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**TRANSCRIPT OF PROCEEDINGS**

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O/N 9158

**TASMANIAN INDUSTRIAL COMMISSION**

**DEPUTY PRESIDENT R.J. WATLING**

**T No 10620 of 2002**

**DISABILITY SERVICE PROVIDERS AWARD**

**Application under section 23 of the Tasmanian  
Industrial Relations Act 1984 lodged by the  
Health Services Union of Australia, Tasmania  
Number 1 Branch to vary the above award**

**HOBART**

**2.15 PM, THURSDAY, 6 FEBRUARY 2003**

## HEARING COMMENCED

[2.15pm]

PN1

MR C. BROWN: I appear on behalf of the Health Services Union of Australia, Tasmania Number 1 Branch and I also appear for the Australian Municipal, Administrative, Clerical and Services Union and I understand you have correspondence authorising me to do that.

PN2

MR J. O'NEILL: I appear on behalf of the Tasmanian Chamber of Commerce and Industry Limited.

PN3

THE DEPUTY PRESIDENT: Thank you. Mr Brown?

PN4

MR BROWN: Thank you, Mr Deputy President. The application before you seeks to vary part 4, leave and holidays with pay, clause 5 holidays with pay in accordance with section 23 of the Industrial Relations Act 1984. A draft order was attached to the application for hearing and I understand from Mr O'Neill that the draft order, at least, is a consent matter. Deputy President, the particular clause in the award is one which has created a number of difficulties within the industry for some time and, in fact, has resulted in disputes between the union and at least employer on more than one occasion.

PN5

The difficulties created by the current award clause for Moondani which is the Disability Service Organisation which has been having most difficulty with this one, prompted that organisation to lodge an application with the Commission to have the clause interpreted in accordance with clause 43 of the Act. Now, notwithstanding certain jurisdictional issues which I won't go into, a conference of the parties was convened before Commissioner Abey on 17 December. And at that conference it was agreed that the best way to deal with this matter was in fact for HACSU to lodge a section 23 application with the Commission seeking to vary the award to remove ambiguities and to ensure that the clause was clear in regards to employee entitlements.

PN6

There has been considerable discussion between the parties, not just Moondani, but with the TCCI and indeed with other Disability service provider employers that operate under that particular award. But we weren't, you know, able to come to some agreement until recently in relation to the actual wording of it. Without going into details concerning the antecedents of the problem it appears it resulted from drafting problems which occurred at the time when the Welfare and Voluntary Agencies Award was restructured under the wage fixing principles. And shortly after that it was translated into the Disability Service Providers Award.

PN7

From memory the applications were originally lodged in 1994 and I think the final order was handed down some time in 1997. If I can take you through the

draft orders and I have provided a copy which basically outlines the changes that have occurred in colour.

PN8

THE DEPUTY PRESIDENT: Yes, can I say it looks very professional. It is very easy to follow.

PN9

MR BROWN: Thank you very much.

PN10

THE DEPUTY PRESIDENT: Yes.

PN11

MR BROWN: It costs a lot of money to buy that colour printer. The red obviously are the deletions, the blue are the inclusions, the black is where there is no change has actually been made.

PN12

THE DEPUTY PRESIDENT: I might just give this an exhibit number if you want?

PN13

MR BROWN: Yes.

PN14

THE DEPUTY PRESIDENT: So we will mark this HSUA1.

### **EXHIBIT #HSUA1 COPY OF DISABILITY SERVICE PROVIDERS AWARD, PART VI**

PN15

MR BROWN: The only changes to clause (a) are really a clarification and the problem basically was where the brackets were located. What it originally had was, "All employees," and then in brackets, "Other than casuals," and then went on, "And part time employees as defined." And our view is that what it was really referring to was those employees that were in receipt of the 20 per cent loading regardless of whether they were casual or part time employees. So the wording that we proposed here to ensure that it is clear is that, "(Other than employees in receipt of a 20 per cent loading in lieu of annual leave, holidays with pay and sick leave.)" And I think that makes it crystal clear what the intention of the clause actually was.

PN16

Clause (b), there is no change to the first paragraph but we have a proviso included. The clause presents no problem for full time employees given that apart for hours of work, penalty payment, shiftwork and overtime in clause 2(b) which provides for the maximum 190 hours work over a five weekly period and clause 8 which provides for two scheduled days off in each week, means that the way that clause is written doesn't create any difficulties for full time employees. It does, however, for the industry create some problem in

terms of part time employees because it is often been raised with us what does a day in lieu actually mean and what does it constitute?

PN17

So the additions that we have included in clause (b) simply seek to make it crystal clear how a day in lieu is calculated for a part time employee. Clause (c) in the first paragraph has the insertion of, "Scheduled days off," so it now reads:

PN18

*Where a holiday with pay occurs on a rostered day off or a scheduled ... (reads)... taken by mutual agreement.*

PN19

Perhaps a sort of quick bit of history is appropriate here. I have also provided another exhibit to you - for you.

PN20

THE DEPUTY PRESIDENT: Yes, I will mark this exhibit HSUA2.

#### **EXHIBIT #HSUA2 COPY OF WELFARE AND VOLUNTARY AGENCIES AWARD**

PN21

MR BROWN: HSUA2, Mr Deputy President, is the last consolidation of the Welfare and Voluntary Agencies Award prior to the restructuring which I referred to earlier. And when you look, if you go over onto - under clause 57 Holidays with Pay and subclause (c), it states that:

PN22

*Where a public holidays occurs on a rostered day off in accordance with ... (reads)... taken by mutual consent.*

PN23

If you then go over the page and I have - clause 58 Hours, part (b) and then over to (a)(v) which I have highlighted there I think and it says:

PN24

*By accruing an entitlement to rostered days off to a maximum of ... (reads)... not exceeding 12 months.*

PN25

So the award clearly provided for a rostered day off provision. And if you go over to the next page which is clause 74 Scheduled Days Off, that clause clearly provides for a scheduled days provision in the award. But if you go back to the holiday with pay clause as it was then worded, it was certainly unclear as to whether subclause (c) of clause 57 was in fact referring to a rostered day off or was referring to a scheduled day off, or in fact it was referring to both. Now, our view is that it was referring to both, but it was badly worded.

PN26

The next consolidation of that award was in order number 5 of 1995 and that was following one of the first orders to come out of the restructuring and the wording of the holidays with pay clause in that consolidation is identical to what it is in the award now. What it served to do is simply to remove the clause number and the reference to scheduled days off and therefore had the effect of only making reference to rostered days off. So our view was that that was a rostering - sorry, a drafting error that occurred at the time.

PN27

There are arguments in our view as to why scheduled days off should be included. And you know, just very quickly, obviously if an employee who was a rostered employee has regular program schedule days off in accordance with the award on a Monday and a Tuesday, then if you take 2003 and the Southern region then they would have five holidays with pay that they would not be entitled to even though subclause (a) actually gives them that entitlement. So what we are seeking here to do is simply to put back what we think should have been in the award all the way along and was a drafting error at the time that the WAVAA Award was restructured.

PN28

Subclause (d) simply seeks to make the payment for holidays with pay which are worked at the rate of double time and a half. Currently what the subclause provides for is either 50 per cent and granted a day in lieu to be taken in mutual agreement, or paid at a rate of double time and a half. Again the reason that we have sought this amendment is in discussions with different employers within the industry, is that they find it hard to accommodate days in lieu that were added in terms of their rostering arrangement. And I think that very few employers, if any, would actually provide for the day in lieu and actually pay the double time and a half payment.

PN29

Subclause (e) is - the only change in the first sentence in that paragraph is simply to make a specific reference to the subclause rather than just simply the rate proscribed elsewhere in this clause. We have actually referred it to subclause (d) of this clause. So it just makes that absolutely clear. We have deleted the second sentence in that paragraph because essentially there is a contradiction between the two of them in our view. And again there is this issue about day in lieu been added which the employers indicated caused them some difficulty. So we have deleted completed the second part of that provision and we believe that the first part does what pretty much is the practice within the industry.

PN30

Subclause (f) is one that has always caused the industry some difficulty. And if you look at the wording of it, it is very much couched in the terminology of the old WAVAA, Welfare and Voluntary Agencies Award. The reference to supervisory positions is a reference to the classification of employee which was a supervisory employee under the WAVAA Award. Now, the other problem with this clause and the reason why we are seeking to delete it, is in fact that it is in contradiction to subclause (d) which provides a different rate of entitlement.

PN31

I think what happened and I have been back through the award history files, is that in the WAVAA Award prior to the restructure there were in fact two divisions within that award. And each division within the award virtually replicated almost every single clause in the award. So there were two holidays with pay clauses and at the time that the restructuring was done those clauses were - those divisions were amalgamated into one division. So there was a lot of redrafting to try and fit the different provisions into one and I think my view is that clause (f) was left in there inadvertently and should have come out. That has probably been one of the biggest problems that we have had with this clause, apart from the issue around the scheduled days off.

PN32

That is the explanation, unless you require further explanation of any, Mr Deputy President, but the HSUA submits that the orders sought do not offend the public interest. In fact we would argue that it is in the public interest because it would certainly reduce the amount of disagreement and potential for disputation within the industry. And the HSUA is seeking an operational date for the first full pay period following this decision. If the Commission, please.

PN33

THE DEPUTY PRESIDENT: Thank you. Mr O'Neill?

PN34

MR O'NEILL: Yes, thank you, sir. The issue giving rise to this application has been of consternation for some time now to the parties to this award and to those in the industry. It is one of the many errors of this award that has required review. So from that point of view it is good to see that the parties have got together to clarify an area of this award which has caused some concern for some time. As Mr Brown indicated to you in his submissions TCCI consents to the award variation as detailed in HSUA1.

PN35

This award variation amongst other things will clarify the entitlement to holidays with pay for full time and part time employees engaged in a rotational shift roster where a holiday with pay falls on their scheduled day off. With the exception of ANZAC Day where that day falls on a Saturday or Sunday, because ANZAC Day is now observed on the day that it falls. Part time employees engaged to work other than on a rotating shift roster and where a holiday with pay falls on say a Monday and they do not normally work on a Monday, then there is no entitlement to payment, nor is there entitlement to a day off in lieu.

PN36

We submit that this variation provides for consistency and a quality of treatment for employees in the industry in comparing other industries, particularly the health care industry. So therefore on that basis it is bringing the award up to date with what current employee entitlements and standards are in other industries and as I said particularly the health care industry. The only area where we differ, sir, is in respect to the operative date and I would like to

make submissions now as to why the operative date should be effective from the first pay period commencing on or after 1 July 2003.

PN37

We make this submission because there are some employees within the industry who have been interpreting the award strictly in accordance with the plain English meaning of the words. The award in its current construction does not provide for a day off in lieu for an employee where a holiday falls on their scheduled day off, and this is clear from part vi, clause 5(c) of the award. Just for the record clause 5(c) states:

PN38

*Where a holiday with pay occurs on a rostered day off (as defined) an ... (reads)... taken by mutual agreement.*

PN39

That clause in itself taking the plain English reading of the words obviously does not provide for a day off in lieu where a scheduled day is being observed. And there are some in the industry, sir, that have been interpreting the award strictly on that basis. Therefore, given that Regatta Day falls this Monday coming, 10 February, the eight hour day is on 10 March, Good Friday this year, being 18 April, Easter Monday being 21 April, ANZAC Day being a Friday 25 April and the Queen's Birthday holiday falling on 9 June, employees - employers, sorry, strictly interpreting the award will be up for additional costs over and above what their funding has been granted.

PN40

They will need to have employees cover for those employees who will be observing a scheduled day off because the way they roster, they simply roster it so it just keeps rotating through and employees obviously observe scheduled days off, but the rosters are budgeted for and funded on that basis. Some employers have put their tenders in that way and therefore there is no additional funding to cover where an employee is observing a day off and another employee has to cover that shift. Therefore as I said to allow some employers to budget and to seek additional funding for this award variation, it only seems appropriate given that the holidays with pay occurring over the next few months that the Commission delay this variation to the date so sought.

PN41

Furthermore and finally, given the application for an interpretation was not proceeded with and I note and accept the submission by Mr Brown that there were some jurisdictional issues with that. Had those jurisdictional issues been resolved which they were resolvable, that would have eroded into some of this time. Given then that we may have got up based on a strict interpretation of the award, it would have then been open for the union to have pursued the application which they are now pursuing, which would have put us some months down the track.

PN42

So on that basis we would urge the Commission to grant the operative date being the first full pay period on or after 1 July 2003. Given that, sir, this application is in the public interest. It does not offend the wage fixing

principles and on that basis given my final submission that it be approved. If it pleases.

PN43

THE DEPUTY PRESIDENT: Thank you. Mr Brown?

PN44

MR BROWN: Thank you, Deputy President. Just three comments in response to Mr O'Neill. First of all the issue about the interpretation application. I mean clearly our view was that it was not jurisdictional and I don't know how that application could have been resolved. I mean I guess the process would have been for the - that to be withdrawn and the TCCI, or such a body lodge an application of interpretation. I think everyone was pretty clear that no matter what happened in terms of an interpretation hearing the outcome would have been that the award needed to be redrafted along the lines that we have done so anyway.

PN45

I would make the point that in terms of time frame we have been dealing with this for well over 12 months. There have been numerous attempts to try and seek some sort of an agreement with the industry and I think we probably would have lodged an application for an award variation in any case. So I don't accept that there would have been any significant time difference and certainly my members have been waiting for well over 12 months to have this issue sorted out. The other point I would make about the costing cost on the industry is that I would argue that there is probably very little costing cost on the industry that would warrant any form of phasing.

PN46

In many ways it is an issue predominantly for full time employees, because full time employees who are rostered employees, and most full time employees in this industry would be rostered, then obviously if they are on a scheduled day off on a Monday which would probably only be a small percentage of them, or in fact any of the holidays with pay that Mr O'Neill outlined, it would only be a small percentage of them. And there are very few full time workers within this industry anyway. So I suspect that the numbers are extremely small.

PN47

With regards to part time employees, the part time employees would only get paid for it if in fact they were on a scheduled day off. If a part time employee is not rostered for the full roster pattern then they probably don't have scheduled days off in any case. If you are a part time employee that only works on a Thursday and a Friday then the concept of scheduled days off is effectively irrelevant. Those employees that work every day in a roster pattern, then yes the scheduled days off provision would apply and it would apply on a pro-rata basis under the provisions that we have proposed here. And again there wouldn't be very many of them that would be having their scheduled day off on a day that was a holiday with pay.

PN48

So our argument is that there is probably a very - the cost impact is not that great because the numbers involved would be extremely small. And we don't

see that there is an argument for any phasing. We would still seek that the operational date be from the first full pay period following your decision. If the Commission, please.

PN49

THE DEPUTY PRESIDENT: Thank you. Well, I will hand down a written decision in due course, but I want to let you know it won't be my usual quick self because I am heading off on leave tomorrow. So it would probably be a decision come down when I return from leave I would think, but I can indicate to you that I am certainly prepared to approve the amendments and congratulate you on sorting it out because I really think at the end of the day interpretations don't sort these things out at all.

PN50

You have really got to get down and do the hard yards and doing this type of thing to work it out. So I think you have gone along the right path and I am prepared to endorse the variation. I have to give some thought to the operative date which will be an issue, but certainly people should be forewarned that the Commission will be approving this clause, it is only a matter of the operative date. That concludes this matter, thank you.

**ADJOURNED INDEFINITELY**

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