



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT  
VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT BELL  
DEPUTY PRESIDENT HAMPTON**

**C2023/8160**

**s.604 - Appeal of decisions**

**Appeal by Mining and Energy Union (301V)  
(C2023/8160)**

**Melbourne**

**10.02 AM, FRIDAY, 15 MARCH 2024**

PN1

PRESIDENT HATCHER: We will take the appearances. Ms Doust, do you seek permission to appear for the appellant?

PN2

MS L DOUST: I do, with Mr Patrick from the union.

PN3

PRESIDENT HATCHER: And Mr Spargo, do you seek permission to appear for the respondent?

PN4

MR W SPARGO: I do, your Honour, with Mr Henley from EnergyAustralia.

PN5

PRESIDENT HATCHER: Yes. All right. We grant the parties permission for legal representation, and I can indicate we have read the outlines of submissions, Ms Doust.

PN6

MS DOUST: Thank you. I think I have a couple of copies of the appeal file. I think they have already been distributed.

PN7

PRESIDENT HATCHER: Copies of the what?

PN8

MS DOUST: I'm sorry?

PN9

PRESIDENT HATCHER: You have a couple of copies of the what?

PN10

MS DOUST: Of the appeal book, I think that were to be distributed to some members of the Full Bench, but I believe that's already occurred.

PN11

PRESIDENT HATCHER: The paper-based members?

PN12

MS DOUST: Yes.

PN13

PRESIDENT HATCHER: Yes.

PN14

MS DOUST: Can I, if it's convenient, if I just launch into the oral submission which I don't promise they will bear any logical relationship to the order of the written outline.

PN15

This is an appeal, of course, from a decision of the Commissioner exercising arbitration powers pursuant to the EnergyAustralia Yallourn Enterprise Agreement 2020. That agreement is at page 42 and following of the appeal book and it concerns a group of employees who, at the relevant time, were what's described as 2x12 shift workers and Division D members of the Equip Super Fund, and that is - if I can ask the members of the Bench to turn to page 32 of the appeal book - you can see at point 2 of the parties' agreed statement of facts below that it identified that group of shift workers and their fund membership.

PN16

PRESIDENT HATCHER: But does the fund membership create any relevant point of distinction?

PN17

MS DOUST: No. No, I'm just simply identifying, at the outset, what the matter concerned.

PN18

PRESIDENT HATCHER: In respect of these people I'm just looking at the payment structure in Appendix 1 of the agreement.

PN19

MS DOUST: Yes.

PN20

PRESIDENT HATCHER: So for maintenance employees there's a - - -

PN21

MS DOUST: An annual salary.

PN22

PRESIDENT HATCHER: A table which sets out what I assume is a weekly amount.

PN23

MS DOUST: Yes. I'm sorry. Yes.

PN24

PRESIDENT HATCHER: And then for Operations, which I assume is - - -

PN25

MS DOUST: This class of employees.

PN26

PRESIDENT HATCHER: - - - your client's members, it sets out a base rate of pay and a normal rate of pay per hour.

PN27

MS DOUST: Yes.

PN28

PRESIDENT HATCHER: So does the normal rate of pay, is that the rate that incorporates the weekend penalties and the shift rates?

PN29

MS DOUST: Yes. It incorporates three additional components. It is the 21 per cent weekend penalty loading that's applied across all hours. So that rate is applied across all hours to, I presume, reflect the overall weekend penalties that would be payable under the roster arrangement which was a 10-week cycle. It also represents the Yallourn allowance and the shift allowance, and on the following page - that's AB99 - one can see the Yallourn allowance and the shift allowance that are there set out. The Yallourn allowance is the first entry in the table on AB99. Shift allowance is the fourth entry and that's reflected in weekly amounts.

PN30

PRESIDENT HATCHER: And how does that convert to a salary? Is it just that amount times 36 per week?

PN31

MS DOUST: Yes. That's what we say is the superannuation salary or fund salary. There's some different descriptions of the term, but the term 'superannuation salary' is used interchangeably with the term 'fund salary' in the definition, but then within that definition there's also a reference to what's described as the 'superannuation fund salary' and it's our submission that they're all a reference to exactly the same thing.

PN32

PRESIDENT HATCHER: So if you go to your outline of submissions, in paragraph 18 you record what's stated in the decision.

PN33

MS DOUST: Yes.

PN34

PRESIDENT HATCHER: But the question involved whether payments seen in clause 12.3 were ordinary time earnings as defined by the SGA Act, but then you suggest an alternative approach.

PN35

MS DOUST: Yes.

PN36

PRESIDENT HATCHER: I will just put this as plainly as I can. It seems to me, speaking for myself that - how shall I put this - the Commissioner was led down the garden path and the answer to the question is to be found in the first sentence of 9.3.

PN37

MS DOUST: Certainly your Honour uses the description 'led down the garden path'. I certainly think it's correct that the parties proceeded before the Commissioner on the basis that the real question to be determined was whether or

not the earnings in respect of the time in lieu that was taken during ordinary hours was ordinary time earnings within the meaning of section 6 of the Superannuation Guarantee Administration Act. So the parties proceeded on that basis.

PN38

PRESIDENT HATCHER: Why would that be the question? I mean the Act operates with its own force and any opinion the Commission has about that is interesting, but that's all it is.

PN39

MS DOUST: That was certainly the position that was arrived at, and can I say, when one looks at the terms of the obligation to pay, and I think this is in 9.3. I'm sorry. No, it's 9.5.3. There's a reference there to two figures.

PN40

PRESIDENT HATCHER: All right.

PN41

MS DOUST: First of all, there's the 12 per cent of superannuation salary or 2 per cent more than the federal government superannuation guarantee.

PN42

PRESIDENT HATCHER: I see.

PN43

MS DOUST: And I think what one might - - -

PN44

PRESIDENT HATCHER: So the 2 per cent is the greater figure, is it?

PN45

MS DOUST: It becomes that at one point in the proceeding, and can I just direct your attention back to paragraph 16 of the outline?

PN46

PRESIDENT HATCHER: Yes.

PN47

MS DOUST: So we think the reference, or we submit that the reference in clause 9.5.3 is a reference to the federal government superannuation guarantee, and that is reference to the rate that appears in section 19(2) of the Superannuation Guarantee (Administration) Act. Those rates are set out at paragraph 16 and your Honour will see that starting at - and the members of the Bench will see, starting at 2019, the rate is 9.5. It increases gradually to the point where by 2025 the underlying rate will be 12 per cent so - - -

PN48

PRESIDENT HATCHER: But this case was argued by reference to the previous agreement so hasn't there been - - -

PN49

MS DOUST: So there's now a subsequent agreement I think in place.

PN50

PRESIDENT HATCHER: Yes. When did that take effect?

PN51

MS DOUST: Late last year.

PN52

PRESIDENT HATCHER: Last year?

PN53

MS DOUST: Yes, but the Commissioner found that she still had jurisdiction to deal with the dispute.

PN54

PRESIDENT HATCHER: That's not the point I'm raising. I'm just talking about when - - -

PN55

MS DOUST: No, I agree that that rate won't cut in during the life of the agreement, but when one looks at that table one can see, I think tolerably clearly, that clause 9.5.3 is a setting up a regime for the rate payable in accordance with the agreement staying at a relativity to the existing statutory rate and so staying ahead of it.

PN56

Now, at the outset of the agreement, 12 per cent was 2.5 per cent ahead of the existing statutory rate and I understand the superannuation legislation doesn't impose an obligation directly upon an employer to make superannuation contributions, but I think it's clear enough from the terms of clause 9.5.3 that those are the rates that are referred to. They're in common parlance as such.

PN57

PRESIDENT HATCHER: So it's a case, for the purpose of 9.5.3, of calculating the two alternatives to work out which is the higher amount?

PN58

MS DOUST: Which is the larger, yes, and her Honour did say at one point in the decision - I'm sorry, the Commissioner said at one point in the decision, and although it's not dispositive here, she said there's no dispute that it's 12 per cent either way. That's not strictly correct because by 1 July - - -

PN59

PRESIDENT HATCHER: Twenty-two.

PN60

MS DOUST: - - - 22, then the relevant rate under that second limb was 12.5 per cent.

PN61

PRESIDENT HATCHER: And does the Commissioner's answer affect which is the higher amount. That is if you start taking off in lieu does that sometimes

mean that the 12 per cent is the higher amount; that is, 12 per cent of weekly salary or SGA plus 2 per cent?

PN62

MS DOUST: It may.

PN63

PRESIDENT HATCHER: It may affect which is the higher?

PN64

MS DOUST: It may. Yes. Depending upon the circumstances of the matter.

PN65

PRESIDENT HATCHER: And does 9.5.3 operate on a week by week basis?

PN66

MS DOUST: It certainly doesn't specify that, but it's not clear to me that that would make any difference on the case that we advance.

PN67

PRESIDENT HATCHER: All right. Well, it depends whether they do overtime and whether, on the Commissioner's answer, whether you do overtime and how much overtime you do may affect what the second amount is.

PN68

MS DOUST: Yes. If one was taking it on a week by week basis and making that assessment every week and reaching the conclusion against the position we contend for, that when the employee takes the time off in lieu the payment made in respect of those hours is not either superannuation salary or ordinary time earnings which is superable, it would be different week to week.

PN69

Your Honour will recall, of course, the reference that Allsop CJ made to the operation of the legislation in the decision in BlueScope about the reason for adopting the approach to ordinary time earnings that he did being, in part, due to the satisfaction of simplicity of operation and not needing to undertake some sort of weekly assessment of what were the usual or ordinary hours - I'm sorry, usual or customary hours, but instead looking at what were the hours that were mandated by the industrial instrument because that gave a certain answer that could be relied upon over the course of the quarter during which the guarantee could be offset, and so that is, I think, relevant to bear in mind considering this matter. So returning to the submissions that I was making. The Commissioner was asked to determine - - -

PN70

PRESIDENT HATCHER: I'm sorry, just to clarify this again.

PN71

MS DOUST: Yes.

PN72

PRESIDENT HATCHER: So up to a certain point under the agreement the first amount was higher; that is, the 12 per cent of salary?

PN73

MS DOUST: Yes.

PN74

PRESIDENT HATCHER: And was there any dispute about the way that was paid?

PN75

MS DOUST: Up to 1 July 2021.

PN76

DEPUTY PRESIDENT HAMPTON: Twenty-one or 22?

PN77

MS DOUST: I'm sorry, if it's higher it's up to 1 July 2021. As of 1 July 2021 they become the same so they're both 12 per cent. As of 1 July 2022 the 2 per cent greater than the guarantee becomes 12.5 per cent.

PN78

PRESIDENT HATCHER: But at least until 21 they would have been paying the first amount?

PN79

MS DOUST: Yes.

PN80

PRESIDENT HATCHER: The first option?

PN81

MS DOUST: Yes.

PN82

PRESIDENT HATCHER: Was there ever any dispute about the way that applied to TOIL?

PN83

MS DOUST: Only to the extent of there being a dispute about whether or not when time off in lieu was taken, that the payments in respect of those hours were superable.

PN84

PRESIDENT HATCHER: So there was a dispute about that?

PN85

MS DOUST: Yes. So only the dispute that we raise here. It's really a question about whether or not those hours are counted in superable salary.

PN86



PRESIDENT HATCHER: I might not be making myself clear. You have 12 per cent or 2 per cent above the guarantee.

PN87

MS DOUST: Yes.

PN88

PRESIDENT HATCHER: At a time when 12 per cent was higher than 2 per cent above the guarantee, which was up before July 2021, I assume the company was paying the first option.

PN89

MS DOUST: Yes.

PN90

PRESIDENT HATCHER: At the end of that first option was there any dispute about how it worked with TOIL?

PN91

MS DOUST: No. I don't think - - -

PN92

PRESIDENT HATCHER: Did they pay the first option up until 21 on TOIL?

PN93

MS DOUST: As I understand it, the 12 per cent figure was used at that time and there's no dispute about the percentage rate that was adopted at that time.

PN94

PRESIDENT HATCHER: No, not the percentage rate. Was the 12 per cent paid on time off in lieu? Was it included?

PN95

MS DOUST: No.

PN96

PRESIDENT HATCHER: It wasn't?

PN97

MS DOUST: No, not at that stage. If your Honour would just excuse me. I will just confirm that because, as I understand it, it is a longstanding practice that time off in lieu, the payments made in respect of those periods has not been regarded as superable by the company going back for some years, if that's correct.

PN98

PRESIDENT HATCHER: All right, and is that part of the dispute?

PN99

MS DOUST: Yes. It's a dispute about the treatment during the life of the 2020 agreement of those hours, or the earnings in respect of those hours, which we say are the, effectively, ordinary time payments in respect of those hours and whether or not they are superable.

PN100

PRESIDENT HATCHER: All right. Thank you.

PN101

MS DOUST: So the question that was posed to the Commissioner - and can I ask the members of the Commission now to go to page 33 of the appeal book which contains the parties' agreed statement of facts. That identifies there, first at paragraph 5, what is the existing practice and that is since the agreement came into operation, when a relevant employee elects to take time off in lieu of payment for overtime pursuant to clause 12.3, the respondent has not made superannuation contributions in relation to the ordinary hours not worked by the relevant employee.

PN102

So it states that the dispute is in respect of the life of the agreement, but we say that there's corresponding issues going back prior to this agreement, with which the Commission isn't concerned in this matter.

PN103

Now, I want to focus, just for a moment, on how the existing practice is described in clause 5. The existing practice is described as taking time off in lieu of payment for overtime and the failure to make superannuation contributions in relation to the ordinary hours not worked by the relevant employee. That's the way in which the practice is characterised, and the reason that I focus on that is for this reason. If the members of the Bench would oblige me by going to the respondent's submissions in this matter and see how the practice is characterised there by the use of some square brackets.

PN104

The respondent there characterises the existing practice as the payment of superannuation contributions from payments pursuant to clause 12.3 of the agreement. That's not precisely how the existing practice was characterised by agreement between the parties. It was, in relation to the ordinary hours not worked by the relevant employee. That's the way it's characterised there.

PN105

That's a small point, but it's important for our purposes to emphasise the appellant did not accept the characterisation, at that stage of the payments that were made to an employee when they took time off in lieu, as being payments that are made pursuant to clause 12.3.

PN106

Now, ultimately, we say even if one regarded the payments as being made pursuant to that clause, it wouldn't make any difference because this was still either superannuation salary within the meaning of the agreement or earnings in respect of ordinary hours of work because it's earnings in respect of ordinary hours in respect of which time off in lieu is had paid at the ordinary rate, but I just wish to emphasise that before going any further.

PN107

The Commissioner answered the question at paragraph 50 of her decision - and this is at page 16 of the appeal book. I'm sorry, it's at page 17. She answered that the existing practice was consistent with the correct application of clause 9.5.3 of the agreement, and the appellant contends that that was an error because on a proper analysis of the agreement the payments were superable.

PN108

Can I take the members of the Commission to the provisions of the agreement that we say are relevant presently, and the agreement appears at page 42 of the appeal book and following.

PN109

I will take the members of the Commission first to clause 2. That's at page 48 of the appeal book. One can see the application of the agreement to the employer, and in the second paragraph of clause 2, below the subparagraphs (a) and (b), that applies to employees who, as well as their eligibility otherwise, are employed to work in the classifications in Appendix 1 - and that's the appendix we just turned to just a moment ago - and one can see, just going to that appendix, which is at page 97 of the appeal book, that there's a number of maintenance classifications designated with the descriptor 'AM' or 'PM' and so on down the page on 97. The operations classifications are on page 98.

PN110

PRESIDENT HATCHER: So why are they expressed in a different way that is hourly rather than weekly?

PN111

MS DOUST: I believe it's because of the difference in shift arrangements between the two classes of employees, that the operations were working, as in the shifts, either seven days, 24 hours, whereas the maintenance staff were not on the same sorts of arrangements. Yes, I think it's principally day work. I think there's some capacity amongst the maintenance employees for some additional out of hours work, but not on the whole.

PN112

Can I ask the members then to turn back to appeal book page 61 where clause 9.5.3 appears. This is the clause that we say imposes the obligation to make the superannuation contributions, and in the sense discussed in the first issue that arose in the BlueScope decision, imposes some sort of mandatory obligation because, of course, the superannuation legislation itself doesn't impose the obligation, but this is a freestanding source of obligation from the employer which is capable of being contravened, and there are there the two amounts which the employer must pay by way of contribution. Contributions to the account equal to 12 per cent of the superannuation salary or 2 per cent more than the federal government superannuation guarantee.

PN113

I have already dealt with how we say the reference to Federal Government Superannuation Guarantee should be understood. That's the charge percentage rates in section 19 of the Superannuation Guarantee (Administration) legislation. Can I, while I'm in this neck of the woods, can I just alert the - - -

PN114

PRESIDENT HATCHER: So the 2 percentage means 2 percentage points? It doesn't mean an amount that's greater by the amount of 2 per cent?

PN115

MS DOUST: No, I think it's 2 percentage. You would understand that to be 2 percentage points. Can I just alert the members of the Bench, if I can ask the members to turn up paragraph 17 of the appellant's written submission. There's an error in subparagraph (d) of that written submission, at 17(d). So there's a reference there to 13 per cent from 1 July 2023 being 2 per cent greater than the 10.5 per cent at item 10. That should read greater than the 11 per cent at item 11 which is apparent from the table above. There was some sloppy cutting and pasting on my part there, but it's not material, I think, to the outcome here.

PN116

So when one looks at the way in which those rates advance over the life of the agreement, one would see that the clause was designed to roughly maintain the existing superiority of the contributions, of a percentage of contributions under the agreement compared to that which is identified in its statute.

PN117

Then if one goes back to clause 9.3 to see the definition of 'fund' or 'superannuation salary' - and here you see, at the outset, the term 'fund salary' is used there. That's not referred to in the definitions, but '(or superannuation salary)', so those two appear to be interchangeable. Again, there's a reference here to the salary being equal to the salary shown in Appendix 1 plus normally received shift allowance and weekend penalties, so when one thinks back to Appendix 1, it's that second rate of pay, the normal rate of pay which includes that shift allowance component and the weekend penalties. Note the full stop at the end of that first paragraph and then there's a further paragraph:

PN118

*Except where payments are in relation to overtime, and provided an Employee is in regular receipt of such payment, the Yallourn Allowance, Shift Allowance, and Weekend Penalties shall be included as part of the salary used to calculate*

-

PN119

First of all -

PN120

*(a) Superannuation Fund Salary; and*

PN121

Second -

PN122

*(b) Final Average Salary; and*

PN123

Third -

PN124

*(c) the Company's Superannuation Guarantee (Administration) Act obligation.*

PN125

So can I go back to some aspects of that. The second paragraph, the subject of that paragraph is Yallourn allowance, shift allowance and weekend penalties, and whether or not they're included in the fund salary. They're to be considered part of salary, where the employee is in regular receipt of them, except where they're paid in relation to overtime and the clause doesn't, on a proper reading, establish some sort of generalised exclusion of anything bearing any connection whatsoever with overtime from inclusion in overtime salary.

PN126

So one doesn't read, 'Except where payments are in relation to overtime,' as providing that under this agreement where any payment, there's any relationship to overtime, it is immediately excluded from superannuation salary. That's, in my submission, an incorrect reading when one understands the way in which that part of the definition proceeds.

PN127

The second point to be made about that clause is this. In subparagraph (a) there's a reference to 'superannuation fund salary'. As I already indicated previously, we think that that term, which is an amalgam of the two alternatives at the top of the paragraph, is that all of those things are the same thing, that fund salary is superannuation salary is superannuation fund salary, and that's just a little bit of the slight inconsistency in drafting that one sometimes sees in instruments of this type in relation to which no store would be set or no force would be given to that. Nothing would be made of it.

PN128

The second thing is in paragraph (b) there's a reference to 'final average salary'. That's not relevant for current purposes. That's obviously in respect of a defined benefit scheme member. Lucky them.

PN129

The third reference is to 'The company's Superannuation Guarantee (Administration) Act obligation,' and one sees again there that this agreement, I won't say wrongly, but in a very shorthand way, portrays an understanding of the Commonwealth superannuation legislation as imposing an obligation upon the employer to make certain contributions in respect of earnings.

PN130

Now, whilst it's legally incorrect, it's an understanding which is common and it does roughly equate to the way in which the superannuation legislation operates because if contributions aren't made into a fund, then a charge applies and money can, in fact, be recovered by the Taxation Office and then deposited into a superannuation fund.

PN131

So although there's many steps along the way to that amount of money becoming the superannuation contribution for the employee, effectively there is an

entitlement on part of an employee to have those superannuation contributions made to their benefit.

PN132

Now, the parties conducted the matter below on the basis that the question to be answered by the Commissioner was whether or not the agreement obliged the employer to make contributions by reference to ordinary time earnings as defined in the Superannuation Guarantee (Administration) Act, and I won't take the members of the Bench to it, - but the references to the parties' respective submissions are, for the respondent, it's at appeal book 135 paragraph 9, and for the applicant, at appeal book page 36 paragraph 12.

PN133

So both of the parties proceeded on the basis that the real question to be determined by the Commissioner was whether or not the earnings in respect of the time taken off in lieu were ordinary time earnings as comprehended in the superannuation legislation.

PN134

PRESIDENT HATCHER: So in respect of clause 9.3, the second sentence begins with the words, 'except where payments are in relation to overtime'. Does that mean that we can, in terms of determining what the right amount is payable under the second limb of 9.5.3, that we can ignore those words because the question is what does the guarantee charge require and what is 2 per cent above that; that is, that those words can't be read as qualifying what the Act requires?

PN135

MS DOUST: I'm sorry, they can't be read as qualifying what the Act requires?

PN136

PRESIDENT HATCHER: The Superannuation Act requires.

PN137

MS DOUST: Yes, I think that's right.

PN138

PRESIDENT HATCHER: That is, the Act says what it says?

PN139

MS DOUST: Yes.

PN140

PRESIDENT HATCHER: 9.5.3 requires 2 per cent above what the Act says?

PN141

MS DOUST: Yes.

PN142

PRESIDENT HATCHER: And the agreement can't qualify what the Act requires?

PN143

MS DOUST: Yes.

PN144

PRESIDENT HATCHER: I suppose the alternative might be that the additional amount of 9.5.3 might be read down by reference to 9.3, but did anyone submit that?

PN145

MS DOUST: If your Honour would just excuse me. Now, the Commissioner proceeded below on the basis that the question before her was the ordinary time earnings question, and that's apparent at paragraph 34 of the Commissioner's decision. That's at page 15 of the appeal book.

PN146

So there's no dispute between the parties, and I accept that the reference to superannuation salary in clause 9.5.3 is to be construed as per the OTE definition in the SGA Act; that is, the company is obliged to calculate and make superannuation contributions by reference to a percentage of an employee's OTE. So that's where the Commissioner identifies the question that was being posed, and if I can then take the members of the Commission to paragraph 36 where, in the final sentence, the Commissioner says this:

PN147

*I need to determine whether TOIL accrued because overtime was worked, pursuant to clause 12.3, is part of OTE -*

PN148

and therein we say is the first indication of the Commissioner's error because we say the question wasn't whether the TOIL, time off in lieu, which was accrued was ordinary time earnings because accrued hours aren't earnings at all until they're realised in some monetary form and then they become earnings.

PN149

The question is whether what is paid when the TOIL is taken is ordinary time earnings in accordance with the definition of that term. So whilst they're just numbers in an accrued hours bank there's no earnings as such in respect of them. No payment has been made. It's when payment is actually made that the accrued hours turn into earnings.

PN150

VICE PRESIDENT ASBURY: And it's when the employee opts to either take it as the time off or take it as the overtime payment?

PN151

MS DOUST: Yes, and can I say, from the union's position, there's no dispute below that if the employee proceeded to work all of their ordinary hours, didn't take any time off in lieu, but simply accepted the overtime payment, which was at a loaded rate in respect of that overtime shift, no suggestion that that was superable, but what we're saying is that when the employee applied some of those accrued hours to offset their ordinary hours of work, then what they were paid in respect of that shift remained superable.

PN152

VICE PRESIDENT ASBURY: And is the question not whether that is part of OTE, it's a question of whether they're entitled to be paid superannuation on that amount under the agreement?

PN153

MS DOUST: Yes. The real question is, for the purposes of the Commission, is the employer obliged to make superannuation contributions in respect of that amount consistent with the agreement?

PN154

The parties proceeded on the basis that the way in which that fell to be answered was by considering whether or not the earnings were ordinary time earnings. We say, yes, they're ordinary time earnings, but also, if one was applying the test, is this superannuation salary within the meaning of 9.3, it is also that amount. So any which way the question is approached these earnings attract superannuation.

PN155

VICE PRESIDENT ASBURY: But ordinary time earnings and the superannuation salary may not be synonymous because the Superannuation Guarantee (Administration) Act may have a narrower definition of 'ordinary time earnings' than what an agreement does.

PN156

MS DOUST: I accept that, but below the parties accepted that the scope of the question for the Commissioner to determine was whether or not they were ordinary time earnings. So that was the basis on which the arbitration was conducted by reference to the submissions that I have just referred to a few moments ago.

PN157

VICE PRESIDENT ASBURY: So the submission has narrowed because the question itself was:

PN158

*Is the existing practice consistent with the correct application of clause 9.5.3?*

PN159

MS DOUST: Yes, and the parties really identified the answer to that question coming by way of answering the question whether it was ordinary time earnings. That has narrower scope, in my submission, than superannuation salary, but if we're correct that the earnings are ordinary time earnings - - -

PN160

VICE PRESIDENT ASBURY: The answer is the same?

PN161

MS DOUST: Yes, within that definition. So it makes no real difference to the outcome which question is being posed. In our submission, these earnings would meet that definition either of 'superannuation salary' or 'ordinary time earnings' under the Superannuation Guarantee (Administration) Act.



PN162

PRESIDENT HATCHER: Ms Doust, well that might be right, but didn't the Commissioner's answer require then the first limb to be addressed as well; that is, whether or not it fell within the definition of 'superannuation fund salary' or the variance on that definition?

PN163

MS DOUST: That certainly, I have to accept as a matter of the construction of the agreement, that that is a question that arises, but - - -

PN164

PRESIDENT HATCHER: It may have been higher. Certainly on your approach it would be higher.

PN165

MS DOUST: Yes.

PN166

PRESIDENT HATCHER: Because that would become the obligation given the Commissioner's answer.

PN167

MS DOUST: But I'm bound, I think, by the way in which the proceeding was conducted below as to how the argument was advanced.

PN168

PRESIDENT HATCHER: Well, I don't know about that. I mean this is purely a question of construction. If the wrong approach was taken, the wrong approach was taken.

PN169

MS DOUST: I would submit the members of the Bench might have seen that I say that these payments fall into either definition. Whether one considers whether the payments are superannuation salary within the meaning of the clause, or they're ordinary time earnings within that somewhat different meaning in the Superannuation Guarantee (Administration) Act, the answer is yes.

PN170

PRESIDENT HATCHER: So what do you say is the relevant principle we can draw from the BlueScope decision?

PN171

MS DOUST: I'm sorry?

PN172

PRESIDENT HATCHER: What do you say is the relevant principle we can draw from the BlueScope decision which might assist here?

PN173

MS DOUST: Well, I think it's the passage that I have set out from paragraph 56 of that decision. I think my instructor sent an electronic copy of that decision to

the members of the Bench, and I apologise I don't have hard copies. Can I just inquire whether the members have - - -

PN174

PRESIDENT HATCHER: Well, I have just searched it so I have got it.

PN175

MS DOUST: So the non-paper members (indistinct).

PN176

VICE PRESIDENT ASBURY: We have got it electronically too.

PN177

MS DOUST: Thank you. Yes, it's paragraph 56. So his Honour, Rangiah J, right at the end of the decision, agreed with both Allsop CJ's reasoning and also the reasoning of Collier J in the matter, that one can see, when one considers Allsop CJ and Rangiah J together, that this passage is authoritative.

PN178

The chief justice poses the question initially - and I think this is from about paragraph 20 onwards in the judgment. I'm sorry, it's 25 onwards. His Honour considers what's the proper construction of the superannuation legislation. He sets out how the legislation operates in that manner that the members of the Bench would be well familiar with, that there is a notional charge amount levied against employers based upon all earnings of employees calculated at the charge rate, the percentage rate of which may be offset by employer contributions in respect of individual employee ordinary time earnings and his Honour says how do we - and this is at paragraph 30 onwards - how do we interpret the reference to ordinary time earnings in section 6 of the Superannuation Guarantee (Administration) Act. Paragraph 32:

PN179

*It is thus critical to understand the meaning of the phrases 'ordinary time earnings' and the otherwise undefined phrase 'ordinary hours of work' used in the definition of the former phrase -*

PN180

and he poses, at paragraph 33, the two competing approaches that might be taken of choosing between standard hours to be paid at ordinary rates or the regular, customary, normal or usual hours worked by each individual employee.

PN181

At paragraph 34 and following you can see that his Honour refers first to text. At 37 and following, context, and then at 43 and following, the purpose. So he's weighing up how each of those observations informed the approach to be taken in selecting between those two ways of understanding the phrase 'the ordinary hours of work,' and in particular, at paragraph 43, about two-thirds of the way down that passage his Honour says this - and this is what I was referring to before to the president's inquiry:

PN182

*The statutory purpose of simplicity and efficiency for a minimum level of superannuation would be undermined by the need to find, factually, usual or normal hours for each employee in each quarter; the purpose would, on the other hand, be supported by an interpretation that looked to the relevant industrial instrument for standard hours at ordinary rates of pay.*

PN183

His Honour then goes on to consider the enactment history and the explanatory memorandum and so on before concluding, in paragraph 56 - and this is at the bottom of page 378:

PN184

*The meaning that best reflects these considerations and the text, context, purpose and history of the provision is earnings in respects of ordinary or standard hours of work at ordinary rates of pay as provided for in a relevant industrial instrument, or contract of employment, but if such does not exist (and there is no distinction between ordinary or standard hours and other hours by reference to rates of pay) earnings in respect of the hours that the employee has agreed to work or, if different, the hours usually or ordinarily worked.*

PN185

So one can see there that the concept of 'ordinary hours' has a fixed and certain meaning and that his Honour has elected between the two to go with the fixed amount. He goes on to say in the following paragraph:

PN186

*The distinction long familiar in the industrial and employment context, and widely understood, between earnings for ordinary time and earnings for an additional or greater number of hours beyond ordinary or standard hours.*

PN187

PRESIDENT HATCHER: So in respect of the weekend penalties incorporated into the rate, is that part of ordinary earnings for the purpose of the Superannuation Guarantee (Administration) Act?

PN188

MS DOUST: Yes.

PN189

PRESIDENT HATCHER: Why is that?

PN190

MS DOUST: Because it's part of ordinary hours.

PN191

PRESIDENT HATCHER: But it's not at ordinary time. I mean if I read BlueScope correctly - and it was discussed in BlueScope by reference to public holidays - it seemed to be fairly clearly saying that public holidays, hours worked on public holidays were a penalty rate.

PN192

MS DOUST: Yes.

PN193

PRESIDENT HATCHER: That penalty rate is not part of the ordinary time earnings.

PN194

MS DOUST: Yes, but in this case, when it's part of the ordinary roster cycle of the employee, it falls within - and I apologise. Let me bring it up. It certainly falls within that definition of 'superannuation salary,' we say, because it's payable.

PN195

PRESIDENT HATCHER: Yes. So that's the first, option 1.

PN196

MS DOUST: Yes.

PN197

PRESIDENT HATCHER: I'm talking about option 2. How do you get weekend penalties into option 2?

PN198

MS DOUST: Because it becomes incorporated as part of the normal rate of pay which is payable on all hours, and one can see that in clause 12.3. Can I ask your Honour to turn to that clause of the agreement.

PN199

PRESIDENT HATCHER: We can come back to the agreement. I'm just focusing upon the superannuation legislation.

PN200

MS DOUST: Yes.

PN201

PRESIDENT HATCHER: If the answer is to be found in the legislation alone, are weekend penalties included, because I read BlueScope, at least in respect to public holiday penalties, as saying they're not included?

PN202

MS DOUST: Yes, because they're paid in respect of all hours. So how that agreement operates is that that is an amount which applies in respect of every ordinary hour. So the ordinary rate has been determined by reference to the roster cycle that is paid in respect of an ordinary hour which is both worked on the weekend and not on the weekend.

PN203

PRESIDENT HATCHER: Yes, but the whole point of BlueScope is that they had an aggregated payment arrangement which incorporated those sort of things, public holiday penalties and built in overtime, and there seemed to be an emphasis upon being a payment attributable to the base ordinary hours, in that case 38, at ordinary time.

PN204

MS DOUST: Yes.

PN205

PRESIDENT HATCHER: So whereas we have 9.3 in the second sentence, it seems to be saying the penalties would be included. If you looked at the Act alone and BlueScope it, on one view it suggests they should not be included.

PN206

MS DOUST: Yes. Well, I won't repeat what I say about superannuation salary, but all that I can say about that is that under this particular agreement that is how the payment is made. It is made in respect of all hours, so it is a payment that applies in respect of all of those ordinary hours.

PN207

PRESIDENT HATCHER: So does that mean that for the second limb of 9.5.3 it is not just the federal government superannuation guarantee? There are add-ons provided for in the agreement itself?

PN208

MS DOUST: Well, there's two ways in which one can read the second limb, and one might say that the second limb refers either to that percentage applied against the same measure, which is superannuation salary. That's one way of reading it. I accept that that wasn't the reading that was advanced at first instance.

PN209

PRESIDENT HATCHER: So why would it be read against superannuation salary?

PN210

MS DOUST: Really what we're saying is 9.5.3 refers to a percentage rate, two competing percentage rates. Now, I accept that wasn't the way in which the matter was advanced at first instance, but that is, to my mind, what clause 9.5.3 poses.

PN211

VICE PRESIDENT ASBURY: And if they are not different, then what it's saying is - that's my difficulty.

PN212

MS DOUST: Pick the higher percentage.

PN213

VICE PRESIDENT ASBURY: Yes.

PN214

MS DOUST: Which percentage is higher.

PN215

VICE PRESIDENT ASBURY: So you have to know both and that's my difficulty. I don't know that ordinary time earnings and the superannuation salary

are synonymous and that you can say if it's one, it's the other. It's not necessarily - - -

PN216

MS DOUST: No. I accept that there's a great deal of force in the reading that what 9.5.3 establishes is 12 per cent, and when the federal rate exceeds 10 per cent it will become 12.5 per cent and then 13 per cent measured in relation to the same underlying amount which is superannuation salary.

PN217

VICE PRESIDENT ASBURY: Not ordinary time earnings?

PN218

MS DOUST: Yes.

PN219

VICE PRESIDENT ASBURY: Yes.

PN220

MS DOUST: I accept that there is a great deal of force in that construction. That wasn't the construction that was advanced below.

PN221

VICE PRESIDENT ASBURY: Yes. So they were saying it's ordinary time earnings. So it's a comparison between what it would be if you applied ordinary time earnings under the SGA and salary under the agreement?

PN222

MS DOUST: Yes. It doesn't make sense that there would be a provision like that that required you to undertake two calculations of different amounts of payments each week, but it does make sense that you would have a provision like that that said you can never drop below this amount, this percentage amount of contribution.

PN223

VICE PRESIDENT ASBURY: (Indistinct) salary.

PN224

MS DOUST: And as the federal percentage increases your contribution will increase commensurately, and there's no doubt that clause 9.3 evinces an intention to incorporate into fund salary normally received shift allowances and weekend penalties, so there's definitely an intention there in clause 9.3 that they be considered a part of the mix.

PN225

VICE PRESIDENT ASBURY: Weekend penalties where they're paid for ordinary time worked on weekends?

PN226

MS DOUST: Yes.

PN227

PRESIDENT HATCHER: If that is so, is it incorporated into the payments in Appendix 1?

PN228

MS DOUST: Yes.

PN229

PRESIDENT HATCHER: All right. So, Ms Doust, speaking for myself, it would be easier if you just tell us what you think the correct interpretation is rather than  
- - -

PN230

MS DOUST: I think that's the correct interpretation of the agreement, but I'm conscious that a particular question was posed for the Commissioner and that is the basis upon which we have appealed because we think that in that decision that the Commissioner was incorrect.

PN231

VICE PRESIDENT ASBURY: But really what you're saying is fundamentally the payment that employees get when they are taking a day off, as time off in lieu of overtime, is superannuation salary, not overtime?

PN232

MS DOUST: Yes.

PN233

VICE PRESIDENT ASBURY: Yes. That's fundamentally the question, isn't it?

PN234

MS DOUST: Yes, and the answer to that question we say disposes of both the argument of whether or not it has the character of ordinary time earnings, but also whether or not it's superannuation salary, that either way what happens is the employee receives a payment which, in the sense discussed in BlueScope, at least in respect of that normal rate of pay, is an amount which is payable in respect of an ordinary hours shift at the rate that's ordinarily payable for the performance of such a shift.

PN235

That's how, when one reads the provisions about payment, when one reads clause 12.3, that's how the agreement operates, that one accrues some hours in the bank and then takes that against one's obligation to perform ordinary hours shift or your normal shift, however that is characterised, but that's a payment of the usual salary which is salary at the rates provided for in Appendix 1 in respect of the hours that are mandated under the agreement as the ordinary hours of those permanent full-time employees.

PN236

VICE PRESIDENT ASBURY: And it's overtime if you take it at double time payment?

PN237

MS DOUST: Yes.

PN238

VICE PRESIDENT ASBURY: So really 9.5.3 is probably a matter for another day; which of the two is greater.

PN239

MS DOUST: Well, it's another day when I'm not here.

PN240

PRESIDENT HATCHER: So can I just try and reframe what you have just said, Ms Doust?

PN241

MS DOUST: Yes.

PN242

PRESIDENT HATCHER: That on the second limb of 9.5.3, where it says 2 per cent more than the federal government superannuation guarantee, it is not, by that sentence or by those words, calling up the definition of 'ordinary time earnings' under the Act. It's simply calling up the percentage amount.

PN243

MS DOUST: My submission is I think that's the preferable reading of 9.5.3 that's consistent - - -

PN244

PRESIDENT HATCHER: So the only effect of the second limb is to qualify the 12 per cent in the first limb by saying it will be higher than 12 per cent at a certain point in time?

PN245

MS DOUST: Yes.

PN246

PRESIDENT HATCHER: And in either case the superannuation salary is the reference point? That's what you're saying?

PN247

MS DOUST: Yes. I think superannuation salary is the reference point throughout, that to interpret - - -

PN248

VICE PRESIDENT ASBURY: You would have to get a ruling from the ATO every time you had an argument about what ordinary time earnings is for the purposes of this agreement.

PN249

MS DOUST: Yes, possibly. Possibly. Yes, but I do say that that is the better reading of clause 9.5.3, your Honour.

PN250



PRESIDENT HATCHER: Well, given that's been advanced I think we might need to ask Mr Spargo whether he's ready to answer that case today because it's a different proposition from I think what the case has been about to date.

PN251

Mr Spargo, so do you understand what's now being advanced?

PN252

MR SPARGO: I do, your Honour. Look, the answer in short is that I, in fairness to my client, that we're probably not ready to answer that case.

PN253

PRESIDENT HATCHER: Not ready?

PN254

MR SPARGO: Not ready as well as I might. Look, I do say that the dispute in this matter does not extend to this issue. The parties who made the agreement agree that, or agreed below that superannuation fund salary and the obligations under the Act are intended to be interchangeable.

PN255

I could make some points off-the-cuff for your Honour in support of that proposition. I would also say it probably gives rise to a question - given this is a private arbitration - as to what are the limits of the Commission's jurisdiction because in a private arbitration, under an enterprise agreement in section 739 of the Act, my understanding is that the Commission's jurisdiction is limited by the extent of the dispute between the parties. So it perhaps raises that issue.

PN256

PRESIDENT HATCHER: Well, there's a difference between the dispute and the way that the dispute was framed as a legal question. I mean the dispute is whether there's a superannuation payment payable on this time off in lieu. That's the dispute. If the parties have framed that dispute into an incorrect legal question, then I don't think that necessarily narrows what the dispute is actually about, which is whether you have to pay super and TOIL.

PN257

MR SPARGO: I accept that's one way of looking at it, your Honour, but the other way of looking at it would be that the parties agree that this clause requires super to be paid at either 12 per cent or 2 per cent above the SGA, but in accordance with the rules in the SGA regarding ordinary time earnings, and I would say that is supported by the fact that while superannuation fund salary and the company's superannuation guarantee obligations are listed separately under 9.3, the same chapeau applies, that the same definition applies to each of them, but - - -

PN258

PRESIDENT HATCHER: So the second part of 9.3 says weekend penalties are included and I understand that your client does, in fact, pay super and weekend penalties, but I would question whether, having read BlueScope, whether weekend penalties are, in fact, included in the statutory 'ordinary times earnings' definition.

PN259

MR SPARGO: I have, with respect, a different understanding, your Honour, and that is it's not legally binding, but if you look at the 2009 Commissioner's guidance as to what is payable under the SGA, penalties on ordinary time hours, as opposed to penalties on overtime hours, are included in what is superannuable.

PN260

Your Honour made the point that it might be ordinary time, but it's not the ordinary rate. I'm painfully aware, your Honour, that ordinary time does not always mean the ordinary rate of pay. There's a decision of the Full Court of the Federal Court last year involving Target Australia [2023] FCAFC 66 which found that, where annual leave and annual leave loading was to be capped later on ordinary time earnings, that included specifically weekend penalties which accrued on ordinary time, on ordinary time hours.

PN261

So in my submission, that is the case under the SGA, and it's consistent with what the parties agree, or the parties who negotiated the agreement had agreed, at what would be a submission or is a submission from the bar table, but is the way that the employer applied the agreement at its predecessors, which is that the intention was to be consistent with the SGA, albeit the drafting could have been clearer about that issue.

PN262

So that would be our submission, but I'm not prepared to properly address you on that case today, your Honour, and I would like to have a bit more of a think about the balance of the dispute as well.

PN263

PRESIDENT HATCHER: Ms Doust, getting back to the alternative, or in one view new argument that you have propounded today, have you put that as far as you want to put it or should we give you a further opportunity to articulate it?

PN264

MS DOUST: I think that probably reflects it. I think I have touched on it at least in the submissions that I have put. I think I accepted that that was an arguable reading of the clause, but it wasn't positively advanced, your Honour, I don't think.

PN265

VICE PRESIDENT ASBURY: Does it need to be - - -

PN266

MS DOUST: At paragraph 9 - I'm sorry.

PN267

VICE PRESIDENT ASBURY: Does it need to be decided for the purposes of this dispute? Can the dispute determine whether the payment that's received by employees for taking time off in lieu, physically taking it as time off, is part of the superannuation salary - for want of a better description - without determining which of those is higher, which of those is higher for the purposes of 9.5.3?

PN268

MS DOUST: No, I'm not sure that it would. I think if the Bench was - - -

PN269

PRESIDENT HATCHER: Just excuse me, Ms Doust. I think the best course might be, firstly, to allow you, Ms Doust, to actually set out in writing what exactly is, you say, is the proposition you're advancing, leaving aside what was argued at first instance; that is, unconstrained by that, what do you say is the right approach, and then give Mr Spargo a fair chance to respond in writing to that, having regard to everything that's been said on the record today.

PN270

MS DOUST: Yes. Your Honour, I think at best what I have done thus far hasn't fully advanced that construction. It's referred to the possibility of that construction and it would be useful, I think, to have the opportunity to properly articulate what really is the proper construction of that clause.

PN271

PRESIDENT HATCHER: All right. So how long might you need to do that?

PN272

MS DOUST: I think (indistinct) week, your Honour.

PN273

PRESIDENT HATCHER: And how long in response, Mr Spargo?

PN274

MR SPARGO: I won't ask for more time than what your Honour thinks about how it interacts with the Easter.

PN275

PRESIDENT HATCHER: If we just allow each party a fortnight, is that sufficient?

PN276

MR SPARGO: Yes. Thank you.

PN277

PRESIDENT HATCHER: All right. So we will allow the parties a fortnight each to file further written submissions on the issues indicated and then we will consider what the next step is.

PN278

MS DOUST: May it please the Commission.

PN279

PRESIDENT HATCHER: If you want to raise an issue about the scope of the dispute, in light of the new argument advanced, obviously your submissions can address that, Mr Spargo.

PN280

MR SPARGO: Thank you, your Honour. Yes. I thank the Commission.

PN281

MS DOUST: In which event perhaps a facility for reply might be necessary.

PN282

PRESIDENT HATCHER: Well, we will just leave that for the time being. We will determine whether we should then have another hearing or whether we need further submissions.

PN283

MS DOUST: May it please the Commission.

PN284

PRESIDENT HATCHER: All right. Well, if there's nothing further, we will now adjourn.

**ADJOURNED INDEFINITELY**

**[11.09 AM]**