



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER BISSETT

C2023/976

s.739 - Application to deal with a dispute

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union"
known as the Australian Manufacturing Workers' Union (AMWU)
and
Gruma Oceania Pty Ltd T/A Mission Foods
(C2023/976)

The Gruma Oceania Enterprise Agreement 2021

Melbourne

1.00 PM, WEDNESDAY, 14 JUNE 2023

Continued from 15/03/2023

PN1

THE COMMISSIONER: Good afternoon, I'll take appearances.

PN2

MR R WAINWRIGHT: Good afternoon, Commissioner, Wainwright, initial R, I appear for the AMWU. Mr Naveet Bede(?), employee representative at the respondent is with me, he's just attending to an issue for the next couple of minutes.

PN3

THE COMMISSIONER: Thank you, Mr Wainwright.

PN4

MR D McLAUGHLIN: Yes, Commissioner, David McLaughlin, seeking permission, although I think it's been granted already, to appear for the respondent. With me at the Bar table is Ms Pahoff, from the company.

PN5

THE COMMISSIONER: Thank you. Yes, permission has been granted. Thank you.

PN6

Mr Wainwright?

PN7

MR WAINWRIGHT: Thank you, Commissioner.

PN8

To begin with, Commissioner, we have filed and served submissions and submissions in reply, and one witness statement, that you find at pages 12 and 13 of the court book, of Mr Bede.

PN9

My friend has instructed me that he has no cross-examination for Mr Bede, so on that basis, Commissioner, we seek that you mark his witness statement and admit it into evidence.

PN10

THE COMMISSIONER: So we'll do that. I'll mark the witness statement of Naveet Bede, dated 13 April 2023, as exhibit AMWU1.

**EXHIBIT #AMWU1 WITNESS STATEMENT OF NAVEET BEDE
DATED 13/04/2023**

PN11

MR WAINWRIGHT: Thank you, Commissioner. That then leaves us with the simple task of us seeking to assist you with what we've put to you in our materials.

PN12

To that end, Commissioner, can I ask, first of all, if you have any specific questions that you would like me to address?

PN13

THE COMMISSIONER: No, I'd just like to understand a bit more.

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MR WAINWRIGHT: Yes.

PN15

THE COMMISSIONER: Thank you.

PN16

MR WAINWRIGHT: Well, in trying to assist you to understand a bit more, can I start by talking about regulation 3.46 of the Fair Work Regulations.

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We say, Commissioner, that many people, when they look at these regulations would feel that it's regulatory overreach and not really required. We say, in response to that, that this matter really demonstrates why it's so important that employers provide the content listed there at regulation 3.6. The reason for that is so that employees, food workers, perhaps food workers from a non English speaking background, food workers in the norther suburbs of Melbourne can look at their payslip and can understand what's going on.

PN18

They can understand what their shift loading is. They can understand how they've been paid overtime. They can understand all of the different bonuses, allowances and penalty rates that they might be receiving. That understanding is central to the employer meeting their legal requirements.

PN19

Without this seemingly innocuous regulation, the entire system of wage payment is in peril. We say that this matter really demonstrates that very clearly. For a period going on 10 years, and I remind you, Commissioner, of the agreed facts, agreed fact 3. Agreed fact 3 is that the loadings were not specified in the payslips until February of this year.

PN20

What we say that that means, Commissioner, is the arguments that have been put to you about custom and practice, the arguments that have been put to you about historical payments are a house of straw, because those payments could not, it's been demonstrated and agreed, those payments could not be understood by the employers. So we say that, logically, there is no way that there is any agreed understanding about how these payments worked, up until February of this year, when Mr Bede raised the question. Quite properly, within the terms of the agreement, raised the question and said, 'Look, I don't understand how this is working'. His witness statement says:

PN21

I went and it was explained to me how it was working and I still couldn't understand. Then when I arrived at my own understanding of how it works, my own reading of the agreement, I thought the way it was being paid was wrong.

PN22

Then in pursuing that, through the dispute settlement procedure and involving his union in that process, we agree with him. The way that it is being paid is wrong.

PN23

We say that, in fact the Full Bench in Berri, says that we have to start with the words in the agreement.

PN24

Applicable shift loading will apply to all hours including overtime hours.

PN25

So, first of all, where is the ambiguity in that? We say that there is no ambiguity, it's very clear what the framers went.

PN26

THE COMMISSIONER: So if you're working an eight hour shift and you actually do 10 hours, which is two hours of overtime, you get the shift loading on the 10 hours?

PN27

MR WAINWRIGHT: Yes.

PN28

THE COMMISSIONER: Yes.

PN29

MR WAINWRIGHT: Well, you get the shift loading on all hours worked.

PN30

THE COMMISSIONER: Yes.

PN31

MR WAINWRIGHT: Which is a bit different to clause 9, which makes it clear that you don't get the shift loading on all hours worked.

PN32

So one of the things that I'm going to talk with you about, Commissioner, to try and clarify our position, is that clause 9 becomes central, in a couple of different ways, as a real juxtaposition to what's in clause 12.

PN33

THE COMMISSIONER: Yes.

PN34

MR WAINWRIGHT: We did make submissions about the sequencing, so this is - the question that we're asking for your assistance is, how do we calculate it? In doing a calculation you sequence your steps. For us the sequencing is

central. The plain words on the page tell us, 'The applicable shift loading will apply to all hours, including overtime'.

PN35

We say that the loaded rate, afternoon or a nightshift worker, becomes their base hourly rate, within the meaning of clause 13. That's the only way that the applicable shift loading is not affected by working overtime.

PN36

So the respondent has tried to put an alternative interesting interpretation of those words, but we say that the only way that the shift loading is not affected by the working of overtime is to sequence the payment in the manner that we suggest. By delaying its application in the sequence, it is affecting the payment of the shift loading.

PN37

We say what the respondent seeks is that it is affected - shift loading is affected by working overtime, effectively to make it disappear. They seek that - their methodology, Commissioner, results in the shift loading not being applied to the overtime. So we say that's a reversal of what the clause tells us to do and, again, to reference Full Bench decision in Berri, a rewriting of the agreement. The agreement tells us how to do it and to do it the way that it is being done, again in reference to the agreed facts, is a rewrite of the agreement.

PN38

It's very much, and we talked, in our submissions, about the subjectivity of the respondent's case. It's very much a 'We hope that the loading does not compound on the loading'. Again, in clause 9, we're told clearly, 'This loading does not compound on the loading'. So the agreement goes out of its way. 'To be absolutely clear', it says, 'it does not compound'.

PN39

We say that, subjectively, that is what the respondent hopes is happening in clause 12, but is not what the words tell us. The words, in fact, tell us that it does compound, that that is what the parties agreed.

PN40

I'll just pause there, Commissioner, we made reference, in our submissions, to the materials that the employees had, in voting on the agreement. Berri talks about the importance of how we interpret an agreement, based on the type of document it is and the process it's followed to have it approved.

PN41

We see that there are clear materials in front of employees when they vote. The document, any other materials incorporated by the document, the award, and the explanation given to the employees by the employer, of the document. That's the employee - that's the employer - I'll withdraw that. That's the employer's document that they develop and they have a responsibility to put it to the employees so that the employees can vote, knowing exactly what the agreement means.

PN42

That explanatory material is not before you and we say, Commissioner, that you are entitled to reflect on that, that the document only controlled by the employer, that we don't have, has not been put to you to aid in your assisting the parties to tell us exactly how clauses 12 and 13 should be applied.

PN43

The respondent, in their submissions, points to the purported tension between clause 13 and clause 12. First of all, we say that there is no tension. There's a clear sequencing, again. The arrangement, in the agreement, in our submission - I'll just let your associate know - that the arrangement in the agreement is important, that clause 12, obviously, comes before clause 13.

PN44

We say that there's two ways to understand how clause 12 and clause 13 work in that logical sequence. Firstly, clause 12 is intended to specifically describe the circumstances for shift workers. We rely on the legal maxim that the specific should override the general. So when you're looking at how you interpret clause 12 and 13, it's important to note their arrangement in the agreement but it's also important to note that clause 12 is designed to specifically address the circumstances for shift workers. Because it's specific it ranks above the general overtime clause.

PN45

As a specific provision, importantly preceding the general provision in the arrangement in the agreement, the specific provision should prevail.

PN46

Secondly, in seeking to understand how clauses 12 and 13 work, the respondent seeks that clause 12 be read down. This ignores the clear point that we've made about the contrast with clause 9.3(c) and, perhaps interesting to note also, the provisions at 9.3(d).

PN47

So 9.3(c), again, just to concentrate on the actual words being used in the agreement, which we're told to do, does not compound on the shift loading. A clear phrase is employed for the avoidance of doubt.

PN48

So the question that we are asking, and we're very much asking it of the respondent, is, first of all, do we accept that there are two very clear different models here, in 9.3(c) and in clause 12.2 about this compounding question? So how is it that we, according to the respondent, arrive at the same result in these two clauses, when we have the two very different sets of words?

PN49

To us, that has to, logically, involve some re-reading of the agreement. Some inclusion of different words, because the words are different but they put to you that the result if the same. How does that happen?

PN50

We ask, if it was the intention of the parties, in clause 12, that the allowances not compound and, currently, Commissioner, the allowances are not compounding, we see that there is an underpayment occurring, if that was the intention, why wasn't it said?

PN51

What we see at clause 9 is, 'We know how to do it, we know how to say the two allowances don't compound, and it's obvious, on its face, because we did it, we put it there. So why is it, if that was, in fact, our intention, at clause 12, that we didn't put those words there that we already knew how to employ?'. Our conclusion of that is, there's simply no logical explanation for why clause 12.2 and clause 9.3(c) should both produce the same result with radically different or diametrically opposed sets of words.

PN52

Again, at 12.2, 'This clause applies in addition to a shift loading'. I withdraw that. In clause 9.3(c):

PN53

This clause applies in addition to a shift loading but does not compound on the shift loading.

PN54

Compared with:

PN55

The applicable shift loading will apply to all hours the employee works, including overtime hours.

PN56

Diametrically opposed sets of words and it's being put to you, brazenly, that they somehow produce the same result.

PN57

The intention of the parties was that the shift loading is applied to all hours work and then the overtime loading is applied to that. That was the intention. The arrangement of the agreement supports that proposition and the drafting of the clause itself supports that proposition. If the parties had not intended the two loadings to compound they would have said so, 9.3 is evidence of that.

PN58

So, again, the question for the respondent is how, let's start with 'How', how does 12.2 deliver the same result as 9.3 with different wording? How is that possible. Secondly, 'Why', why should we, the Commission, the employees, why should we accept that the same result should be achievable, given the difference in the wording. That's where we have to examine the bulk of the submissions put to you by the respondent, Commissioner, about customer practice.

PN59

They have appended I don't know how many payslips, customer practice says, 'Look, this is how we've done it. Everyone understood how we've done it'. None

of those paystips demonstrated how the calculation was being done. The employees were not in a position, and the evidence before you is clear, employees were not in a position to understand how that calculation was being done, based on the material available to them. So the custom and practice part of the respondent's submissions is a house of cards.

PN60

We say that the only reason, the only possible answer that you could have for how the two different sets of words arrive at the same result is to argue that there's some form of linguistic alchemy going on here. We say that's simply not good enough for an enterprise agreement, remembering what Berri says about the importance of this document, separate to a commercial contract or something else, the importance of how we interpret these documents.

PN61

The way that we certainly put it is that we have to think from the perspective of the worker who is voting on the agreement. What do they understand that they're voting on? What can they understand that they're voting on? What do they have before them?

PN62

In terms of the sequencing of how the payment is calculated, again a close comparison between 9.3(c) and 12.2 is instructive, because what we've asked you, Commissioner, is how do you calculate these payments. Part of that is how do you sequence the different steps. We say that 9.3 clearly sequences how the payment is calculated; one and half times the base hourly rate, in addition to the shift loading. That stands in clear contrast with what we're told in 12.2. The first thing we're told to do is apply the shift loading to all hours worked.

PN63

So we say that the sequencing tells us, very clearly, that the shift loading impacts on the base rate. Then, once you go back to the general clause, in clause 13, that clause talks about the base rate. But how do you, in sequencing the process that needs to be followed, how do you include the shift loading? We say the answer to that is you simply read the words in the clause and you do it the way the clause says, which is to do it up front.

PN64

So, Commissioner, I don't know if that has been of any additional assistance to you, or if you have any additional questions?

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THE COMMISSIONER: No, I think I have it all, thank you, Mr Wainwright.

PN66

MR WAINWRIGHT: Thank you, Commissioner.

PN67

THE COMMISSIONER: Mr McLaughlin?

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MR McLAUGHLIN: Thank you, Commissioner. My references will be to the digital hearing book that we received.

PN69

If I could, firstly, take you to page 17 of that book. This is the further submissions of the applicant. At paragraph 34 the applicant says:

PN70

We rely on the decision of the Full Bench, in Berri. Firstly, the Full Bench says, 'The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome'.

PN71

And we accept that. It is not the task of the Commission to rewrite the agreement, it's the task of the Commission to look at the wording of the agreement, as it stands.

PN72

The union's argument is set out on page 15, at point 4. It's talking about the effect of clause 12.2 and it says:

PN73

The import of the phrase is that the new loaded rate becomes the base rate for shift workers.

PN74

Then, at point 8, it says:

PN75

The specific reading of 12.2(b) must prevail, thus the base rate of pay is altered and it is the base rate that allows clause 13 to be fully implemented without needing to read in any extra words or provisions.

PN76

They say, the effect of that is, effectively, set out on page 14 and that is, you apply the shift loading to the base rate, add that together, and then you apply time and a half and double time. That's what they say is the effect.

PN77

If I could take you, then, to page 21, because page 21 sets out, firstly, clause 13. So, remember, the union's argument is that the effect of clause 12 is to change the base rate for shift workers. But clause 13.1 reads:

PN78

Other than time that accrues towards an RDO, any time worked in excess of 38 or in excess of 8 hours or on a Saturday, is considered overtime and will be paid at a rate of (a) 1.5 times the employee's base rate of pay, as set out in clause 10.1. It then goes on, two times the base rate of pay in clause 10.1. Then time worked on Sunday is considered overtime and will be paid at two times the employee's base rate of pay, in clause 10.1.

PN79

Now, 10.1 in the agreement is simply the - - -

PN80

THE COMMISSIONER: Wage rates.

PN81

MR McLAUGHLIN: The wage rates, the hourly rates of pay for ordinary time.

PN82

So, effectively, the union is saying that clause 12.2, the effect of clause 12.2 is that you delete the words, 'as set out in clause 10.1'.

PN83

THE COMMISSIONER: Well, the words, 'as set out in 10.1' don't appear in 12.2.

PN84

MR McLAUGHLIN: No, but they appear in clause 13, and the union is saying, the effect of clause 12.2 is that the base rate to which apply the penalties becomes the rate plus the shift loading. So that is the rate in 10.1 plus the rate in 12.2(a).

PN85

THE COMMISSIONER: Except that 12.2(b) says that I have to apply the shift loading to all hours the employee works.

PN86

MR McLAUGHLIN: That's correct, yes, you do. Yes. The applicable shift loading to all hours worked.

PN87

THE COMMISSIONER: Including overtime hours.

PN88

MR McLAUGHLIN: That's right. That's right. And the applicable shift loading is set out in clause 12.2(a). It is 15 per cent for afternoon shift, it's 15 per cent of the employee's base rate of pay for hours worked. Not base rate of pay for ordinary hours, it is base rate of pay for hours worked. So that's ordinary hours and overtime hours.

PN89

Clause 13.1 is the only clause that spells out the penalty rates for overtime, of 1.5 and double time. It specifically says, reading the words that are there, 'The base rate of pay, as set out in clause 10.1'.

PN90

The union's argument is, 'No, no, you don't read that anymore, you apply 1.5 to the shift loaded rate so that the loading is compounded'. Right?

PN91

THE COMMISSIONER: Yes.

PN92

MR McLAUGHLIN: That's the argument. So you've got to ignore the words of clause 13.1, as it's written. You have to get rid of the reference set out in clause 10.1 and just read it as, this is the first step of the union's argument, you have to read that as just the employee's base rate, ignore the reference to 10.1 and then, by reading their interpretation of clause 12.2, the base rate somehow becomes the loaded rate, with the shift loading, and then you apply one and a half and double time to that loaded rate.

PN93

We say the correct interpretation is, yes, the base rate gets the time and a half and double time applied to it but also they get paid the relevant shift loading, the applicable shift loading, when they work overtime. That applicable shift loading is as set out in 12.2(a), 15 per cent of the base rate or if they're a night shift worker, 30 per cent of the base rate. The shift loading doesn't change is what we're saying. Whether it's overtime or ordinary time, the shift loading doesn't change.

PN94

THE COMMISSIONER: I don't think that Mr Wainwright is suggesting that shift loading changes at all, it's the application of the overtime rate. The shift loading is the shift loading, it's 15 per cent for afternoon shift, regardless of whether you work eight hours or 15 hours.

PN95

MR McLAUGHLIN: Yes, but he's saying you apply the 15 per cent to the rate that has had the one and a half or double time attached to it.

PN96

THE COMMISSIONER: No. Well, he actually says that you apply the 15 per cent to the shift rate.

PN97

MR McLAUGHLIN: In fact, what he does say, if you go back to clause 14, you apply the shift loading to overtime work. So you take the base rate, 28.84, plus 15 per cent, which gives you 33.17, and then you apply time and a half and double time to that.

PN98

THE COMMISSIONER: Yes.

PN99

MR McLAUGHLIN: So you're effectively compounding the shift loading.

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THE COMMISSIONER: Yes.

PN101

MR McLAUGHLIN: That's his argument.

PN102

THE COMMISSIONER: Yes.

PN103

MR McLAUGHLIN: We say the agreement doesn't allow for that, just on the wording itself, because the time and a half and double time is applied to the rate in 10.1, not to the loaded rate. The shift loading, in 12.2(a) - - -

PN104

THE COMMISSIONER: What do you say - sorry, you might be going to come to this, and that's fine, but about the distinction that's been made in 9.3?

PN105

MR McLAUGHLIN: Yes. 9.3, clause 9.3(c) is not dealing with overtime.

PN106

THE COMMISSIONER: Yes, but it deals with the effects of whether various loadings should compound.

PN107

MR McLAUGHLIN: it deals with a particular penalty that is applied for part-time employees who are working in excess of their rostered hours but still less than 36 hours, so they haven't clicked into overtime. It's a particular penalty that applies - - -

PN108

THE COMMISSIONER: Yes. No, I understand what it is and Mr Wainwright's argument is that that clause makes clear that the rates don't compound and that I should take that into account in reviewing how clause 12.2 applies because it doesn't say that. So where it's the intention of the parties that the rates don't compound, that's stated clearly, it's not stated in 12.2 so it's a different circumstance.

PN109

MR McLAUGHLIN: Yes. But clause 9.3(c), as I say, is dealing with a particular - it's not dealing with overtime, it's dealing with a particular loading and - - -

PN110

THE COMMISSIONER: Yes, but it makes - - -

PN111

MR McLAUGHLIN: - - - because it is an unusual loading it is specifically saying - - -

PN112

THE COMMISSIONER: Well, why not say that in 12.2?

PN113

MR McLAUGHLIN: It doesn't need to be said in 12.2.

PN114

THE COMMISSIONER: Why not? If it needs to be said in 9.3 why doesn't it need to be said in other places where it's the case?

PN115

MR McLAUGHLIN: Because 12.2(a) and, in particular, clause 13.1 makes it quite clear that the base rate, the penalties of 1.5 and double apply to the base rate of pay in clause 10.1. Those words can't be ignored, they must have a meaning. That's the only clause that applies the penalty loading for overtime, '1.5 and double time, the base rate of pay, as set out in 10.1'.

PN116

Clause 12.2 says:

PN117

You get paid a shift loading of 15 per cent of his or her base rate of pay for hours work.

PN118

We accept that's for all hours worked. Then 12.2(b) states:

PN119

The shift loading that applies to an employee's hours of work on shift is determined by reference to the ordinary hours the employee is rostered and is not affected by working overtime.

PN120

The purpose of those words is to make it clear, because the agreement is very specific in defining day shift, afternoon and night shift. So afternoon shift is 2 pm to 10 pm. So when an employee on afternoon shift works overtime at the end of the shift, it could be argued they're working those hours in what would otherwise be night shift hours. So there could be an argument that they get a 30 per cent loading on their overtime hours, instead of 15 per cent.

PN121

The purpose of 12.2(b) is to make it clear that if you're an afternoon shift worker and you're working overtime, the shift loading is not affected by working overtime. It then goes on to say:

PN122

For the avoidance of doubt, the applicable shift loading will apply to all hours the employee works, including overtime hours.

PN123

So what is the applicable shift loading? Again, back to 12.2(a), it's the shift loading of 15 per cent on the base rate of pay for hours worked.

PN124

THE COMMISSIONER: So you say the purpose of clause 12.2(b) is, I don't know if the word 'if only' is appropriate, but the purpose of 12.2(b) is only to maintain the shift loading that was applicable to the shift that the overtime is hanging off?

PN125

MR McLAUGHLIN: Yes. Yes.

PN126

THE COMMISSIONER: So you don't fall into a 30 per cent or back to a whatever.

PN127

MR McLAUGHLIN: Or back to even, yes, if they worked before the afternoon shift, the argument that they're on day work hours and therefore no shift loading would apply.

PN128

THE COMMISSIONER: Yes.

PN129

MR McLAUGHLIN: So that's what 12.2(b) does. But then:

PN130

For the avoidance of doubt, the applicable shift loading will apply to all hours the employee works, including overtime.

PN131

As I say, the applicable shift loading can only mean 12.2(a), 15 per cent of the base rate.

PN132

I think the union, in their argument, tends to concede that because they say, 'No, no, base rate doesn't mean base rate for a shift worker anymore, base rate means base rate plus shift loading and then you apply penalties to that'.

PN133

So we say when a shift worker is working overtime they get time and a half or double time applied to the base rate in clause 10.1, but they also continue to get the shift loading that they've been paid throughout their ordinary time, they still get that same shift loading, same amount, paid for overtime hours. It's a benefit that's provided. It's above the award, the award doesn't carry through shift loadings for working overtime.

PN134

Quizzical look?

PN135

THE COMMISSIONER: I'll go and look at the award.

PN136

MR McLAUGHLIN: Yes. I'm pretty confident that the shift loadings don't apply when overtime is worked.

PN137

So the agreement, which all we've done, in terms of - I think much has been made, and we're arguing custom and practice, all we did was really show that this hasn't changed over the years.

PN138

THE COMMISSIONER: If the custom and practice has been wrong, then the fact that it's custom and practice doesn't help it.

PN139

MR McLAUGHLIN: Yes. So we're not relying on that, we're simply saying the agreement itself hasn't changed since 2012. The way we've paid it hasn't changed. Mr Bede would not be aware, he's only, I think maybe this year, moved to afternoon shift, prior to that he was day shift, so there's nothing to be made of that.

PN140

Yes, we did have an issue with payslips in that we were incorporating the shift loading on ordinary time and had to do a recalculation. So nothing turns on that. What we say is this turns on just the wording of the agreement itself and there's no basis for arguing that 12.2(b) rewrites clause 13 to define the base rate of pay for shift workers as something other than as in clause 10.1. The wording of the agreement is the wording of the agreement and, in accordance with Berri, that's the way the agreement should be applied.

PN141

THE COMMISSIONER: Thank you.

PN142

Mr Wainwright?

PN143

MR WAINWRIGHT: Thank you, Commissioner.

PN144

Commissioner, you asked my friend a question after he had made submissions about the only purpose of 12.2(b). He said that is to make it clear that if you're on afternoon shift then that's not affected by working overtime. So if you're on afternoon shift, he says the only purpose of 12.2(b) is if you're on afternoon shift and you've got a 15 per cent loading, you work overtime before afternoon shift, or overtime after afternoon shift, your shift loading stays the same. He says that's the only purpose. Then you asked the question, to clarify it, that the shift loading is hanging off the shift, and he said, 'Yes, that's the only purpose'.

PN145

We say that ignores what 9.3(d) says. It might take me a moment to get it in front of me again, Commissioner, so if you'll bear with me.

PN146

THE COMMISSIONER: (c) or (d)?

PN147

MR WAINWRIGHT: (d). (d) says, you can see there, that it follows on from the 9.3(c) that we've been looking at, which talks about what happens if you're a part-time employee and you're down for 20 hours a week, what happens if you work 22 hours. Then (d) talks about:

PN148

Where a flexible, part-time employee works in excess of the 36 hours or in excess of 8 hours a day.

PN149

What 9.3(d) tells us is:

PN150

The time is considered and calculated as overtime, pursuant to clause 13.1. For the avoidance of doubt -

PN151

And I'm glad that we're avoiding doubt:

PN152

overtime for a flexible, part-time employee is calculated on the employee's base rate of pay and the additional payment, in 9.3(c) -

PN153

which is the shift payment. So the shift loading:

PN154

The additional payment does not apply to any overtime hours.

PN155

So what that says to me, Commissioner, is that the proposition that my friend put to you cannot be right. Because what we are told, going beyond, 'This is just the shift loading and you only get one allocated to you', we say no, 12.2(b) has more work to do than that. That's proved to us by what's written at 9.3(d).

PN156

Again, where, at 9.3(d), the framers have made it clear that you don't get your shift loading on overtime at all. You don't get it. You just get your overtime money. You just get your time and a half and double time. So we say that that juxtaposes with the special arrangement that's been put in place for shift workers.

PN157

Essentially, the argument is that the loading is not compounded. That's what was put to you and we say if that is the case why wasn't it stated in the clause when the parties demonstrated that they knew full well how to do it? So we're not saying silence indicates that there's no compounding, we're not even saying that. And as we said in our submissions, we say, very loudly, at one point of the agreement they don't compound. So how is it that complete silence, and the absence of that message, delivers the same result? Again, we don't see the logic of that proposition.

PN158

My friend told you that the import of our submissions was that you should ignore clause 13, that's not correct. We don't say that at all. Clause 13 is a mechanism, it does what it does. But clause 13 is the general provision for the agreement.

PN159

THE COMMISSIONER: Except it seems to be the only place - sorry, it's the only place that's been identified where the base rate is referenced and the base rate appears to be the rate in 10, in clause 10.1.

PN160

MR WAINWRIGHT: Well, I don't want to confuse things further, but the base rate in clause 10.1 is not the base rate, because the base rate in clause 10.1 gives us a mechanism on how to calculate the base rate. What seems to be the base rate is not the base rate, I suppose, is what I'm going to put to you.

PN161

THE COMMISSIONER: 10.1 is the rates of pay.

PN162

MR WAINWRIGHT: Yes, but the rates of pay now, for the last increase in December of last year and the increase of December of this year, include reference to the National Wage Case, so it's not as if we're looking at clause 10.1 and the dollar figures are there, as they are in most agreements.

PN163

THE COMMISSIONER: Yes, but it references the wage rate that people are entitled to for ordinary hours.

PN164

MR WAINWRIGHT: Yes, as their base rate.

PN165

THE COMMISSIONER: Yes, as the base rate. So clause 13 is the only place that seems to say, 'That's where you go to get the base rate, you go to clause 10, you go to the wage rates, that's the base rate'.

PN166

MR WAINWRIGHT: Yes. So I suppose what I'm putting to you is two-fold about that. First of all, it's about going back to the customer practice argument, we're setting out submissions, there's no way, based on the document, for the employee to easily know what the base rate is now, because it does involve some calculation and some outside factors. Equally, we say - - -

PN167

THE COMMISSIONER: I'm sure someone will work it out.

PN168

MR WAINWRIGHT: Yes. Equally, we say that if you are applying the principle that the specific overrides the general, then in applying 12 and 13 together, you're told specifically what to do in clause 12, for shift workers.

PN169

So what I want to make clear to you, Commissioner, is we're not saying to you that you should ignore clause 13, clause 13 does have important work to do, but it is subservient to clause 12.

PN170

THE COMMISSIONER: But you require me to redefine the base rate.

PN171

MR WAINWRIGHT: No, we say that clause 12 does that for you. So we are saying - - -

PN172

THE COMMISSIONER: You're saying that the base rate on which overtime is paid is the shift loaded rate?

PN173

MR WAINWRIGHT: Yes. So when, in the sequence, the clause tells us, 'Apply the shift loading to all hours worked', then you do that then. That's what we say, you do that then. Then you get to clause 13 - - -

PN174

THE COMMISSIONER: It doesn't say, 'Apply the shift loading to all hours worked', it says, 'The applicable shift loading will apply to all hours'.

PN175

MR WAINWRIGHT: Yes. I put to you that those two things are the same.

PN176

THE COMMISSIONER: I think that's where the difference comes in.

PN177

MR WAINWRIGHT: Yes.

PN178

THE COMMISSIONER: I think maybe we shouldn't use 'for the avoidance of doubt' any further.

PN179

MR WAINWRIGHT: It doesn't seem to have been successful.

PN180

THE COMMISSIONER: No.

PN181

MR WAINWRIGHT: Well, let me withdraw that, I withdraw that. We say that the agreement is clear.

PN182

THE COMMISSIONER: Yes. No, I understand.

PN183

MR WAINWRIGHT: The repeated use of the phrase, through the agreement, 'for the avoidance of doubt', is perhaps not the best way to try and convey clarity. The best way to convey clarity is to agree on what you want, put the words together to deliver what you want and then implement that.

PN184

THE COMMISSIONER: If only it was so easy.

PN185

MR WAINWRIGHT: The last thing that I want to put to you - - -

PN186

THE COMMISSIONER: And I don't suggest by that, that there was any intent on the parties to mislead, in terms of the drafting of the agreement.

PN187

MR WAINWRIGHT: And we don't suggest that either.

PN188

THE COMMISSIONER: No.

PN189

MR WAINWRIGHT: The final point that I'm going to is about my friend says, about custom and practice, 'This hasn't changed'. In fact, their submissions say that prior to 2011 this was the practice and then the wording in the agreement changed, going from 2011 to 2012. In the circumstances of the payslips not providing a proper detail, which was required from at least 2009.

PN190

We say that what - and we said this in our submissions, so I'm just going to repeat. What the respondent is asking of you, Commissioner, is to recognise that the relevant words changed in that iteration of the agreement but there were no consequences of that change. We say that that's a really troubling submission.

PN191

When we change words in agreements those changes should have consequences. For us to simply expect that, regardless of what the agreement says, the machine will just roll on is problematic in and of itself. We say perhaps that's the reason why we've landed where we've landed today, compounded, to use that loaded phrase today, compounded by the fact that the regulation 3.46 requirements were not met for so many years.

PN192

Commissioner, that's all that I wish to put.

PN193

THE COMMISSIONER: Okay. Thank you, there's nothing else?

PN194

MR McLAUGHLIN: I really don't have a right of reply - - -

PN195

THE COMMISSIONER: Mr McLaughlin?

PN196

MR McLAUGHLIN: I wonder if I may just address clause 9.3 and subclause (d)? My friend said that that makes it clear that the shift loading is not payable on overtime. 9.3(d) isn't dealing with that, it's dealing with that particular loading,

it's not a shift loading, it's a loading for working additional hours, which are not overtime hours. They're hours in excess of the roster but still below overtime. What (d) is making clear is that you don't get that extra loading when you work overtime. 13.1 applies and we would say 12.2(a) and (b) would also apply.

PN197

THE COMMISSIONER: I'll review clause 9.3 and if there are any questions I've got about it I'll come back to the parties, in writing.

PN198

MR McLAUGHLIN: Thank you, Commissioner.

PN199

THE COMMISSIONER: But otherwise my decision is reserved. Thank you, we'll adjourn.

ADJOURNED INDEFINITELY

[1.55 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #AMWU1 WITNESS STATEMENT OF NAVEET BEDE DATED
13/04/2023PN10**