TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Minister administering the State Service Act 2000 / Department of Health v United Firefighters Union of Australia, Tasmania Branch [2023] TASICFB 1

PARTIES: Minister administering the State Service Act 2000/Department of Health (Appellant)

United Firefighters Union of Australia, Tasmania Branch (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 70(1b) application for hearing of an industrial dispute

FILE NO: T14922 of 2022

HEARING DATE(S): 14 September 2022

HEARING LOCATION: Hobart

DATE REASONS ISSUED: 17 January 2023

MEMBERS: Barclay P, Lee C, Cirkovic C

CATCHWORDS: Tasmanian Firefighting Industry Employees Award - Holiday pay and overtime – working on a public holiday when not rostered to do so – whether entitled to pay for the public holiday and to also be paid overtime

REPRESENTATION:

Appellant: E Warner

Respondent: H Pill

MINISTER ADMINISTERING THE STATE SERVICE ACT 2000/DEPARTMENT OF HEALTH V UNITED FIREFIGHTERS UNION OF AUSTRALIA, TASMANIA BRANCH

REASONS FOR DECISION 17 JANUARY 2023

[1] This is an appeal from a decision of Deputy President Ellis relating to the construction of public holiday provisions of the Tasmanian Firefighting Industry Employees Award (the Award).

[2] The question for determination is whether an employee who works on a public holiday is entitled, by virtue of clause 3(a) of the Award, to be paid for the holiday and, whether in addition the employee is also entitled to be paid overtime for working on the public holiday. In effect the question is whether the employee is entitled to be paid triple time for public holiday work made up of ordinary time as a result of the effect of clause 3(a) and overtime as a result of the overtime provisions, which provide that an employee is paid double time for overtime work.

[3] It is convenient to set out the Deputy President's decision dealing with the background of the matter and the relevant provisions with which we must deal:

> "[6] The parties lodged an agreed statement of facts, as copied below:
>
> a. Jeremey Ripper is a Station Officer who is identified and paid as a Non Rostered Shift Worker (NRSW) (an employee who works a roster of 320 hours over 8 weeks).
>
> b. Mr Ripper normally works a 40 hour week Monday to Friday.
>
> c. Mr Ripper's planned work pattern for the week commencing 4 November 2019, was him working Tuesday 5 November 2019 to Friday 8 November 2019 with Monday 4 November 2019 off as it was a gazetted public holiday.
>
> d. On Monday 4 November 2019 Mr Ripper attended an unplanned bushfire incident and worked 12 hours on that day (0700 until 1900).
>
> e. On Tuesday 5 November 2019 to Friday 8 November 2019 Mr Ripper worked 8 hours per day.
>
> f. Mr Ripper did not work on Saturday 9 November 2019, or Sunday 10 November 2019.
>
> g. Mr Ripper's pay for the week commencing 4 November 2019, Mr Ripper received payment as follows:
>
> i. 40 hours ordinary salary;
>
> ii. 16 hours pay for additional work undertaken on Monday 4 November 2019.
>
> h. Total number hours paid to Mr Ripper on 4 November 2019 was 24.
>
> i. Mr Ripper received a total gross payment of $1,088.88 for working on 4 November 2019."

The Award and Agreement

[7] The question is to be resolved having recourse to the Tasmanian Fire Fighting Industry Employees Award (the Award). Part VI, clause 3(a)(ii) 'Holidays With Pay' which deals with public holidays. That clause provides as follows:

> 3. HOLIDAYS WITH PAY
>
> (a) Entitlement
>
> (i) All employees, other than rostered shift employees, are entitled to the following public holidays:
>
> - Christmas Day;
> - Boxing Day;
> - New Year's Day;
> - Australia Day;
> - Hobart Regatta Day (south of Oatlands);
> - Eight Hour Day;
> - Good Friday;
> - Easter Monday;
> - ANZAC Day;
> - Queen's Birthday;
> - Show Day (as defined);
> - Recreation Day (where Hobart Regatta Day is not observed).
>
> (ii) The entitlement to public holidays is to be without loss of pay and is to count as continuous service.

[8] Further to, and in lieu of, the relevant provisions of the Award for overtime, the Agreement in place at the time of the dispute was the Tasmanian Fire Fighting Industry Employees' Industrial Agreement 2016 (the Agreement). It was agreed by the parties to be the applicable Agreement to the dispute, and it provides the relevant clause for payment for NRSW employees when attending unplanned work. Clause 30(d) and (e)(ii)(2)(b) provides as follows:

> 30. HOURS OF WORK AND OVERTIME PROVISIONS FOR NON-ROSTERED SHIFT EMPLOYEES
>
> The following provisions for hours of work and overtime for non-rostered shift employees are to apply in lieu of the relevant provisions set out in Part V — Hours of Work and Overtime of the Award:
>
> a) Hours of Work
>
> Employees working non-rostered shift work are to work an eight week, 320 hour cycle. Employees may be required to work four weekend days and fourteen nights in each eight week cycle. Additional weekend days and

additional nights within the 320 hour cycle may be worked if agreed between the employer and employee.

b) Meal Break

A minimum unpaid meal break of 30 minutes is to be taken during days on which planned work is being undertaken.

c) Planned Work

Planned work is all work that is normally undertaken to achieve the position objective and main duties as set out in a Statement of Duties for an employee when undertaking non-rostered shift work, other than any work that meets the definition of "unplanned work" in d) below. Planned work normally occurs between the hours of 0700 and 2300 on any day and should not normally exceed 10 working hours on any one day. Overtime is not to be paid for planned work.

d) Unplanned Work

Unplanned work is work of an immediate and urgent nature, including but not limited to emergency incidents.

e) Overtime

i) Requirement to work overtime

(1) The employer may require an employee to work reasonable overtime. Approval must be gained prior to working any overtime.

ii) Time of working overtime

Overtime is all time worked:

(1) undertaking unplanned work in excess of 10 hours continuous work (whether that continuous work was planned or unplanned, and excluding unpaid meal breaks) on a weekday; or

(2) when required by a senior officer to undertake work at an Incident Management Team or to support the resourcing or management of incidents. In these circumstances overtime will be paid as follows:

(a) Monday to Friday: - overtime is to be paid for all time worked in excess of 8 hours.

(b) Saturdays, Sundays and Public Holidays: - overtime is to be paid for all time worked

(3) Or when recalled to work unplanned work in line with the recall provisions and;

(a) unplanned work commences after a non-rostered shift employee has already worked 8 hours on any day and has ceased work and returned home; or

(b) unplanned work occurs on a weekend day or public holiday, unless the unplanned work occurs during a period

that the non-rostered shift employee had planned to work; or

(c) unplanned work commences after 1800 hours on a weekday where the non-rostered shift employee had ceased work in order to reduce either TOIL or accumulated hours.

iii) Time Off in Lieu of Overtime

Subject to mutual agreement, overtime hours may be taken partly or wholly as TOIL on an hour for hour basis."

[9] Part V – 'Hours of Work and Overtime', clause 2(d) of the Award provides the rate of payment for overtime, which is:

"The rate of payment for overtime for all employees is at all times to be double the normal rate of pay."

[4] The Deputy President resolved the question of construction by finding that clause 3(a) of the award provided an entitlement to be paid for the public holidays listed in that clause. She then determined that, as a result of the overtime provisions, that where a non-rostered shift worker worked a public holiday they were also entitled to be paid double time. The effect of the finding is that Mr Ripper, and any other non-rostered shift worker required to work on a public holiday would be entitled to be paid triple time.

[5] The Deputy President's findings were as follows:[1]

"[103] The question to be answered is whether the payment of holidays with pay as normal hours is a separate entitlement to the overtime rate of payment for working unplanned work on a public holiday for day workers.

[104] I concur with the Applicant's submissions that the two entitlements are stand-alone entitlements. I am required to examine the context of the text and position and arrangement in the industrial instruments.

[105] There is no contest between the parties there is an entitlement to holidays with pay for day workers.

[106] Part V, clause 3 of the Award provides all employees, other than rostered shift workers, have an entitlement to the specified public holidays without loss of pay and counting as continuous service. There is a specific provision if the employee is absent without reasonable cause, on the working day before and after which is not relevant for this decision.

[107] There are no other exclusions or conditions to this entitlement for a NRSW. I am satisfied the eight hour holiday with pay was considered on a planned roster and Mr Ripper was correctly paid normal rate of pay for these ordinary hours. There was no loss of pay as the hours were included in his ordinary hours.

[108] I do not concur with the Respondent's submissions that this entitlement is only applicable when not worked. It is my opinion the words do not state this. There is a clear expressed entitlement. There are no words stating this does not apply

[1] Ibid, [103]-[119].

when working overtime, or this holiday pay is inclusive of other entitlements. I question how day workers would receive compensation for their missed public holidays. Unlike shift workers who receive additional annual leave in lieu of working on public holidays and a higher penalty rate, there is no other compensation available for day workers who are required to work on a public holiday.

[109] The Applicant relies on the different wording of clauses for CFSOs to demonstrate the intention in Part II of the Award, clause 6(j)(ii). This clause clearly provides an entitlement to one class of day working employees who are rostered to work on public holidays. They "...will be paid overtime at two and a half times the normal rate of pay less the normal daily rate for hours worked." (my emphasis added) In my opinion, this clause expresses the total quantum of pay for hours worked on a holiday with pay and excludes the hours paid for the holiday with pay entitlement at normal daily rate.

[110] The Respondent submitted no reasonable inference can be drawn from the CFSO clause, as the drafters were not contemplating NRSW working on public holidays when this was drafted in the Award in 2007. I do not accept this position as the wording was clearly expressed giving effect to this penalty payment at a time when the NRSW had a different specific clause drafted in the Agreement with the benefit of this knowledge. I am satisfied this is indicative of two different entitlements as drafted.

[111] Clause 30 does not include a cap on payment for NRSW who are required to work on a public holiday. It simply states overtime is to be paid for all time worked on a public holiday. In my view, it could have stated that this payment would be inclusive of the holidays with pay entitlement or reflect the CFSO clause and stated: 'overtime is to be paid for all time worked less the normal daily rate'. It does not.

[112] The Agreement provides other examples of entitlements to be paid inclusively or exclusively. Clause 54(a)(i) provides: "The recreation leave for non-rostered shift workers is to be exclusive of any public holidays." Clause 54(b)(i) provides: "A period of 31.25 consecutive days (inclusive of the 6.25 days set out in Clause 23)..." and (ii) "In addition to the leave prescribed, rostered shift employees are to be allowed seven consecutive days leave annually, including non-working days." The 'Holidays with Pay' clause specifically excludes rostered shift employees, but provides an entitlement for all other employees.

[113] I have considered the subjective evidence of Mr Males and the Respondent's evidence in the form of emails and the Admin Instruction and find them conflicting and not demonstrating a mutuality of understanding of this clause, nor do I believe there is a common assumption between the parties. The previous payment of holiday with pay and double time overtime does not demonstrate a custom and practice, due to an insufficient sample of examples to prove the fact that it was so well known to everybody in the industry. I have adopted the principles of not having regard to subjective intentions, nor rewriting the agreement to achieve a different outcome. The words are the words.

[114] Turning to the second component of this dispute; the payment of overtime. In my view this is a separate entitlement and there is no need to state, in addition or exclusive of the entitlement to a holiday with pay. I have established the payment for the public holiday is a separate entitlement to constitute the required 80 hours of ordinary hours payment for the fortnight.

[115] The two clauses are situated in different parts of the industrial instruments; overtime is found in Part V – 'Hours of Work' and Clause 30 of the Agreement, and holidays with pay is found in Part VI – 'Leave and Holidays with Pay' of the Award. I am satisfied that in applying the findings of DP Shelley and of the Full Bench, that it is not permissible to offset one entitlement against another entitlement, I am satisfied that nowhere in any of these clauses does it say that one entitlement shall be set off against the other.

[116] Despite the Respondent relying on a perceived ban on paying triple time, my view is that this is not stated in the Award or Agreement and in relation to this issue, there is no express words to cap payments to restrict payment of triple time being effectively paid.

[117] I have found that overtime is not paid on planned hours. In my view, Mr Ripper worked unplanned hours to assist in an emergency fire. He was paid ordinary hours for the rostered holiday with pay. I find the payment of single time for eight hours of work on a public holiday is clearly off-setting overtime payment with the eight hours of the holiday with pay.

[118] The relevant payslip states OT @100% TFFIE Wildfire for 8 hours at ordinary rate. I am not satisfied this reflects an overtime payment based on double a normal hourly rate. In effect, he was paid single time for an effective recall of eight hours work on a public holiday, noting he was correctly paid double time for all hours in excess of the eight hours. That is not disputed.

[119] I do not concur with the Respondent's position that double the normal pay includes the normal pay for the holiday with pay. They are two separate legal entitlements and conditions. The provisions are for different purposes; one to ensure employees have the benefit of the specified public holidays and the other, a penalty payment of overtime if required to work approved overtime for an emergency situation on a public holiday."

[6] The appellant's grounds of appeal are:[2]

"Ground 1

In determining that Non-Rostered Shift Workers ('NRSWs') subject to the Tasmanian Fire Fighting Industry Employees Award ('the Award') and the Tasmanian Fire Fighting Industry Employees' Industrial Agreement ('the Agreement') and required to work on a public holiday are entitled to be paid:

- ordinary hours for public holidays, according the provisions of Part VI, clause 3(a)(ii) of the Award; plus,

- double the normal rate of pay for all time worked according to clause 30(d) an (e)(ii)(2)(b), or subsequent replacement provision of the Agreement; and proceeding to make an order accordingly, the Deputy President made a legal error in that she misconstrued the relevant provisions of the Award and the Agreement. Upon their proper construction such provisions do not have the effect that NRSWs are to be paid as determined and ordered by the Deputy President.

[2] Minister administering the State Service Act 2000, 'Notice of Appeal', 7 April 2022, [21]-[56].

Ground 2

In determining that Non-Rostered Shift Workers ('NRSWs') subject to the Tasmanian Fire Fighting Industry Employees Award ('the Award') and the Tasmanian Fire Fighting Industry Employees' Industrial Agreement ('the Agreement') and required to work on a public holiday are entitled to be paid:

- ordinary hours for public holidays, according the provisions of Part VI, clause 3(a)(ii) of the Award; plus,

- double the normal rate of pay for all time worked according to clause 30(d) an (e)(ii)(2)(b), or subsequent replacement provision of the Agreement; and proceeding to make an order accordingly, the Deputy President acted on a wrong principle, in that she misconstrued the relevant provisions of the Award and the Agreement. Upon their proper construction such provisions do not have the effect that NRSWs are to be paid as determined and ordered by the Deputy President."

[7] The two grounds in essence raise the same issue, an error of law of the construction of clause 3 of the award.

The Applicable Law

[8] The parties are in agreement as to the approach to be taken when dealing with the construction of industrial instruments. The Appellants written submissions included the following:[3]

> "32. Awards are to be interpreted in accordance with the natural and ordinary meaning of their words, having regard to their industrial context and purpose15. Context and purpose are considered together with the meaning of the words in question and do not await the discovery of ambiguity in the text.
>
> 33. With regard to an industrial agreement, the Full Court of the Tasmanian Supreme Court has recently cited and applied the following passages from *Amcor Ltd v Construction Forestry Mining and Energy Union* [2005] HCA 10; 222 CLR 241:
>
> > At [13] Gleeson CJ and McHugh J, in interpreting a certified agreement under federal legislation had regard to "... the industrial purpose of the agreement, and the commercial and legislative context in which it applies ...". At [65], Kirby J had regard to the "industrial setting" to the making of the Agreement. At [66] his Honour said:
> >
> > > No longer do courts (or industrial tribunals) seek to give meaning to contested language considered in isolation from the context in which the words are used and the purpose for which the words were apparently chosen. Nowadays, the same insistence on context, as well as text, permeates the approach to interpretation that is taken to legally binding agreements. Indeed, before this approach became normal in the courts,

[3] Minister administering the *State Service Act 2000*, Submissions of the Appellant, Submission in T14922 of 2022, 6 June 2022, [32]-[43].

> in the interpretation of contested instruments it was often the approach adopted for the construction of industrial texts. This was in keeping with an inclination of such tribunals towards practical, as distinct from purely verbal, constructions in that area of the law's operation. [Footnotes omitted.]

[28] At [96], Kirby J said:

> The nature of the document, [the certified agreement] the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court, of interpreting industrial instruments and especially certified agreements. I agree with the following passage in the reasons of Madgwick J in *Kucks v CSR Ltd* (1996) 62 IR 182 at 184, where his Honour observed:
>
> > It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. [Footnotes omitted.]

34. It is submitted that the interpretive principles for industrial agreements discussed in *Amcor* and applied in *Gutwein (as Minister Administering the State Service Act 2000) v Tasmanian Industrial Commission* apply to the interpretation of the Award as well as to the Agreement."

[9] We agree that these are the appropriate principles to apply.

The Submissions

The Appellant

[10] The appellant's written submissions in respect to the construction of clause 3 are in the following terms:[4]

> "35. Clause 3(a)(i) of part VI of the Award says that 'all employees, other than rostered shift employees, are entitled to the following public holidays'.
>
> 36. The first two listed dictionary meanings of 'holiday' are:

[4] Ibid, [35]-[43].

> 1 a day fixed by law or custom on which ordinary business is suspended in commemoration of some event or honour of some person, etc.
>
> 2 any day of exemption from labour.

37. The ordinary meaning of cl 3(a)(i) of Part VI of the Award is consequently that employees other than shift employees are exempted from labour on the days listed in the clause.

38. Clause 3(a)(ii) goes on to say: 'the entitlement to public holidays is to be without loss of pay and is to count as continuous service'. Given that subparagraph (ii) follows from subparagraph (i), it is plain that 'the entitlement to public holidays' referred to, is that granted by subparagraph (i). Further, it is also plain that the phrase 'without loss of pay' refers to to the entitlement to public holidays because of the linking phrase, 'is to be'. Consequently, the ordinary meaning of cl 3(a)(ii) is that the exemption from labour for the listed days is to be without loss of pay.

39. It follows that according to the ordinary meaning of cl 3(a) of Part VI of the Award the phrase 'without loss of pay' applies to circumstances where the entitlement is in operation: that is, where there has been an exemption from labour. Further, it is uncontroversial that, if an employee is required to attend work on a public holiday then he or she is not on holiday. In other words, the entitlement to a public holiday in cl 3 of Part VI is not operating for an employee attending work on such a day. In short, properly construed, the clause simply does not speak of circumstances where an employee works on a public holiday.

40. The context for cl 3(a) of Part VI of the Award supports the proposition that the clause relates to holiday entitlements rather than rates of pay when required to work on public holidays.

41. The clause is titled 'Holidays with Pay'. It appears in Part VI which is called 'Leave and Holidays with Pay' and which also deals with matters such as recreation leave and personal leave. Provisions relating to 'Wages and Salary Provisions', 'Allowances' and 'Hours of Work and Overtime' appear in separate parts of the Award. For Non-Rostered Shift Employees, cl 30 of the Agreement applies in lieu of Part V of the Award, 'Hours of Work and Overtime'. The separation of overtime from provisions relating to holidays and leave with pay indicates that the provisions relate to different things.

42. Clause 2(d) of Part V of the Award (relating to Hours of Work and Overtime) provides that the overtime rate is 'at all times to be double the normal rate of pay'. The use of the phrase 'at all times' is consistent with the Appellant's case and inconsistent with the Deputy President's decisions in the dispute. The phrase suggests an intention that there should be no difference in pay rate based on the nature of the day or time of day the overtime hours relate to. By contrast, the effect of the order is that the rate of pay for a non-rostered shift worker working on a public holiday is greater than the rate if he or she is asked to work on a non-rostered day which is not a public holiday.

43.The broader legal context for the Award also supports the proposition that the purpose for cl 3(a) of Part VI is to grant an entitlement to holidays with pay as opposed to setting a pay entitlement in circumstances where an employee attends work on a public holiday."

The Respondent

[11] The respondent's written submissions in respect to the proper construction of the award are:[5]

> "27. The Appellant contends that the ordinary meaning of cl 3(a) of Part VI of the Award applies only when an employee has been permitted an "exemption from labour".
>
> 28. The logic which gives rise to this interpretation is cyclic. It seeks to ascribe a meaning to the effect that workers are entitled to payment for a day, but only when they are not required to work. Simply put, the clause would create no entitlement at all for non-shift workers.
>
> 29. The interpretation advanced by the Appellant plainly seeks to add exclusionary words to the provision that are not there. The Commission can readily infer that if the parties had of intended for the clause to operate in such a limited way, they would have said so in the clause. The Appellant should not be permitted to retrospectively rewrite the clause, in an entirely self-serving way, to suit its argument.
>
> 30. Returning to the principles summarised in *AMWU v Berri*, regard is to be had to both the text the provision, the text of the instrument as a whole and the broader legislative context.
>
> 31. Turning to the text of the provision, the interpretation contended by the Appellant gives rise to a circumstance which is plainly contrary to the intention of the wording. Insofar as it applies to non-rostered shift workers, cl 3 of Part VI was clearly intended to have an application. There is no exclusion. If given the meaning contended by the Appellant, the clause would serve no purpose at all for non-shift workers.
>
> 32. Turning to the text of the instrument and the broader legislative context, the Appellant's contention ignores the broader context of the Award, which confers different entitlements on rostered, non-rostered and other employees.
>
> 33. Ellis DP correctly identifies this factor, observing that:
>
> > "... There is a clear expressed entitlement. There are no words stating this does not apply when working overtime, or this holiday pay is inclusive of other entitlements. I question how dayworkers would receive compensation for their missed public holidays. Unlike shift workers who receive additional annual leave in lieu of working on public holidays and a higher penalty rate, there is no other compensation available for day workers who are required to work on a public holiday." [citations omitted]
>
> 34. In the following paragraphs, Ellis DP goes on to consider the related clauses in relation to
> Community Fire Safety Officers (or "CFSOs"), noting that, if the Respondent's interpretation was accepted, the agreement would effectively provide greater level of entitlement (being an overtime rate of two and a half times) than that of non-

[5] United Firefighters Union of Australia, Tasmanian Branch, Submissions of the Respondent, Submissions in T14922 of 2022, 27 June 2022, [27]-[36].

rostered shift workers. The Deputy President rightly concluded that this further inferred that the Award, read in context, provided an entitlement to payment for public holidays worked by non-rostered shift workers.

35. This conclusion is entirely consistent with the broader industrial context of the Award and Agreement. Given the status of non-rostered shift workers as operational firefighters who work a set roster and are significantly inconvenienced by being recalled on public holidays, an arrangement which compensated CFSOs (who are not operational firefighters) would create a perverse result which was inherently unlikely to be a reflection of the intention of the Award and Agreement.

36. The Appellant asserts at [55] that the Deputy President failed to properly apply the principles of interpretation of industrial instruments. No particulars or elaboration is provided. This assertion thus may be distilled to nothing more than "we don't like the result". As the Commission will readily identify, this falls well short of an appealable error."

Consideration

[12] Clause 3 of the award is entitled "holidays with pay" with a subheading "(a) entitlement". Clause (i) of clause 3 then provides that "employees, other than rostered shift employees, are entitled to the following public holidays". Thereafter is a list of 12 public holidays. Clause (ii) then provides "the entitlement to public holidays is to be without loss of pay and is to count as continuous service".

[13] Applying the ordinary words of the clause it may be seen that the provision is a provision which deals with an entitlement to observe a number of public holidays. The clause does not in our view provide for an entitlement to payment of any salary or wages if that day is worked. Applying the ordinary words of the clause the entitlement of which it speaks is to observe the holiday: "[a]ll employees, other than rostered shift employees, are **entitled to the following public holidays**" (our emphasis). Further "**the entitlement to public holidays** to be without loss of pay and it is to count as continuous service" (our emphasis).

[14] It is clear, in our view, the purpose of clause 3 (ii) is to ensure that the public holiday is observed without loss of pay (that is it is a paid holiday) and that the day counts towards such things as the accrual of annual leave and long service leave. The clause does not speak of circumstances in which an employee works on a public holiday and does not provide for an entitlement for payment if a public holiday referred to in the clause is in fact worked. During argument the appellant described the clause as providing for an exemption from labour for the holidays listed in clause 3. We agree that that is the proper characterisation and effect of the clause. The employee is entitled to be absent from work and as a result of that absence is not to have deducted any wages or salary for being away from work (as would usually be the case unless the employee claimed holiday, sick or some other form of leave) and the day is to count towards other entitlements. The clause does not provide for or contemplate an entitlement to wages in the event the employee is required to work on a public holiday.

[15] Indeed rates of pay for work, including working on public holidays is dealt with in clause 30 (e)(ii)(2) of the award. That clause is set out above and provides that when an employee is required to undertake work at an Incident Management Team or to support resourcing or management of incidents overtime is to be paid for all time worked on public

holidays. The award also provides that the rate of payment for overtime for all employees is at all times to be double the normal rate of pay[6].

[16] The effect of the Deputy President's decision is that a non-rostered shift worker who works on a public holiday will in effect receive triple time. That is overtime in accordance with clause 2 (d) of part V of the award together with the day's pay which the Deputy President found an employee is entitled to by virtue of clause 3 of the award. Such a conclusion is inconsistent with clause 2 (d) of Part V of the award. The effect of that clause is to specify that wherever an employee works overtime the rate of pay is double the normal rate of pay and in our view this amounts to a cap limiting the amount an employee receives whenever they work overtime to double the normal rate.

[17] The appellant relies, to buttress its argument, on *Telstra Corporation Limited v Todd.*[7] In that case the Federal Court was dealing with the same issue as confronts us. The award being considered by the court included a clause (12.7) relating to public holidays. It provided:

> "for the purpose of this clause full-time or part-time employee is eligible to observe the following public holidays, without loss of pay".

[18] Thereafter was a list of public holidays. The award also contained a provision for emergency work which provided that where an employee was called out to meet an emergency at a time when they would not ordinarily have been at work and they had not been given notice of such a call whilst they were working there ordinary hours, those employees were entitled to be paid at the rate of double time.

[19] Cowdrey J found that clause 12.7 was "essentially declaratory of an employee's right to observe various public holidays without loss of pay. This is distinct from an entitlement, prescribed by a clause, to a special rate of pay on such a public holiday for no rate of pay is prescribed by clause 12.7."[8]

[20] The Deputy President distinguished *Telstra Corporation Limited v Todd.* We however see no justification in distinguishing that case. Whilst the clauses are not identical, the operative words: "without loss of pay" are central in both Todd and the case before us. It follows that that *Todd* is of assistance in construing the relevant clause of the Tasmanian Firefighting Industry Employees Award. Further we agree with Cowdrey J that the clause gives an employee an entitlement to observe the holidays referred to in the clause and that it is otherwise silent as to entitlements to and rates of pay.

Outcome

[21] Accordingly we determine that the Deputy President erred in law in construing clause 3(a) of the Tasmanian Firefighting Industry Employees Award as providing for an entitlement to payment of a day's pay in addition to double time for overtime worked on a public holiday where the employee was otherwise entitled to be exempt from work. Accordingly we determine, for the purposes of section 70(1A)(a) of the *Industrial Relations Act 1984*, that the Deputy President made a legal error and accordingly we uphold the appeal.

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[6] The Award, Part V, clause 2(d).
[7] [2009] FCA 518.
[8] Ibid, [21].

[22] We revoke the orders made by the Deputy President on 24 March 2022 and in their place we determine that Mr Ripper is entitled to be paid double the normal rate of pay for the overtime he performed on the relevant public holiday.

D J BARCLAY
President