

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4451 of 1993

IN THE MATTER OF an application
by the Tasmanian Chamber of
Commerce and Industry to vary the
Carriers Award

re superannuation exemption

COMMISSIONER IMLACH

HOBART, 8 July 1993

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER IMLACH: I'll take appearances?

MR S. CLUES: If the commission pleases, I appear on behalf of the Tasmanian Chamber of Commerce and Industry, CLUES, S.

MR B. HANSCH: If the commission pleases, HANSCH, B.J., appearing for the Transport Workers' Union of Australia.

COMMISSIONER IMLACH: Right. Mr Clues?

MR CLUES: If the commission pleases, I've made application to the commission to seek a variation to the Carriers Award. The intent of the variation is to provide a superannuation exemption for Tennant Removals to utilise the fund known as Tasplan.

To that end, I wish to take the commission through the provisions of the Industrial Relations Act and then I shall present evidence to the commission to support my application.

If the commission pleases, I refer your attention to -

MR HANSCH: If I may, commissioner?

COMMISSIONER IMLACH: Point of order.

MR HANSCH: The application as I see it, is to vary clause 39(d) of the award. Clause 39 of the award is in relation to Sunday work. So perhaps, -

COMMISSIONER IMLACH: What do you say to that, Mr Clues?

MR CLUES: I would say that my award must be in need of some amendment. If the commission pleases, I would seek to amend my application to refer to the correct provision within the Gazette copy pertaining to superannuation.

COMMISSIONER IMLACH: Yes. Well in my award, which is No.4 of 1992, it's clause 40. So you're seeking to amend, are you?

MR CLUES: That would be my intention.

COMMISSIONER IMLACH: Per kind favour of Mr Hansch. Are you agreeable to that, Mr Hansch?

MR HANSCH: Well I should object to it, sir, but because I've been caught most recently myself on the same, it wouldn't be very sportsman like of myself, so I won't object to it, sir.

COMMISSIONER IMLACH: No. I appreciate that. You'd only have to get over another fence then. Right. Thanks, Mr Clues.

MR CLUES: I apologise for any -

COMMISSIONER IMLACH: We'll amend it accordingly.

MR CLUES: - inconvenience that may have caused to the commission or to the other parties present today.

Continuing on from that point of order, I'd refer the commission to section 32 of the Industrial Relations Act which talks about the powers to make awards and related matters and in particular I'd refer the commission's attention to subclause 32(1B) in which the act provides:

(1B) In making or varying an award in relation to payment of contributions to a superannuation fund, the Commission must not refuse to make or vary that award if the superannuation fund -

(a) is a complying superannuation fund; and

(b) is one which the Commission is satisfied meets the wishes of employees.

To that end, Mr Commissioner, I would tender my exhibits and I would just amend them to reflect the new clause number.

COMMISSIONER IMLACH: We'll call the whole document Exhibit TCCI.1. Yes. Thanks, Mr Clues.

MR CLUES: If the commission pleases, the first page of TCCI is a draft order for the proposed amendment. Essentially it provides: Amendment (1) - Clause 40 - superannuation. Insert the following words at the end of sub-clause (d): - and insert the name of the company which is 'Tennant Removals', and the fund as being Tasplan. That is the variation I'm seeking.

In order to satisfy the commission that this application meets the requirements of the act, the first requirement is that:

- the Commission must not refuse to make or vary that award if the superannuation fund -

(a) is a complying superannuation fund;

To that end I refer the commission's attention to the final page of that exhibit which is the latest letter given to National Mutual by the Insurance and Superannuation Commission. The date on it is 1991/1992, but that is the latest letter that has been made available by the Insurance and Superannuation Commission and unless there is any evidence to the contrary, I believe that it is a complying fund that meets the Occupational Superannuation Standards Act 1987.

In order to satisfy the commission that this is a fund which meets the wishes of the employees, the company has provided the following letter. It's on Tennant Removals letterhead and it reads - it's addressed to myself - and it reads:

Dear sir,

Re : Superannuation Exemption

The undersigned parties wish to use Tasplan Superannuation fund in lieu of Transport Workers Union Superannuation Fund.

It then proceeds to name their four employees: D.Cashion; D.Wiggins; P.Graham; P.Tennant. They have each put their signatures to it and the date upon which they signed it. The only one that is missing is the son of the proprietors. He is currently in the USA. If need be, he has a power of attorney here who is prepared to authorise the use of this fund, but it is their belief that he would consent to this position.

It says:

We understand Tasplan is a complying fund and it is hoped our request to use this fund will be approved.

Yours faithfully,

Mrs J. Tennant.

Mr Commissioner, essentially the documents that I have provided to you I believe satisfy the requirements of the act, that is, to make the commission aware that the fund is a complying fund. Tasplan itself is a fund which is recognised in a large number of state awards and has generally been accepted as being a complying fund. I've also provided to the commission as evidence of that a letter from the Insurance and Superannuation Commission confirming that it does comply with the Occupational Superannuation Standards Act 1987 and I've also endeavoured to provide the commission with evidence that the company's employees do wish to use the alternate fund to that nominated by the Carriers Award. Subject to any questions that the commission may have of me, I would ask that this variation be ratified in accordance with the provisions of the act. If the commission pleases.

COMMISSIONER IMLACH: Yes, thanks, Mr Clues. Mr Hansch?

MR HANSCH: Thank you, Mr Commissioner. Mr Commissioner, the TWU would strongly oppose the application to vary the award to provide an exemption for Tennants for the following reasons. The TWU Superannuation Fund is the industry fund and is binding on all employers in the transport industry. Employees

who transfer their employment from one employer in the transport industry to another employer within the transport industry are automatically covered by TWU Superannuation.

It is common that people within the drivers - or employees within the transport workers industry move from one employer to another, so therefore their superannuation automatically follows them. At this point of time Tennants are bound by the Carriers Award and therefore if any of their employees was to go to, say, an example another furniture company, to Grace Brothers, or whatever, they would find the only fund that is accepted would be the TWU fund. I mean, an example, they would not be able to take Tasplan to those other employers because there is clearly awards that bind those employers.

The other point which I should make, commissioner, is the TWU Fund - because like most funds it is a fully portable fund, but however the only fund that has any relevance or application in the transport industry as such as is binding on 95 per cent of the employers in Australia, if not - at least 95 per cent but possibly more, is the TWU Fund.

It is true to say that amendments to the Industrial Relations Act, as quoted by Mr Clues, does allow the employer to use other funds, and I'm endeavouring to argue that for one moment. I have some great difficulty with this application because the TWU has had some prior dealings with this particular company and the Confederation of Industries has been representing Tennants. In fact, it was only in May of this year whereby the confederation, in relation to another matter - not superannuation I may add - advised the TWU that the company had no employees.

Now that confused me at that point of time. Obviously we did not agree; we believe they do have employees but they claim not to, in fact, they claim that they only had contractors - outside contractors. They wouldn't be paying those outside contractors superannuation or there would not be an obligation under the award to pay those outside contractors superannuation. We then find an application - we then find there's four employees, one of them I believe is family and that's a Mr P. Tennant, and I'm of course referring to the exhibit which is before you today. An exemption for the employees D. Cashion, D.Wiggins and P. Graham, but there's no employees.

It may well be that all of these employees have started since May of this year. And it may well be that they have, indeed, paid money to the TWU Superannuation - I've endeavoured to check with TWU Superannuation but they say there is no contributions being made to the TWU Fund by Tennants on behalf of any employees. We now have the employer seeking to make an application - or seeking to make a variation to the award to provide him with an exemption.

The other great difficulty that I have, and Mr Clues has already referred to the changes to the act and, in fact, he did refer to section 32(1B), which says:

(a) is a complying superannuation fund.

Well I've got no arguments that Tasplan is a complying superannuation fund in the meaning of the Superannuation Act, but (b) is what I tend to rely on. And it says:

(b) is one which the Commission is satisfied meets the wishes of employees.

Sure, we have an exhibit, we have signatures for three of those people whose names are contained in that exhibit and they do say that they understand Tasplan is. Well on what basis do they say that? Now on what basis do they say that? And this is very important, commissioner, because it may well be if I was the employer and I went along to my employees and said: look, fellas, we'd better do something about superannuation. The TWU Fund it's about going to wind up. You're going to lose all this money. We better change it into Tasplan.

The point I'm making the employee should have full knowledge as to why they are changing from one fund to another. But I'm placed with great difficulty, Mr Commissioner, because simply one moment the employer, through the confederation, claims they have no employees, they only utilise outside contractors. The next moment, a month or so later, we have an application to vary the award. We have in the form of a statutory declaration, and it is not a statutory declaration by the employees to start with, it is on a Tennant letterhead and it merely has a signature.

I do not believe that that does, in fact, satisfy 32(1B)(b) which says:

(b) is one which the Commission is satisfied meets the wishes of employees.

Now I think there's a lot more work that needs to be done. An example would be, are these employees - bearing in mind they weren't working with the company in May of this year, so they're relatively new employees - have they come from within the transport industry, from another furniture removalist company, is that where their superannuation started where it belongs, how long will they be at Tennant Removals, would they be going back into the industry, do they understand that it is an industry fund that applies to the transport industry?

Now I don't believe at this point of time that the commissioner should, in fact, vary the award as sought by the

employer because I believe the commissioner needs to satisfy himself or herself it's in accordance with the wishes of the employees.

And clearly, I would like to speak to those employees to see if they fully understand that and perhaps if that is the wish of those employees they are able to - to appear in this commission - I mean in the box or wherever, but I'd like to know if they understand it, and I don't think the commission can be sure that they do. And for that reason I do not believe that the award should be varied and we'd ask that that's the way the commission rules.

COMMISSIONER IMLACH: Thanks, Mr Hansch. Yes. Mr Hansch, are you questioning the signatures there at all?

MR HANSCH: No, sir, I'm not questioning the signatures as such. I mean it is a - it is a photostat and I mean that document to start with is not even in the form of a statutory declaration or anything at all, and even if it was, what information is given to the employees to suggest that they're any better off or for whatever reason in - in another fund other than a TWU fund. Are they aware what was said to them which gets them to sign that document.

COMMISSIONER IMLACH: Yes, well I just put it to you, Mr Hansch, that having put their name to it in signature form that I have to take it that they do understand, or if they don't they've taken a rash decision, but nevertheless they've done it.

MR HANSCH: Well, it's not my understanding -

COMMISSIONER IMLACH: I put it to you that that's - I put it to you that that's how I ought to look at it.

MR HANSCH: Well, I mean that will be up to the commissioner. I - I understand that, sir, but what I'm saying to you, you should not because there have been no employees - or the employer has claimed he hasn't had any employees. The confederation is also in representing the employer claimed that. That there are - and that was in May of this year. Now it is possible that these employees have started since May of this year. But if they did, they had an obligation under the Carriers Award to pay superannuation to the TWU Superannuation Fund.

I've checked with the fund and there has been no money paid to the superannuation fund. Now I guess what we're really saying is, that - and I don't believe the commissioner can be satisfied in accordance with the act 31(b) - small (b) - is one which the commission is satisfied meets the wishes of the employees.

Now I believe though, the commission would - most certainly - I - I mean I would because it doesn't have to be up to me, but ask the employees as to why - when they're already in an industry fund and I must admit one of the most successful funds that's operating at this point in time in the vicinity of 80,000 transport workers, 4,300 employers Australia-wide. And bearing in mind that that is the fund that operates throughout the transport industry and if those employees change jobs or whatever tomorrow, they wouldn't be able to take Tasplan with them - they would come back to the TWU fund. And on the assumption that what has been said in the past these employees have not worked for Tennant's for any more than at the very most 6 weeks, or somebody's not being quite truthful with us.

And it's merely on that basis, commissioner, that I don't believe you do have to accept any document that's put before you. And the commission should inform itself further, is if it is really the wishes it may well be signed under duress - I don't know. I don't think this commission knows at this point of time.

COMMISSIONER IMLACH: No, that's true, but of course if it's signed under duress or if they are not the correct signatures - and as far as I see it at the moment no-one is questioning the signatures, they have done it.

MR HANSCH: Well I can't - I'm not in a position to question the signatures, sir, because as I've already said, there's no employees. I mean had some - had somebody - I have never seen this I mean until today. And perhaps had we been - or the confederation contacted us there's been no contact between the confederation or the employer in relation to the application. I mean we may have well had the opportunity to speak to those people to see if there was any problems - we've not had that opportunity. And most certainly, sir, I would wish to speak to those and I would ask, you know, that you allow that to happen before you make a decision to vary this award.

COMMISSIONER IMLACH: And they didn't invite you to talk to them?

MR HANSCH: I - I haven't spoken to anybody at all, sir, no.

COMMISSIONER IMLACH: No.

MR HANSCH: Neither the employer, his representative or any employees at all.

COMMISSIONER IMLACH: Thanks, Mr Hansch. Good. Mr Clues?

MR CLUES: Mr Commissioner, I'll just address some of the points that have been raised by Mr Hansch. Firstly, I didn't

see that we had any obligations to list this matter - I mean go and consult with the TWU in relation to whether or not we had their approval to seek this exemption. I believe that the exemption is a right for the employer and the employees under the act, and there's certainly no restrictions there that we have to discuss the matter with the TWU or seek their approval or give them the opportunity to convince these employees that they're doing the wrong thing.

I also would suggest that Mr Hansch is here more out of a pecuniary interest than he is in relation to the interest of these employees. If the employees were so perturbed at the thought of using the Tasplan fund then I would doubt very much that they would have signed this document, and further, they would have contacted Mr Hansch and told him of the dastardly deeds that were trying to be perpetrated. But I would suggest that none of the latter has occurred - that the employees have, I assume, examined the two funds and made a decision that they wish to go to the Tasplan fund.

As to portability, the Tasplan fund is a portable fund and Mr Hansch's comments, that if they wish to work anywhere else in the transport industry then they have to observe the TWU fund is simply invalid. There are a large number of state awards which pertain driver classifications in which Tasplan is a recognised fund. And the TWU fund does have exclusive rights or coverage over drivers. Drivers do have a choice under a number of funds to use an alternate fund, and Tasplan is nominated as one of those.

MR HANSCH: Not in the transport industry, Stuart.

MR CLUES: The transport industry is only for most part of industries just a small cog in the wheel. I mean you look at the retail industry or the meat industry or the wholesale industry - the primary function of those industries is not that of transport, but they do have driver classifications within the award as ancillary functions, and those funds are there in order to take into - in order to provide assistance to the large majority of employees other than transport and drivers do have the opportunity to avail themselves of that fund.

I also would submit that the TWU have had this application prior to today; it's not something they've just been notified of and had they had any genuine concerns in relation to the employees not being fully availed of the relevant merits of each fund then they were quite at liberty to contact Tennant Removals, make an appointment to see the employees and put these questions to them.

I do not believe it is appropriate for them to come here today and ask to be able to do their homework retrospectively. The application has been before the commission for a period of

time, and had they have had any concerns that these employees were being subjected to duress then those investigations should have been made prior to today.

MR HANSCH: There weren't any employees. You told me that yourself, in your documentation, he didn't employ anybody.

COMMISSIONER IMLACH: Order, order.

MR CLUES: Thank you, Mr Commissioner. In relation to Mr Hansch's comments about the fact that there are no employees out there, this company does engage a number of contractors and I believe that it does have employees as well. The date of their engagement I'm not sure of, and the number of employees here that are also - or that they would consider to be contractors, I'm not aware of. It may be that three or four of these are contractors - I don't know, but what I do know is that these people have put their name to this document saying that either rightly or wrongly in Mr Hansch's view that they wish to use an alternate fund and that fund is Tasplan.

Now in order to process that exemption, whether it be for one employer or whether it be for four is irrelevant. The commission is being asked to make the variation in accordance with section 32(1)(b) and I believe we've provided the commission with a satisfactory level of evidence - that these four employees - or whether they be contractors - are satisfied that they wish to use the Tasplan in lieu of the TWU fund. I'd suggest that the comments made by Mr Hansch in relation to the supremacy of the TWU fund are somewhat biased as it is obviously his fund and I can understand that he is somewhat perturbed that someone would dare to choose an alternate fund.

But the reality is, this is a free state; the legislation allows that choice to be made and I'm making an application in relation to that legislation and I don't believe there's a lot of discretion here for the commission to do anything other than to award this exemption on the basis and the words that you find in that act unless the TWU can produce evidence to suggest that these employees have been placed under duress. They've failed to do that. All they've made is some disparaging remarks from the bench and it has no foundation and I would suggest that the commission should make the variation in light of the evidence it has before it, and I would object to any adjournment suggested by the TWU on some sort of fact finding mission to determine whether or not these employees have been placed under duress.

Had the employees been done so, they would have contacted the TWU, or if the TWU believed that there was some duress or had some concerns in relation to whether they were employees or contractors then it had the opportunity upon notification of this hearing to go out and visit Tennant Removals and make

those investigations. And I would suggest it's not adequate for them to come along here today without any supporting evidence and just attempt to discredit that which I've put before you.

So if the commission pleases, I would seek that you do make the variation to the award and that no adjournment be granted for the purposes suggested by the TWU. If the commission pleases.

COMMISSIONER IMLACH: Yes, Mr Clues. What about an operative date?

MR CLUES: The operative date I'd seek as the first full pay period on or after today's date.

COMMISSIONER IMLACH: Thanks, Mr Clues. I suppose you're opposed to that - the operative date - Mr Hansch?

MR HANSCH: I'm opposed to the exemption, Mr Commissioner, so

COMMISSIONER IMLACH: Yes.

MR HANSCH: - so I'd be opposed to the operative date.

COMMISSIONER IMLACH: Yes, fair enough. Alright, well I'll reserve my decision, but in so doing, I intend to put it as euphemistically, if you like, as possible, or whatever - I tend to feel that I am bound by the current provision of the act. Nevertheless, I'll reserve my decision and put in writing.

This matter is closed.

HEARING CONCLUDED