DECISION

Fair Work Act 2009
s.739—Dispute resolution

United Firefighters' Union of Australia; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; United Voice
v
Emergency Services Telecommunications Authority T/A ESTA
(C2018/3112)

COMMISSIONER WILSON MELBOURNE, 5 AUGUST 2019

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)].

[1] This decision concerns an application by the United Firefighters' Union of Australia, (UFU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and United Voice (UV) pursuant to s.739 of the *Fair Work Act 2009* (the FW Act) alleging a dispute arising under an enterprise agreement. The three Applicants are referred to collectively as "the Applicants" in this decision. The matters in dispute relate to payment of public holidays that fall within a period where an employee is receiving paid parental leave under the *Emergency Services Telecommunications Authority Operational Employees Agreement 2015*[1] (the Agreement) as well as the wage rate of employees on paid parental leave.

[2] In particular, the decision concerns whether employees are entitled to have their paid parental leave entitlements extended by the number of public holidays which occur while they are on such leave or whether they are entitled to payment of an additional day's salary with respect to the holiday(s) which fall while they are on paid parental leave. Additionally, the parties dispute whether an employee is entitled to the benefit of any pay rises which occur during or immediately prior to an employee commencing a period of paid parental leave.

[3] Mr Jim McKenna of Counsel instructed by Mr Jeremy Murphy of the UFU and Ms Sue Riley of the CEPU appeared for the Applicants while Mr Brendan Avallone of Counsel instructed by Mr Aras Mollison of Lander and Rogers appeared for the *Emergency Services Telecommunications Authority* (ESTA). Permission for both parties to be represented in these proceedings by a lawyer was granted by me pursuant to s.596 of the FW Act, with me being satisfied that legal representation would enable the matter to be dealt with more efficiently taking into account the complexity of the matter (s.596(2)(a)).

[1] AE418496.

[4] Evidence in these proceedings was provided for the Applicants by Mr Alex Williams, Fire Call Taker and Fire Dispatcher, and for ESTA by Mr Todd Delahunt, Payroll Manager.

QUESTIONS FOR DETERMINATION

[5] This decision involves determination of questions about the interpretation of an enterprise agreement in relation to the taking of parental leave. Whereas the Applicants pose two Questions for Determination, the Respondent poses three, comprising the two questions asked by the Applicants and a third, in the form of an alternative to the first. The Respondent's questions are slightly differently framed to those of the Applicants, however not materially so. This decision is arranged as answering the Applicants' framing of questions (numbers 1 and 3 below) and the Respondent's further question (number 2 below). The three questions to be addressed in this decision are as follows:[2]

1. Whether the entitlement under clause 31.7 to paid parental leave of 14 weeks on full pay, or 28 weeks on half pay, for leave associated with the birth of a child, should be calculated as inclusive or exclusive of any public holiday which falls within that period;

2. In the alternative, on the proper construction of the Agreement, does clause 35.12 of the Agreement entitle an employee who takes paid parental leave under clause 31.7 to an additional day off for each public holiday which falls within the 14 week period of paid parental leave?

3. Whether an employee is entitled to the full benefit of any pay rise that falls during or immediately before the commencement of paid parental leave for the purpose of their entitlement to leave in accordance with clause 31.7.

BACKGROUND

[6] The circumstances of the matter are illustrated through the evidence of Mr Williams who is employed as a Fire Call Taker and Fire Dispatcher and has been employed with ESTA for over seven years. During 2018 he took paid parental leave. His last shift prior to taking leave was on 17 January 2018 after which he took a period of annual leave. He then took parental leave commencing on 18 March 2018. His daughter was born on 29 January 2018, however the circumstances of the birth necessitated a grant of compassionate leave for two days within the period previously arranged as annual leave. After he commenced parental leave he took one day industrial training leave which is authorised by clause 42 of the Agreement. During the period of his parental leave he also took two days for enterprise bargaining activity for which he was paid. His paid parental leave continued until he commenced two weeks of unpaid parental leave on 26 June 2018.

[7] Mr McKenna succinctly characterises the matters in dispute as they relate to Mr Williams as follows;

> "4. In the case of Mr Alex Williams, this meant that:

[2] Exhibit A1 at [1]; Exhibit R1 at [1].

> a. ESTA did not recognise the six public holidays which occurred during his 14 weeks' paid parental leave and his leave was not extended by reason these holidays; and
>
> b. His remuneration whilst on parental leave was less than his base salary.
>
> 5. The United Fire Fighters Union (UFU) contends that the entitlement to 14 weeks' parental leave at "full pay" or 28 weeks at "half pay", should be calculated:
>
> a. as exclusive of any public holiday which falls within that period; and
>
> b. in recognition of any pay rise that fall during or immediately before the paid parental leave commences, such that an employee on paid parental leave is not paid at less than their base salary (or half of their base salary)."[3]

[8] In Mr William's case, six public holidays fell during the period of his paid parental leave, namely Good Friday, Easter Saturday, Easter Sunday, Easter Monday, ANZAC Day and the Queen's Birthday. He did not receive an extension to his parental leave or any pay in lieu for any of those public holidays.[4] In January 2018 Mr Williams queried with ESTA his rights in relation to the extension of the period of leave to deal with public holidays, with it being advised to him by ESTA on 24 January 2018 that "[w]hen on paid maternity leave, there is no extension of leave or pay in lieu for public holidays. Annual and personal leave accrues on the ESTA paid component of maternity leave".[5]

[9] In April 2018 while still on paid parental leave, Mr Williams noticed that his hourly wage rate had increased by $1.06 per hour and queried the situation with ESTA's payroll department. The advice given to him was the increase was an error which had been made in calculating the average of his past six-month earnings. The payroll officer advised that the error had been rectified and set out a schedule of payments due to him based on fortnightly payments totalling $1324.01. This recalculation indicated an overpayment which it sought to be returned from Mr Williams who then raised a further query with the payroll department about the basis of calculation;

> "Hi Kathryn,
>
> Can you please confirm the hourly rate at which you have made the final calculations off? I'd just like to confirm ESTA's reasoning behind it being lower than my normal hourly rate of $35.7077. Based on my normal hourly rate I should be getting $1332.97 per fortnight. So from your calculations that's a loss of $8.96 per fortnight.
>
> Is this due to ESTA's interpretation that the average ordinary time earnings for the 6 months prior is paid? And therefore ESTA believes I am not entitled to the full pay rise from October but rather the average of my ordinary earnings for the full preceding 6 months?
>
> Thanks,

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[3] Exhibit A1 at [4].

[4] Exhibit A2 at [26].

[5] Ibid, Attachment AJW – 3.

Alex Williams"[6]

[10] The response to Mr Williams from ESTA's Payroll Manager, Mr Todd Delahunt set out ESTA's belief that the payment of paid parental leave is to be upon the basis of a six monthly average wage and then indicated to Mr Williams the basis of its calculation, set out in the following manner;

"Hi Alex,

Parental leave is paid in per clause 31 .80.

Payment will be based on the average ordinary time rate of earnings (i.e. excluding shift penalties, Overtime and Mentor allowance. but including higher duties) for the six months period prior to commencing the parental leave.

Your average ordinary time earnings for the previous 6 months is calculated as follows:

Your ordinary hours + paid leave+ higher duties over the last 13 pay periods. The total is then divided by 13. (13 pay periods} Then divided by your current hours per fortnight (currently 37.33 per fortnight}

29-Sep-17	$ 1,294.15
13-0ct-17	$ 1,294.15
27-0ct-17	$ 1,294.14
10-Nov-17	$ 1,332.98
24-Nov-17	$ 1,332.97
8-Dec-17	$ 1,332.97
22-Dec-17	$ 1,332.97
5-Jan-18	$ 1,332.96
19-Jan-18	$ 1,332.97
2-Feb-18	$ 1,332.97
16-Feb-18	$ 1,332.96
2-Mar-18	$ 1,332.96
16-Mar-18	$ 1,332.96
TOTAL	**$17,212.11**

$17,212.11 / 13 = 1,324.01

$1324.01 / 37.33 = $35.4677 per hr

Any questions please let me know

Regards

Todd Delahunt
Payroll Manager
Emergency Services Telecommunications Authority".[7]

[6] Ibid, Attachment AJW – 4.

[11] The Applicants contend that an employee on paid parental leave shall be entitled to a minimum rate of remuneration at their base salary.[8] In contrast ESTA argue that the payments to be made to a person on paid parental leave are calculated "by reference to the earnings "prior to commencing the parental leave", not future earnings which might be affected by pay increases".[9]

RELEVANT PRINCIPLES FOR DETERMINATION OF THE DISPUTE

[12] In dealing with a dispute such as this the Fair Work Commission (the Commission) is not undertaking an exercise of judicial power but is instead exercising a power of private arbitration, with that power deriving from the parties' agreement to submit their differences for decision by a third party. The resultant arbitrator's award is not binding of its own force but instead its effect depends on the law which operates with respect to it.[10] It is accepted that while not exercising judicial power, the Commission "may legitimately form and Act upon opinions about legal rights and obligations as a step in the exercise of its own functions and powers".[11]

[13] The Commission is required to examine whether an enterprise agreement's dispute settlement procedure "requires or allows" the Commission to deal with the dispute. In order to do so, it is necessary to look at the text of the dispute settlement procedure, understood in light of its industrial context and purpose, to determine whether the dispute, properly characterised, falls within it.[12] The scope of a dispute settlement procedure in an enterprise agreement should not be narrowly construed; "to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement."[13]

[14] In characterising the nature of a dispute the Commission is not confined to the application filed to deal with the dispute.[14] The entire factual background is relevant, and may be ascertained from the submissions advanced by the parties on the question of jurisdiction.[15] Further, a dispute may evolve during proceedings in the Commission. It may therefore be necessary in some cases when ascertaining the character of a dispute to have regard to both the nature of the dispute alleged in an originating application and the factual circumstances as they evolve.[16] The character of the dispute is distinguishable from any relief which may be

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[7] Ibid.

[8] Exhibit A1 at [34(b)].

[9] Exhibit R1 at [69].

[10] *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 [30]–[32]; cited in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FCAFC 82 at [25].

[11] *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87 [21], cited in *Kentz (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWCFB 2019 at [52].

[12] *CEPU v Thiess Pty Ltd* (2011) 212 IR 327 at [42], [47]; *CFMEU v AIRC* [2001] HCA 16.

[13] *SDA v Big W Discount Department Stores* PR924554 at [23].

[14] *AMWU v Holden Limited* PR940366 at [47]; *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [23].

[15] Ibid at [47].

[16] *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [19], [23]; *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 163 at 168; *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* PR973884.

sought, or granted, following an arbitration of the dispute.[17] However, the relief sought may cast light on the true nature of the dispute in some cases.[18]

[15] If the Commission has jurisdiction to deal with the dispute, the nature of the relief that the Commission may grant will depend on the limitation in s.739(5)[19] and the agreement of the parties as recorded in their enterprise agreement, provided that such relief is reasonably incidental to the application of the enterprise agreement to which the dispute relates.[20]

[16] Interpretation of an enterprise agreement requires construction of the words of the instrument, with the Full Bench in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*[21] (Berri) setting out the principles for such a task. In that matter, and after an extensive analysis of the subject, the Full Bench summarised the principles to be applied in the following way:

> "[114] The principles relevant to the task of construing a single enterprise agreement may be summarised as follows:
>
> 1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:
>
> (i) the text of the agreement viewed as a whole;
>
> (ii) the disputed provision's place and arrangement in the agreement;
>
> (iii) the legislative context under which the agreement was made and in which it operates.
>
> 2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
>
> 3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.
>
> 4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual

[17] *MUA v Australian Plant Services Pty Ltd* PR908236; *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [21] - [22].
[18] *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* PR973884 at [20].
[19] The Commission must not make a decision that is inconsistent with the FW Act, or a Fair Work instrument that applies to the parties.
[20] *MUA v Australian Plant Services Pty Ltd* PR908236 at [63]; *Seven Network (Operations) Ltd v CPSU* (2003) 122 IR 97 at [31] - [32].
[21] [2017] FWCFB 3005.

consideration. It may be inferred that such agreements are intended to establish binding obligations.

5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901* (Cth) applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

> (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;

(ii) notorious facts of which knowledge is to be presumed; and

(iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."[22]

[17] The application of these principles, and especially to those in which ambiguity may be considered was further considered by the Full Bench in *United Firefighters Union of Australia v Emergency Services Telecommunications Authority*:

"[35] As stipulated in Berri, the starting point for interpreting an enterprise agreement is to have regard to the ordinary meaning of the words used. Further, the text must be interpreted in the context of the agreement as a whole. Principles 7 and 10 elicited in Berri emphasise that ambiguity in a provision within an enterprise agreement must be identified before one is to have regard to evidence of the surrounding circumstances. However, principle 8 makes it clear that, in determining whether ambiguity exists, one may have regard to evidence of the surrounding circumstances. That is, such evidence can be used to identify and resolve any ambiguity."[23]

RELEVANT AGREEMENT PROVISIONS

"49. Settlement of Disputes

49.1 Any dispute or grievance:

49.1.1 about matter/s pertaining to the employer/employee relationship; and/or

[22] Ibid at [114].
[23] [2017] FWCFB 4537.

49.1.2 a matter arising under this Agreement; and/or

49.1.3 about the NES;

except termination of employment, shall be dealt with in the following manner:

49.1.4 Step 1: the dispute /grievance will be submitted by the Union and/or Employee(s) to the Employee's immediate supervisor or other relevant ESTA employee as appropriate to the nature of the dispute/grievance;

49.1.5 Step 2: if not resolved after Step 1, it will then be submitted to the appropriate senior ESTA employee (generally an Executive Manager Operations);

49.1.6 Step 3: if not resolved after Step 2, it shall be submitted to the Head of People and Culture or their delegate.

49.2 If after following steps in sub-clause 49.1, the dispute remains unresolved, it may be referred to the FWC for conciliation, and where necessary, arbitration to determine the matter. The decision of the FWC must be accepted by the parties subject to any appeal available.

49.3 Any dispute or grievance regarding matters pertaining to the relationship between Unions and ESTA shall be submitted to the Head of People and Culture or delegate. If not resolved after this, it may be referred to the FWC for conciliation and, by agreement from the parties, arbitration.

49.4 Employee(s) shall be entitled to have a representative, who may be a Union representative present at any or all steps in this procedure.

49.5 Steps 1 to 3 in sub-clause 49.1 shall normally take place within a period of fourteen consecutive days and disputes/grievances should be resolved at the local level where possible.

49.6 During this disputes resolution process, both ESTA and the aggrieved Employee(s) shall cooperate to ensure that these procedures are carried out expeditiously.

49.7 Until the dispute/grievance is determined, work shall continue normally in accordance with the existing work practices before the subject matter of the dispute/grievance arose.

49.8 No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this procedure.

49.9 Resolution of occupational health and safety issues under this clause are subject to the relevant state occupational health and safety legislation and are not subject to sub-clause 49.7.

…

31. Parental Leave

31.1 Employees are entitled to parental leave in accordance with the parental leave provisions in the NES and this clause. For the avoidance of doubt, if there is any inconsistency between the NES and this clause to the detriment of an Employee, the NES will prevail.

31.2 Paid and unpaid parental leave encompasses birth related leave, concurrent parental leave and adoption leave, and is available to all Full-time and Part-time Employees and eligible casual Employees who have been employed for a 12 month period or more immediately preceding the commencement of the leave.

31.3 An eligible casual Employee means a casual Employee employed on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months and who has, but for the pregnancy or decision to adopt, a reasonable expectation of ongoing employment.

31.4 The leave is unpaid (including Public Holidays), except as detailed in sub clauses 31.7 and 31.9 and is available for a period of up to 52 weeks for Full-time, Part-time and eligible casual Employees in one unbroken period. Sick leave is not available and no annual or sick leave entitlements accrue during the period of parental leave.

31.5 Employees may take any other forms of paid leave to which they are entitled, such as annual or long service leave, in substitution for some or all of this 52 week period.

31.6 The maximum entitlement to parental leave is reduced by any parental leave taken by the Employee's spouse. Any periods of concurrent unpaid parental leave will be in accordance with the NES.

31.7 Leave associated with the birth of a child of an Employee will be paid parental leave of 14 weeks on full pay, or 28 weeks on half pay (at the discretion of the Employee) and:

> 31.7.1 if the leave is birth-related leave, the period of leave may start up to six weeks before the expected date of birth of the child or earlier, if ESTA and the Employee so agree, but must not start later than the birth of the child; or
>
> 31.7.2 if the leave is adoption related leave, the period of leave must start on the day of placement of the child.

31.8 Payment will be based on the average ordinary time rate of earnings (i.e. excluding shift penalties, Overtime and Mentor allowance, but including higher duties) for the six months period prior to commencing the parental leave.

31.9 The spouse or partner of the Employee on birth related parental leave will be paid concurrent parental leave for one week at the ordinary time rate of pay. This leave may be taken as provided for in the NES.

31.10 Employees returning from periods of parental leave are entitled to the same position, and the same salary, held by them immediately before going on leave. If such a position is not available, they will be placed in a position as nearly comparable in status to that of their former position.

31.11 An Employee may request EST A to:

31.1 1.1 extend the period of unpaid parental leave by a further continuous period of leave not exceeding 12 months; and/or

31.11.2 return from a period of parental leave on a Part-time basis until the child reaches school age.

Subject to the exceptions provided for in the FW Act, ESTA must agree to the requested
extension of the parental leave.

31.12 Other entitlements relating to parental leave will be in accordance with the FW Act including:

31.12.1 unpaid special maternity leave;

31.12.2 transfer to a safe job;

31.12.3 paid no safe job leave; and

31 .12 .4 unpaid no safe job leave.

31.13 ESTA must make available details of entitlements under the NES and FW Act on its intranet."

CONSIDERATION

Questions for Determination 1 and 2 – whether the period of leave is inclusive or exclusive of public holidays.

[18] The first two questions set out above deal with the matter of whether parental leave is inclusive of or exclusive of public holidays falling within the period, or whether the entitlement to 14 weeks paid parental leave on full pay is extended in some way because of the public holiday falling within the period. The questions posed by the Applicants plainly envisage that a period of paid parental leave sits around and does not encompass public holidays falling within the period.

Question 1

[19] I first consider Question 1: Whether the entitlement under clause 31.7 to paid parental leave of 14 weeks on full pay, or 28 weeks on half pay, for leave associated with the birth of a child, should be calculated as inclusive or exclusive of any public holiday which falls within that period.

[20] Several matters may be observed from clause 31;

- parental leave is to be "in accordance with the parental leave provisions in the NES and this clause" and the provisions of the NES will prevail in the case of any inconsistency (clause 31.1);

- except as provided for elsewhere within the wider clause 31 "the leave is unpaid (including Public Holidays)" with the exceptions of paid leave being deatl with in clauses 31.7 (leave associated with the birth of a child) and 31.9 (spouse or partner leave for birth of a child);

- further, the leave "is available for a period of up to 52 weeks" and is plainly to the exclusion of sick leave with it also being the case that "no annual or sick leave entitlements accrue during the period of parental leave" (clause 31.4);

- other forms of paid leave may be taken "in substitution for some or all of this 52 week period" (clause 31.5);

- the paid leave element may be taken either "on full pay" or "on half pay" (clause 31.7);

- there is no prohibition within the clause for the leave to be taken in smaller portions than what should be regarded as the maximum. In the case of unpaid parental leave, the clause is explicit saying that the leave "is available for a period of up to 52 weeks", but is not explicit in relation to the paid leave. While it would be an unusual circumstance in which a person said they wanted less than 14 weeks paid parental leave on full pay, there does not appear to be a prohibition for a person being absent only for, say, two months.

[21] While clause 31.1 establishes that in the event of any inconsistency between the clause and the National Employment Standards (NES), the NES prevails, examination of the relevant provisions would indicate that there is no direct inconsistency, at least in relation to matters in dispute in this application. Parental leave is set out in Division 5 of Part 2 – 2 of the FW Act. That Part establishes the right to unpaid parental leave and establishes a right to paid parental leave. The only provision of Part 2 – 2 which appears to be material to this decision is s.71(2) which provides, with reference of course to the right to unpaid parental leave, that "the employee must take the leave in a single continuous period".

[22] The Applicants' contentions about clause 31.7 start with the proposition that the proper meaning of the words "paid parental leave of 14 weeks on full pay or 28 weeks on half pay" is critical,[24] with it then being argued;

> "11. It is submitted that the reference to a week of "paid leave" is a reference to one week where the employee does not attend work but is paid because of that leave. An employee will not be on a particular type of "paid leave" where they are entitled to not work and be paid for a different reason.

[24] Exhibit A1 at [10].

12. It is trite to say that one week's annual leave over the Christmas and New Year period will entitle a worker to more than one week away from their job because of the public holidays falling within that period. Likewise, it is submitted that paid leave for a period of 14 weeks must be taken to extend for more than the minimum period of 14 weeks were the employee is entitled to different forms of leave or paid absence during that 14 week period."[25]

[23] The entitlement to public holidays is dealt with in Division 10 of Part 2 – 2 of the FW Act. Section 114 establishes the entitlement to be absent, with the provision, so far as is relevant in these terms;

"114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent on public holiday

(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

Reasonable requests to work on public holidays

..."

[24] Section 115 defines the days established as public holidays.

[25] The Applicants also refer to the provisions of s.116 which sets out the entitlement to payment for absence on a public holiday. The section itself provides the following;

"**116 Payment for absence on public holiday**

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs."

[26] The Applicants then submit an employee may have "ordinary hours" despite being on leave;

"16. Accordingly, the FW Act contemplates an employee having "ordinary hours" during annual leave. Likewise, the payment of annual leave, sick leave, compassionate leave, jury service leave and public holiday leave under the NES are each expressly

[25] Ibid at [11] - [12].

calculated upon the employee's base rate of pay for the employee's ordinary hours of work in the period (see FW Act at ss 90(1), 99, 106, 111 (2) and 116.) Notably, although the 2015 Agreement may include terms that are ancillary or incidental to or supplement the NES entitlement to public holidays, it may not exclude those provisions (FW Act at s 55).

17. That an employee will have "ordinary hours" during a period of leave is also affirmed by the 2015 Agreement. Clause 6 of the 2015 Agreement defines "ordinary hours" to mean the rostered hours usually worked by an Employee, averaging up to 38 hours per week, inclusive of all categories of leave but exclusive of the hours accrued in accordance with clause 14.1. Clause 14.1 pertains to the accrual of additional ordinary time per week and is not relevant for present purposes. As such, an employee of ESTA will have ordinary hours during a period of paid parental leave. Pursuant to the NES (at s 116) ESTA is obliged to pay that employee at the employee's base rate of pay for the employee's ordinary hours of work on a public holiday during a period of paid parental leave."[26]

[27] In support of their case the Applicants also submit that a "common theme" of the Agreement and the NES is "that an employee will not be taken to be on two forms of paid leave at the same time"[27] with it further being submitted;

"21. The NES also directly addresses the interaction between public holidays and various forms of paid leave. Specifically, an employee will be taken not to be on annual leave (s 89(1)) or personal leave (s 98) on any day which is a public holiday in the place where the employee is based for work purposes. The FW Act does not directly address the interaction between paid compassionate leave and paid jury service leave. However, it is submitted that no employee would lose the benefit of a public holiday by reason of their absence on paid compassionate leave or jury service leave.

22. Consistent with the recognition that an employee will not be taken to be on two forms of paid leave at the same, the 2015 Agreement provides at 30. 7 that:

> *Long service leave does not include any public holiday or annual leave occurring during the period when the long service leave is taken.*

23. The entitlement to Long service leave under the 2015 Agreement shares a number of key aspects with the entitlement to paid parental leave. Both forms of leave relate to extended periods of time, being 13 weeks' long service leave (after 10 or 15 years' service) and 14 weeks' parental leave. Both may also be taken half pay over double the period (cl 30.8 and cl 31. 7). There is no practical or policy reason why long service leave would be exclusive of public holidays whereas parental leave would not. Indeed, by cl 8.1 of the Agreement, ESTA affirms its commitment to the principles of Equal Opportunity in employment and expresses its commitment to providing equal opportunity for promotion and access to career path progression.

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[26] Ibid at [16] - [17].

[27] Ibid at [20].

> 24. By contrast, the NES and 2015 Agreement do not provide for recognition of public holidays whilst on different forms of unpaid leave. Consistent with this, cl 31.4 expressly provides that there is no recognition of public holidays during unpaid parental leave. However, cl 31.4 provides that parental leave is unpaid (including Public Holidays), except as detailed in sub clauses 31.7 and 31.9. That is, the prescription that Public Holidays be unpaid during unpaid parental leave does not extend to paid parental leave as is dealt with at clauses 31.7 and 31.9. Rather, properly construed, paid parental leave under the 2015 should be calculated as exclusive of any public holiday which falls within that period."[28] (original emphasis)

[28] In contrast to these arguments the Respondent points firstly to the ordinary meaning of the word "week" as it is used in clause 31.7 with it being submitted that both the Macquarie Dictionary and the Shorter Oxford English Dictionary define the ordinary meaning of the word "week" to be "a period of "seven successive days". ESTA submit there is "nothing in the ordinary meaning of the word "week" which suggests that week means seven days plus any public holidays which happen to fall within the week".[29] After analysis of the Full Bench decision in the matter of *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union*[30] *(RACV)* ESTA submit that "[t]here is nothing in the ordinary meaning of the word "week" which supports a conclusion that a week is extended to 8 days if there is a public holiday, or to 9 days if there are two public holidays. Nor does such a conclusion accord with common sense."[31]

[29] ESTA's analysis then turns to the statutory context of the entitlement to parental leave, considering first that the statutory entitlement is to a period of unpaid parental leave in distinction with paid parental leave, and then turning to those occasions on which the Act refers to periods of time stated in multiples of one week;

> "14. The NES entitlement is provided by Division 5 of Part 2-2 of the FW Act. The NES entitlement is to a period of 12 months of unpaid parental leave.6 These requirements include that "the employee has or will have responsibility for the care of the child".7 That is the purpose of parental leave under the FW Act: so that the employee can be absent to fulfil her or his responsibility for the care of the child. The existence, or otherwise, of such a responsibility is unaffected by whether a particular day is a public holiday.
>
> 15. Division 5 of Part 2-2 of the FW Act contains many references to periods of time stated to be multiples of one week. They are as follows:
>
> (a) section 71(3)(a): birth-related leave for a female employee may start "up to 6 weeks before the expected date of birth of the child";
>
> (b) section 72(3)(a)(i): which is to a similar affect;
>
> (c) section 72(5)(a): concurrent leave of two employees "must not be longer than 8 weeks in total";

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[28] Ibid at [21] - [24].

[29] Exhibit R1 at [9].

[30] [2015] FWCFB 2881.

[31] Exhibit R1 at [12].

(d) section 72(5)(b): "concurrent leave may be taken in separate periods, but, unless the employee agrees, each period must not be shorter than 2 weeks";

(e) section 73: pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth;

(f) section 74(2)(a): the employee must give notice of the taking of unpaid parental leave "10 weeks before starting the leave" except in limited circumstances where the requirement is "4 weeks before starting the period of concurrent leave";

(g) section 74(4): confirmation or change of intended start and end dates "at least 4 weeks before the intended start date specified in the notice";

(h) section 75(3): extension of period of leave by notice "at least 4 weeks before the end date of the original leave period";

(i) section 76(2): request to extend for up to 12 months beyond available parental leave period must be given "at least 4 weeks before the end of the available parental leave period";

(j) section 77A(4)(b): the employee may give the employer notice of return to work "within 4 weeks after the employer receives the notice";

(k) section 77A(6): the specified day for return to work must be "within 4 weeks after the employer receives the notice" under subsection 77A(4) or otherwise "at least 6 weeks after the notice is given to the employee" by the employer;

(l) section 78(3): an employer who gives an employee notice requiring the employee to return to work because the employee ceases to have responsibility for care of a child must specify a day "at least 4 weeks after the notice is given" and "if the leave is birth-related leave taken by a female employee who has given birth - must not be earlier than 6 weeks after the date of birth of the child";

(m) section 80(1)(b): unpaid special maternity leave applies if an employee's "pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child"; and

(n) section 82(1): if an employee is on paid no safe job leave during the 6 week period before the expected date of birth of the child, the employer must ask the employee to give the employer a medical certificate stating whether the employee is fit for work.

16. The clear statutory context is that, in relation to NES entitlements regarding parental leave, a reference to a "week" is a reference to a calendar week, that is a period of 7 successive days. There is no justification in the statutory context of the

provisions set out above to construe one week as meaning 7 successive days plus the number of public holidays that happen to fall in that 7 day period."[32]

[30] ESTA also address the statutory context for parental leave including the *Paid Parental Leave Act 2010* (Cth) (the PPL Act), noting that the PPL Act provides for a maximum period of leave, somewhat tightly defined in the following manner;

""***maximum PPL period end day*** for a child is the earlier of the following days:

(a) the day that is 125 days after the maximum PPL period start day (which is 18 weeks from (and including) that start day);

(b) the day before the child's first birthday."[33]

[31] The submission is then made that "[t]here is nothing in the PPL Act which would extend the 18 week period of paid parental leave under the federal scheme in the manner suggested by the unions in this case, i.e. extending it to 18 weeks plus the number of public holidays which occur during the parental leave period."[34]

[32] Both parties also draw attention in support of their respective cases to the operation of long service and other forms of paid leave.

[33] In the case of the Applicants the main contention, already set out above, is that the NES provides that an employee will be taken not to be on annual leave or personal leave on any day which is a public holiday and that in relation to compassionate leave and jury service leave that no employee would lose the benefit of a public holiday because of such leave.[35] The unions also drew attention to the provisions of the Agreement dealing with long service leave; again in submissions set out above, including that an employee will not be taking two forms of paid leave at the same time.[36]

[34] Against these contentions ESTA note that the provision within clause 30.7 of the 2015 Agreement is reflective of express statutory provisions being "to the effect that long service leave does not include any public holiday occurring, or annual leave taken, during the period when the long service leave is taken. There is no equivalent provision to which the unions can refer, in the Agreement, the FW Act, the PPL Act, or any other statute, in relation to public holidays occurring during a period of parental leave". Further it is argued that "[p]arental leave and long service leave are not the same entitlement. One is to provide a period of absence from employment so that an employee may carry out their responsibilities for a child. It is not an entitlement that accrues (in the sense of increasing) with each year of service. The other is an accruing entitlement, intended to provide furlough after a period of long service with one employer."[37]

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[32] Ibid at [14] - [16].

[33] Ibid at [17].

[34] Ibid at [18].

[35] Exhibit A1 at [21].

[36] Ibid at [22] – [24].

[37] Exhibit R1 at [25] – [26].

[35] The Applicants referred briefly to clause 30.8 (the text of which is set out above) in the context of an ability for both long service leave and paid parental leave to be taken at half pay over double the period, with it being submitted that the common elements support the view that "there is no practical or policy reason why long service leave would be exclusive of public holidays whereas parental leave would not".[38] It is noted that clause 30.8, within the clause providing the entitlement to long service leave is in these terms;

> "30.8 An Employee, by agreement with ESTA, may take double the period of long service leave at half the rate of pay, or half the period of long service leave at double the pay. The agreement shall have regard to the needs of the Employee and ESTA's operational requirements."

[36] The Applicants argue that the meaning of the words "paid parental leave of 14 weeks on full pay or 28 weeks on half pay" is critical.[39] Arising from these words and the questions for determination posed above are two considerations; namely is the length of 14 weeks or 28 weeks extended by public holidays and what payment should be made for the duration of the leave?

[37] ESTA submitted that the context of the current agreement included that a number of predecessor agreements have included similar clauses to the current clauses 31.7 and 31.8 since 2004 and that "none of those predecessor clauses contained a requirement to provide additional days of paid parental leave in respect of public holidays occurring during the leave period".[40] Further, Mr Delahunt offered the following opinion in his witness statement, which was not the subject of cross examination; "none of the predecessor agreements have ever provided for an extension of leave for each public holiday that falls within a period of paid parental leave. While the quantum of the paid parental leave entitlement has increased from 2003 to 2015, the relevant clauses have always expressed the entitlement with reference to a fixed period of "weeks"."[41] While Mr Delahunt offers that opinion, it is not to be regarded as objective evidence of the common intention of the parties. Neither the UFU, UV nor CEPU contended ESTA's submission in relation to past enterprise agreements was inaccurate.

[38] Other than these matters, neither party brought forward any material that would be admissible evidence of objective background facts either for the purposes of establishing an ambiguity within the terms requiring consideration, or for resolving such ambiguity as there may be.

[39] In turning to the matter of the construction of clause 31.7, I am satisfied that the term is not ambiguous or susceptible of more than one meaning and that its construction will require resolution of the plain meaning of its language.

[40] The length of parental leave provided for by the Agreement in total is a maximum of 52 weeks. Within that maximum length may be a period of 14 or 28 weeks paid leave associated with the birth of a child. That leave is a period of "weeks" and in particular "paid parental leave of 14 weeks on full pay, or 28 weeks on half pay". As much as that phrase is

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[38] Exhibit A1 at [23].

[39] Ibid at [10].

[40] Exhibit R1 at [36].

[41] Exhibit R2 at [17].

critical to determination of the first two questions is that the leave entitlement is specified to a number of "weeks", either 14 or 28.

[41] The Agreement does not define the term "weeks" or its singular form "week". It is to be noted though that the Agreement uses the word "weeks" in a number of places and contexts;

- Clause 14 (38 Hour Week Agreement) provides in clause 14.7 that;

  > "The hourly rate for the "38 hour week payment in lieu" and the "38 hour week time in lieu" will be calculated by dividing the annual rate of pay by 1976 (i.e. 52 weeks x 38 hours per week)."

  No express provision is made within the clause to extend the period of 52 weeks referred to for reasons of public holidays occurring within the period.

- Clause 15 (Rosters) provides in clause 15.1 "[t]hat rosters will be posted at least 8 weeks in advance" with no express provision made within the clause to extend the period in question for reasons of public holidays occurring within the roster notification period.

- Clause 17 (Multi-Skilled Employees (1 July 2016)) provides with respect to changes to rosters arising because of changes in maintenance hours that;

  > "17.3.2 if the remaining Maintenance Hours are to be performed at a work location other than the Multi-skilled Employee's usual work location, the Employee will be provided with one weeks' clear notice while the Employee is on shift of when they will perform the remaining Maintenance Hours in their additional service or the relevant Employee and ESTA may, by mutual agreement, determine when the remaining Maintenance Hours are performed. Any travel will be in accordance with clause 10."

  No express provision is made within the clause to extend the period of one week's clear notice referred to for reasons of public holidays occurring within the period.

- Clause 28 (Annual Leave) provides that "Annual leave shall accrue at the rate of four weeks (152 hours) per annum for all Full-time Employees. For Shift Workers, annual leave shall accrue at the rate of five weeks (190 hours) per annum" (clause 28.1) and that in relation to cashing out of annual leave "out, a balance of at least four weeks accrued annual leave entitlement must remain" (clause 28.4.1).

  The operation of the clause though is subject to the provisions of s.89(1) of the FW Act which specifically provides that an employee is taken not to be on paid annual leave on a day which is otherwise a public holiday.

- Clause 30 (Long Service Leave) provides for long service leave to be "at the rate of 13 weeks leave" (clause 30.3), however the operation of the terms is subject to clause 30.7 which expressly provides "long service leave does not include any public holiday or annual leave occurring during the period when the long service leave is taken."

- Clause 31 (Parental Leave) uses the terms which are the subject of this decision as well as providing in clause 31.7.1 the opportunity for early leave to be taken; "if the leave is birth-related leave, the period of leave may start up to six weeks before the expected date of birth of the child or earlier, if ESTA and the Employee so agree, but must not start later than the birth of the child" (clause 31.7.1).

- Clause 41 (Accident Pay) provides that "[t]he maximum period of payment of accident makeup pay is 52 weeks. If the Employee has more than one period of incapacity arising from the same injury, the maximum aggregate payment for those periods is 52 weeks."

  No express provision is made within the clause to extend the period of accident make up pay for reasons of public holidays occurring within the period.

- Clause 50 (Termination) provides for termination to be on the basis of notice or payment in lieu thereof with the periods of notice or payment being constructed as "at least 2 weeks", etc, with the period to be increased "by one week" if the employee is over 45 years of age and has completed at least two years continuous service (clause 50.1).

  No express provision is made within the clause to extend the periods of notice referred to for reasons of public holidays occurring within the period.

[42] In its submissions the Respondent put forward that the Full Bench decision in *RACV* supported its contentions regarding interpretation of the Agreement. That decision concerned a dispute over "the amount of hours which should be deducted from the accrued leave entitlement of a shiftworker working a 21-day shift roster for each day taken off work for annual leave or personal/carer's leave" and required the Full Bench to consider in detail the meaning of "week" and "day" within the FW Act, with the following being held;

> "**[32]** Having regard to the immediate context in which the words are used - namely in relation to leave from work - we consider that a "*week*" of leave is to be understood as meaning an authorised absence from the working days falling in a seven day period, and a "*day*" of leave is an authorised absence from the working time in a 24 hour period. The immediate context does not suggest that "*week*" and "*day*" are used as special constructs to refer to a given number of paid ordinary working hours, as suggested by RACV.
>
> **[33]** Looking at the broader context of the FW Act as a whole, both words are used in a variety of different contexts throughout the FW Act. For example, "*week*" is used in the following provisions:
>
> - s.64(1) - to describe the period (26 weeks) over which an employee's hours may be averaged in accordance with a written agreement entered into between an employer and an award/agreement free employee;
>
> - s.76(2) - to describe the period of notice ("*at least 4 weeks before the end of the available parental leave period*") which must be given to access extended unpaid parental leave;

- s.80(1) - to describe the entitlement to unpaid special maternity leave (where "*the pregnancy ends within 28 weeks of the expected date of birth of the child*");

- s.117(3) - to describe the periods of notice which must be provided to employees upon termination of employment; and

- s.392(6) - in the context of compensation for unfair dismissal, the cap on compensation is set by reference to the remuneration earned during a period of employment (26 weeks) immediately prior to dismissal.

[34] Similarly the word "*day*" is used in different contexts throughout the FW Act, for example:

- s.79A(2) - for the purpose of describing a "*keeping in touch day*" (that is, a day upon which work is performed during a period of unpaid parental leave);

- s.85 - to describe the entitlement (2 days) to unpaid pre-adoption leave;

- s.104 - to describe the entitlement (2 days) to compassionate leave (which, in the case of casual employees, is unpaid - see s.106); and

- s.394(2)(a) - to describe the period of time after which a dismissal takes effect (21 days) during which an unfair dismissal remedy application must be made.

[35] It is apparent from the examples above, and from the other provisions of the FW Act in which the words appear, that "*week*" and "*day*" are often used in contexts where they have no connection to any entitlement to payment. The inference one draws from such provisions is that "*week*" and "*day*" where used in the FW Act bear their ordinary meaning as descriptions of a calendar period of time. It is a principle of statutory interpretation that words and expressions in an Act are presumed to have the same meaning throughout the Act. Therefore, unless there is a specific implication arising from the narrower context of the NES provisions concerning annual leave or personal/carer's leave which dictates otherwise, "*week*" and "*day*" should be given their ordinary meaning where used within those provisions."[42] (reference omitted)

[43] Because of the manner in which the present Agreement is drafted, resolution of the present dispute turns upon the language of the relevant term and not directly upon the language of the FW Act.

[44] Nonetheless it is apparent from the Enterprise Agreement as a whole that the employment of the word "weeks" is in the context of a time period which, as with *RACV*, requires a construction in accordance with its ordinary meaning as set out in the clause in question.

[45] The overall construction of clause 31 (Parental Leave) is to provide a scheme of leave to eligible employees comprising both unpaid and paid parental leave. The period of unpaid

[42] [2015] FWCFB 2881.

leave encompasses paid leave and is to be a maximum of 52 weeks. Within the period of total leave available to eligible employees there may be a period of paid parental leave which is to be either 14 weeks on full pay or 28 weeks at half pay.

[46] What is discernible from the overall Agreement is that some time periods expressed as weeks make it clear that the period in question is exclusive of public holidays which may occur within the period and others do not.

[47] Clauses 28 (Annual Leave) and 30 (Long Service Leave) specifically require that the primary leave in question does not sit over the secondary entitlement to be absent, the public holiday. In the case of annual leave, an employee is taken not to be on paid annual leave on a day which is otherwise a public holiday, which arises because of s.89(1) of the FW Act. Clause 30.7 which expressly provides that "long service leave does not include any public holiday or annual leave occurring during the period when the long service leave is taken". While it is the case that this replicates the provisions of both the current and former state long service leave legislation, the fact of the replication is largely incidental to this decision simply because the face of the Agreement makes it clear that there is to be an extension for public holidays which occur within the period of leave. It is also to be noted that clause 31.4 dealing with the outer limits of parental leave being over a period of 52 weeks specifically provides that "the leave is unpaid (including public holidays), except as detailed in subclauses 31.7 and 31.9".

[48] In order for the Commission to find in favour of the Applicants in this matter in relation to whether or not parental leave is exclusive of public holidays it would be necessary to find that the drafters of the Agreement did not have regard to the different language employed within clause 30.7 in the case of long service leave or the operation of s.89(1) of the FW Act in the case of annual leave. It would also be necessary for the Commission to be persuaded that the drafters deliberately intended the lack of a specific reference in clause 31.7 to exclusively be read differently to the forms of leave which do not permit the leave to be taken at the same time as a public holiday.

[49] Running contrary to such a proposition would be that it is likely that there is no warrant for those other clauses of the Agreement employing the word "weeks" to be construed as a period of time to be extended by a public holiday occurring within the period. The computation of the hourly rate in clause 14 plainly does not envisage any extension because of public holidays. There appears to be no warrant in clause 15 dealing with the notification of rosters that the notification period is extended because of public holidays even though foreseeably there will be some times in a year in which there are several public holidays. The same proposition arises in respect of the notification of performance of the remaining maintenance hours in clause 17.3.2. The provision dealing with accident pay in clause 41 is also very specific and unlikely to have any possibility of an extension beyond the 52 weeks referred to.

[50] To find that clause 31.7 should be construed as a period of 14 weeks on full pay or 28 weeks at half pay, exclusive of any public holidays falling within the period would be to infer additional words into the clause. A consideration of the Agreement as a whole leads to the conclusion that when it is intended that a time period is exclusive of public holidays, that specific reference is made. Accordingly, the first question for determination should be resolved on the basis that a period of paid parental leave referred to is inclusive of any public holiday falling within the period.

Question 2

[51] The second of the Questions for Determination invites an analysis of clause 35.12 of the Agreement, and is in this form; In the alternative, on the proper construction of the Agreement, does clause 35.12 of the Agreement entitle an employee who takes paid parental leave under clause 31.7 to an additional day off for each public holiday which falls within the 14 week period of paid parental leave?

[52] This question, originally proposed for determination by ESTA, followed the Applicants' submissions about the provisions of clause 35.12.1 which sets out the entitlements for shiftworkers in relation to public holidays and substitute public holidays. After noting the fact that a shiftworker rostered off on such a public holiday is "entitled to a day salary in respect of that day the Applicants submit, "[a]ccordingly, it is no answer to the UFU's claim that an employee is "rostered off duty" whilst on paid parental leave".[43] In his oral submissions, Mr McKenna, Counsel for the Applicants submitted that clause 35.12 provided an alternate day or a substitute day for a shiftworker who is rostered off duty on a public holiday and that the effect of the clause would be in Mr Williams case that he would be entitled to a pro-rate payment for the six public holidays occurring during the period of his leave (with the pro-rating being because Mr Williams is a part-time employee).[44] Mr McKenna also submitted on the subject that;

> "The respondents have suggested that the Commission should make a particular determination about the operation of 35.12. It's unclear why that is so or that is necessary. As I understand it it's not said by the respondents that an employee is rostered off duty whilst they're on paid parental leave. The consequence of that, in my submission, is that they, consistent with the definition of ordinary hours, they have ordinary hours. They are on leave and therefore they have ordinary hours. And so they have an entitlement to be absent from work on a public holiday and to be paid from that. And 35.12 extends the entitlement provided by the NES, such that they need not have ordinary hours of work on the particular day. If they're a shift worker they still are entitled to the payment with respect to the public holiday."[45]

[53] In response, ESTA argued that the proposition appeared to have been abandoned and, in any event, did not hold weight;

> "60. Apart from a brief reference to clause 35.12.1 at paragraphs 18-19 of the UFU Submissions, the Unions do not make any submissions in support of the alternative assertion contained in their Application that employees who take paid parental leave should be provided with an additional day off in accordance with clause 35.12 of the Agreement for any public holiday which occurs during their paid parental leave period. It would appear that the Unions have abandoned the argument. The Commission should issue a determination formally rejecting the argument.
>
> 61. Clause 35.12.1 provides an entitlement to a day's pay to shift worker employees who are "rostered off duty on a public holiday". Clause 35.12.2 then adds further

[43] Exhibit A1 at [19].

[44] Transcript, PN 45 – 46.

[45] Ibid, PN 134.

detail in relation to such an entitlement. In both subclauses, an essential feature is that the employee is "rostered off".

62. The fundamental flaw in the Unions' alternative argument is the words "rostered off duty". An employee who takes leave is not away from their duties because he/she has been "rostered off". She/he is on leave. The reason for his/her absence from work is not because of a roster, it is because of the purpose of the relevant period of leave.

63. In the case of parental leave to which clause 31.7 applies, the purpose of the leave is associated with the birth or adoption of a child. The leave is to enable the employee to fulfil his or her responsibilities for the care of the child."[46]

[54] Mr Avallone, Counsel for ESTA, also submitted that;

"… an employee who is on leave is not rostered off, they're on leave. Again if the union's argument here were correct, then an employee who is on unpaid parental leave under the Act would be rostered off, an employee who is on any other form of unpaid leave would be rostered off and on the union's argument entitled to payment for that day which happens to be a public holiday."[47]

[55] The whole of clause 35.12 is in these terms;

"35.12 Entitlements for Shift Workers in relation to Public Holidays and Substitute Public Holidays

35.12.1 A Shift Worker who is rostered off duty on a public holiday, alternative day or a substitute day, shall be entitled to a day's salary in respect of that day.

35.12.2 A Full-time Shift Worker is entitled to the following payments in relation to public holidays (as determined in accordance with sub-clauses 35.1, 35.6, 35.7 and 35.8):

Rostered On	**Rostered Off**	**Payment Public Holiday**	**Payment – Substitute Day**
Public Holiday (No substitute day applicable)		Single time, plus Public Holiday shift penalty	N/A
	Public Holiday (No substitute day applicable)	A day's salary at the single time rate, in lieu of the public holiday. The hours are to be calculated in the same manner as sick leave.	N/A

[46] Exhibit R1 at [60] - [63].

[47] Transcript, PN 326.

Public Holiday and Substitute Day		Single time - plus Saturday or Sunday shift penalty, whichever day is rostered. Where Christmas day (Dec 25) falls on a Saturday or Sunday an additional 50% loading is paid	Single time, plus Public Holiday Shift penalty
	Public Holiday and Substitute Day	A day's salary at the single time rate, in lieu of the public holiday. The hours are to be calculated in the same manner as sick leave.	N/A
Public Holiday	Substitute Day	Single time plus Saturday or Sunday shift penalty, whichever day 1s rostered. Where Christmas day (Dec 25) falls on a Saturday or Sunday an additional 50% loading is paid	A day's salary at the single time rate, in lieu of the public holiday . The hours are to be calculated in the same manner as sick leave.
Substitute Day	Public Holiday	A day's salary at the single time rate, in lieu of the public holiday. The hours are calculated in the same manner as sick leave.	Single time, plus Afternoon, night or weekend shift penalty, depending on the day when work is rostered.

[56] The provisions of the sub-clauses which immediately follow are also noted;

> "35.13 Part-time Shift Workers are entitled to the same provisions as Full-time Shift Workers except that their entitlement/payment will be made proportionate to their hours worked compared with a 38 hour week.
>
> 35.14 Absence when rostered on a public holiday
>
> Employees rostered to work on a public holiday and failing to do so, will not be entitled to public holiday rates for that day."

[57] What becomes apparent from the consideration of the whole clause in its proper context of the wider clause 35, dealing with the subject of public holidays, is that it is

concerned with employees who are either rostered for work or are not rostered to work on the day in question. The clause has very little to do with the eventuality of a person who may be on leave. Plainly clause 35 does not regard a person on leave to be an "employee rostered to work" or, for that matter, a person who is "rostered off duty". The overall context of the clause is that it deals with employees who are subject to a roster during which it may be expected there will be days on which they are required to attend for work and other days on which they are not.

[58] For this reason, as well as for the considerations elaborated within the response to Question for Determination 1 I do not find there is any basis upon which clause 35.12 can be construed in such a way as to entitle employees taking paid parental leave under clause 31.72 to an additional day off for each public holiday falling within their period of paid parental leave. The second question for determination should be answered in the negative.

[59] As a result of the foregoing considerations, the answers to Questions for Determination 1 and 2 must be as follows;

> Q1: Whether the entitlement under clause 31.7 to paid parental leave of 14 weeks on full pay, or 28 weeks on half pay, for leave associated with the birth of a child, should be calculated as inclusive or exclusive or any public holiday which falls within that period;
>
> > A: The period of paid parental leave referred to is inclusive of any public holiday which falls within that period.
>
> Q2: In the alternative, on the proper construction of the Agreement, does clause 35.12 of the Agreement entitle an employee who takes paid parental leave under clause 31.7 to an additional day off for each public holiday which falls within the 14 week period of paid parental leave?
>
> > A: No.

Question for Determination 3 – whether employee on parental leave received benefit of pay occurring during the period of leave.

[60] The final Question for Determination is; "whether an employee is entitled to the full benefit of any pay rise that falls during or immediately before the commencement of paid parental leave for the purpose of their entitlement to leave in accordance with clause 31.7." It is be noted though that clause 31.8 also has a connection and that clause provides the following;

> "31.8 Payment will be based on the average ordinary time rate of earnings (i.e. excluding shift penalties, Overtime and Mentor allowance, but including higher duties) for the six months period prior to commencing the parental leave."

[61] The circumstances relating to Mr Williams are set out above. After querying a change to his pay-rate, he was advised that there in fact had been an error in calculating his payments which led to ESTA believing there had been an overpayment to him. ESTA's response to Mr Williams made it clear to him that the Authority considered that payment for paid parental leave should be on the basis of his "average ordinary time rate of earnings (i.e. excluding shift

penalties, Overtime and Mentor allowance. but including higher duties) for the six months period prior to commencing the parental leave".[48]

[62] The Applicants contend that the reference in clause 31.7 to payment being "based" on the average ordinary time rate of earnings, etc on "full pay" or "half pay", must have regard to an employee's base salary;

> "25. As noted above, cl 31.7 refers to "paid parental leave" on "full pay" or "half pay". The ordinary meaning of those terms relates to an employee's full base salary, or half of their full base salary. In this regard, "base salary" is defined in the Agreement to the annual salary prescribed in clause 21 for each position. That base salary includes annual pay increases of between 3% and 5% as prescribed by cl 21.1. The resulting salaries reflect the minimum remuneration which ESTA must pay to employees so as to comply with its obligations under the 2015 Agreement and s 50 of the FW Act.
>
> 26. Clause 31.8 provides a further formula for calculating a figure upon which "[p]ayment will be based" during parental leave. That formula involves an averaging of the ordinary rate of earnings over the six months prior to commencing parental leave. A strict application of this formula was applied in Mr William's case. Mr Williams enjoyed an annual salary increase in the six months prior to commencing paid parental leave. As a result, his ordinary time earnings for part of the relevant six month were lower than his "base salary" at the time of taking parental leave. It flowed from this that his average ordinary time rate of earnings was also below his "base salary" during parental leave. A similar result arises where an annual salary increase occurs during a period of parental leave. An increase of this kind will not be reflected in the averaging of the ordinary rate of earnings. It is submitted that such a strict application of the formula in cl 31.8 does not reflect the proper interpretation of intended purpose of the provision.
>
> 27. Here, the phrase "[p]ayment will be based" is also significant. The parties could have stated that payment will be "calculated" in the manner described. Rather, the use of the term "based" suggests a minimum or baseline for payments. Read together with the reference to "full pay" and "half pay" and in the context discussed below, it is submitted that the "base" prescribed by cl 31.8 ought not be taken to be prescriptive of the total actual payment. This is especially so where the formula in cl 31.8 results in quantum of remuneration less than an employees' base salary."[49]

[63] The Applicants then addressed in their submissions the matters which are to be included for the purposes of the paid parental leave calculation;

> "29. The 2015 Agreement provides that "wages" are comprised of ordinary time earnings, allowances, shift penalties and Overtime (cl 13). Clause 31.8 makes clear that the terms "full pay" and "half pay" in cl 31. 7 do not incorporate each of these components. Rather, "full pay" and "half pay" exclude shift penalties, Overtime and Mentor allowances. In this respect, the clause is similar to the NES entitlements to annual leave, sick leave, compassionate leave, jury service leave and public holiday leave, each of which are to be calculated by reason of the employee's "base rate of

[48] Exhibit A2, Attachment AJW – 4.

[49] Exhibit A1 at [25] - [27].

pay" (see FW Act at ss 90(1), 99, 106, 111 (2) and 116.) Notably, "base rate of pay" is defined by s 16 of the FW Act to be exclusive of, inter alia, loadings, monetary allowances and overtime or penalty
rates.

30. Whilst excluding shift penalties, Overtime and Mentor allowances, cl 31.8 does provide for an recognition of employee's work performing "higher duties". "Higher duties" are dealt with at cl 23 of the 2015 Agreement which provides for employees temporarily engaged in duties of a classification higher than their own to be paid at the higher classification rate. Clause 23.2 specifically provides for employees who have been performing higher duties for an extended period to continue to be paid at the higher rate while on leave in certain circumstances.

31. By recognising an employee's higher duties when calculating leave pay, cl 31.8 ensures that the employee's parental leave pay recognises the additional work performed by them. This suggests that the parties had in mind recognising an employee's entitlement to remuneration in excess of their standard base rate of pay whilst on parental leave.

32. The averaging provision in cl 31.8 must be also seen in light of the beneficial purpose of the provision, the context of the leave to be taken and ESTA's commitment to Equal Opportunity. As to the particular circumstances in which the leave may be taken, it is submitted that an employee is more likely to reduce their hours of work in the lead up to parental leave than in the lead up to other forms of leave. The averaging provision here allows the leave payment to reflect the working hours in the prior 6 months and would maintain the value of that leave for an employee who had recently reduced their hours."[50]

[64] For its part ESTA argue that the Applicants contentions are "directly inconsistent" with the provisions of clause 31.8 and notes in regard to the clause that;

"(a) the draftspersons turned their mind quite specifically to what was included, and what was not, in the payment for paid parental leave under clause 31.7;

(b) the payment is expressly to be calculated by reference to the rate of pay prior to commencing the parental leave; and

(c) there is no support in the text – or the context – for a conclusion that the payment is to be calculated by reference to future events such as changes in the rate of pay."[51]

[65] In response to the unions' arguments about the matters to be included within the calculation of paid parental leave or not ESTA submitted that it is "significant that in turning their minds specifically to what was included, additional payment for public holidays (or additional days for public holidays) falling within the paid parental leave period was not included. Further, it is significant that the parties decided to calculate payment by reference to the earnings "prior to commencing the parental leave", not future earnings which might be

[50] Ibid at [29] - [32].

[51] Exhibit R1 at [68].

affected by pay increases".[52] Finally, ESTA contend that while it was open to the parties to expressly provide for inclusion pay increases in the paid parental leave calculation they chose not to do so.[53]

[66] In relation to this question it must be noted that clause 31.7 provides the entitlement to paid parental leave whereas clause 31.8 defines how the period of paid leave is to be paid.

[67] As noted in relation to the first two Questions for Determination ESTA made submissions regarding a number of predecessor enterprise agreements including those made since 2004 with the Authority contending that "each of the predecessor clauses calculated the rate of pay during paid parental leave based on past earnings prior to the employee commencing leave, not future earnings including pay rises after the leave commenced".[54] Further, Mr Delahunt offered the following opinion in his witness statement, which was not the subject of cross examination; "no predecessor agreement has ever provided for the receipt of any benefit from a pay increase that has taken effect after the employee has commenced their period of leave. The quantum of paid parental leave has always been calculated with reference to the average rate of earnings in the six-month period prior to the employee commencing a period of paid parental leave."[55] While Mr Delahunt offers that opinion, it is not to be regarded as objective evidence of the common intention of the parties. Neither the UFU, UV nor CEPU contended ESTA's submission in relation to past enterprise agreements was inaccurate.

[68] Other than these matters, neither party brought forward any material that would be admissible evidence of objective background facts either for the purposes of establishing an ambiguity within the terms requiring consideration, or for resolving such ambiguity as there may be.

[69] In turning to the matter of the construction of clauses in question I am satisfied the terms are not ambiguous or susceptible of more than one meaning and that their construction will require resolution of the plain meaning of the language employed.

[70] What must be observed about clause 31.8 is that it provides a retrospective calculation for a prospective payment. The essential nature of the clause is to resolve what would otherwise be a problem of calculation of payment within the context of ESTA's operations in which variability of potential future rosters not actually worked may lead to the undesirable situation in which the payments to be made to a person on paid parental leave may not fairly reflect their recent patterns of work. That of course, is a mere observation and what is more compelling than the observation are the words of the clause which entitles employees progressing on paid parental leave to receive for the future three months an average of the earnings they received in the past six months. Such calculation, it must be stressed, is a retrospective one.

[71] There is nothing within the words of clause 31.8 that would cause the conclusion to be reached that "the average ordinary time rate of earnings … for the six months period prior" requires the inclusion of future wage rises, whether programmed or not at the time the

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[52] Ibid at [69].

[53] Ibid at [70].

[54] Exhibit R1 at [36].

[55] Exhibit R2 at [17].

calculation was made. The Applicants argue that the current Agreement differentiates between the things that are "wages" and provided specifically for within clause 13 and those matters provided for in clause 31.8. Whereas the former clause constructs wages to be ordinary time earnings, allowances, shift penalties and overtime, the latter clause excludes shift penalties, overtime and mentoring allowances from the calculation. The unions note as well that the provision in clause 31.8 requires inclusion of higher duties pay in the calculation. The Applicants also submit that the beneficial purpose of paid parental leave with it being a positive measure in favour of women[56] should lead to an acceptance that the construction leans to that advanced by the unions; if for no other reason than it is likely that women may reduce their hours prior to taking paid parental leave and thus may be disadvantaged if the interpretation favoured by ESTA were to succeed. It was also submitted that ESTA's stated commitment to the principles of equal opportunity employment may reinforce such a submission.

[72] Although having had regard to these submissions, the arguments made by the Applicants in relation to the considerations that should be applied in respect of the construction of the clause are not compelling in the absence of cogent extrinsic evidence that would support that such contentions were the objective intentions of the parties at the time the current Agreement was made.

[73] As a result of these considerations, the third of the Questions for Determination must be answered in the following manner;

> Q3: Whether an employee is entitled to the full benefit of any pay rise that falls during or immediately before the commencement of paid parental leave for the purpose of their entitlement to leave in accordance with clause 31.7.
>
> A: No.

CONCLUSION

[74] For the reasons set out above, I find that the Questions for Determination require answering in the manner indicated above. In summary, my determinations about each question are as follows;

> Q1: Whether the entitlement under clause 31.7 to paid parental leave of 14 weeks on full pay, or 28 weeks on half pay, for leave associated with the birth of a child, should be calculated as inclusive or exclusive or any public holiday which falls within that period;
>
> A: The period of paid parental leave referred to is inclusive of any public holiday which falls within that period.
>
> Q2: In the alternative, on the proper construction of the Agreement, does clause 35.12 of the Agreement entitle an employee who takes paid parental leave under clause 31.7 to an additional day off for each public holiday which falls within the 14 week period of paid parental leave?

[56] Transcript, PN 95 – 131.

A: No.

Q3: Whether an employee is entitled to the full benefit of any pay rise that falls during or immediately before the commencement of paid parental leave for the purpose of their entitlement to leave in accordance with clause 31.7.

A: No.

[75] The application is determined accordingly.

COMMISSIONER

Appearances:

J. McKenna of Counsel for the Applicants.
B. Avallone of Counsel for ESTA.

Hearing details:

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Melbourne:
14 May.

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