

Pres - only

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 1818 of 1989

IN THE MATTER OF an application by
the Secondary Colleges Staff
Association for interpretation of
the Teaching Service (Teaching
Staff) Award

re recreation leave allowance

PRESIDENT

HOBART, 16 February 1989

TRANSCRIPT OF PROCEEDINGS

(UNEDITED)

PRESIDENT: I'll take appearances, thank you.

MS MORAN: **PATRICIA MORAN** for the Secondary Colleges Staff Association, Mr President.

PRESIDENT: Thank you, Ms Moran.

MR GEURSEN: If the Commission please, I appear for the Tasmanian Public Service Association and with me is **KERRYL GREY**.

PRESIDENT: Is the TPSA party to this award? Yes, you are, thank you.

MR LANE: Mr President, if it please the Commission, **CHRIS LANE** appearing on behalf of the Tasmanian Teachers Federation.

PRESIDENT: Thank you, Mr Lane.

MR WILLINGHAM: Good morning, Mr President. **CLIVE WILLINGHAM** for the Minister for Public Administration, together with **MR JOHN KENNY** and for the last time this year, **MR HARRY ONSMAN**, who is shortly to go to greener and better pastures.

PRESIDENT: Well, who's going to open the batting?

MS MORAN: I think I am, Mr President.

Mr President, the SCSA has asked for an interpretation of this section of the award because of inconsistencies in the Education Department's administration of the holiday leave loading as a result of which we believe some of our members, who are temporary teachers, are being unfairly treated.

This request for an interpretation of the award arises out of a dispute hearing in December last year before the Deputy President.

The Association declared a dispute at that time because we believed, and we still do believe, that some of our

/JR - 16.02.89

APPEARANCES - PRESIDENT - MORAN

MS MORAN:

members were wrongly being denied their leave loading entitlement.

When the last pays went out for the college year, at the end of last year, temporary teachers who'd not been notified that they'd be employed again in 1989 didn't receive the 17.1/2% leave loading.

At the time we believe that this loading was denied to all temporary teachers, but in the interim we've been informed by the Department that the leave loading was paid to all ongoing temporary teachers, that is to all temporary teachers who had been informed that they would be reappointed in 1989.

So some of these arguments go back to that dispute hearing and therefore relate to the first more general proposition, that all temporary teachers should have the leave loading.

When we enquired originally why temporary teachers were denied the leave loading, Mr President, we were told that they were entitled only to proportionate recreation leave and therefore they were subject to the clause that we are interpreting here today, 14(1)(iii) in particular, and they weren't eligible for the loading.

Should we look at 14(1)(iii) at this stage, or ...

PRESIDENT:

Well, it's your case.

MS MORAN:

Right. Well, I suspect that whoever the first fast thinker was who produced that idea in the first place is probably now suitably embarrassed.

But let's have a look at the word 'proportionate' just in case the Department is unrepentant on that score.

My Oxford English Dictionary defines

/JR - 16.02.89

PRESIDENT - MORAN

MS MORAN:

`proportion' as a comparative part, or a share or a comparative relation or a ratio and it uses as an example the proportionate births in the population and that is the relation of a part to a whole.

A portion is a part and a proportion is a piece or share, i.e., it's still a part too.

To say that people are entitled to 100% proportion or part of their recreation leave, is bad English as well as being bad industrial relations once it's used to drag temporary teachers into the ambit of 14(1)(iii).

If we look at 14(1)(iii) carefully, it's obvious that it was intended to cover people who resigned or who were dismissed before the end of a leave year, that is, before the next anniversary of their appointment, but if it was meant to convey that anyone who did that automatically lost entitlement to a leave loading, surely that's what it would have said but it doesn't, it uses the famous word `proportionate'.

It says that, in fact, if you were only entitled to proportionate leave you can't have a leave loading, i.e. it's designed, in my opinion (at least in the Association's opinion) to cover the case of the teacher who resigns or who is dismissed without teaching 40 weeks in the leave year and therefore hasn't completed a year's work, which for a teacher is 40 weeks, and isn't entitled to full recreation leave.

Then, according to 14(1)(iii), if we take an example of a teacher who has taught for 30 weeks out of the 40, then he or she is only entitled to three-quarters of the recreation leave and hence isn't entitled to any leave loading.

Now, the Department itself does its

/JR - 16.02.89

MORAN

MS MORAN:

sums on this basis. I can refer you to the formula if you like. Would you like me to include the formula?

It's fairly complicated and it's taken ...

PRESIDENT:

I'm sure it is.

MS MORAN:

It's taken from regulation 256 as amended in 1986 in the State Service Award. 297 the amendment is.

If we look at that formula, which is used for paying all teachers who've worked for more than 20 consecutive working days but haven't finished a leave year, we find this allowance is calculated in accordance with this formula and it's $A = (B \times 12 \text{ over } 40 \text{ minus } C) \times S \text{ over } 52$, which is just a week's pay. Where A's the allowance in lieu of recreation leave payment ... well, the same thing. B is the number of weeks of the school terms, from the day that teacher commenced to the day of termination of work. C is the number of weeks of recreation leave taken in the period referred to in B, that is, within those weeks that the teachers worked and S is the annual salary, as I said. So, S over 52 is 1 week's pay.

So for a temporary teacher who's worked a full 40 weeks of terms 1 to 3, there is in fact, if we apply the formula, an extra 8 weeks' pay on top of the total of 4 weeks' recreation leave he or she's already had between terms 1 and 2 and terms 2 and 3.

Am I going too fast?

PRESIDENT:

No. Ms Moran, I wonder if you'll be coming back to the important preamble to the entitlement, namely, those words in the first line that says, "during a period of recreation leave". Doesn't that qualify the whole thing?

MS MORAN:

Sorry, I had better look again.

/JR - 16.02.89

PRESIDENT - MORAN

PRESIDENT: 14(i).

MS MORAN: "During a period of recreation leave, an employee shall be paid an allowance by way of additional salary, calculated at the rate ..."

Yes, I see what you mean, but I'm arguing ... I think what we're arguing ...

PRESIDENT: Well don't argue the merit before me.

MS MORAN: No. But I think, does that exclude necessarily, a period of ...

PRESIDENT: Well it says it shall not. The proviso says "Shall not apply proportionate direct leave".

But first ...

MS MORAN: Yes. I was reading ...

PRESIDENT: ... do you not believe that there must be an entitlement to recreation leave ...

MS MORAN: Mm.

PRESIDENT: ... already accrued ...

MS MORAN: Yes.

PRESIDENT: ... before this particular provision can have any application?

MS MORAN: Yes. But I'm ... no, sorry, I'm ... when I was reading you the formula, that was why I was wondering whether I should go into such detail. What I was going to go on to say was there are some teachers who are entitled under that formula, quite clearly, to the whole period.

So I'm not just talking about proportionate recreation leave, like the person who's only worked three-quarters. I'm talking about the many temporary teachers who are employed from the first day of Term 1 to the

MS MORAN: last day of Term 3, and therefore under the formula are entitled to the whole ...

PRESIDENT: Are they?

MS MORAN: ... of their recreation leave.

PRESIDENT: Yes, they might be entitled to the whole of their recreation leave, but are they entitled to any recreation leave allowance? That's what you're putting to the Commission, I take it.

MS MORAN: Yes. Well they're given it. They're paid that recreation leave allowance.

PRESIDENT: That doesn't necessarily mean it's right. But if it says `During a period of recreation leave ...`

MS MORAN: Mm.

PRESIDENT: ... then clearly the leave must first be due and the employee must be enjoying that leave ...

MS MORAN: Yes. So we're coming down then ...

PRESIDENT: ... in order to attract any payment.

MS MORAN: Yes.

PRESIDENT: Would you agree?

MS MORAN: I see where you're going, I think. Yes. Are you then saying that someone whose period of employment has finished is not on recreation leave?

PRESIDENT: That's right.

MS MORAN: And in that sense, the allowance in ...

PRESIDENT: I'm not discussing the merits of the thing.

MS MORAN: No, no. I realise that. It's a very ... it's a difficult point because everyone up until that point, up until when that final recreation

/LM - 16.02.89

PRESIDENT - MORAN

MS MORAN: leave is paid, the ... all teachers have got to that point, and they're all entitled to their 8 weeks' pay ...

PRESIDENT: Sure, yes.

MS MORAN: ... and in fact they all get their 8 weeks' pay. Is 14 meant to say that they shouldn't get a leave loading, if in fact, they've ceased working for the department, but are still getting their recreation leave pay?

PRESIDENT: Well they'd be paid pro rata leave wouldn't they ...

MS MORAN: Yes, when in fact ...

PRESIDENT: ... under (iii).

MS MORAN: Yes.

PRESIDENT: That takes over in circumstances where they are not, to use my term, enjoying a period of recreation leave.

MS MORAN: Mm. But can you say ... does 14(1)(iii) mean (the (iii) mean) that for proportionate ... it uses the word "proportionate" which is partial. A proportion.

PRESIDENT: Yes. Could I suggest this to you, or just bounce it off you.

MS MORAN: Yes.

PRESIDENT: Let's assume that someone had worked the full year and part of the next year, and their services were then terminated for some good reason. Do you not feel that 14(1)(iii) would then have application?

MS MORAN: Oh it would certainly apply to them in those circumstances. Yes.

PRESIDENT: Is it not then ...

MS MORAN: Because they're not ... they haven't worked for a whole year. They haven't worked for the 40 terms ... 40 weeks.

/LM - 16.02.89

PRESIDENT - MORAN

PRESIDENT: But they've worked for 1 year.

MS MORAN: Yes.

PRESIDENT: And a bit. Right?

MS MORAN: Yes. So they're surely entitled to their holiday leave loading for the 1 year.

PRESIDENT: But not for the bit.

MS MORAN: Not for the bit. Yes.

PRESIDENT: Well do you not think that that's what 14(1)(iii) means?

MS MORAN: Yes. That's what I do believe it means.

PRESIDENT: Well then why are we here today?

MS MORAN: Why are we talking about ... well because the argument the department used was that temporary teachers were only paid proportionate leave, and when asked for an explanation of what 'proportion' meant, the departmental officer we contacted said, well in this case it meant a hundred per cent.

So in other words, the department was using 14(1)(iii) in that way to justify not paying the leave to people who had worked for the full 40 weeks of the school year.

PRESIDENT: Well, I suppose people are entitled to interpret an award in any way they wish, but let's hope they get it right.

MS MORAN: Yes.

So that was part of the department's argument.

PRESIDENT: Yes.

MS MORAN: Oh well, that was the department's original argument to us, and then in the dispute hearing it was argued

MS MORAN: that in fact teachers hadn't ... the temporary teachers hadn't worked for a full leave year, and therefore weren't entitled to the recreation leave payment, or weren't entitled to the leave loading on their recreation leave.

But, in fact, all the other teachers who've worked ... all the permanent teachers who've worked until 16 December are paid their leave loading before their leave year has expired, for the most part, also.

PRESIDENT: But their employment is ongoing and....

MS MORAN: Their employment is ongoing.

PRESIDENT: ... I suppose the Director-General has discretion, but whether he has to exercise it or not in those circumstances might be another matter. But they would satisfy 14(1) would they not, because they are then enjoying a period of recreation leave.

MS MORAN: Well, in fact, their contract expires all ... sorry, yes, permanent teachers' contract doesn't expire, but in fact the department is paying some temporary teachers, the ones reappointed in the following year or who are told, rather, that they will be reappointed in the following year. The department is paying them.

PRESIDENT: So they're not terminated at the end of the year?

MS MORAN: Well, in fact, they are.

PRESIDENT: Are they?

MS MORAN: Because their contract ... sorry, I keep saying contract ... their appointment is up until usually the last day of the third term, and in fact I think there's a public ... there's a ... there is an instruction from the Commissioner for

MS MORAN: Public Employment, saying that all temporary appointments must cease on 31 December each year unless in a particular case there's the permission, I think, of the Director-General. Is that right, Mr Kenny? Is that the way it goes?

MR KENNY: Sorry?

PRESIDENT: Well if all ... if there is an identifiable group of people whose services are terminated at the end of the teaching year, then I would suggest to you, with respect, that none of them in those circumstances would be entitled then to enjoy a period of recreation leave. If they've finished, they've finished.

MS MORAN: Well ...

PRESIDENT: Certainly be entitled to pro rata.

MS MORAN: Mm.

PRESIDENT: Now, I'm not arguing the merits of it.

MS MORAN: No.

PRESIDENT: I couldn't read it. I mean, it's silly to suggest that the words, `during a period of recreation leave`, for example, mean any more than the words say, `during a period of recreation leave`.

If the person concerned is not relieved from duty for the purpose of taking recreation leave, then clearly 14(1) doesn't apply, and if 14(1) doesn't apply, the proviso to 14(1) would have no application, if I'm right.

MS MORAN: Well, I assume you're a lot more right than what I am.

PRESIDENT: Don't ever assume that, please. I'm sure you're the only person in this room who would say that.

MS MORAN: Anyway, the fact remains that what does happen is that the department does pay those people, who are going to be reappointed in the following year, the leave loading and it doesn't pay the leave loading to those people who aren't informed at that time that they will be reappointed the following year.

PRESIDENT: And was that the basis of your section 29, or your dispute ...

MS MORAN: No. The basis was that temporary teachers didn't get the leave loading and we believed that they should be entitled to the leave loading and it was because there was a grey, or at least Mr Robinson wasn't quite sure how 14 should be interpreted in this case, that he suggested that we come here to ask for an interpretation because if we went the other way, the people who felt themselves disadvantaged, who complained to us in the first place, wouldn't benefit from any change to the award.

PRESIDENT: Short of making application to amend the award to put it beyond doubt what the intention ...

MS MORAN: Yes. But even then it would be unlikely that that would benefit those temporary teachers whose jobs were terminated at the end of last year.

PRESIDENT: Well, it would if the variation you sought made it clear that they were entitled to it.

MS MORAN: I see. So you could get a certain amount of retrospectivity in that way. Is that what you mean?

PRESIDENT: That's a proscribed word.

MS MORAN: I'm sorry.

I'll have to learn what sort of words are not acceptable in the Commission.

PRESIDENT: You may use as much Latin as you wish. Mr Willingham is present. He loves it.

MS MORAN: Well, right. I think probably then by talking about the period of recreation leave, if we take that as meaning that you can only have a period of recreation leave whilst you are still employed, then the whole of the argument becomes invalid. I mean, the rest of my argument becomes invalid.

If, however, you take that as meaning during a period in which you were still paid as being on recreation leave though, because you're entitled to that payment, even though your employment is terminated, then my argument still does apply.

PRESIDENT: Well, does that hole up, having regard for the definition of leave year, Ms Moran, in 14(ii)?

MS MORAN: It means the period of one year from the date the employee commenced duty or the anniversary of that

/JR - 16.02.89

PRESIDENT - MORAN

MS MORAN: date. You see, the temporary teachers are still paid for that 52 weeks, even though they mightn't be employed beyond week 40 of the school year, even though their employment is terminated.

PRESIDENT: They are paid up until when?

MS MORAN: They are paid 52 weeks' salary.

PRESIDENT: Although they don't work 52 weeks?

MS MORAN: Yes. They are paid in the same way as permanent teachers are paid. They work 40 weeks and, under that formula I was going through before, if they begin at the beginning of Term 1 and continue to the end of Term 3 they're paid for the 40 weeks. They've had 4 weeks' recreation leave in that time and under that formula they then get the remaining 8 weeks' pay.

So they are actually paid ...

PRESIDENT: For a whole year?

MS MORAN: ... 52 weeks' salary. Yes, paid for a whole year.

PRESIDENT: And that would be paid to them in a lump sum? Well, I suppose it's paid to other teachers. The other teachers are paid, in effect, in advance for the residue of the year until the commencement of the next school year.

MS MORAN: Yes, that's right.

PRESIDENT: Temporary teachers are paid off and their final pay includes a period of 8 weeks?

MS MORAN: Yes. It's called by the department, allowance in lieu of recreation leave.

PRESIDENT: Yes, because they have worked all the time they were required to work and have therefore qualified.

MS MORAN: Yes, on the basis of equity, they've

/JR - 16.02.89

PRESIDENT - MORAN

MS MORAN: qualified to get the same pay as anybody else.

PRESIDENT: Yes. What would you say then in the case of a person who isn't a teacher, who works a full 12 months and his or her services are then terminated? Let's say a teacher aide. Would you believe that that person would also be entitled to recreation leave allowance?

MS MORAN: Yes, I would. If they've worked for the full 12 months, yes.

PRESIDENT: And their services were terminated?

MS MORAN: Mm.

PRESIDENT: And they knew that this was going to happen, that was the contract, for a year.

MS MORAN: Yes.

PRESIDENT: They would have qualified for a year's annual leave.

MS MORAN: Well, again, under the definition of the leave year ... do you mean they've worked for the full 12 months or they've worked for 49 weeks out of 52, or 48 weeks?

PRESIDENT: Perhaps I ought to have said an office assistant. Someone who works the 52 weeks.

MS MORAN: And takes leave during the course of that?

PRESIDENT: Well, who may not. A day worker, in other words, a non-teacher who simply works Monday to Friday every week in the year for a year and at the expiration of that period his or her services are terminated. There's no question that that person having worked for a year would qualify for a full year's recreation leave.

Would you think that person would also qualify for recreation leave allowance?

/JR - 16.02.89

PRESIDENT - MORAN

MS MORAN:

It seems to me he or she would, the way I'm interpreting the clause.

PRESIDENT:

Then do you believe that 14(i), the preamble to 14(i), should be ignored?

MS MORAN: No. No, I can see that 14(i) is a stumbling block unless ...

PRESIDENT: Well 14(i) ... I don't wish to interrupt you unduly. 14(i) is the entitlement, isn't it?

MS MORAN: Mm.

PRESIDENT: What follows are provisos or qualifications to 14(i).

MS MORAN: Mm. But if we ... it depends on whether or not you regard the person whose services have been terminated as being on recreation leave or not.

PRESIDENT: Well, would a simple ...

MS MORAN: Although while they're being paid for that recreation leave.

PRESIDENT: Would a simple test be whether or not that person is covered for workers' compensation? Is there an employer/employee relationship?

MS MORAN: No, there isn't, obviously at that point because the contract's terminated, yes.

PRESIDENT: So, could a person who has no employer/employee relationship be on recreation leave?

MS MORAN: Well he probably thinks he is, but ...

PRESIDENT: Well it'd be a long leave I suppose, part of which is paid and part ...

MS MORAN: Yes. Yes, part of which is paid.

So it depends on how you ... I can understand what you're getting at. If we take that as a period of recreation leave as being strictly to mean while ... you can only have recreation leave while you are still in the Department's employ, then my argument lapses or my argument is irrelevant.

PRESIDENT: I think, Ms Moran, that some of the Federal awards make this painfully clear that proportionate leave ... recreation leave on termination is only payable after the right to the leave has accrued and the employment is ongoing.

In other words, if you've worked your full year, you haven't immediately proceeded on recreation leave and, say, a month or so later your services are terminated for some reason or other you are entitled to the full recreation leave allowance for 1 year, but you experience for the remainder, the proportionate.

MS MORAN: Yes.

PRESIDENT: Don't ask me to justify it, I can't. But that's the way it works.

Whether 14(1)(iii) is intended to be read that way or not is something that I will have to decide, I guess.

MS MORAN: Yes.

PRESIDENT: And if I decided against you, subject to any right of appeal that you might have, it always open to you to seek to have the award varied ...

MS MORAN: Yes.

PRESIDENT: ... to provide what you believe equity suggests should be prescribed.

MS MORAN: Yes. Right. Well I think I've probably completed my argument, such as it is. It seems to have got a bit disjointed here and there.

Let's see. No, I don't think there was anything else I really needed to say, except perhaps to say that my argument on 14(1)(iii) is based on the fact for temporary teachers, this award ... well not based on, but it sort of ... it fits in with the fact that for temporary teachers, this

MS MORAN: award's been a landmark award really because it's given them all sorts of entitlements and equity that they didn't have before.

And that was one of the reasons why we ... that was why we called the dispute and it is why we asked for the interpretation because we felt that in this area the award wasn't being interpreted in a way that was ... by the Department in a way that was consistent with the general tenor of the award as it is at the moment.

PRESIDENT: Yes. Did Mr Robinson conclude the file or complete the file on your dispute notification or has he adjourned it sine die to allow this to proceed?

MS MORAN: I think he completed the file, didn't he?

PRESIDENT: Well the dispute wasn't obviously settled.

MS MORAN: No. I ... just a moment until I see. He said that it was not clear cut enough for a section 29 dispute decision and that we should either go for a section 43 interpretation or for a variation of the award.

So that was his ...

PRESIDENT: Yes, I see.

MS MORAN: ... the sort of the notes of ... our notes of his final ...

PRESIDENT: In effect then, he's probably dismissed your section 29, in effect, I imagine.

MS MORAN: Yes, I think so.

PRESIDENT: Yes. So whatever the outcome, if you are aggrieved by this, you have a right of appeal.

MS MORAN: Yes.

PRESIDENT: Whether that happens or whether you

PRESIDENT: are pleased by it, I don't know, but either way, it is still open for you to proceed to have the award varied ...

MS MORAN: Have the award ... right.

PRESIDENT: ... on merit.

MS MORAN: Right. Good. Thank you, Mr President.

PRESIDENT: Thank you, Ms Moran.

MR GEURSEN: Mr President ...

PRESIDENT: Yes, Mr Geursen.

MR GEURSEN: ... interpretations, as we've found out over the years, Mr President, and you're constantly reminding us are quite complex matters.

It seems to me that we've still got to come back at some stage to the unlined fundamental to the words. I don't think you can look at the words in sort of the bare essentials as it were. I think you've got to look at what underlays ... what underpins the words and the concepts that were enshrined in the award, and particularly in the recreation leave allowance.

Now it really turns, as I see it, upon the question of when do you even in fact have an entitlement to recreation leave and whether the payment of that recreation leave or payment in lieu of recreation leave, in fact voids that entitlement.

It seems to me that it is a question of logic, the case of these people and in the case of our people that 40 weeks establishes their entitlement to a recreation leave of some sort.

Now an allowance in lieu may not necessarily void the concept of them still having annual leave as such.

MR GEURSEN:

They're taking it in their own time, as it were, but they're still being paid for it.

Now take the case of a public servant who services a full year, and as you know, the leave year operates from October to October. He actually accrues annual leave and an entitlement to annual leave after the first 52 weeks or depending on the state, February. It may be 51 point something or other, but the basic 52 weeks for point of the argument.

Then the next period of annual leave is actually accrued after the next 48 weeks because the period of leave is inclusive in the ...

PRESIDENT:

It's less the period of leave, yes.

MR GEURSEN:

Yes. So, if a person then resigns, at the end of that forth-eighth week or whatever, then the tradition has always been that he be paid the annual leave loading.

Now that's happened, to the best of my knowledge, for quite some time. Even though ... because at that stage they've actually accrued the entitlement ... the entitlement is there. It's fixed and as to when actually somebody takes that period of annual, it seems to me, isn't all that relevant or takes an allowance in lieu of.

The full period of accrual has occurred and that, in effect, establishes the right to the full period of annual leave, and in our submission, would mean that you establish the full right to the annual leave loading.

MR GEURSEN:

If you've served less than that period, then obviously the provisions of the clause would mean that it would be very difficult to get the 17.1/2% loading. So if you happen to serve the full period to accrue the entitlement, as it were, but if you've served a full period, it seems to me that the logic is that you're then entitled to your annual leave loading.

Now if that's not so, then we've obviously got to do something about varying the provisions of the award, and I think you foreshadowed that that may be the only way we will actually be able to remedy this matter. But I'd still be very concerned if there was a view that people are not entitled to their annual leave loading if they've actually served the period which entitles them to their annual leave period.

As the Association has put this morning, the 40 weeks in fact means that they are then being paid for the full 52 weeks, so they've served their time, as it were, in order to be able to get their recreation leave. And similarly, I would submit, that that means the very fact that they're getting their full annual leave entitlement should mean that they should also get the annual leave loading.

PRESIDENT:

Yes, but what about your members though who ... take a hypothetical case of a person who commences his employment in November, and we agree that the leave year is October, that person who commenced in November would not be entitled ... he certainly would be entitled to pro rata leave next October, but no leave loading. I feel sure you would agree.

MR GEURSEN:

They are in fact paid a proportion of leave loading if their employment is continuous if they're going on. They

MR GEURSEN:

might take the 3 weeks or whatever they're entitled to ... one month short. They may, but they're in fact paid the annual leave loading for that period if they go on. But if they haven't yet ... if they resign, say, at 1 October and haven't fulfilled the full 12 months entitlement in the first year, no they would miss out.

However, if it's the following year, so they've had the 48 weeks, as it were, then they would get the full entitlement, and I think that establishes the point that they've established the period of time necessary to accrue the annual leave, and I think that's really meant by, what, not applied to proportionate recreation leave.

The proportion is total; the proportion is a whole and therefore, having served that period, they're entitled to that annual leave loading.

PRESIDENT:

But the definition of leave year that has been included in this award is a period of one year - a period of one year from the date the employee commenced duty or the anniversary of that date, so surely that means 12 months.

MR GEURSEN:

I think, with respect, sir, I think one year means the 40 weeks ...

PRESIDENT:

It doesn't say less the period of annual leave.

MR GEURSEN:

No, well perhaps it should, and that may well be that we need to come back to have the award varied. I mean, that's in the hands of the Association. But I think the logic of that is that the year means the 40 weeks that you need to establish your entitlement to annual leave.

PRESIDENT:

We've already discussed the peculiar situation these people find themselves in, that they have worked

/WL - 16.02.89

PRESIDENT - GEURSEN

PRESIDENT: all the time they are required to work in the year. That doesn't satisfy the definition of leave year, of course.

MR GEURSEN: It depends, I think, how you ... I mean, I don't think the period of leave year is possibly defined as it should be. It should be defined as the working year.

PRESIDENT: Well you have to go to the regulations, don't you? In order to qualify for a period of recreation leave, other than I imagine those periods that occur during the middle of the year, you would have to work for a year. And we must go to regulation 251 and 252 to find out a little more about recreation leave, I think.

I think it says:

"The annual recreation leave for teachers in every State school is in the case of a teacher in a secondary college, leave commencing at the end of the third term of every year and ending on the Friday before the second Monday in the month of February in the following year".

Well now unless someone's period of employment was so described, you can't say they'd be on recreation leave could you?

MR GEURSEN: Well if you're actually still being paid for the whole year, even though you're not actually working that whole year it seems to me that ...

PRESIDENT: It's a moot point ...

MR GEURSEN: Yes.

PRESIDENT: ... but is that position occupied by the temporary teacher vacant as at the day he or she is paid the

PRESIDENT: remaining 8 weeks is it? Is it declared vacant?

MR GEURSEN: I'm not quite sure just how it's done.

PRESIDENT: If it is, then quite clearly regulation 251(a) is not satisfied, because, if I'm reading it correctly, that person in order to be on recreation leave would have to commence his or her leave at the end of the third term and conclude it on the Friday before the second Monday in the month of February in the following year.

MR GEURSEN: Yes. That would be fine. I mean the other way round the matter of course, is for people to actually resign at the end of their period of recreation leave, which often happens ...

PRESIDENT: Yes.

MR GEURSEN: ... and we often advise people to do so, and they're entitled to do so.

PRESIDENT: Do they have the option?

MR GEURSEN: The problem with these people is that they don't have that option ...

PRESIDENT: No.

MR GEURSEN: ... because they are in fact terminated.

PRESIDENT: They're terminated before. Yes.

MR GEURSEN: Yes. So in a sense it comes back to the logic of what you mean by 1 year. And my submission is that the year in this case, means that the period of work that you have to engage in in order to qualify for your period of recreation leave. Your full period of recreation leave.

MR GEURSEN: And it seems to me that that's a fairly clear way out the conundrum. The other one may well be, that we just have define the year in some better way. But it seems to me the logic of what the Association's putting up is pretty inescapable.

PRESIDENT: Thank you, Mr Geursen.

Yes, Mr Lane.

MR LANE: Mr President, we're obviously on a sticky wicket this side of the day, well I think, or this end of the table.

PRESIDENT: Not another one, Mr Lane.

MR LANE: Mr President, I have listened with great interest to the comments that you have made, and I must admit that the way the things are looking at the moment, it would appear that our only option is going to be to come back with a variation, or a suggested variation of the award.

But I would like to stress that I believe the Secondary College Staff Association case is, if nothing else, based on virtual natural justice, and that is, that people have worked for 40 weeks, they are entitled to 52 weeks' pay, which includes a payment in lieu of recreation leave. In other words the department is saying 'You are entitled to recreation leave, but rather than giving you that, we are going to give you the money for it'.

So they have worked long enough to have an entitlement to the recreation leave, and yet they are being denied the recreation leave loading.

Now I believe that comes down to a basic natural justice. And I believe that it is something which without adding too much expense to the employer's salaries bill, could be fixed, and I think in fairness it

MR LANE:

should be fixed.

But I have a feeling, that it's not going to be fixed by an interpretation, although I would hope that you could see your way clear to interpreting the award in such a way, these people would gain that to which they are entitled, in my opinion anyway.

Other than that, I think the only other matter that has been raised this morning, perhaps that question of the leave year, and I tend to agree with what Mr Geursen has said, that perhaps we should somehow look at redefining a leave year, so that it is in fact the period you have to work in order to gain 52 weeks' salary.

And in other words for a teacher, that would end up as being 40 weeks' work.

And that's just an off-the-top-of-the-head suggestion. But I think we do have to look at this whole question and sort it out, because I think there is some inequity in some people being entitled to recreation leave loading after a year's work, and other people not being. And I think it's something we ought to look at.

PRESIDENT:

Yes, I think Mr Willingham will no doubt advise us why, if I've understood Ms Moran correctly. Some teachers who are re-engaged in the next year are paid the recreation leave allowance. I think that's what you said?

MR LANE:

Yes. If I may, Mr President, as I understand it, and I'm quite sure Mr Willingham or Mr Kenny will either confirm or deny it, it is where they term the appointment to be a continuous appointment. If it is a continuous appointment, even though in effect, an appointment ends and

/LM - 16.02.89

PRESIDENT - LANE

MR LANE: another one starts, it is termed a continuous appointment. They receive the recreation leave loading.

PRESIDENT: I don't see it can be. There must be a contract. There must be an instrument of appointment that either says you are permanent or you are temporary.

MR LANE: Well in the case of the temporary teachers, it clearly says they are temporary up until and no later than a certain date which is usually the last day of the third term of the year of their appointment.

PRESIDENT: Yes. Because what would happen in the case of the people we are talking about, if they were terminated as at the ... after the fortieth week, paid their rec. leave allowance, and then reappointed ...

MR LANE: Well of course, the real danger ...

PRESIDENT: ... next year or say the second week or the third week of the next year or something like that?

MR LANE: The real danger ... well one of the questions I'd like answered, I guess by those who're representing the other side, Mr President, is in fact, the case where somebody ... you have two people, both are temporaries, one is told in November that 'Your appointment will continue into the following year'. That person receives the recreational leave loading, or the leave allowance.

You have teacher B who is also a temporary teacher, who is told, 'Sorry, at the moment we don't have a job for you. Here's your 8 weeks' salary in lieu of leave'. And then in the middle of January or February, they're told 'You will be starting on the first day of the school year'.

PRESIDENT: Yes, that's what I had in mind.

MR LANE: Yes. What happens with those ...

/LM - 16.02.89

PRESIDENT - LANE

PRESIDENT: That's going to merit of course.

MR LANE: ... particular people?

PRESIDENT: That's the sort of thing that ought to be raised in the merit argument, I believe, Mr Lane.

MR LANE: Yes.

Thank you, Mr President.

PRESIDENT: Well now. Mr Willingham or Mr Kenny?

MR WILLINGHAM: Thank you, Mr President.

Mr Geursen echoes my sentiments when he says that, as with most of these matters, in the absence of the availability of merit argument, it's very difficult for the parties to mount the sort of persuasive arguments available to them under other sections of the Act. And this one is clearly one that, in my view, Mr President, requires those parties who have brought us here today, to make an application for award variation, and seek to persuade the Bench as then constituted to include words which in fact convey in clear terms, precisely what those applicants want.

And the current provisions of the award, simply cannot give relief to Ms Moran, Mr Geursen or Mr Lane. They simply cannot.

Mr President, in case you're not aware of it, can I just point out to you, in the case of these so-called temporary teachers, I believe I'm correct in saying that all of them are appointed about this time of the year, or a little earlier, on the basis that their employment will expire ... their contract of employment will expire on the last day of the third term of each year.

Now, I'm open to correction on that. That's my understanding. There may

MR WILLINGHAM:

of course be shorter term contracts than that, but those people are not the subject of debate in this matter.

So we're talking about a fixed term contract for the majority of these people. It's not a question of coming to someone, as I think Mr Lane said, in November, and saying 'Sorry we haven't got a job for you next year'. There is technically no job for anyone past 19 December or whatever the appropriate date happens to be.

It is the way the administration of the department and the administration of the appointment of temporary teachers runs, that at any time late in the year, and from then on to the start of the first term of the new school year, that some of those temporary teachers can be informed that they will be re-engaged in the following school year.

MR WILLINGHAM:

So if we could just go to the contentious provisions that have brought us all here. My submission, as always, sir, has been well and truly anticipated by you - you've picked the bones out of it. If I could ...

PRESIDENT:

It won't deter you though, will it?

MR WILLINGHAM:

If I could have the benefit of your son's Christmas present to you, sir, I could have possibly done the submission in latin ...

PRESIDENT:

Yes.

MR WILLINGHAM:

... which indeed you once told me made more sense than the one I made in English.

PRESIDENT:

You presuppose that I've read the Christmas present, yes.

MR WILLINGHAM:

I thought you may have even been a co-author it.

Ms Moran was also correct when she said that clause 14 contains some elements of bad English. And it certainly true, Ms Moran, Mr President, that bad English in our awards causes all sorts of bad industrial relations. I'm the first to concede that. And it's the great wish of many of us in the system, that some of the odd and sometimes archaic wording that is included in a number of our public sector awards be brought up to at least the 1980s so that it does contain in clearer terms just what is meant by the provisions of those awards.

So I have some sympathy with all parties when we have this sort of issue, because it can literally mean all things to all people.

I appreciate what Mr Lane has said. I appreciate what Mr Geursen has said. That if you were talking about merit and natural justice, I think was a word that was used, then you've

/CD - 16.02.89

PRESIDENT - WILLINGHAM

MR WILLINGHAM:

probably got a walk up start for this application. But we're not here for merit. We're not here for natural justice, other than that which you're required to observe in letting the parties be heard.

We're required to look at the words of clause 14, and it says, Mr President, as you've said:

"... during a period of recreation leave".

It's the end of the section, because none of these people are on a period of recreation leave.

But I go further, the second aspect, if we go to 14(1)(iii) which says:

"The allowance [that is the recreation leave allowance] shall not apply [shall not apply] to proportionate recreation leave accrued by an employee in the leave year of the termination of service".

Now it's one of the few things we've got a definition of in the award, is leave year. And it says at (ii) in the second proviso:

"A leave year means a period of 1 year from the date the employee commenced duty or the anniversary of that date".

Now technically, and I'm not here to argue it, one could say that the Department's been extraordinarily generous in paying people an amount of leave equal to that of permanent employees after 40 weeks. Because theoretically, if the employee hasn't started till 16 February of this year, or whatever the commencement of the school year is, they shouldn't be entitled to that full amount of recreation leave until 15 February the following year. If you read that leave year definition down as the

MR WILLINGHAM:

words currently exist.

I agree with Mr Geursen, as it happens. I think that maybe you're entitled to assume all sorts of things, because of the peculiar arrangement, the extraordinary arrangement of annual leave that applies to teachers.

And if the Teachers Federation had accepted the offer of a Full Bench of earlier last year to come before them and settle all these sorts of questions, about annual leave and recreation leave and conditions of service for teachers, we might not be having this argument now. But because they didn't ...

PRESIDENT:

Well, I'm glad we're not going to merit.

MR WILLINGHAM:

.... That is, indeed, what the Teachers Federation hoped. That's why they didn't come before you, because there wasn't any.

But, sir, there's really little point in me going over the ground that you're already raised - I'm content that you've raised. And those are the two key elements as far as I'm concerned that are fatal to the SCOSA's application.

I do believe that some long term cure would be derived from an application for an award variation where the matter should and must be hammered out on its merits.

PRESIDENT:

Yes. Thank you, Mr Willingham.

Mr Willingham, of course you don't ... you're not obliged to answer this, but I am curious to know the answer as Ms Moran has raised it. And I refer, of course, to the situation of full-time teachers who, theoretically, I think, finish at the end of the year and who are re-engaged the next year and are paid the recreation leave allowance.

/CD - 16.02.89

PRESIDENT - WILLINGHAM

PRESIDENT: Now I'm ... Ms Moran, just fill me in. You were talking about a different group again, weren't you? Those whose contract is from year to year, as it were.

MS MORAN: No.

PRESIDENT: They're weren't temporary teachers, Ms ... well, they were, but ...

MS MORAN: No, they were temporary teachers, but for some reason there are these two groups - what I'd call the ongoing temporaries. That is, the ones who've been told they will be reappointed in mid-February, and the ones who are non-continuing, that is, at, certainly at the end of December they don't know that they are going to be reappointed in mid-February ... whether they are going to be reappointed or not, and the Department has told them that so far there is no appointment available the next year.

The first group do get the leave loading, as we were informed after the dispute hearing, and the second group don't.

PRESIDENT: Well, I think you have probably addressed that, Mr Willingham, have you, that situation?

MR WILLINGHAM: Yes. I wasn't sure what your question was. Perhaps I don't want to know.

PRESIDENT: Yes. Well, you had stated that every temporary teacher is a term appointee.

MR WILLINGHAM: Yes.

PRESIDENT: So they finish at the end of the third term. But some are informed, after that period, that they will be re-engaged, a new engagement the next year, and are paid recreation leave allowance. My question is, why?

MR WILLINGHAM: I'm sorry, Mr President. Perhaps I

MR WILLINGHAM:

should clarify as best I can. In the period of employment up to and including the projected expiry date of the employment, some teachers - as I understand it, quite a number - are advised that re-employment will be available for them in the following school year. So to make that perfectly clear, that information is imparted, and one assumes, a contract of employment renegotiated, prior to the projected expiry date.

PRESIDENT:

How could that give those persons an entitlement to recreation leave allowance?

MR WILLINGHAM:

That's another question, and the one I hoped you wouldn't ask me, and you did say it wasn't necessary to answer it, so I'll stand. Thank you.

PRESIDENT:

Yes, so you won't answer it?

PRESIDENT: Yes. All right. Well you have, yes.

Ms Moran, do you wish to say anything in reply? Not to that one.

MS MORAN: No, not to that.

Just briefly, I'd like to reiterate of what I said at the end there, which was that the spirit of this award seems to me to give equity to all people who work ... all teachers whether they be permanent or temporary, that seems that if we can't interpret ... if this particular part of the award cannot be interpreted in that way, then we probably do need ... well we do need to attempt to renegotiate that section of the award.

But that ... I agree with Mr Geursen that perhaps if we look at the spirit of the award rather than the particular words, it might be able to be interpreted in our favour in any case.

PRESIDENT: And is that in accord with the guidelines for interpretation laid down by this Commission? And if so, which particular guideline? Maybe Mr Geursen would like to answer it.

MR GEURSEN: I'm unable to find ... I'm not often at a loss for words, Mr President.

PRESIDENT: Yes. That's like someone who said they forgot to bring the guidelines with them ... forgot to bring their principles with them.

MR WILLINGHAM: It wasn't me ...happening.

PRESIDENT: Well, Mr Lane, you're really not entitled to any response. You're not an applicant.

MR LANE: No, I don't wish to make any further comment.

/GP - 16.02.89

PRESIDENT - MORAN - GEURSEN - LANE - WILLINGHAM

PRESIDENT:

No, I'm sure you don't. No.

I think on that understanding I will
reserve my decision.

That concludes this hearing.

HEARING CONCLUDED