have been down this path before in a previous interpretation. I think the Bakers Award is a prime example.

The interesting factor is the award nowhere within its terms establishes that an employer must establish a start/finish time, and it is our view that an employer providing he doesn't go beyond the parameters established by clause 19A, is entitled to organise the working hours within his establishment in the manner he best thinks suits his business.

That would - I won't go too much further into that, for obvious reasons, because it will come to the merit argument - but that would be the exercise of managerial prerogative which enables the employer to organise the hours at which he wants the work performed, providing he doesn't got beyond the parameters established by the award. That is clearly an almost unfettered right.

There would, of course, be the ability to test the exercise of that right as to merit and to test it against the criteria of harsh, unjust, or unreasonable, and whether or not the employer has acted in a proper way in exercising what is his clear right; and if the AWU sought to test the employer's exercise of that right through this tribunal, then we'd have no objection to that.

But that becomes an issue of considering the matter on its merits rather than whether or not an employer does have the right to vary the start and finish times, which we clearly argue he does have.

And we believe the question of the terminology in clause 13(a) clearly bears on the question before the commission.

One interesting factor that arises from clause 19 is the interaction of clause 19(a)(ii) with the rest of the provisions in the clause. And I pose the question, how does the employer at his discretion require employees to work up to 10 hours per day, presumably coming from the existing eight, without varying the start and finish times. It's impossible for an employee to complete 10 ordinary hours in an 8-hour period. And therefore, in our opinion and in our submission, clause 19(a)(ii) as an example, nominates that it is clearly the employer that has the discretion to require employees to change their start and finish times, because that is clearly contemplated by any change from a lesser or greater number of hours than 10 to a 10-hour day.

And that is able to be achieved at the employer's discretion. There is no requirement to consult with other employees and/or the union and in that regard can be differentiated against the provisions of 19(a)(iii) whereby the introduction of a 12-hour shift requires agreement between the employer, the union and the majority of employees.

So the provisions of clause 19(a) are a strange amalgam, as it were, of a variety of different mechanisms for changing hours of work. In our submission, 19(a)(i) when read in conjunction with the contract of employment clause places the ability to do that with the employer by the giving of the requisite one week's notice. Anything else would, in our view, be an invalid exercise of the employer's power.

19(a)(ii) enables the employer to change the daily hours of work by his own discretion without requirement to consult, and 19(a)(iii) requires consultation between three parties, that being the employer, the union and the majority of employees.

PRESIDENT: Just as an aside, Mr Edwards, how does that - explain to me how paragraph (iii) deals with shift work in the day worker subclause. Is that what (iii) - is (iii) about shift work?

MR EDWARDS: No, it's not, in my view, Mr President. It's about working 12-hour shifts with the loosest possible understanding of the word `shifts'. What it's talking about is working a 12-hour period of work or day, if you like.

PRESIDENT: Yes.

MR EDWARDS: It doesn't necessarily require the shifts to be conducted across the 24 hours of the day.

PRESIDENT: Or 7 days a week?

MR EDWARDS: I'm sorry?

PRESIDENT: Or 7 days a week.

MR EDWARDS: Or 7 days a week, necessarily. There is shift work provisions contained in subclause (c) of clause 19 which is on the next page -

PRESIDENT: Yes.

MR EDWARDS: - in the award.

PRESIDENT: Yes.

MR EDWARDS: Which has the same provision in it as the one we're now looking at which is 19(a)(iii) going to the question of the introduction of 12-hour shifts.

PRESIDENT: Yes.

MR EDWARDS: And I'd suggest without actually reading through the actual words used would be well nigh identical with the provision we're now contemplating.

PRESIDENT: Right, anyway, as I said -

MR EDWARDS: So for that reason I'd say it doesn't apply to shifts, but is dealing with the question of a 12-hour day worker period of work.

PRESIDENT: Yes. As I said, it was just an aside.

MR EDWARDS: No, that's fine. Like Mr Cooper, I don't intend to clutter up the transcript with a lengthy dissertation on this question, Mr President. In our submission the award was being short on a number of words that could have been included and perhaps should have been included. Nevertheless, clearly in our view, gives to the employer the right to vary an employment contract by the giving of a week's notice and to thereby organise the hours of work in the span stipulated in the award at his own discretion.

There arises to an employee in those circumstances certain rights and I guess on the employer certain obligations, but once they've been contemplated and the employees accept ongoing employment on the basis of the new employment contract, then those rights and obligations disappear and the employer has clearly then been able to exercise his managerial prerogative.

So in our view, providing the employer gives at least 1 week's notice and does not exceed the average of 38 hours a week, does not go outside the hours of 6 am to 6 pm and does not go outside the days of Monday to Friday inclusive, the employer has a clear, almost unfettered right to vary hours of work, that is, the start and finish times, within the meaning of the award.

I certainly agree with Mr Cooper that the 38 - the 6.00 to 6.00 on the Monday to Friday may be varied by agreement between the employer and the majority of employees affected by the change as clearly stipulated in the proviso in 19(a)(i). But that is all that that proviso goes to. It does not go to the question of the ordinary start and finish times of an employee in a day because they are not established by the terms of clause 19(a) or subclause 19(a), and thereby that proviso cannot go to that question.

I think that's consistent, Mr President, with the line of questioning you were pursuing with Mr Cooper, that the start and finish times aren't established by this subclause, and thereby that proviso can have no operation.

I guess for completeness' sake, Mr President, because there has been some fairly loose terminology used by the parties as part of the negotiations on this particular question, that I'll take you, sir, to clause 19, subclause (e), which deals with the question of split shifts, and I do this solely for completeness' sake, Mr President, that during the negotiations the organisation of work that the employer has sought to implement has been variously referred to as split shifts, and I say to the commission that the term there, split shifts, means that the one shift by the individual employee can be split into more than one part, i.e., it could be broken at some stage during its length to - into at least two periods - sorry - into no more than two periods.

What we are contemplating here is not split shifts. The shift of each employee would be a continuous thing. And I do that solely to avoid any confusion, Mr President, that employees on the plant may have that subclause (e) may have any application to this question.

There has been a lot of misunderstandings, and that's the main reason I go to that.

PRESIDENT: Yes, I'm not certain that it was appropriate or relevant, but -

MR EDWARDS: I just say for the sake of the record, Mr President.

PRESIDENT: Alright, yes.

MR EDWARDS: That we are not contemplating split shifts as subclause (e) means - indicates. You may then choose to ignore it from there on, sir.

PRESIDENT: Yes. I had -

MR EDWARDS: In fact I would suggest you do.

PRESIDENT: - I have already.

MR COOPER: That's good.

MR EDWARDS: I wouldn't want your mind to be cluttered with extraneous materials, sir.

PRESIDENT: No, I can't handle that, Mr Edwards.

MR EDWARDS: I'm sure you could. Mr President, really that is the sum total of the submission we've put to you this morning, and that is, it's not appropriate to consider clause 19 in isolation. It is an appropriate means of constructing the terminology of an award and understanding it to go beyond the instant clause and to try and understand the award as a whole, and I've deliberately tried to keep away from using terms like the interaction of the award and the common law and things like that, because I think that would get me into deeper water than I choose to be in.

So, we'd pause at that point, Mr President.

PRESIDENT: Yes, thanks - thanks, Mr Edwards. Mr Cooper?

MR COOPER: Thanks, Mr President. That was very interesting, Mr President. If I could respond to the comments made by Mr Edwards first, I think could serve some useful purpose for your benefit, if for nobody else's.

The - the use of clause 13(a) as it now is, was interesting in that Mr Edwards indicated to the commission that you must use that clause or look at that clause and it must be relevant with respect to the contract of employment as it is - goes to the week. What I'd like to advise the commission is, that the people at K&D Brick do work a 19-day month and they do organise a roster for the implementation of that 19-day month, 12 months in advance.

So when you come to take your rostered day off you know, 12 months in advance by the drawing up of a roster, that's done on an agreed basis when your rights to that RDO are - are actually accrued. And I think with respect to Mr Edwards' argument too, I'd ask you dismiss them with respect to clause 13, because if you were to use clause 13 in its isolation, then when you go to clause 19 and you look at the average, which was a point I forgot to make in my earlier submissions, the ordinary hours of work shall be an average of 38 - an average of 38 as opposed to what? They will be 38 a week, because we'd have - you'd have no other additional weeks that you could average them out against.

So in effect if you varied your contract of employment on a weekly basis in order to maintain propriety at law, you'd

have to fully engage those people for 38 hours each week and you'd have nothing to average it against. I think you need more than 1-week period in order to average your 38 hours, so I'd ask you to dismiss those - those suggestions that Mr Edwards has made, that it is something that can be done on a weekly basis.

I think what we have to look at is, we have to look at the situation as it is -

PRESIDENT: That's quite an interesting approach, Mr Cooper, yes.

MR COOPER: Thank you, Mr President. So the other thing I was going to comment on was, I could also take the commission through a number of clauses that go to annual leave and those types of things, but I don't think there's any point in that because what we're dealing with here, the subject matter before the commission is 19 - clause 19 - hours - (a)(i), day workers.

And it is quite clear in that that the ordinary hours of work that are to be an average shall be worked between the hours of 6.00 to 6.00 Monday to Friday and may be varied by agreement.

Now, one thing that I do - I did - I was remiss, Mr President - and that is with respect to the organising of the rostered days off.

I understand that the company wants to have, rather than a staggered rostered day off situation which goes to the averaging of the 38 hours, I understand the company wants to bring them into a sort of 1 day a month where the majority of the people are off.

So they are actually seeking to change the averaging part with respect to the implementation of the RDO.

Now, what I would like to say, Mr President -

PRESIDENT: How does that bear on -

MR COOPER: On the interpretation?

PRESIDENT: On the interpretation?

MR COOPER: Well, `The ordinary hours of work ... shall be an average of 38', so the average part is something that can be varied by agreement.

Now, if the company wants to unilaterally change that, I'd say, I'd suggest that the interpretations you give with respect to that clause would be -

PRESIDENT: What, that the average be less than 36 - less than 38 - or more than ....

MR COOPER: How you do the average. I mean, as I have said, you have got to do an average over what. If you are doing an average over a week it is 38. It has got to be over more than a week to become an average.

PRESIDENT: Yes.

MR COOPER: So, if you are going to change that, I think you should have to do it by agreement.

And I don't think it is necessary to take the commission beyond 19(a) because the act is quite specific with respect to section 85: 85 of the act says quite clearly if you are going to look at contracts of employment that the award prevails over the contract except where the contract construes a more favourable provision. That's how I understand that section of the act. It is quite clear.

So, what we are looking at here, we are looking at the award first, because the award shall prevail unless the contract that's in force is as a result of the award being remiss, is to have application. So, I think we have got to look at that, Mr President.

PRESIDENT: I think they are two different sorts of contracts, though, in that the one referred to in the act is where one contracts out of the award.

MR COOPER: I understand that.

PRESIDENT: By granting conditions over and above.

MR COOPER: I understand that may be the case. I am just suggesting that it -

PRESIDENT: Yes.

MR COOPER: And, with respect to the clause then, Mr President, I think it is important that you have clear in your mind that the people at K&D do work by agreement a roster that allows for RDOs to be taken 12 months in advance. If they do work and have worked for a considerable amount of time from 7.30 in the morning to 4.15 at night except in the area of the kilns, and they have always understood that those things would be changed by agreement; and that's supported by their understanding of clause (i).

When we go to clause (ii), and I think it is important to take the commission to that as well, not that I believe it is relevant to what we're interpreting but Mr Edwards did raise it, and it says:

> The employer may at his discretion require employees in the plant or section or sections concerned to work up to 10 hours per day.

Now I think Mr Edwards might have assumed that that means ordinary hours. It doesn't say ordinary hours. It doesn't say, in fact, anything, it just says `hours', and I understand that those people do work regular amounts of overtime which could be, I could argue, part of the 10 hours a day.

It says:

> The employer may at his discretion require employees in the plant or section or sections concerned to work up to 10 hours per day.

And I think the commission shouldn't take any - or place too much emphasis on that provision as well - because if it was to be ordinary hours which were to form part of subclause (i) then it should clearly state the employer at his discretion may require his employees to work up to 10 ordinary hours per day. But it doesn't say that. It says 10 hours per day. And I understand that when the people do work they do work in excess of 10 hours at times, but they do do that on an overtime basis and are remunerated accordingly.

So I think if we are going to have a strict application of subclause (ii) it should be then that subclause (ii) should be quite clearly defined for the commission to understand its application; and I would say its application is more liberal than ordinary hours and, in fact, we could argue quite rightly, given that provision, that it excludes ordinary hours. So I don't think you should place too much emphasis on that part of Mr Edwards' submission as well.

So, what we are looking at, Mr President, is we are looking at -

PRESIDENT: It's interesting in that in 19(a)(iii) it talks about ordinary hours not exceeding 12.

MR COOPER: That's correct. So if subclause (ii) was to have application to ordinary hours one could assume - and I am only assuming before the bench - that subclause (ii) could have a more liberal application in respect to ordinary hours because it does clearly state 10 hours per day, and I understand the people do work a considerable amount of overtime out there, and they do work in excess of 10 hours. So, I would ask the commission to consider that as well.

What we are looking at then, Mr President, is we're looking at an interpretation from yourself, if you are able to give one, that supports our submissions that the provisions, the

ordinary hours of work, that will be an average of 38, will be worked between the hours of 6.00 to 6.00 Monday to Friday, can only be varied by agreement between the employees - the majority of the employees in any plant or section.

So, when you are considering that, Mr President, I would ask you too to consider that the ordinary hours of work which are to be averaged do commence at a certain time and they do finish at a certain time, and when the ordinary hours -

PRESIDENT: But the award says they can be anywhere between 6.00 and 6.00, doesn't it?

MR COOPER: That's quite right, it does say that. They have been set, and they have been set on the commencement of this award, and they have been set for a considerable period of time.

So, the ordinary hours shall be an average of 38. What we have to look at, I think, Mr President, is the cycles that are worked and how the average is implemented, and the start and finish times that the award is deficient on are something that is agreed between the employer and the employees.

And I don't think taking the commission through to clause 13 or any other clause in the award would allow you to place a better understanding on that clause than its actual application as the application goes to the ordinary hours of work.

It goes how they will be worked, and between what hours they may be worked, and how those hours are worked can be varied by agreement.

I suppose we are asking you to interpret that more liberally than Mr Edwards has, in that the ordinary hours of work are included in the start and finish times.

PRESIDENT: Yes. I just have some - and I must make it clear to you, at this stage I have some difficulty with the notion that because the hours have - well, start and finish time have been established and that they are within the period of this ban, 6.00 till 6.00, that they can't be varied - I mean, I don't see this proviso going to the actual start and finish times. The proviso appears to go to changing either the ordinary hours of work of 38, changing the span of 6.00 to 6.00, or changing Monday to Friday, and that's all that proviso deals with.

MR COOPER: It does, it deals with those three parts of subclause (a)(i), yes.

PRESIDENT: It doesn't deal with what might be the actual start and finish times.

MR COOPER: Excepting that they are already there.

PRESIDENT: Excepting that they are already there, but this clause doesn't seem to go to that at all.

MR COOPER: No, the award is deficient, as Mr Edwards has pointed out, in respect to a provision that allows the employer to vary the start and finish times, right, and I really don't want to comment on why this is, but what we have done and before other commissioners - members of the commission, they were quite pedantic with respect to those provisions. It's quite clearly spelt out in the award what the employer has the right to do and what he doesn't and in this case, that is not the case and it places us in a difficult position of having to ask you to advise us what it means.

PRESIDENT: You're asking me to interpret something that isn't there.

MR COOPER: Well excepting that, what I'm asking you to do, I suppose, and the strength of our submission is that the ordinary hours of work will be an average of 38 is one of the things that can be varied by agreement - the ordinary hours of work which shall be varied by agreement. Right?

PRESIDENT: Right.

MR COOPER: Now, they are working - now any variation to start and finish time is then a variation of how the ordinary hours will be worked. Now I suppose it's drawing a long bow, but that is part of that provision.

PRESIDENT: Yes, that's making the next big leap.

MR COOPER: Well that's something I suppose that, when I conclude, that you'll likely have to decide.

PRESIDENT: Yes.

MR COOPER: But I would ask you to, before I close, not place too much emphasis on Mr Edwards' submission with respect to clause 13 as average would have no meaning at all. I'd ask you also not to place too much emphasis on Mr Edwards' interpretation of subclause 19(a)(ii) as it goes to hours and not ordinary hours, and I'd ask you to support our submissions that the provisions of this subclause that I've explained on numerous occasions can only be varied by agreement and if you don't have agreement, then you can't vary them. If the commission pleases.

PRESIDENT: Yes, I understand your line of reasoning, Mr Cooper. Mr Edwards?

MR EDWARDS: A couple of new issues in that -

PRESIDENT: I wondered whether you might want to respond.

MR EDWARDS: - Mr President. I wonder if I might -

PRESIDENT: Mr Cooper, obviously, isn't going to object.

MR COOPER: Not at all. I can assist the commission, I won't object at all.

MR EDWARDS: I can understand that Mr Cooper did omit to raise a couple of things in his initial submission and so I wish to comment just briefly. Mr Cooper first goes to the question of the working of the rostered day off system of organising ordinary hours. I see nothing inconsistent with what we have submitted to you on a proper understanding of the award that would be precluded or which would preclude the 19-day month system. In fact you can change ordinary start and finish times without in any way impinging on the rostered day off roster, as it were, which I think is the point that Mr Cooper was endeavouring to make.

I dismiss Mr Cooper's observations on section 85 of the act and I think you, sir, have already indicated the reasons why that should be the case, and I don't intend to go with it any further than that.

There is just one further issue that I want to comment on and that is simply to ask the commission if it would give serious consideration to an expeditious decision in this matter. As the commission may be aware there has been considerable heat in the question which is the subject of this interpretation. The employer is desirous of moving fairly quickly to the new work arrangements he wishes to introduce and that is being held up by agreement between the parties to enable this interpretation to take place so that it could be clearly established whether or not the employer does have the right to vary start and finish times within the parameters established by the award.

Having said that I can do no more, sir, than implore you for a decision at the earliest available opportunity - today would be great - within the next 2 minutes probably better still.

PRESIDENT: I know you're jesting.

MR EDWARDS: I can only ask, sir.

PRESIDENT: Yes.

MR EDWARDS: But I do implore the commission to make a decision at the earliest available opportunity. As I said

there is considerable heat in this issue and I think that heat could be defused to some extent if this question can be answered and answered in the way in which I have suggested it should be answered. And as to Mr Cooper's comments that you shouldn't pay much attention to my submission, I know you will ignore that, sir.

PRESIDENT: All right. Thanks, Mr Edwards.

MR COOPER: Mr President, with respect to the situation at the current work site that we're seeking the interpretation for, I believe that as Mr Edwards has stated, it is important that you consider this question. We are having ongoing discussions and while the employer does wish to implement change, I equally would ask you to give your consideration to the matters, but I wouldn't ask you to do that hastily if it was going to give a decision that would not be proper and correct, so I would ask you to have due regard for -

PRESIDENT: Quite right.

MR COOPER: - the matters that we've put before you. They are substantial and while we would appreciate an early decision, we wouldn't ask for one in haste that may, in fact, be incorrect.

PRESIDENT: Yes. Yes, I'm on your side there, Mr Cooper.

MR EDWARDS: Mr President.

PRESIDENT: Very good. Well, that concludes the proceedings. Decision reserved.

HEARING CONCLUDED