

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s.29 application for hearing of an industrial dispute

Australian Nursing Federation Tasmanian Branch

(T12671 of 2006)

and

**The Minister administering the State Service Act 2000
(Department of Health and Human Services)**

DEPUTY PRESIDENT SHELLEY

HOBART, 30 October 2009

**Industrial dispute - breach of an award - shiftworkers - work on public holidays
- time off in lieu - extended annual leave**

FUTHER DECISION - ORDERS

[1] On 12 May 2006, the Australian Nursing Federation Tasmanian Branch (ANF) (the union) applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act), for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (Department of Health and Human Services) (the employer) arising out of a dispute regarding public holidays and accrual of hours for shift workers under the *Nurses (Tasmanian Public Sector) Award 2005* (the award).

[2] A hearing commenced at Hobart on 3 August 2006. There were further hearing days on 29 September 2006, 17 September 2008 and 7 and 8 May 2009. The question that remained to be determined was: whether shift workers should have days off in lieu of double time added to their annual leave provision in addition to days in lieu of statutory holidays, as provided for in the award.

[3] A decision was published on 13 July 2009, in which I found that, according to the terms of the award, a shift worker who works on a public holiday is entitled to be paid double time, which maybe taken as time off in lieu and is also entitled to 11 or 11 ½ days of "extended leave" (in lieu of statutory holidays).

[4] The following Directions were issued:

"I hereby direct that the parties confer with the aim of reaching agreement as to the form of orders to be issued in settlement of this dispute AND THAT such discussions take place no later than 3 August 2009 AND THAT the parties inform the Commission of the outcome of the discussions no later than 17 August 2009."

[5] I was subsequently informed by correspondence from the union that the parties had conferred in accordance with the Directions but had been unable to reach agreement on the form of orders to be issued. On 20 August 2009, further Directions were issued:

"I hereby direct:

THAT the Australian Nursing Federation Tasmanian Branch file with the Commission a Draft of the Orders it proposes to give effect to the decision in Matter T12671 of 2006 together with an outline of submissions in support and provide copies to the Minister administering the State Service Act 2000 by close of business on 4 September 2009; and

THAT the Minister administering the State Service Act 2000 file with the Commission a Draft of the Orders it proposes to give effect to the decision in Matter T12671 together with an outline of submissions by close of business on 18 September 2009."

[6] A further hearing date was set for 30 September 2009, at which time Mr P Gardner appeared for the union. After brief submissions outlining the discussions and correspondence that had occurred as a result of the Directions that were issued, the parties entered into a conciliation conference, at which a proposal as to the form of orders was put forward by the union and a further meeting was scheduled to take place between the parties with a report-back to be given to the Commission on 15 October 2009. On that date Commission was informed that the discussions had not resulted in any agreement being reached as to the form of orders. Mr Gardner advised that the Minister had put no alternative proposal to the ANF and on 15 October 2009 the matter proceeded to further hearing in respect of the orders to be issued in settlement of the dispute.

[7] The union presented a written draft of the orders they proposed:

"AMENDED DRAFT ORDER

1.

- (a) Within three months of the date of these orders, the respondent shall pay to shift workers who have worked on a public holiday prior to the date of these orders double time (exclusive of shift allowance) for time so worked. This order includes shift workers who performed work for the respondent on and from 1 January 2006 whose employment has ceased prior to the date of these orders and shift workers currently employed provided that in the case of employees whose employment has ceased prior to the date of these Orders the payment shall be made within six months;*
- (b) In the event a shift worker has already taken time off in lieu of double payment for time worked on a public holiday such hours of time off in lieu taken shall be off-set against the payment required by order 1 (a). In the event a shift worker has already been paid double time for time worked on a public holiday such payment shall be off-set against the payment required by order 1 (a).*
- (c) Subject to Order 2 hereof, on and from the date of these orders the respondent shall pay to shift workers who work on a public holiday double time (exclusive of shift allowance) for time so worked.*

2. *On and from the date of these orders a shift worker who works on a public holiday may elect to take time off in lieu of the double time payment referred to in Order 1 (c), such time off to be equal to the time so worked. The time at which the time off in lieu is taken is at the shift workers' election. In the event the employer has reasonable grounds for operational reasons to seek to vary the date of that election, and a dispute arises, such dispute shall be dealt with in accordance with the dispute settlement procedure in the award.*
3. *Notwithstanding Orders 1 and 2 and separate from the entitlements contained therein, on and from the date of these orders the respondent shall, in respect of the period commencing 1 January 2006 and continuing, add to shift workers' periods of annual leave one day for every [statutory] public holiday mentioned in clause 2 of Part VI of the award whether or not such holiday is or was observed on a day which, for each shift worker, was or would be a rostered day off. For each day added to a shift workers' annual leave the respondent shall pay leave loading at the rate of each shift worker's projected shift roster. In the event the respondent has, prior to the date of these orders, already added to a shift worker's period of annual leave one day for a [statutory] public holiday mentioned in clause 2 of Part VI of the award, such day or days so added shall be set-off against the obligation contained herein to add to shift workers' periods of annual leave one day for every [statutory] public holiday mentioned in clause 2 of Part VI of the award whether or no such holiday was observed on a day which, for each shift worker, was a rostered day off. In the event the respondent has, prior to the date of these orders, already added to a shift workers' period of annual leave one day for a [statutory] public holiday mentioned in clause 2 of Part VI of the award and paid leave loading on such day or days so added such payment shall be set-off against the obligation to pay leave loading provided by this order.*
4. *Within 6 months of the date of these orders, the respondent shall pay to shift workers who were employed on or after 1 January 2006 but whose employment has ceased prior to the date of this order, the money equivalent to the amount those shift workers would have been paid for the days added (including projected shift leave loading) had the respondent added to those shift workers' periods of annual leave one day for every [statutory] public holiday mentioned in clause 2 of Part VI of the award whether or not such holiday was observed on a day which, for each shift worker, was or would have been a rostered day off. In the event the respondent had, prior to the date of these orders, already added to such shift worker's period of annual leave one day for every [statutory] public holiday mentioned in clause 2 of Part VI of the award, such days shall be set-off against the obligation contained herein.*
5. *The respondent is directed to conduct an audit of any money or leave owed to its current and past employees from 1 January 2006 to the date of this order (the relevant period) and to file in the Registry and serve on the Australian Nursing Federation Tasmanian Branch a report of that audit by close of business on a date 6 months from the date of these orders.*

6. *The report referred to in paragraph 5 shall contain, as to each workplace in which the respondent employed shift workers, and in respect of each shift worker employed in the relevant period;*
- (i) the employee number of each shift worker;*
 - (ii) the number of public holidays worked by each shift worker and the hours worked thereon and the amount of money owed and paid in respect thereof;*
 - (iii) the number of days/hours added to each shift workers' period of annual leave for each [statutory] public holiday, or the money paid in respect thereof to past employees;*
 - (iv) the amount of annual leave loading due and paid to each shift worker in respect of days referred to in Order 3.*
 - (v) the details, in respect of each shift worker, of any set off applied in accordance with these orders.*
7. *Interest at the rate prescribed by Regulation 5A of the Supreme Court Rules shall be added to the amounts paid pursuant to orders 1 and 4.*
8. *At the time of making payment to shift workers or adjusting a shift worker leave entitlements under these Orders in respect of work performed prior to the date of these Orders the Minister shall provided to each shift worker to whom a payment is made or for whom a leave adjustment is made, a notice setting out the amount of the payment or adjustment and particulars of the calculations referred to in Order 6.*

...¹

SUBMISSIONS

Mr Gardner for the Union

[8] Mr Gardner submitted that whilst it might be said that the orders the union proposed extend beyond the precise terms of the decision, the issues addressed were within the scope of the dispute application.

[9] He referred to section 31(1) of the Act, which provides:

"Subject to this section, where the Commissioner presiding at a hearing under s29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken."

¹ Exhibit A12 Amended Draft Order submitted by the ANF on 14/10/09

[10] The orders are necessary to provide for the maximum certainty in respect of the resolution of the dispute, he said, particularly because there had been inconsistency in the positions adopted by the Minister. It is essential that the issues be addressed by the orders in a clear manner in order to prevent further disputation.

[11] Mr Gardner outlined the purpose of each of the proposed orders. Order 1 relates to the entitlement to the payment of double time; 1(a) concerns back pay from the date the award came into effect; order 1(b) ensures that there is an offset provision; order 1(c) provides for prospectivity; order 2 allows for days off to be taken at the employee's election; order 3 allows for the additional days to be added to the employee's annual leave and provides for an offset and makes it clear that it is a separate entitlement to the double time payment; order 4 makes provision for past employees and orders 5, 6, 7 and 8 are consequential orders.

[12] Mr Gardner submitted that the proposed payment of interest is not a penalty, but is compensation to the employees for not having had use of the money. That is industrially fair and appropriate, he said.

Mr Baker for the Respondent

[13] Mr Baker submitted that the time limit of three months proposed by the union for the payment of back pay to current employees was impracticable. He said that there are 170,000 transactions to be manually checked and he suggested a period of six months with a review date.

[14] In relation to proposed order 2, Mr Baker submitted that the resource implications were huge, and that the order should be phrased in such a way that the default position was that double time would be paid to shift workers who worked on public holidays, with time off in lieu able to be taken on request. Where there is an operational capacity to provide leave, then that should be negotiated between the employer and the employee.

[15] Mr Baker said that there was no need to issue proposed order 3, because the parties were now in agreement on those issues and there was no dispute.

[16] He said that proposed orders 5 and 8 deal with matters that would of necessity be done by the agency [completion of an audit and provision of details to employees] anyway, and it is therefore unnecessary to issue an order to that effect. Mr Baker submitted that it would not be appropriate to provide the ANF with the audit. There are employees who are not members of the union. If the union wished to follow up their members' entitlements they are able to seek that information through the relevant pay section.

[17] In the employer's submission, it would be industrially unfair and totally inappropriate for the employer to pay interest on the back pay owing, as claimed in proposed order 7. The Minister had paid the employees according to a previous decision of the Commission, which has now been superseded by the instant decision. It would be wrong to impose a penalty upon the employer for observing a decision of the Commission.

[18] Mr Baker said that if there is a breach of an award then there had always been a breach of the award because the award remained unaltered and has always applied. However, the present circumstances are somewhat different inasmuch as the employer relied upon a decision of the Commission which was an interpretation of an award in

1985. He said that the way the award was applied has remained unaltered for the period that the award was in the federal jurisdiction and again in the state jurisdiction. Mr Baker submitted that the order should be prospective because there are unique circumstances that need to be taken into account.

[19] For the reasons which follow, I have decided to issue the following orders in settlement of the dispute.

[20] The parties agreed that the time allowed for back payments to be made should be six months. In view of the large number of calculations involved and the administrative resources required, I have decided that six months is reasonable in the circumstances.

ORDER NO. 1

Pursuant to s 31(1) of the Act I hereby order THAT by no later than close of business on 20 April 2010 the employer shall pay to shift workers subject to the *Nurses (Tasmanian Public Sector) Award 2005* who have worked on a public holiday prior to the date of this order double time (exclusive of shift allowance) for time so worked EXCEPTING WHERE a shift worker has already taken time off in lieu of double time in which case such time off shall be off-set against the payment required by this order and EXCEPTING WHERE a shift worker has already been paid double time. This order applies to current employees and to shift workers who performed work for the employer on and from 1 January 2006 and whose employment has ceased.

[21] In respect of the submissions made by Mr Baker that the order for payment should be prospective, I note that this question was dealt with by a Full Bench of the Commission in T12321, T12322, T12323 and T12341 of 2005² which was an appeal by a number of parties against a decision of Abey C, in which he had ordered that an award would have application to labour hire company employees from a point in time. The Full Bench found at para 30:

"The CFMEU and AWU argued that the Commissioner erred in exercising his discretion by limiting the application of the Zinifex award to an operative date of the period after 21 September, 2005...as having found that the Zinifex award had application to the work in question then, as a matter of law, the obligations under the award would apply from the time the employment commenced at the Zinifex site.

We agree with that submission: if the Zinifex award has application to the employees...then it has application for the period of their employment on the Zinifex site..."

[22] Having found that the award confers an entitlement for shift workers to be paid double time if they work on public holidays and that it also entitles employees to have days equivalent to the number of statutory holidays added to their annual leave, I have no discretion to make an order that the award applies prospectively. I observe that I do not agree with the submission that the employer has applied the award consistently.

² Zinifex Australia Ltd, AMMA (Inc), CFMEU (Tas Branch), AWU (Tas Branch) and the TESA Group Pty Ltd and Skilled Group Ltd - appeal against a decision of Abey C arising out of T11802 and T11848 Full bench decision 13/6/06

[23] The parties are agreed that in future the preferred method of payment to shift workers who work on public holidays should be that they be paid double time, rather than be granted time off in lieu of the penalty payment. Mr Gardner suggested an amendment to the proposed order 2, which, he said would achieve that end. However, I am of the view that the proper course of action is to vary the award to give effect to the agreed position. I have therefore decided to order that the parties make application to the Commission to vary the award accordingly.

ORDER NO. 2

Pursuant to s31(3) of the Act I hereby order that the Australian Nursing Federation Tasmanian Branch and the Minister administering the State Service Act 2000 make application to the Commission to vary Clause 2 (h) (ii) (3) of Part V of the *Nurses (Tasmania Public Sector) Award 2005* by deleting the current words and inserting in lieu thereof the following: *“subject to operational requirements, a shift worker who is required to work on a public holiday may elect to take time off in lieu thereof, in which case the above penalty shall not apply. The time at which the time off in lieu is taken is at the employee’s election. In the event the employer has reasonable grounds for operational reasons to seek to vary the date of that election, and a dispute arises, such dispute shall be dealt with in accordance with the dispute settlement procedure set out at Part VIII of this award.”* Such application is to be made no later than close of business on 20 November 2009.

[24] Having found that a shift worker who works on a public holiday is entitled to be paid double time and is also entitled to 11 or 11½ days leave in lieu of statutory holidays, the following order gives effect to that finding. That part of the order proposed by the union which referred to leave loading is unnecessary because the employer placed on record the agreements and understandings reached between the parties in respect of that issue, which was not the subject of the decision.

ORDER NO. 3

Pursuant to s31(1) of the Act and notwithstanding Order 1 and separate from the entitlements contained therein, on and from the date of these orders I hereby order that the employer shall, in respect of the period commencing 1 January 2006 and continuing, add to shift workers’ periods of annual leave one day for every statutory holiday referred to in clause 2 of Part VI of the award whether or not such holiday is or was observed on a day which, for each shift worker, was or would be a rostered day off EXCEPTING WHERE prior to the date of these orders the employer has already added to a shift worker’s period of annual leave one day for a statutory public holiday referred to in clause 2 of Part VI of the award.

[25] Shift workers who have ceased employment prior to the date of the orders have an entitlement to have the days in lieu of statutory holidays added to their leave. The parties were agreed that six months should be allowed for back payments to be made to those employees.

ORDER NO. 4

Pursuant to s31(1) of the Act I hereby order THAT no later than close of business on 20 April 2010 the employer pay to shift workers who were employed on or after 1 January 2006 but whose employment has ceased

prior to the date of this order an amount of money equivalent to the amount those shift workers would have been paid for the days added (including projected shift leave loading) had the respondent added to those shift workers' periods of annual leave one day for every statutory holiday referred to in clause 2 of Part VI of the award whether or not such holiday was observed on a day which, for each shift worker, was or would have been a rostered day off EXCEPTING WHERE prior to the date of these orders the employer has already added to a shift worker's period of annual leave one day for a statutory holiday referred to in clause 2 of Part VI of the award.

[26] I have decided not to issue the orders proposed by the union which would have required the employer to provide them with an audit setting out the details of employees' entitlements to back pay. The employer acknowledged that it would be necessary for them to conduct such an audit and said that if the union wished to follow up their members' entitlements then they are able to seek that information through the relevant pay section. The order sought is not necessary in order to give effect to my decision. Similarly, the proposed order requiring the employer to provide each shift worker to whom a payment is made or a leave adjustment made a notice setting out the details is unnecessary to give effect to my decision and is something that would be done, in any event.

[27] I have also decided not to make the order sought by the union in relation to the payment of interest on back pay. It has not been the practice of the Commission to make such orders. I am of the view that the order should be confined to the amounts due under the terms of the award.

P C Shelley
Deputy President

Appearances:

Ms C Saint for the ANF on 3 August 2006, 17 September 2008, 7 and 8 May, 30 September 2009

Ms N Ellis for the ANF on 3 August 2006, 7 and 8 May, 30 September and 15 October 2009

Ms J Fitton for MASSA on 3 August and 29 September 2006, 7 and 8 May, 30 September and 15 October 2009

Mr P Baker for MASSA on 17 September 2008, 7 and 8 May 2009

Mr E White for the ANF on 7 and 8 May 2009

Mr P Gardner on 7 and 8 May, 30 September and 15 October 2009

Mr R Clegg for MASSA on 7 and 8 May 2009

Mr R Hitchcock for MASSA on 30 September and 15 October 2009

Ms S Darcey for the ANF on 7 and 8 May 2009

Date and place of hearing:

2006

August 3, September 29

2008

September 17

2009

May 7, 8

September 30

October 15