

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T No 1785 of 1988

**IN THE MATTER OF** an application by  
the Electrical Trades Union of  
Australia, Tasmanian Branch to vary  
the Electrical Engineers Award

PRESIDENT

George Town, 8 March 1989

**TRANSCRIPT OF PROCEEDINGS**

(Unedited)

PRESIDENT: We'll take appearances, thank you.

MR PETTMAN: **PETTMAN G.J.** for Secretary for Labour, Mr President.

PRESIDENT: Thank you, Mr Pettman.

MR SMITH: If the Commission pleases, **SMITH G.J.** I appear on behalf of the Tasmanian Confederation of Industries.

PRESIDENT: Thank you, Mr Smith. No other appearances? Well, Mr Pettman, you'll outline the application please?

MR PETTMAN: Yes. Mr President, this interpretation is based on an actual case of an employee, Bradley James Hicks, and Electrical Engineering Supplies Pty Ltd. And the application is for an interpretation regarding the need for a payment of a 17.1/2% leave loading on a full amount of leave. That is the 4 weeks for 12 months which was paid for and not taken.

There has been agreed facts in this case so I haven't the called the employer and employee as witnesses.

I've also listed the relevant sections of the award.

PRESIDENT: Thank you. I'll identify this as Exhibit T.1, Mr Pettman.

MR PETTMAN: The agreed facts are that the employer was Electrical Engineering Supplies, 2b Racecourse Crescent, Launceston - that was the head office - and the employee was Bradley James Hicks of 11 View Road, Burnie, whose date of birth of 21 April 1970.

His classification under clause 8 of Division C, which covered the wholesale seller of electrical goods, clause 2 Juniors 18 to 19 years of age, 73% of the adult rate, which was

MR PETTMAN:

a rate of \$196.70.

He commenced his employment with E. and E. Supplies on 13 March 1987, and terminated on 1 July 1988.

His employment covered a period of one year and three complete months, and his termination came about when Mr Gavin Moore, the general manager, gave him the award requirement of one week's notice.

Mr Hicks had not taken any annual leave during his period of employment and at termination was paid 4 weeks' annual leave for the period 30 March 1987 to 30 March 1988, and a further one week proportionate leave for the 3-monthly period 30 March 1988 to 30 June 1988.

He was not paid any annual leave loading on his 5 weeks pay in lieu of leave.

The employer approached the Launceston office of Department of Labour and Industry, and were advised that there was no proportionate leave payment due.

The employee approached the Burnie office of Department of Labour and Industry to complain that he hadn't been paid and was told that he had an entitlement, hence the application for an interpretation.

The employee's termination took place on 1 July 1988, and the Electrical Engineers Award No.2 of 1988 Consolidated, which came into force on 31 March 1988, was the controlling award.

This has been replaced by No.3 of 1988 Consolidated, but the clauses remain identical, Mr President.

The annual leave clause: as Hicks was employed under Division C 'Wholesale seller of electrical goods' clause 46 on page 73 is the

/WL - 08.03.89

PETTMAN

MR PETTMAN:

appropriate annual leave clause. And sub-clause (a) headed "Period of Leave" states:

"A period of 28 consecutive days' leave shall be allowed annually to an employee after 12 months' continuous service (less the period of annual leave) to an employee on weekly hiring in any one or more of the occupations to which this award applies".

Sub-clause (b), which deals with annual leave exclusive of public holidays, does not appear relevant to this issue, nor does sub-clause (c) "Calculation of Continuous Service".

Sub-clause (d), which is headed "Proportionate Leave on Termination of Service", provides that:

"If after one month's continuous service in any qualifying 12 monthly period an employee lawfully leaves his employment, or his employment is terminated by the employer through no fault of the employee, the employee shall be paid at his ordinary rate of wage as follows:

thirteen and one third hours for each completed month of continuous service."

Sub-clause (e) "Payment in Lieu Prohibited" provides that:

Annual leave provided by this clause shall be allowed and shall be taken, and except as provided in sub-clause (d) hereof, payment shall not be made or accepted in lieu of annual leave".

And sub-clause (d) was the proportionate leave on termination clause.

MR PETTMAN:

Sub-clause (f) `Payment for Period of Leave`, provides:

"(i) Each employee before going on leave shall be paid the amount of wages he would have received in respect of the ordinary time which he would have worked had he not been on leave during the relevant period.

In addition thereto all employees (including part-time employees engaged to work 20 or more hours per week) shall receive a loading of 17.1/2% on payments made for annual leave as prescribed in paragraph (a) for annual leave falling due. Such loading shall not apply to proportionate leave on termination of service."

Subsection (iii):

Part-time employees engaged to work less than 20 hours per week for a continuous 12 months period, shall be paid a loading on each anniversary date of their engagement.

Such loading shall be calculated in the following manner:

70% of the average weekly wage for the 3 months prior to the anniversary date falling due. This average weekly wage is to exclude the 20% loading paid in lieu of annual leave, sick leave and public holidays."

The remaining sub-clauses (g) `Calculation of Service`; (h) `Time of Taking Leave`, and (i) `Broken Leave` do not appear relevant to this issue. And sub-clause (j) `Disputes` is not relevant at this particular time, Mr President.

/WL - 08.03.89

PETTMAN

MR PETTMAN:

The interpretation which is sought concerns sub-clause (f)(ii), which provides for a 17.1/2% loading to be made on payments for annual leave falling due.

This clause however, is prefaced by the words `in addition thereto`, which refers back to sub-clause (i) which provides that each employee before going on leave shall be paid for the period of leave.

MR PETTMAN:

Two possible interpretations were considered at the time. The first was that each employee due for a full year's entitlement to leave, that is the 4 weeks for the 12 months, should be paid for the amount of leave plus a 17-1/2% loading on that leave.

And the alternative which was considered was that only employees who actually went on leave should be paid for the full year's entitlement of leave and loading.

Reference back to sub-clause (e) prohibits the payment in lieu of taking, if any, leave except for proportionate leave as provided in sub-clause (d). And it is made quite clear in sub-clause (2) there that a leave loading does not apply to proportionate leave on termination of service.

It's been very difficult for us in this one, Mr President, because we are constantly trying to apply merit and, of course, that just isn't permissible in this case.

So they were the two possible interpretations that we considered at the time.

PRESIDENT:

Is there a separate clause that deals with annual leave loading or is annual leave loading simply referred to almost in passing, as it were?

MR PETTMAN:

Yes, it is an integral part of clause 46, Mr President. I think it is clause 46.

PRESIDENT:

That's the only reference to it in the payment for period of leave, is it?

MR PETTMAN:

Yes.

PRESIDENT:

"Annual leave shall be given at a time fixed by the employer".

You argue that, or you believe that

/JG - 08.03.89

PRESIDENT - PETTMAN

PRESIDENT:

sub-clause (h) is not applicable. I wonder if it is?

On the one hand there is an obligation on the part of the employer to fix the time of taking annual leave when it falls due, and if the employer fixed a period of, say, 4 months after the right to it fell due but the employee resigned or was terminated before that time had expired, do you think he, in those circumstances, would qualify for annual leave loading?

I'm not talking about the proportionate part of the year, the accrued part, I'm talking about the 4 weeks.

MR PETTMAN:

No, Mr President, because my understanding of the clause is that provided the period doesn't exceed 6 months from the date from which the right accrued, then anything that the employer does during that time, either to accept a resignation or to implement a termination, is in accordance with the award. And although there are serious implications for the employee, he does not appear to me to be entitled to the loading.

PRESIDENT:

So that if an unscrupulous employer was minded to do so, he could work an employee for 12 months, fix a time for taking annual leave 2 or 3 months down the track, then terminate the employee's services, re-engage him for another 12 months and do the same thing again.

In those circumstances, you'd never had to pay him any leave loading.

MR PETTMAN:

Yes, I can't argue with that reasoning, Mr President. I'm not suggesting in this particular case that there was anything untoward in the termination at that particular time, but it did have the fact of denying the employee a leave loading which he would normally have added to

/WL - 08.03.89

PRESIDENT - PETTMAN



MR PETTMAN: his annual leave, had he, say, 2 months after qualifying, taken his leave. He was there for a further 3 months before he was terminated.

PRESIDENT: Yes, well he must have been there for a further 3 months with the approval of the employer.

MR PETTMAN: Yes.

PRESIDENT: It obviously didn't suit the employer for the employee to take his annual leave immediately it fell due, or it may have suited the employee not to take it.

Would either circumstance have the effect, in your opinion, of denying the right to leave loading that had already been earned.

MR PETTMAN: Yes, well to answer that, Mr President, I must admit that I believe the information given out by the Launceston office to the employer that the loading should only be payable on leave taken is the correct way to interpret the clause, so in my view, yes, the employee would not receive leave loading.

PRESIDENT: You don't think that it may mean that an employee whose services are terminated for other than misconduct or who terminates his services after having worked a continuous period of 12 months without having taken any leave, is entitled to be paid on termination only for the leave loading that would have otherwise been paid, but nothing in relation to the proportionate leave that falls due to him on termination.

MR PETTMAN: Mr President, based on merit, we had been advising employers to pay a leave loading on a full amount of leave, and where this was accepted by the employer as being a reasonable course, we were very pleased that they adopted it. But in the odd occasion where the question is asked, do we have to pay, and there is no

MR PETTMAN:

expressed intention of making what may be considered as a reasonable payment, well then we have had to agree that we cannot say that on the present wording of that clause, that they must pay it. We're hoping that you may be able to, of course.

PRESIDENT:

Yes.

PRESIDENT: You'd be aware that in the public sector, that the leave loading is paid automatically, paid to you, I imagine, if you don't take your leave.

MR PETTMAN: Yes, it's entirely a different arrangement and a very fair arrangement.

PRESIDENT: Yes. But is the wording in the relevant award ... yes, it does appear. It's just called recreation leave allowance, but is it any different really to the kind of wording ...

MR PETTMAN: Yes. I don't have a copy of one of the public service awards but I think it is totally different and the other matter which perhaps concerns me somewhat and I'm not asking for an interpretation at this time, is the fact that sub-clause (e) of clause 46 says:

"That payment in lieu is prohibited [and it says] that annual leave provided by this clause shall be allowed and shall be taken and except as provided in sub-clause (d) payment shall not be made or accepted in lieu of annual leave".

To me, that clearly says that nobody can even receive a payment for the 4 weeks as this young chap did.

I'm not asking your interpretation on that, it seems quite clear. But it's one which we hope we're never called on to apply.

PRESIDENT: Well, you can't pay people in lieu of annual leave whilst they are still employed, can you?

MR PETTMAN: No. Mr President, that begs the question as to whether proportionate leave on termination could also encompass more than a 4-week period. In other words, in this case there

MR PETTMAN: were 5 weeks. Could the whole lot of that be considered as 5 weeks' proportionate leave.

PRESIDENT: Well, it wouldn't be proportionate leave in those circumstances, would it, Mr Pettman, because after 12 months continuous service there is a right to 28 consecutive days. That is accrued, it's due. The only proportionate leave would be that which is earned in accordance with the other part of the award, that says that it accrues at the rate of 13.1/3 hours per completed month of service.

MR PETTMAN: That's our understanding of it.

PRESIDENT: So that is the proportionate leave, isn't it?

MR PETTMAN: That's our understanding, Mr President, but a complete amount of leave cannot in any way be considered as a proportionate.

PRESIDENT: No. Part of an employee's final payment might comprise payment in lieu of annual leave, a full year's annual leave due but not taken together with pro rata leave, calculated on the basis in this case, 13.1/3 hours for each completed month of service and I would suggest to you that that may very well be what is meant by a reference to the fact that such loading ... this is in sub-placitum (ii) of (f), such loading shall not apply to proportionate leave on termination.

MR PETTMAN: Well perhaps, Mr President, it could be argued then that as annual leave, a full amount of annual leave, cannot be paid for, it must be taken. The employee in this case went off on annual leave, but the facts don't support that in that his contract of employment ended on 1 July.

PRESIDENT: Yes. But the employer must have allowed him to continue working. He didn't send him off on leave ...

/JR - 08.03.89

PRESIDENT - PETTMAN

MR PETTMAN: No.

PRESIDENT: ... so he's condoned it, hasn't he?

MR PETTMAN: Yes, definitely.

PRESIDENT: Now, it might be that the employee didn't want to take his leave. It may be that he was intending to leave in any case. We can't look into the person's mind.

MR PETTMAN: No. I have no information on that.

PRESIDENT: But the employer, whatever it was, the employer must have approved.

MR PETTMAN: Yes, he did. The whole action was initiated by the employer.

PRESIDENT: Otherwise, he could have said, no, take your leave.

MR PETTMAN: Yes.

PRESIDENT: Well, we'll see what Mr Smith's got to say about it.

MR SMITH: Thank you, Mr President.

I concur with many of the comments of Mr Pettman, that on any consideration merit in relation to this matter, it'd probably be my position to say that the leave loading would be payable. However, I do have a difficulty in adopting that position in respect of this particular matter, in that I don't believe that that is what the award actually says.

It appears to me, with due respect to the draftsman of the award, that the annual leave clause is somewhat inadequate in that, for example, as you've already referred, Mr President, sub-clause (h) the time of taking leave, there is no provision within the clause to provide for the situation where sub-clause (h) is in fact breached where the leave is not taken in the 6-month period.

The question could then be raised as

MR SMITH: to what happens to an employee's entitlement to that leave if sub-clause (h) is in fact breached.

One position obviously would be that the leave is forfeited, which is a very, perhaps, biased point of view, but I know that in other proceedings, in other jurisdictions, that that has in fact been held to be the case, although I haven't got the reference to that today.

I do have a couple of documents that I would like to tender for the purpose of information of the Commission, if I may.

PRESIDENT: Yes, if you would.

MR SMITH: Well, now I'll mark them as exhibits to be consistent, Mr Smith, in what order?

MR SMITH: The first document should be Australian Labour Law Reporter.

PRESIDENT: Yes. That will be S.1.

MR SMITH: The second document is an extract from the Australian Industrial Law Review and it's paragraph 395, volume 27 of 21.

PRESIDENT: S.2 and S.3.

MR SMITH:

Thank you, Mr President. These documents really are ... I don't consider them authoritative in terms of what they allude to. However, I have tendered them merely for the purpose of information and some background into what I see as the construction of clause 46 of the Electrical Engineers Award.

If I can refer you to Exhibit S.1, Mr President, which is an extract from the Australian Labour Law Reporter and in fact it's an extract that deals with annual leave and annual leave loading.

There was a quotation that I wish to refer you to at the bottom of the first page. It's headed paragraph 37-070 Annual Leave Loading and it says:

"In the early 1970s it was mooted that workers on annual leave ought to be paid a bonus or loading in addition to their ordinary pay for the leave period.

The justification for this additional payment was twofold:

(a) to compensate workers for additional expenses usually incurred during holidays, e.g. cost of travelling to and staying at holiday resorts, and

(b) as compensation for the unavailability of additional income while on leave from sources such as overtime."

Further over, Mr Commissioner, the document then deals with the situation as it applies in Tasmania and on page 2, which is headed Tasmania, indicated at paragraph 39 is the source of the legal obligation of employers and the legal entitlement of employees in respect

/JR - 08.03.89

SMITH

MR SMITH:

of annual leave benefits including annual leave loading and it says that the entitlements arise from both Federal and State awards and agreements and in this case, of course, we're dealing with an award of this Commission, a State award, and this document indicates that there are approximately 70 State awards in Tasmania, in a number of respects the common rule applicable to each of these awards makes provision in relation to conditions of employment.

One such matter covered by a common rule award is annual leave and it goes on to say:

"That the commentary in this section is based on the typical award ...".

And mention is made of the more specific provisions contained in particular awards in some instances.

The part that I want to refer you to, Mr President, is some way over, two pages over from where we've just been reading at paragraph 39-035, headed Annual Leave Loading. It says:

"In addition to the employees' ordinary pay for the annual leave period the standard clause prescribes that all employees, other than temporary or part-time employees, shall be paid an amount equal to the minimum wage as prescribed.

Many awards provide for an annual leave loading of 17.1/2% of the amount paid in respect of annual leave instead of the minimum wage.

In some awards, such as the Cement Makers Award, do not discriminate against part-time and temporary employees in relation to loading and

/JR - 08.03.89

SMITH



MR SMITH:

simply provide that all employees receive the loading."

And over the page, Mr Commissioner, under the heading On Termination:

"Upon termination of employment an employee may become entitled to payment of any accrued annual leave loading not previously afforded him by his employer. This depends on the wording of the annual holiday loading clause in the relevant award.

If the award provides that on termination all accrued annual leave which is untaken is deemed to be then granted, it follows that an employer must pay all normal holiday pay including annual leave loading.

On the other hand, if an award lacks such a deeming provision, there is no requirement for an employer to pay annual leave loading on termination and he is not obliged to do so.

There is no right to annual leave loading if the reason for termination is the worker's misconduct."

As I've indicated and as this document indicates, Mr Commissioner, it is only a summary and obviously as is indicated there and the task that you will have at the end of these proceedings is to interpret the actual award.

Finally, in respect of this document, on the very last page, at paragraph 39-040, Mr President, under the heading Leave Fully Accrued But Not Taken, it says:

/JR - 08.03.89

SMITH

MR SMITH:

"Failure to take annual leave in the period specified in the award within 6 months of its accrual in the standard clause or within 12 months of its accrual in some awards such as the Cement Makers Award, results in the forfeiture of the entitlement to leave as such.

No provision is made for payment in lieu of such leave on termination in the standard leave clause."

PRESIDENT:

Do you think the author is simply pointing to a drafting defect in the award?

MR SMITH:

I think that may well be the case, Mr President, and as I indicated at the outset in my submission, I believe that this particular clause is inadequate in a number of respects and I suppose the task of the parties respondent to the award, subject to your interpretation of course, if you decide in that manner, then the object of the parties would then be to perhaps amend the clause to reflect what should properly be intended.

However, I believe that the clause as it stands doesn't provide for the payment of annual leave loading on termination of employment, either in respect of pro rata annual leave which is quite clearly spelled out, or in respect of any previously accrued entitlement to annual leave and consequently leave loading which has not been taken by the employee or granted by the employer.

The basis for saying that, Mr President, lies in the words of the clause itself. Firstly, in respect of sub-clause (a) of clause 46 is found on page 73 of the consolidated print 3 of 1988, where it defines the period of annual leave as being:

/JR - 08.03.89

PRESIDENT - SMITH

MR SMITH:

"A period of 28 consecutive days leave shall be allowed annually to an employee after 12 months continuous service".

/JR - 08.03.89

SMITH

MR SMITH:

That is the only reference to a period of leave, or the only definition, if you like, of what is meant by the term 'period of leave' in the leave clause.

When one looks at sub-clause (f) which is the relevant sub-clause in respect of the interpretation or the application by the Department of Labour and Industry, it refers to the payment for the period of leave being the 28 consecutive days' leave and it says two important things and I think in placitum (i) in sub-clause (f):

"Each employee before going on leave shall be paid the amount of wages he would have received in respect of the ordinary time which he would have worked had he not been on leave during the relevant period".

That, to me and in my submission, indicates that even a payment for leave doesn't arise until the employee actually proceeds on annual leave.

In such circumstances, he then receives the payment that he would have had had he remained at work.

PRESIDENT:

What happens at annual closedown when some employees haven't worked a full year, but are nonetheless paid their leave accrued due to them when the employer closes his business premises for the purposes of allowing annual leave.

Aren't all employees in those circumstances paid either their full leave loading due to them or proportionate, having regard for the period of service?

MR SMITH:

They would be, in normal circumstances, paid both their annual leave entitlement for that period and the leave loading, yes, Mr President. However, that is a

/JR - 08.03.89

PRESIDENT - SMITH

MR SMITH:

practice which is not specifically catered for within the clause itself.

PRESIDENT:

Don't you think (ii), sub-placitum (ii), would allow that:

"In addition, all employees engaged to work 20 or more hours shall receive a loading on payments made for annual leave as prescribed in paragraph (a) for annual leave falling due".

If annual leave, proportionate leave, fell due at the time the employer closed down his premises to allow all employees to take whatever leave was due to them. You yourself pointed out that (a) simply says a period of 28 days shall be allowed annually.

Well, now, if that doesn't mean 14 days after 6 months, then it would mean that if the employer closed down for the purpose of allowing annual leave to all employees, including those who didn't then have a full year's service, they wouldn't be entitled to any pro rata leave, but if they were, and it was regarded as annual leave then, clearly, they would be entitled to a leave loading, wouldn't they?

MR SMITH:

Yes, most certainly.

However, I don't believe that the clause entitles either an employee or an employer to grant leave where the employee has had less than 12 months' service.

PRESIDENT:

The old notion of the annual closedown for the purpose of allowing annual leave, I thought that was a particular situation that was approved of by tribunals that provided the employer closed it down for the purpose of allowing annual leave he can compel all employees, whether they've had a full year's service or not, to remain off work for the whole of the period that he

/JR - 08.03.89

PRESIDENT - SMITH

PRESIDENT: closes his premises but he must pay them whatever pro rata leave is due to them and the balance without pay.

MR SMITH: Certainly, Mr President.

PRESIDENT: That used to be the case with the building industry anyway.

MR SMITH: And I have no problem and the Tasmanian Confederation of Industry has no problem in respect of the application of that principle. All I'm saying to you is that I don't believe that it's specifically catered for within this award clause which really is another inadequacy, in my opinion, that should be corrected if people operating under this clause wish to do that.

It's interesting, in respect of the questions you've been asking, to read sub-clause (i), Mr President, which is broken leave.

PRESIDENT: Yes.

MR SMITH: Wherein it says:

"Leave allowed under the provisions of this sub-clause shall be given and taken in one consecutive period within 6 months of the preceding year of employment, or if the employer and the employee so agree, in two separate periods, the lesser of which shall be not less than 7 consecutive days.

No entitlements shall be permitted to accrue beyond 12 months after the date of accrual."

Again, I know that that is not adhered to in a substantial proportion of cases, that people tend to take their leave as it suits them subject to the commitments of the employer and whilst that may have

MR SMITH:

been originally designed to provide some protection in respect of both the employer and the employee, there are obvious departures from what the clause actually provides for in practice.

/JR - 08.03.89

SMITH

MR SMITH:

Getting back to the point in terms of the period of leave in sub-clause (f), Mr President, it's my submission that the employee is not entitled to a payment for annual leave until such time as he actually proceeds on that leave and placitum (ii) of sub-clause (f) which then comes into play says:

"That in addition thereto all employees shall receive a loading of 17.1/2% on payments made for annual leave as prescribed in paragraph (a) for annual leave falling due".

The situation, as I read the award clause and as I would advocate to you to interpret in the same manner, is that firstly payment for annual leave may only be made when an employee actually proceeds on annual leave and consequently the leave loading may also only be paid for a period of annual leave that is actually taken.

Now, I recognise, as Mr Pettman has already indicated to you, that that perhaps ignores the merit of the case but I believe that that's what the award actually says.

If I may, Mr President, that is borne out in Exhibits S.2 and S.3 and whilst I am cognisant of the fact that you are required to interpret the particular clause in question on what the words say, and that may not allow you to have particular reference to these documents, I believe that there are some similarities can be drawn.

So far as Exhibit S.2 is concerned, at paragraph 395, it's an extract from a decision of the Full Court of the Federal Court concerning an interpretation of annual leave loading.

If I can refer you down towards the bottom of the page on the left-hand side, Mr President, under the head,

/JR - 08.03.89

SMITH



MR SMITH:

The Question, it says:

"The appellant was employed by the respondent between 25 May 1982 and 2 July 1983. the appellant retired voluntarily and was paid the award rate in respect of the annual holiday entitlement which accrued during the period of her employment.

However, the appellant was not paid 17.1/2% annual leave loading for which the award provided in the case of persons taking annual leave.

The question set before the court was whether the appellant was entitled to such loading."

Quite clearly, that depended on the award clause that was being dealt with and the relevant extracts are set out there, Mr President, under that heading, Relevant Extract.

There are a couple of comments listed here in respect of Justice Shepherd, who was part of the Full Court. At the top of the page, on the right-hand side, Mr President, it says:

"It is to be observed that the first paragraph of clause 33(g) open with the words 'During a period of annual leave'. This seems to me to suggest that the draftsman had it in mind that an entitlement would arise during the period of leave.

If that be right, the clause cannot apply where no leave is taken because the entitlement will only arise when leave is taken."

And he goes on to elaborate on the counsel's argument in respect of that, but further down under the

/JR - 08.03.89

SMITH

MR SMITH:

heading Conclusion he says:

"One difficulty with counsel's submission is that it refers only to the first part of clause 33(e). The clause not only provides that an employee is to be paid moneys then due to him in respect of the annual leave being taken, he must also be paid all moneys which may accrue due to him during his period of leave.

In my opinion the latter words of the clause require the payment of the loading in advance of leave being taken, notwithstanding that the entitlement to it does not actually arise until the leave is taken.

For that reason there is no warrant for giving the word 'during' any but its natural meaning. If it be given its ordinary meaning it becomes apparent that accepting cases provided for in the second paragraph of clause 33(g) of the award, the loading will only be payable in cases where leave is actually taken."

He goes on to conclude, Mr President, that:

"Since it is common ground that no leave was taken, the loading was not payable".

As I've indicated, that interpretation was based on clause 33 of the relevant award. However, there are some similarities in respect of that award provision and the one that's before you.

If I can refer you to Exhibit S.3, Mr President, which again is an extract of the Australian Industrial Law

/JR - 08.03.89

SMITH

MR SMITH:

Review. There's a decision quoted at paragraph 300 under the heading Conditions of Work, in the middle column of the document. It's a Full Bench of the Australian Commission considering the hotels and retail liquor industry.

In fact, this particular one was for a claim in respect of 17.1/2% leave loading to be paid on pro rata severance pay and annual leave payment.

At the top of the page on the right-hand side the Full Bench deals with this matter under the heading 17.1/2% Loading on Termination of Employment. The document indicates:

"The claim was to superimpose on the pro rata payment of 1/12th of 1 week's pay for each completed month of service a loading of 17.1/2%.

In support of the claim, the applicants cited a Full Bench decision on the Food Preservers Award when the Bench granted a proportionate payment of annual leave loading for seasonal workers.

In rejecting this, the Full Bench stated that the hotel etc. industry was not seasonal and there was no justification for regarding the Food Preservers decision as a recognition of an emerging standard.

The current standard was for loading of 17.1/2% only when leave was actually taken.

MR SMITH:

And I believe that is the relevant point in this matter, Mr President. But in normal circumstances subject to what the award actually says the leave loading is only payable when the leave is actually taken. And where an employee terminates his or her services or is terminated by the employer, then the leave is not taken. A payment is made in lieu of that annual leave entitlement but it is not actually taken.

It is interesting that this particular award, the Electrical Engineers Award, as you will be well aware contains a number of divisions and in this particular case we're dealing with Division C.

If I may just refer you very briefly by way of contrast, Mr President, to the other annual leave clauses for Division A and Division B. They are, in fact, almost identical.

I beg your pardon, the clauses in Division A and Division B are almost identical to one another. They do differ from that in Division C.

But on page 23, clause 9. Annual Leave for Division A, sub-clause (f), Mr President - it happens to bear the same numbering - payment for period of leave.

There is a slight difference in placitum (i). In fact, I beg your pardon, there is no difference in respect of placitum (i). The differences arises in placitum (ii) in respect to the annual leave loading in that the clause in Division C is quite succinct in what it says.

In placitum (ii) of the clause in Division A it starts with the words `During a period of annual leave an employee shall receive a loading calculated on the rate of wages prescribed for the employee concerned` and then goes on to detail

/JG - 08.03.89

SMITH

MR SMITH:

what that loading shall be.

I raise that only by way of comparison with the remainder of the award. Certainly I think that the clauses in Division A and Division B are much clearer in that the leave loading is only payable during a period of leave and perhaps there is some discretion that can be read into the words in respect of Division C, which is the one that is before you.

However to conclude, Mr President, I would say that I would support the comments of the Secretary for Labour in that it is our belief that in the way that the clause is currently written, the entitlement in the circumstances that have been relayed to you in Exhibit P.1 do not give rise to an entitlement to the leave loading on termination of employment.

If the Commission pleases.

PRESIDENT:

Yes, thank you, Mr Smith. Then it would be because of the drafting you feel it would be the intention of the award maker that an employer, having the absolute capacity to determine when leave shall be taken provided it is taken within 6 months, could if he was minded to do so employ people on 17-month contracts or something of that order and terminate them and not pay any leave loading at all. All he would need to do is fix the time of taking leave to be 6 months after it fell due.

MR SMITH:

Yes. That could eventuate. It certainly wouldn't be the advice that I would give an employer because it is obviously not a fair practice. Again I agree with your most recent comment that it is because of the award drafting that gives rise to the submission that I've put to you this morning.

In practice my advice to an employer in the circumstances relayed in this particular case, as Mr Pettman has

/JG - 08.03.89

PRESIDENT - SMITH

MR SMITH:

indicated, would be that `Yes, you should in fairness make payment for the leave loading`.

However as Mr Pettman also indicates where an employer fails to heed that advice and the award clause does not prescribe any clear indication that the leave loading should be paid, then the circumstances that you've outlined and some employers being able to perhaps avoid their moral obligations, could arise.

PRESIDENT:

Well we have a specific case before us, don't we, the case of Mr Hicks? The agreed facts include the statement that Mr Hicks' termination came about by Mr Gavin Moore giving Mr Hicks a week's notice.

We must also assume that the general manager, or whoever was in charge, had determined that annual leave would not be taken within the period of 18 ... no, within a period of 17 months otherwise the employer would have been in breach of the award, wouldn't he?

So that as Mr Hicks could not have taken his leave - this is an assumption based upon the award drafting - within the period we must assume stipulated by the employer.

The employer was quite at liberty to terminate him, not for misconduct - it doesn't say it was misconduct - and not pay him any leave loading because he couldn't physically proceed on leave. The employer couldn't have said to Mr Hicks `I want you to proceed on leave at the expiration of which you'll finish up`.

Now is that what we can read into the award on those facts?

/JG - 08.03.89

PRESIDENT - SMITH

PRESIDENT:

You see the award says it shall ... the employer has the absolute discretion to determine when leave will be taken. So if he has the absolute discretion, then he must have decided in Mr Hicks' case, that leave would not be taken within that period of Mr Hicks' employment, which 13 March 1987 to July 1988, which is something like 16 months or thereabouts ... 15 months.

So the employer was within his rights presumably, deciding, well the annual leave that had fallen due could not be taken within ... couldn't be taken in March, and certainly couldn't have been taken before July, otherwise he would have directed the employee to have taken it.

And then he terminates him. Now the employee we'll assume has done nothing wrong. He's complied with the award, and he's forfeited his leave loading.

He'd have had his leave loading, had the employer decided that annual leave would be taken when it fell due, or within a month ...

MR SMITH:

Yes. I suppose what we don't know is ...

PRESIDENT:

... and still terminated in July.

MR SMITH:

Yes. Yes. I suppose what we don't know is whether or not the employer intended to grant the annual leave in accordance with the award within the 6-month period, from the date of accrual. It obviously would have meant that it would have had to have been taken by September ...

PRESIDENT:

That's right.

MR SMITH:

... of 1989.

PRESIDENT:

Yes.

MR SMITH:

He his also only required to give 2 weeks' notice to the employee of

/LM - 08.03.89

PRESIDENT - SMITH

MR SMITH: taking that leave.

PRESIDENT: Yes. But he is required to fix the time of taking leave isn't he?

MR SMITH: Oh yes, yes, he certainly is.

PRESIDENT: So had he fixed a time some time after the right to leave fell due, the man would have been paid it - the leave loading, had he proceeded on leave.

Because the employer chose not to fix an earlier time, and eventually terminated this employee's services, he's missed out.

MR SMITH: Yes.

PRESIDENT: Well I agree we can't discuss the merits, but I wonder if that's the intention ... I wonder if that's the true intention? I wonder if that's the way we should construe the award?

MR SMITH: Well I suppose that question of what role ... with due respect to the Commission, with what role the Commission plays in terms of an interpretation of the award. Whether or not the term in what the award actually says, and if in this case, that acts to the detriment of the employee, then it's up to the parties to then rectify that clause, or whether or not your licence extends to be able to discover the intent of the draftsmen, and what lays behind the actual words to determine not only a strict interpretation, but its application in practice if you like.

PRESIDENT: Well I think this Commission has indicated at the outset that it will generally follow the normal ground rules for interpreting industrial awards, and has taken a great deal of comfort from the observations made by .... of the New South Wales Industrial Commission.

In fact you don't need to be an



PRESIDENT:

astute student of industrial relations to work out where those ground rules came from. The seven ground rules that with slight adapt. They're adapted or adopted to suit the Commission.

Now I agree with you it would be quite wrong to try and put a construction on a clause applying the ordinary English usage to the language just will not permit. Clearly that would be quite wrong, and would not be an interpretation at all.

I would think that one would certainly in interpreting this particular provision have to look at the annual leave provision in its entirety and endeavour to discover from the language used, what the intention was, regarding leave loading.

It would have been so much easier I'm sure you would agree, had the award contained some sort of definition of leave loading and what it was intended to compensate for.

You've drawn the Commission's attention to something that has been written about leave loading, and the possible intention, and I think we all know that ... I think it first emerged on the waterfront, when waterside workers were concerned that when they proceeded on annual leave, they lost their shift allowances, and therefore they were losing money when going on leave.

That's all right for shift workers, but under the present provision the day workers get more money for going on annual leave, as part of a continuing employment.

But we're now suggesting, or it's been put to the Commission today, that if a day worker doesn't enjoy continuity of employment, although he may have worked for a full year and more, he miss out on leave loading.

/LM - 08.03.89

PRESIDENT

PRESIDENT: So the real test seems to be whether he remains in employment. Perhaps that's the acid test.

MR SMITH: Yes.

PRESIDENT: Perhaps if he doesn't ... that's a penalty that attaches to being dismissed for other than misconduct or for terminating perhaps for good and sufficient reason. Well that's something, I suppose, the Commission will have to come to grips with.

Thank you, Mr Smith, for your assistance.

Mr Pettman, is there anything more you would like to add as you're the advocate?

MR PETTMAN: No, Mr President. I have before me the seven guidelines which were issued by the Commission earlier and I would concur with Mr Smith's comments. And I don't for the moment believe that the people who drafted this award originally intended it to have the effect that it has had in this particular case.

But based on the common usage of the language there I find it very difficult to argue with the effect it has achieved in that somebody through no fault of their own misses out on a leave loading which they would have received had they been quicker off the mark in taking their accrued leave.

But I have nothing further to add, Mr President.

PRESIDENT: Yes, thank you, Mr Pettman. Thank you, Mr Smith.

I will reserve my decision and that concludes this hearing.

HEARING CONCLUDED