TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT MILLHOUSE

C2022/5211

s.739 - Application to deal with a dispute

Ms Thelma Stewart
and
Spotless Facility Services Pty Ltd T/A Spotless Integrated Facilities Services (C2022/5211)

Spotless Public Hospitals (Victoria) Enterprise Agreement 2017

Melbourne

10.00 AM, TUESDAY, 15 NOVEMBER 2022

Continued from 09/09/2022

PN1

THE DEPUTY PRESIDENT: Good morning, everyone. I will start with the appearances, please.

PN2

MR C GRANGER: Good morning, Deputy President. Granger, initial C, on behalf of the applicant. The applicant Stewart, initial T, is present also.

PN3

THE DEPUTY PRESIDENT: Thank you, Mr Granger. For the respondent, please.

PN4

MR A LYNCH: Good morning, Deputy President. May it please, for the respondent Lynch, initial A. I am joined in the room with Smith, initial N, and joining virtually is O'Callaghan, initial J.

PN5

THE DEPUTY PRESIDENT: Thank you very much, Mr Lynch, and welcome, everyone. I understand from a review of the materials that the agreed position is that those individuals who have filed a witness statement in the application will not be required for cross-examination. Is that understanding correct, Mr Granger?

PN6

MR GRANGER: Yes, thank you, Deputy President.

PN7

THE DEPUTY PRESIDENT: Correct from your perspective, Mr Lynch?

PN8

MR LYNCH: Yes, thank you, Deputy President.

PN9

THE DEPUTY PRESIDENT: On that basis, parties, are you each content for the court book to be received into evidence and marked as an exhibit in the application in the interests of efficiency?

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MR GRANGER: Deputy President, yes, we would be. Thank you.

PN11

THE DEPUTY PRESIDENT: Thank you. You're also content, Mr Lynch?

PN12

MR LYNCH: Yes, Deputy President.

PN13

THE DEPUTY PRESIDENT: Thank you. I'll mark the court book as exhibit 1 and I extend my thanks to the parties for preparing that.

EXHIBIT #1 COURT BOOK

PN14

Mr Granger, from your perspective are there any other housekeeping matters before you proceed to present your case? I say at the outset that I appreciate that you're in attendance at short notice today and I thank you for that.

PN15

MR GRANGER: Deputy President, it is entirely through a fault of our own; of the applicant's representative body. I thought I had an initial day to prepare, so my apologies. I really am pulling this together at short notice, so I would seek a bit of understanding from the Commission that this may not be a terribly polished performance as it may otherwise have been.

PN16

THE DEPUTY PRESIDENT: Thank you, Mr Granger. I appreciate that. Anything from your perspective by way of housekeeping, Mr Lynch?

PN17

MR LYNCH: No, thank you, Deputy President.

PN18

THE DEPUTY PRESIDENT: All right. I will ask you to proceed to present your case. Thank you, Mr Granger.

PN19

MR GRANGER: Thank you, Deputy President. I would like to say at the outset thanks to the respondent's counsel for their assistance along all steps of this matter. It has been greatly appreciated. The agreed question we're here is does clause 45.62 - albeit that clause number being incorrect but I think that has been dealt with – of the Spotless Public Hospitals (Victoria) Enterprise Agreement 2017 entitle Thelma Stewart to payment on a public holiday that falls on a day on which she was not ordinarily required to work.

PN20

In order to try and guide the Commission in assisting the Deputy President come to a conclusion on that, there has been a joint statement of facts at pages 36 and 37 of the court book. I don't intend on reading the actual agreed facts out, but the essence of it comes down to a clause in the enterprise agreement in which it is spelt out, we say, in very plain language that if an employee doesn't work on a day that they would not otherwise work – i.e., a rostered day off – that they be entitled to payment at one and a half times the ordinary pay.

PN21

In coming to that conclusion we rely on, in essence, the plain wording of that enterprise agreement which we say isn't open to interpretation given that there are other clauses in the enterprise agreement which spell out some of the issues that have been raised by the respondent. What we have also drawn together in the court book is a number of references to authorities on the matter and we say that there are some similarities particularly in the matter of the *Construction, Forestry, Maritime, Mining and Energy Union v Great Southern Energy Pty Ltd t/as Delta Coal* [2020] FWC 5851.

PN22

That concerns the entitlement of a weekend rostered employee working in mining to be paid as per their enterprise agreement for public holidays that fall on their rostered days off. The Fair Work Commission in that matter upheld the entitlement be applied. What I think helps in drawing attention to what the central question is in relation to rostered days off, we say that there is authority in relation to what defines rostered days off.

PN23

We would draw the Commission's attention to the Fair Work Commission case of *Hospitality Industry (General) Award 2010 - Australian Business Industrial* marked AM2009/154, which is at pages 71 through to 75 of the court book. In particular at paragraph 14 of that decision on page 74:

PN24

> *The LHMU submitted that, contrary to the ABI submission, the term 'rostered day off' is defined in clause 3 of the modern award. The relevant part of clause 3 is as follows: 'rostered day off' means any continuous 24-hour period between the completion of the last ordinary shift and the commencement of the next ordinary shift on which an employee is rostered for duty.*

PN25

Relevant to this matter is of course that 'rostered day off' in this enterprise agreement is considered as a day that is rostered for the person to be absent, if you like. That's the best terminology I think I can put it. It's not that the person is sometimes working that day or occasionally is rostered to work that day, but this is a definition of somebody who is forward rostered to be absent from the workplace.

PN26

Also in that matter at paragraph 17, at page 75, we refer to the Public Holidays Test Case and in that it says – quoting from paragraph 17, the Commission determined:

PN27

> *We refer here to full-time workers who do not regularly work a five-day, Monday-Friday week. Such workers include persons who work regularly on Saturday or Sunday, workers with variable rosters, continuous shift workers and employees who work for nine days per fortnight or 19 days in each four weeks. This list is not intended to be exhaustive.*

PN28

> *It may happen that a prescribed holiday falls upon a day when the employee would not be working in any event. Fairness requires that the worker be not disadvantaged by that fact. The appropriate compensation, we think, is an alternative 'day off'; or an addition of one day to annual leave; or an additional day's wages.*

PN29

Going back to the plain language of the enterprise agreement in this context we say that if the person is not ordinarily required to work on a day that would fall on

a day that they had been rostered off, that they be paid what the enterprise agreement prescribes and in this matter that is one and a half times their ordinary rate of pay.

PN30

We think it's also useful to draw attention to the matter of *Construction, Forestry, Maritime, Mining and Energy Union v Great Southern Energy Pty Ltd t/as Delta Coal*. In that matter we would draw the Commission's attention to paragraph 66 at page 138 of the court book where it goes into:

PN31

> *For an employee who works a weekend day shift roster, if a public holiday falls on a Monday, that day is a 'rostered workday' within the meaning of clause 4.1, even though the employee never actually works on a Monday. Assuming the employee is not required to work the Monday in question, clause 4.1(c) requires them to be paid for that day at their ordinary rate for the number of hours they are ordinarily rostered to work on a rostered workday.*

PN32

We note that that doesn't contemplate that the employee actually has to work that day. Further, at 66(b):

PN33

> *For an employee who works a weekend night shift roster, if a public holiday falls on a Friday or a Monday, that day is a 'rostered workday' within the meaning of clause 4.1, even though the employee only works part of a night shift each week on a Friday and a Monday. Assuming the employee is not required to work the Friday or Monday in question, clause 4.1(c) requires them to be paid ... at their ordinary rate for the number of hours they are ordinarily rostered to work on a rostered workday.*

PN34

Again, the comparison here to the enterprise agreement is not that the employee actually has to work the day in question, but there is a comparison made to their ordinary rostered work on a rostered workday and indeed the requirement for them to be paid on a day that they do not work; i.e., the rostered day off.

PN35

We make reference to only one other matter, Deputy President, in relation to this case and that is on page 85 of the court book, the *Australian Salaried Medical Officers Federation of New South Wales v Hunter New England Local Health District*. In this case the respondent, the health service, was indicating quite similarly to this matter that they had identified what they say was an incorrect payment received by employees.

PN36

They put the matter for hearing before the Industrial Relations Commission of New South Wales and argued that the payment didn't apply to workers because of a misinterpretation of the enterprise agreement. In that matter, Stanton C made a very strong recommendation that the health service continue to pay the staff for

the public holidays not rostered and not worked given that that was what the plain language in the award at the time mentioned and that the award was up for expiry and renewal, and it was recommended that the present custom that had occurred up until that time continue.

PN37

In this matter employees, as per the witness statements submitted by the applicant, have been receiving this payment as an historical payment and the only thing that has changed that has led to this dispute before the Fair Work Commission is that the respondent has chosen to interpret the language in a different way and has unilaterally moved to withdraw that payment to the applicant and to other workers.

PN38

Similarly to the case just quoted before the Industrial Relations Commission New South Wales, this enterprise agreement has come to an end; it has nominally expired. We are in the middle of renegotiating a new enterprise agreement at this time. This particular clause has been the subject of discussion during enterprise bargaining and it will undoubtedly continue to be so. It will largely turn on what is decided by the Fair Work Commission in this matter.

PN39

However, we maintain that the plain language says that an employee is entitled to that payment. The respondent has been, up until very recently, paying it to employees and we say that they should continue to do so otherwise the matter should rest solely as a matter for enterprise bargaining in the new enterprise agreement. Forgive me, Deputy President, that might have to be the briefest of outlines that you have had in some time. I will leave it there for now.

PN40

THE DEPUTY PRESIDENT: Thank you, Mr Granger. I will say that I was greatly assisted by the written submissions that you have already filed, so thank you very much for supplementing those orally today and taking me to those authorities. Mr Lynch?

PN41

MR LYNCH: Thank you, Deputy President, and also we extend our thanks to the HWU in this matter in the fact that there's no factual dispute. Really what we are here today for and seeking the Commission to arbitrate is a technical question and we hope that the resolution will provide certainty so that we can properly instruct our payroll team and to provide employees certainty, and our team is preparing and planning the workforce understanding exactly what are the ramifications, entitlements and where they fall.

PN42

We can address some of the authorities and I might to refer to Ms Smith to address those specifically at the conclusion of what is a very brief summary of our position. I think Mr Granger's outline sort of highlights where the distinction between the position of the parties. I think we both come to this with a view that the clause in dispute has a plain meaning. The union's position, as set out in the submissions and in the outline, is a position that relies upon the industrial usage

related to how similar clauses have operated in different contexts, under different awards - - -

PN43

MR GRANGER: Sorry to interrupt, Deputy President, but I have just been joined by the organiser from the HWU who has been dealing with this matter, Mr Sharp, initial G.

PN44

THE DEPUTY PRESIDENT: Thank you for announcing Mr Sharp's appearance, Mr Granger. Please go ahead, Mr Lynch.

PN45

MR LYNCH: Thank you. On my reading of the HWU's position is that the meaning is plain, looking to how similar clauses have operated in different contexts and, as I said, we can speak to those specific authorities and why we say this matter ought to be dealt with on its own terms. We also, I suppose, at this point would note that the Commission and the Deputy President is not bound by those authorities and can provide the basis for that as specifically required.

PN46

What we say is that the meaning is plain on the terms and in the context of the agreement, and there is no need to look beyond that to extrinsic material. The meaning is plain as revealed in the context of the agreement. As the parties are not in dispute about the evidence before the tribunal, I do intend to speak briefly and we say that the question for determination is narrow, and the position of the respondent is simple.

PN47

We say that the answer to the question for arbitration should be no, in that clause 45.6.2 of the agreement does not entitle Ms Stewart to payment on a public holiday that falls on a day when she is not ordinarily required to work. The summary of our reason is that during the relevant period Ms Stewart was not required and we say nor was she capable of working ordinary hours of work on a public holiday that fell during her non-working days.

PN48

We say that the test for the entitlement as described in the applicant's submissions for a rostered off benefit – we say the test is whether an employee is capable of being rostered on to work their ordinary hours on a particular public holiday. If the answer is yes and they are then not rostered on that day, we say they are entitled to the payment in clause 45.6.2. It's an agreed fact, at 7(b), that during the relevant period Ms Stewart was never rostered to work on a Monday or Tuesday.

PN49

We also say that during the relevant period Ms Stewart was never capable of being rostered to work on a public holiday. We say that the rostered off benefit only applies to those who are capable of being rostered on to work ordinary hours on a particular day. We don't say that this is strictly a limitation or a reading down of the clause, but a plain reading of the clause based on a review of the

structure of the agreement and the roster arrangements that are provided in the agreement.

PN50

In summary, we say that the clause in dispute is unambiguous and, as set out in the submissions, we say that the term 'rostered day off' is clearly directed at workers on a rotating roster. We make this point based on the specific words of the clause read in context with the agreement and in particular the different arrangements for how full-time work can be arranged and performed, and the limitations on those arrangements. In particular, the consultation requirements placed on any change to rostering and the rostering of ordinary hours.

PN51

Accordingly, as we set out in the submissions, we say that the agreement is comprehensive and our reading provides internal consistency, so there is no basis for the Commission or requirement for the Commission to have regard to the extrinsic material. We say that the rostered off benefit could only apply to a person who could be rostered on for ordinary hours in a particular day when the public holiday falls. Starting with the specific words of the provision, 45.6.2, we say it reads:

PN52

If the public holidays falls on the employee's rostered day off, he or she shall be entitled to one and one half times the payment for his or her ordinary day.

PN53

We say, on our reading, that there must be an ordinary day that is capable of falling on that day that the employee is otherwise not required to work. Taking one step outside that provision, we say looking at the structure of the agreement – in particular the different work patterns that are permissible for full-time employees and we set these out at (8) of our submissions, which is at page 210 of the court book - we say that the agreement comprehensively describes how work is permitted to be arranged by the respondent.

PN54

For employees such as Ms Stewart who are engaged on a full-time basis, the arrangement of work broadly falls into one of two categories: there are fixed work patterns where the days and times of the week where work is performed and not performed does not vary from week to week, and rotating roster patterns where the days and times of the week where work is performed and not performed by an employee varies and, therefore, must be determined by reference to a roster which in turn must be set in accordance with the agreement.

PN55

Within both of these arrangements, the set work pattern and a rotating roster pattern, employees may agree to work a compressed pattern of hours which accrue time towards a paid accrued day off or ADO and there is no dispute that that operates separately. But, we say that only the second of the two headline iterations for full-time employees – that is fixed and rotating – we say that it's only those engaged on a rotating roster is an employee who can be sensibly

described as being rostered on or rostered off for the purpose of the entitlement of the rostered off benefit in clause 45.6.2.

PN56

For an employee who works a set work pattern, we say that it would be absurd to describe their non-working days as rostered days off and in our submissions we describe the analogy of the Monday to Friday work at para 20 of the submissions. In fact in the subsequent clause, 45.7.1, in describing the Easter Saturday public holiday, the interaction between an employee who works Monday to Friday, that time on the Saturday is not described as a rostered day off but it's described as time where the employee does not work, which we say is a critical distinction and probably goes to the part of the distinction between the position of the two parties here.

PN57

So, applying our position to Ms Stewart's work pattern, during the relevant period Ms Stewart could not be rostered on to work ordinary hours on a Monday or Tuesday, including when a public holiday fell on those days. We say that she was never capable of being rostered on and so we say that she was, therefore, never entitled to the rostered off benefit.

PN58

This reference to 'never' during the relevant period is not an exaggeration. The enterprise agreement places strict constraints on how work patterns can be arranged and the context that is relevant for the Commission here is clause 10 of the agreement, which are the consultation provisions, which mean that without consultation the employer cannot unilaterally alter the ordinary hours of work for an employee; so there's no ability for the employer to unilaterally shift someone from a set work pattern to a rotating roster pattern.

PN59

Any change could be a major change and require formal consultation. Accordingly, we say employees are afforded certainty that the work pattern that they are assigned is the one that they will work. Employees on a set work pattern can plan the year knowing when those public holiday will fall and how that will interact with their working days.

PN60

Finally, we say the critical context which supports our position and our view that their ought to be internal consistency within the agreement is we say that the meaning of the clause in dispute is clear in the context of clause 45.8 which governs the equivalent entitlement for part-time employees. That is set out in two parts, 45.8.1 and 45.8.2. I don't intend to read that out in full.

PN61

What we say is that that clause, which we say is effectively a pro rata'd version of the rostered off benefit – we say that clause is direct expression to the distinction between those – quoting directly – 'not ordinarily required to work on a day' and those 'working on a rotating roster who may be capable of being rostered to work on a particular day of the week.' That distinction goes to the heart of the rostered off entitlement as we describe it.

PN62

If a person is not ordinarily required to work, but does work as required, they are entitled to the higher rate of pay. If a person may, based on their roster pattern, be rostered to work ordinary hours on a particular day when the public holiday falls, but they do not, then they are entitled to the rostered off benefit. We say that without having to re-write or constrain the meaning of clause 45.6.2, the clause and the term 'rostered day off' operate consistently and harmoniously with part-time entitlement.

PN63

As I mentioned briefly before and in closing, it was open to the parties bargaining for the agreement at the time to describe the entitlement in clause 45.6.2 as being payable where a public holiday falls on a day where an employee does not work as they did in the case of the Easter Saturday benefit, but that is not what the clause in dispute says.

PN64

Our simple proposition is the plain meaning of 'rostered day off' in 45.6.2 requires a person to be capable of being rostered for ordinary hours on that particular day of the week. In the case of Ms Stewart, we say that was not the case and therefore the question for arbitration should be answered in the negative.

PN65

Deputy President, if I can hand to Ms Smith to speak to some of the - I suppose our position in respect of some of the authorities raised by Mr Granger if that would assist. Otherwise, we would be open to receiving any questions from the Bench.

PN66

THE DEPUTY PRESIDENT: Thank you, Mr Lynch. I do welcome the opportunity to hear from Ms Smith. Before doing so, can you just remind me, in the agreed statement of facts there is a reference at paragraph 8 to the fact that during the relevant period the applicant has not worked on a Monday or a Tuesday. Was there an occasion around the recent period of Ms Stewart's lengthy period of employment that her roster did in fact change?

PN67

MR LYNCH: Excuse me, Deputy President, we couldn't quite hear the end of it. Was the question did Ms Stewart's roster pattern change during the relevant period or prior to the period - - -

PN68

THE DEPUTY PRESIDENT: At any point in recent history of Ms Stewart's employment - I appreciate in the relevant period it said in the statement of facts that it did not change, but was there a period of time where Ms Stewart did work on different days of the week pursuant to, as you refer to, a fixed roster?

PN69

MR LYNCH: Deputy President, I don't have that information before me. I would be open to hear from Ms Stewart directly on that point.

PN70

THE DEPUTY PRESIDENT: No, I'll defer to Mr Granger who might have that information at hand.

PN71

MR GRANGER: Thank you, Deputy President. I am instructed that the last time the applicant's roster changed was in 2019 and it changed from being a Monday to Friday worker to its current pattern; so 2019 was the last time it changed.

PN72

THE DEPUTY PRESIDENT: Thank you, Mr Granger, I appreciate that. Mr Lynch, that's the only question that had come to mind throughout the course of your oral submissions. I content to hear Ms Smith in relation to the authorities if that suits.

PN73

MR LYNCH: Thank you, Deputy President.

PN74

MS SMITH: Thank you, Deputy President, and I'll be quite brief. I just intend to touch on the three cases that Mr Granger addressed in his opening submission and to outline to you why our view is that they are not applicable and clearly distinguishable in these circumstances.

PN75

The first was the 2009 case, which is on page 71 of the court book, which was the ABI application in relation to the Hospitality Industry (General) Award. Our position is that that case simply isn't relevant here and the reason for that is because the term 'rostered day off' is strictly defined in the Hospitality Award. The position that the tribunal came to in that case was with reference to a specific definition that doesn't exist in our circumstances and we say that the term must be read in light of the enterprise agreement which exists in these cases rather than an award which has no application on the respondent's enterprise.

PN76

The next case was the case of – I think he then took us to page 85 of the court book, which was the case of the *Australian Salaried Medical Officers Federation v Hunter New England Local Health District*, a 2018 case in the New South Wales Industrial Relations Commission. Our position again is that case is clearly distinguishable from the factors in this case.

PN77

In that case there was no clause that addressed how public holidays should be applied or paid within the enterprise in those circumstances and so the Commission had to come to a view in relation to what the appropriate entitlement was with reference to an award which was incorporated into the agreement. Additionally, the rostering arrangements that were in place in the respondent's enterprise in this case were clearly those of a compressed shift roster, so it was employees who were working for four days a week, 10 hours a day, or part-time employees who were working two shifts a week, 10 hours a day.

PN78

Not only were there no terms in the way in which public holidays operated, which exists in our case and we say which is what the Deputy President should have regard to in making her decision, but also I think it's worth noting that those roster patterns that were in place were exactly the type of roster patterns that we say would, if they were applying in our enterprise, be capable of receiving a payment for the rostered day off benefit because it was a rotating shift pattern, not a fixed working shift pattern which is the case of Ms Stewart.

PN79

Finally, Mr Granger took us to the case on 114 of the court book, which is the 2020 decision of the *Construction, Forestry, Maritime, Mining and Energy Union v Great Southern Energy Pty Ltd t/as Delta Coal*. Again, our view is that this is a clearly distinguishable case from the present circumstances. That decision was made in reference to an enterprise agreement which operated on Delta Coal and the terms of that enterprise agreement are entirely different from the terms that operate in our enterprise, and to Ms Stewart's employment.

PN80

Relevantly, the enterprise agreement which operated in those circumstances defined what a workday was and was not, and with reference to the Sunday work pattern it defined what days were workdays for those who worked on a weekend roster; so it specifically said for those work on a weekend roster, if a public holiday does not fall on a rostered workday it will be paid for any public holiday that falls on a Tuesday, Wednesday or Thursday. The enterprise agreement in that case was explicitly clear as to what days were considered a workday and what days were not considered a workday.

PN81

The decision which Mr Granger took us to and the paragraphs which he took us to were made in light of the way in which that enterprise agreement operated. If you look at paragraph 66 of the decision, it says it's drawing together the analysis and applying it to the issues in dispute, and it specifically takes us to the fact that Monday is the rostered workday within the meaning of clause 4.1 and that's because 4.1 defines what a workday is; so that case has its own terms and the Fair Work Commission applied the agreement on its terms.

PN82

Those terms do not exist within the Spotless Public Hospitals Enterprise Agreement and so we say it's simply not relevant to the issues that are in dispute here, and we simply must just look at the terms of the enterprise agreement that apply to Ms Stewart's employment. Unless you have any further questions, Deputy President, that is our view on why those cases aren't relevant to the issues in dispute in this case.

PN83

THE DEPUTY PRESIDENT: Thank you, Mr Smith. I appreciate that. Mr Lynch, anything else before I hear from Mr Granger in reply?

PN84

MR LYNCH: No, thank you, Deputy President.

PN85

THE DEPUTY PRESIDENT: Thank you. Mr Granger?

PN86

MR GRANGER: Thank you, Deputy President. I thank the respondent for going through their arguments and I think in some respects by their very arguments they have hit the issue on the head really. I don't disagree that – I think the Deputy President's decision has to be made on the plain language that is in the enterprise agreement. However, it is where there has been no definition provided to some of the wording in the enterprise agreement, I think that some of the authorities that we've referred to may be useful, particularly the Public Holidays Test Case which has been referred to.

PN87

In fact it was almost notorious in my experience in regard to these matters. It very clearly decides that for those people who never get the opportunity to work on a day in which a public holiday falls, they should be entitled for fairness to receive some compensation. That is what we say this enterprise agreement does, at 45.6.2, albeit the numbering again is a bit out of kilter there.

PN88

I think also in reading the enterprise agreement some of the other clauses, such as 45.6, which contemplates payment for absence on a public holiday in some respects on first reading may appear to deal with the same very issue. However, we say that in light of the Public Holidays Test Case it is quite distinct that 45.6.1 provides for payment for those people who may work a rotating roster when a public holiday comes up who may be absent on that day, they are entitled to the payment 45.6.1. That is contemplated in that clause.

PN89

What again – we return to this – is not referred to there is a rostered day off and in the absence of any definition of what is a rostered day off, then we look to the authorities to give some assistance in that matter, but we say that the plain meaning of 'rostered day off' is that it is something that, rather contrary to somebody being rostered on to work, this is a day that was rostered in which they will be absent. It's not through ad hoc rostering practices or through the fact that they may be ill or have chosen to opt for the right to be absent on a public holiday under the National Employment Standards, we say that they are deliberately rostered off on those days and that is what the clause at 45.6.2 clarifies.

PN90

In relation to what Mr Lynch has said about clause 45.8, and that is public holidays and part-time employees, again there is a very specific clause there that has a very specific test for part-time employees who may be working on a rotating roster who will work on a certain day of the week for 50 per cent of the time or more in any given year and that then becomes the test as to whether they're entitled to a public holiday that falls on a day on which they're not working. Again, quite separate to the rostered off benefit that we say has plain meaning at clause 45.6.2.

PN91

We would also note that the language in this enterprise agreement has been the language of its preceding enterprise agreements for decades and mirrors what has been in the awards again for decades. It also mirrors the awards in not being terribly great at pulling this out as separate wording that perhaps, you know, needs its own separate heading in order to define it better and to separate it from other matters in relation to public holidays.

PN92

However, the earlier awards going back 1998, Health Professionals and Support Services Awards going back to that time, have it as a line item, they don't have it as a separate heading at all and the language is consistent with those awards. We say that this has been contemplated in awards and enterprise agreements for decades. It has been regular custom and practice at the respondent's workplaces.

PN93

Should they not be happy with the wording of the enterprise agreement and they wish to remove an entitlement from employees, the appropriate place to do that is at the bargaining table where we are sitting in another place at this point in time. I will leave it there, thank you, Deputy President.

PN94

THE DEPUTY PRESIDENT: Thank you, Mr Granger. I extend my thanks to both you, Mr Lynch, and Ms Smith for the very helpful submissions that you have provided today to supplement the very detailed and valuable written submissions that I have been considering. Thank you all for your time. I will reserve my decision and the Commission is adjourned.

ADJOURNED INDEFINITELY **[10.42 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #1 COURT BOOK PN13