

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4795 of 1994

IN THE MATTER OF an application by
the Australian Liquor, Hospitality
and Miscellaneous Workers Union -
Tasmanian Branch to vary the Child
Care and Childrens Services Award

re increase to wage rates of
\$8.00 per week

COMMISSIONER GOZZI

HOBART, 3 August 1994

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Could I have appearances, please.

MS P. SHELLEY: If the Commission pleases, I appear on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union - Tasmanian Branch, SHELLEY, P.

COMMISSIONER GOZZI: Thank you, Ms Shelley.

MR T.J. EDWARDS: If it please the Commission, EDWARDS, T.J. I appear for the Tasmanian Chamber of Commerce and Industry.

COMMISSIONER GOZZI: Yes. Thank you, Mr Edwards.

This matter is called on simply because when it was first listed in January this year, it was to vary the award by \$8 per week safety net adjustment. At that time the TCCI, through Mr Abey, submitted that the Child Care and Childrens Services Award could be a paid rates award and he wanted that issue determined first. I referred that matter to the president who convened a full bench. The full bench heard the matter, determined that the Child Care and Childrens Services Award was not a paid rates award. That decision was handed down yesterday and the full bench referred the matter back to me for conclusion.

So, who'd like to pick up the reins? Ms Shelley. :

MS SHELLEY: Thank you, Mr Commissioner. There are two aspects to my submission. The first goes to the granting of the \$8 safety net adjustment and the second to the operative date of that increase, should the commission so order. In respect of the first aspect, the granting of the increase, I submit that all the requirements of the principle have been met. The award in question has been the subject of a substantial restructuring process, has minimum rates, supplementary payments, total weekly payments and a classification structure which reflects skill levels. All of the minimum rates adjustments are in place and the Child Care and Childrens Services Award, as determined by a full bench in this matter, is a minimum rates award. I submit that all the structural efficiency principles have been met.

In relation to enterprise bargaining, there has been no activity in this area, no interest has been demonstrated by the employers who to date have indicated that they prefer to work within the award. We submit therefore, that the commission should grant the \$8 increase. Unfortunately, I don't have a draft order prepared, owing to the fact that Kerry O'Brien has had carriage of this matter to date and he is interstate at present and I was unable to discuss this matter with him until 5 o'clock last night. So, consequently, there has been no opportunity to prepare a draft order, but I can provide one later on today if required.

In relation to the second aspect of this submission, the operative date, it is our view that the increase should apply from the date of the first hearing regarding this application, which was 17 January 1994. I am aware that the supplementary decision of the Federal Commission says:

The award variation will operate from a date no earlier than the granting of the application.

However, it is our view that the special circumstances of this case warrant retrospectivity being granted. The history of the matter, as you have already canvassed, is that we made an application for the \$8 increase on 4 January 1994, which was not long after the availability of the increase following 24 December decision regarding the State Wage Case.

There was a hearing on 17 January during which the employers put forward the view that this was a paid rates award and therefore ineligible for the increase. This was found not to be the case. A hearing was set down for determination on this point on 11 February, but that one was cancelled. We then had to wait until 20 June for a full bench hearing and the decision, as you say, was handed down yesterday, 2 August. This makes it, in fact 8 months since our application.

None of these delays have been of the employees making, and we believe that the union in fact did everything right. Nonetheless, child care workers have until now been denied access to an increase in pay for which we believe they were entitled to 8 months ago. Child care workers are not highly paid. They belong to that class of worker which the Federal Commission has identified as eligible for the safety net adjustment.

The National Wage Case Bench in its October 1993 decision, Print K.9700 observed:

The exercise is designed inter alia to assist those employees covered by minimum rates awards who have suffered from the inequities of the present system, due to the level of their award rates and their lack of substantial over-award payments.

By the employers own admission before this commission, there are few over award payments in the child care industry and according to the employers own survey, where they do exist they tend only to be paid to the directors or assistant directors of the centres, not to the lower paid workers and child care workers have had no access to gains through the enterprise bargaining processes.

In our view, the long delay constitutes special and compelling circumstances, which warrant retrospectivity, and we submit that the supplementary decision provides the commission with

guidelines only and that there is nothing in the act which precludes the commission from ordering retrospective payment in this instance. If the commission pleases.

COMMISSIONER GOZZI: Yes, thank you, Ms Keller - Ms Shelley. Mr Edwards?

MR EDWARDS: Commissioner, I guess in the ordinary circumstances, TCCI would have little compunction in now agreeing to the increase sought by the union application and that is in respect of the \$8 per week safety net adjustment. However, the matter of the operative date that's been raised by Ms Shelley obviously puts a completely different light on the nature of the submission that we are now going to be required to make and we would be seeking probably to make submissions based on two principles, the first being in respect of the safety net adjustment itself and the second would be to bring into play the question of economic incapacity.

If the union is to persist with the claim for some 8 months retrospectivity in respect of the application of the \$8 safety net adjustment, it will only give rise to further delay because we would have no option in the circumstances but to pursue a claim for economic incapacity.

However, before going to that point the commission may be able to provide some guidance that might assist the parties in the determination of this particular question.

As I understand the situation in the State Wage Case decision of the 24th December 1993, the full bench of the commission which constituted amongst others the commission as currently constituted, adopted not only the principles of the federal commission but the decisions and reasons for decision of the federal commission, and whilst Ms Shelley may try and take some heart that the comments made by the full bench of the Federal Commission in its supplementary decision which is now quoted and described only as guidance, they are of course more than that in the context of the state commission picking up not only the principles but the reasoning of the full bench of the Federal Commission.

If the commission can provide some guidance on that point then I will be in a position to perhaps even consent to the application if the question operative date is laid to rest at an early date.

COMMISSIONER GOZZI: I think that's a fair approach. Ms Shelley, do you want to say anything in respect to the preliminary issues raised by Mr Edwards before I make my observations?

MS SHELLEY: No, I don't wish to add anything further. I agree that it would be valuable to have some guidance from the commissioner on the point of retrospectivity.

COMMISSIONER GOZZI: Alright, I'm happy to do that. In the full bench proceedings in this matter - in the paid rates award matter, both Mr O'Brien and Mr Fitzgerald addressed the question of operative date. The assumption was that the full bench would determine operative date and I can indicate in writing the decision, as I did, on behalf of the members of the members of the bench that I canvassed the issue of operative date and we concluded if we go behind that decision that really it would be short-cutting the proceedings if we were to go to the question of operative date in the full bench decision because all that had been referred to the full bench was in fact the question of whether or not this award is a paid rates award or not, and so we really couldn't go beyond that.

But for what it's worth, my view - and I'm not going to attribute this view to anybody else, except that I could indicate the decision that I wrote was picked up with - in - in its entirety - the one that was issued - but my view certainly was and still is in the context of providing guidance to you this morning that there - it is not possible for the commission - even though it might have a mind to - to grant retrospectivity for the reasons you referred to, Mr Edwards.

We picked up the October '93 National Wage Case decision and reasons for decision and it follows in my view that that encompasses everything giving rise to that decision - the supplementary decision as well. And quite clearly the commission, as constituted in various matters, has not been able to give retrospectivity under any circumstances in these matters.

Now I agree that at the end of the day, Ms Shelley and the employees concerned might feel a little bit put out that - in respect of the course of events, because at the start of proceedings in January '94 in the matter before me, the indications certainly were the question of paid rates would be tested in a very real way to the extent that I thought it was going to be a test case.

Well in fact it didn't turn out to be a test case - it was no more than a reliance on a survey document of some 38 canvassed employers - 31 responded and you're aware of our comments that we made about that. So it certainly didn't turn out to be a test case. But I don't think that overrides what I've indicated about the operative date, and so I can indicate to you, Ms Shelley that whilst I am sympathetic to what you're saying, the reality is that I would not endorse it.

MR EDWARDS: Thank you, commissioner, and thank you for that guidance. Commissioner, having heard the observations you make, it will obviously abbreviate my submission now and I am in a position to offer the consent of TCCI to an \$8 safety net wage increase of the form described in the wage fixing principles adopted by the commission in its decision of 24th December 1993 in T.4692 of 1993.

Obviously we will view a draft order when one is prepared by Ms Shelley, as she's undertaken to do, and we'll offer our consent to the content of that once we've had an opportunity to review it.

We would also put that the operative date for the increase should be the first pay period to commence on or after the date of your decision, which I imagine from what you've said this morning, sir, will be very swift - in fact probably immediate.

COMMISSIONER GOZZI: Yes -

MR EDWARDS: If it please the commission.

COMMISSIONER GOZZI: - Mr Edwards, I think that's a pretty safe bet. I mean one of the reasons we called this matter on so quickly was being conscious of all the developments and looking at it in toto.

Ms Shelley, anything further you want to add?

MS SHELLEY: No, I don't have anything to add, but should the commission not find favour with my arguments in respect of the operative date, then Mr Edwards, having indicated consent to the matter, I would put an alternative submission that the operative date be the first period on or after today's date.

COMMISSIONER GOZZI: Yes, thank you, Ms Shelley.

COMMISSIONER GOZZI: Well I can indicate that in respect of the submissions made that the award will be varied operative from the first pay period on or after today's date and the decision will issue in the next day or so and I would appreciate if a draft order could be exchanged and one forwarded to me.

These proceedings are concluded. Oh, look, I'm sorry - please sit down - one other point, before we conclude these proceedings - and heaven forbid, I've almost forgotten - there is one other matter that we need to address ourselves to, and that goes to the format of the award and it was raised by Commissioner Watling in the full bench proceedings and it goes to, I think - I haven't got the document in front of me - but I think it goes to the first two levels or so in the award which only show a base rate.

There is no supplementary column and there is no table rate and I think it's important that that be redressed, and Ms Shelley, you might be able to have some discussions with Mr Edwards or Mr Fitzgerald - who ever is appropriate - to realign the award to get the hundred per cent relativity right and so that the - that's one aspect. And the other aspect is that the levels 1 and 2 - and I don't think it goes beyond that - it might be level 3 as well - but just level 1 and 2 - that the - that we introduce base rate supplementary column and total rate. Because, presumably at the moment there is no capacity if in fact there was some over awards paid in those levels - and I doubt very much that there would be - for any absorption to take place.

MS SHELLEY: Can I just ask for some guidance on how that might be done -

The reason there were no supplementary payments for levels 1 and 2 were that at the time of the restructuring of that award the rates for those equivalent skill level positions at the time were in fact in advance of those ordered by the full bench in what was known as the child care test case. fSo we cherefore couldn't establish any adjustments at those levels at that time.

COMMISSIONER GOZZI: Yes. I think what we should do is that the end result - I mean, it's the total wage column that's important and I think what needs to happen is that the base rate needs to be the total wage so obviously the base rate needs to be lower than what it currently is.

MR EDWARDS: I think the - just thinking aloud, commissioner - and it's not an award I've had any experience in, very much off the reserve benches on this one. But the way I would see it perhaps going would be to create the base rate on the relativities setting, which is what the bench has determined in other matters.

COMMISSIONER GOZZI: Yes.

MR EDWARDS: And the remainder being the supplementary payment. But we would have to write a provision into the award with a clear instruction that that supplementary payment amount was not to be absorbed against existing over award payments. I think that would overcome the fear that Ms Shelley has averted to.

COMMISSIONER GOZZI: That's a very helpful suggestion, Mr Edwards. I must say, at the time, Ms Shelley, I didn't pay it that much attention because it was a consent structure. But

subsequently - and also it was early on in the piece of the relativities and so on and I don't think there would be many awards that haven't got the supplementary columns. And I wouldn't have any objection to that sort of wording.

What I would like to do at the end of this exercise is pass the amended award on - I think the deputy president has got it now. I mean, all intents and purposes all new matters will go to him anyway. With that area resolved, that sort of wording in it close the chapter on that part of the exercise.

So if you look at that as well that would certainly be helpful. And for that purpose at this point I won't close this file because you may not have to come back. Hopefully not, but if you do, well at least the avenue is there.

MR EDWARDS: You'll close it by way of your decision perhaps, commissioner, if it need be.

COMMISSIONER GOZZI: Well I'll do this as a interim decision and indicate in there that you'll be looking at that part of the exercise and if it's comprehended in what you put forward to me, that's fine, I'll just close the file.

Okay. Thank you very much.

HEARING CONCLUDED