# DECISION

*Fair Work Act 2009*
s.739—Dispute resolution

**Australian Workers' Union, The and "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)**
**v**
**Downer EDI Engineering Power Pty Ltd**
(C2019/6530 and C2019/7193)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 22 MAY 2020

*Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] – whether 10-minute paid rest break is part of the "total worked hours for the day" – whether 30-minute unpaid meal break is part of the "total worked hours for the day" – whether paid afternoon commute is part of the "total worked hours for the day" – whether employees entitled to additional break or overtime payment under clause 10.2 of the Agreement because total worked hours for the day are 10 or more – applications dismissed.*

**[1]** The Applicants, The Australian Workers' Union and the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union are in dispute with Downer EDI Engineering Power Pty Ltd (Downer) about the entitlement of employees covered by the *Downer EDI Engineering Power Pty Ltd/AMWU/AWU/CFMEU Metal Engineering On-Site Construction Agreement 2017 – 2020* (Agreement) to rest breaks, or appropriate compensation in lieu. They separately lodged applications pursuant to s.739 of the *Fair Work Act 2009* (Act) for the Commission to deal with a dispute in accordance with a dispute settlement procedure of the Agreement. The applications were heard together as in substance they raise the same issue. There is no issue that the Commission's jurisdiction has been properly invoked. There is however an issue as to whether there is power to now arbitrate given, as will be apparent below, there has been a cessation of the work performed under the Agreement and this is said to remove the underlying basis for the dispute.[1] For reasons that will become clear, it is unnecessary for me to deal with that contention.

**[2]** Before I turn to the substance of the disputes, which essentially is one of construction of the Agreement, it is convenient to set out some uncontroversial background facts.

**[3]** In or about March 2018, Downer was contracted by APA Orbost Gas Plant Pty Ltd to perform works in connection with the upgrade (Project) of the Orbost Gas Plant (Plant). The

[1] Respondent's outline of submissions at [48]-[54]

Plant was formerly named the Patricia Baleen Gas Plant.[2] The Project included supply, fabrication, installation and commissioning support.[3] The Plant is located about eight kilometres south of Orbost in East Gippsland, Victoria and has been operating since 2003.[4] Downer's role in the Project was to construct new structures at the Plant, while other contractors were engaged by the client to upgrade the existing structures at the Plant.[5]

**[4]** Most of the new structures, including pipe racks and piping, were manufactured off-site and brought to the Plant in modules.[6] Downer assembled the new structures on-site, including pipe racks, switch rooms, tanks and vessels.[7] Once new structures were assembled, Downer worked on welding of the piping, installation of the cabling, cable ladder, rigging, scaffolding, painting, lagging and insulation.[8] Before the work on the Project began, the Plant was in a care and maintenance mode and was not operational.[9] On completion of all works, the Plant is intended to process gas from newly installed offshore wells in the Sole Gas Field and export it to the Eastern Gas pipeline to supply the Australian domestic market.[10]

**[5]** The scheduled completion of Downer's work on the Project was in September 2019 but delays have meant that, at the time of hearing the applications, Downer's work on the Project was to be completed by late February 2020.[11] At the time of writing, Downer's work on the Project has been completed.

**[6]** Employees engaged by Downer to perform work on the Project were covered by one of two enterprise agreements. The first is the Agreement which covers mechanical employees, including crane drivers, mechanics, welders, construction workers, labourers, pipefitters and riggers/scaffolders and is the subject of these applications. The second is the *Downer EDI Engineering Electrical Pty Ltd and ETU Enterprise Agreement – 2017-2020* and is not presently relevant.

**[7]** Following some discussions between representatives of Downer and relevant unions, including the Applicants, Downer implemented a 10/4 roster for work on the Project.[12] Pursuant to the roster the following work and break patterns and payment arrangements operated:

- During Monday to Friday:
    - employees work between 7:00am and 5:00pm, with two breaks (a 10-minute paid rest break in the morning and a 30-minute unpaid lunch break);
    - employees were paid until 5:30pm each day;

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[2] Exhibit 2 at [5] – [6]

[3] Ibid at [5]

[4] Ibid at [6]

[5] Ibid at [7]

[6] Ibid at [8]

[7] Ibid

[8] Ibid

[9] Ibid at [9]

[10] Ibid

[11] Ibid at [10]

[12] Ibid at [22]-[26]

    - during the 30-minute period after sign-off, employees made the afternoon commute;
    - most employees availed themselves of a bus service arranged by Downer to transport employees between the Project site and two off-site car parks - one at Pelz, the other at Newmerella;[13]
    - employees who did not use the bus service were also paid until 5:30pm;
- On Saturday: –
    - employees work between 6:30am and 1:45pm, with one 20-minute paid lunch break;
    - employees were paid an additional 30 minutes after the end of the shift, that is to 2:15pm; and
- Thursday (drive out day) – employees worked between 7:00am and 3:00pm, with the two clause 10.1 breaks. Again, employees were paid an additional 30 minutes after the end of the shift, to 3:30pm.

**[8]** At the Project's peak, which was in around July 2019, about 250 Downer employees were working on the Project organised across two crews. Each crew worked the same shift patterns in accordance with the roster.[14]

**[9]** As is apparent from the above, the Project has now effectively demobilised. At the time around hearing Downer had approximately 10 employees remaining on the Project and had ceased operating the bus services.

**[10]** As a matter of practice according to the evidence of Mr Robert Cuddy,[15] a Rigger/Scaffolder engaged on the Project, and Mr Peter Morrow,[16] Downer's Project Manager, a typical weekday shift timeline was largely as follows:

- Employees wishing to use one of the morning bus services would drive to the Pelz car park or the Newmerella car park as noted above, and would then board one of Downer's bus services;
- Downer did not impose a requirement about which particular bus service any employee might use. The only requirement was that employees were to be ready to attend a pre-start meeting at the Project site commencing at 7:00am;
- Any employee electing not to use the bus services would drive directly to, and park at, the Project site car park;
- On arrival at the Project site, employees waited in what are described as 'brew rooms' until the commencement of the shift at 7:00am. The waiting time varied depending on the bus service used or on the time of arrival by any employee driving directly to the Project site. It is uncontroversial that the travel and waiting time before the shift

[13] Ibid at [30] and Attachment PM-1

[14] Ibid at [37]

[15] Exhibit 1

[16] Exhibit 2

commenced at 7:00am was not paid and was not considered as time worked under the Agreement;[17]

- Employees clocked on or signed in at 7:00am and then attended prestart meetings held in the 'brew rooms';[18]
- Following the pre-start meetings, employees worked until 10:00am;[19]
- At 10:00am, employees took a 10-minute paid morning break for which provision is made in clause 10.1 of the Agreement;
- Employees worked between 10:10am and 1:30pm;
- At 1:30 pm, employees took a 30-minute unpaid lunch break for which provision is also made in clause 10.1 of the Agreement;
- Employees worked from 2:00pm until around 4:50pm;
- At about 4:50pm, employees downed tools and locked them away by 4:55pm;
- At around 5:00pm employees attended a short close-out meeting;
- Employees signed a daily time sheet, recording 5:30pm in the "Time Out" column of the sheet;
- At around 5:05pm, employees returned to the crib rooms, which involved a 2-minute walk from the location of the close-out meetings, then washed up and gathered at the bus pickup location;
- Employees travelling back to the Pelz or Newmerella car parks by bus would board buses and depart the site between 5:10pm and 5:15pm. The buses would drop employees back at the respective car parks at between 5:25pm and 5:30pm.
- Employees which drove to the Project site car park would leave at between 5:10pm and 5:15pm.

**[11]** It is necessary for contextual purposes to say something about the bus service, which according to the evidence Downer arranged at its own cost, to transport employees who wished to use the service between the Project site and the earlier mentioned car parks. The evidence is that Downer arranged the service in addition to paying employees a travel allowance covering the journey in their own cars from the employees' accommodation to the car parks and a living away from home allowance to the majority of employees living outside the local area.

**[12]** The distance travelled by bus between the Project site and the car parks is about 8.8 km and the journey time is about 15 minutes.[20] Multiple bus services operated each morning at intervals between 6:10am and 6:45am.[21] The afternoon bus services departed between 5:10pm and 5:15pm.[22]

**[13]** According to Mr Morrow, Downer provided the bus services for several reasons. First, although located only eight kilometres from Orbost, the Project site was in a remote location

[17] Exhibit 1 at [14]; Transcript PN358-PN369

[18] Ibid at [14]-[15]

[19] Ibid at [16]

[20] Ibid at [12]

[21] Exhibit 1 at [14]; Exhibit 2 at [47]-[49]

[22] Exhibit 1 at [18]; Exhibit 2 at [66]

on the edge of an unpopulated part of the coastline. The roads leading to and from the Project site are only partially paved and have varying speed restrictions. Secondly, it was the Plant operator's (APA Orbost Gas Plant Pty Ltd) preference following local community pressure to reduce traffic on local roads.[23] Thirdly, the Project site had approximately 120 parking spaces in its car park.[24] That was sufficient space to accommodate employees who had a particular need to drive directly to and from the Project site but could not accommodate the entire workforce driving to the Project site.

**[14]** As earlier noted, the disputes essentially concern the proper construction of the Agreement in light of the working arrangements earlier described. The working arrangements described above differ from the working arrangements described in the Agreement in some respects and I will return to this later in this decision. The Applicants claim that under the Monday to Friday shifts in the roster, the threshold of 10 hours worked per day in clause 10.2 of the Agreement had been exceeded, with the result that employees are entitled to a 20-minute paid meal break or overtime in lieu. Downer contends that no such entitlement arises under the Agreement from the working arrangements on the Project.

**[15]** The principles applying to the proper construction of an enterprise agreement were canvassed at length in *Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*.[25] A detailed consideration and summary of the applicable principles is to be found in *Golden Cockerel*. The summary contained therein was modified in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*.[26] These are not in contest and need not be rehearsed at length here. In short compass, much like construing a statute, the construction of a provision or provisions in an enterprise agreement begins with a consideration of the ordinary meaning of the words used, having regard to the context and evident purpose of the provisions or expressions being construed. Context may be found in the provisions of the agreement taken as a whole, or in their arrangement and place in the agreement. The statutory framework under which the agreement is made may also provide context, as might an antecedent instrument or instruments from which a particular provision or provisions might have been derived. The industrial context in making an enterprise agreement and in which it operates is also relevant.

**[16]** Clause 9 of the Agreement regulates work hours and rostered days off. Ordinary hours of work under the Agreement are 36 hours per week. Clause 9.3 of the Agreement deals with work cycles and provides, *inter alia*, that ordinary working hours shall be worked in a 10 day/2 week cycle, Monday to Friday inclusive, with eight hours worked for each of nine days and with 0.8 of an hour on each of those days accruing towards an RDO on the tenth day.

**[17]** I noted earlier that the working arrangements on site differed from those described in clause 9 of the Agreement. Senior Counsel for Downer explained the difference during the following exchange:

> THE DEPUTY PRESIDENT: Sorry, Mr Dalton, before you go on, the 7.2 hours paid at ordinary time - - -

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[23] Exhibit 2 at [18]

[24] Ibid at [42]

[25] [2014] FWCFB 7447

[26] [2017] FWCFB 3005

MR DALTON: Yes.
THE DEPUTY PRESIDENT: - - - how is that determined, because when one looks at work cycles in 9.3.1, the notion there is that eight hours be worked with 0.8 of one hour accruing for an RDO.

MR DALTON: Yes.

THE DEPUTY PRESIDENT: So that, in effect, what would happen is the employee gets paid 7.2 hours and doesn't get paid for 0.8 of one hour and that amount accrues, but the ordinary hours are in fact eight. They work eight and it's only after that time that there would be overtime.

MR DALTON: On my instructions they have treated the 0.8 per day as accruing but paid out.

THE DEPUTY PRESIDENT: Yes. At overtime?

MR DALTON: At overtime rates.

THE DEPUTY PRESIDENT: And accruing?

MR DALTON: Well, they didn't accrue it as time off, so it's recognised and treated - - -

THE DEPUTY PRESIDENT: They don't accrue an RDO?

MR DALTON: No, but in terms of the designation of the hours, 7.2 ordinary hours, 2.8 overtime hours for the Monday to Friday shifts. Perhaps just to clarify on that point, it was the subject of an exchange between you, Deputy President, and Mr Terzic. We're on the same page as the union in relation to how the clause operates, save for the meaning of 'hours worked'.

THE DEPUTY PRESIDENT: Yes.[27]

**[18]** That this was the practice on the Project was not in contest.[28]

**[19]** Clause 10 of the Agreement deals with rest and meal breaks and provides:

> "10.1 One 10 minute paid morning rest break and a 30 minute unpaid lunch break will be scheduled within ordinary daily hours. The lunch break must be taken no later than 6 hours after work starts.
>
> 10.2 If the total worked hours for the day are 10 hours or more there will be an additional 20 minute rest break paid at ordinary rates to be taken at the end of ordinary daily hours, and prior to the commencement of overtime. However, an employee may elect to take a payment in lieu of stopping work for this break in

[27] Transcript PN551-PN563

[28] Transcript PN135-PN139

which case the employee will be regarded as having worked a further 20 minutes, and he or she must be paid accordingly."

**[20]** It is uncontroversial that the reference to "total worked hours" in clause 10.2 is a reference to all rostered hours (whether ordinary hours or scheduled overtime). That much is also apparent from the requirement in the clause that the additional 20-minute paid rest break be taken at the end of ordinary daily hours and before the commencement of overtime.

**[21]** The trigger for the entitlement to the additional paid rest break in clause 10.2 is when the total worked hours for a day is 10 hours or more. Given the scheduling of the break inherent in clause 10.2, where 10 hours are worked in a day, the break must occur after eight ordinary hours. As both the scheduling of the break and the alternative election (overtime for the period in lieu of the break) are contingent on the total working hours for a day being 10 or more, the total hours to be worked must usually be known in advance of the total being worked. The word "worked" in clause 10.2, as a verb, might suggest a use in the past tense, so that the total hours worked are only know once the total has been worked. However, such usage would make compliance difficult, as the break must be scheduled before the total hours have actually been worked. The better grammatical construction is that "worked" is a past participle used in forming, in this case, a passive tense. This reading is confirmed by the words "are 10 hours or more". If the word "worked" was intended to be used in a past tense, one would expect grammatically the words "were" or "was" "10 hours or more" to follow instead of "are". Properly construed, the introductory part of the sentence, "[I]f the total worked hours for the day are 10 hours or more", is capable of both forward looking and backward-looking application, because "worked" is used in a passive tense. For the most part where the rostered total working hours in a day will be 10 or more, the scheduling of the second paid rest break can occur in conformity with the requirement.

**[22]** Ultimately the issue to be addressed in determining the dispute is the meaning of "total worked hours" and specifically the constituent elements that are to be counted in calculating the total hours worked. To recap, the evidence discloses that a typical working day on Mondays through Fridays is that after an unpaid morning commute to the Project site on a Downer provided bus service or by private vehicle, employees commence work at 7:00am. At 10:00am, employees take a 10-minute paid morning break (clause 10.1). At 1:30pm, employees take a 30-minute unpaid lunch break (clause 10.1). At about 4:50pm, employees down tools and lock them away by 4:55pm. Thereafter employees attend a short close-out meeting, sign a daily time sheet, recording 5:30pm in the "Time Out" column, return to the crib rooms, wash up and walk to either the bus pick-up point where buses depart between 5:10pm and 5:15pm or the carpark and drive away in a private vehicle. Employee are paid for the afternoon commute until 5:30pm whether using the bus service or private vehicle.

**[23]** Although it is not entirely clear from the Applicants' written submissions, it became clear during oral argument that they accept that the 30-minute unpaid meal break is not taken into account when assessing whether there are (or are to be) 10 or more hours worked.[29] Respectfully, this is plainly correct. That leaves the 10-minute paid rest break and the incidental and commute time after employees complete their time sheets (essentially 30 minutes between 5:00pm and 5:30pm). The gravamen of the Applicants' contention is that the

[29] Transcript PN62, PN102, PN200; PN425

calculation of the total worked hours in a day involves taking into account all hours in the day for which an employee is paid.[30]

**[24]** Downer contends that on its proper textual, contextual and purposive construction, none of the 10-minute paid morning rest break, the 30-minute unpaid lunch break or the afternoon commute forms part of the "total worked hours" for the purposes of clause 10.2 of the Agreement.

**[25]** As to the 10-minute paid morning rest break, Downer advances several bases for its contention the 10-minute morning rest period does not count toward the "total worked hours" in clause 10.2. First, it says the plain meaning of the text of both provisions favours that construction. In summary, it contends that clause 10.1 reflects a distinction between periods of "work" and periods of "break", providing for a "10 minute paid morning rest break" and a "30 minute unpaid lunch break" to be scheduled within ordinary daily hours and that the term "break" on a textual construction must give meaning to that distinction, namely that it is a period which is a break from the "work" involving a cessation, suspension or separation from the "work". A similar distinction between "work" and a "rest break" is comprehended by clause 10.2. Thus "work" and a "rest break" are mutually exclusive concepts.

**[26]** Although the contention advanced is not without merit, I consider that it is an overly narrow or pedantic approach to the construction of the provisions. It is to be remembered that the meaning of the words "total worked hours for the day" turns on the language of the Agreement, understood in the light of its industrial context and purpose[31] and that the words are not to be construed in a vacuum divorced from industrial realities.[32] Agreements are frequently couched in terms intelligible to the "parties" (or perhaps the bargaining representatives) without careful attention to form and language found in a statute.[33] As Madgwick J observed in *Kucks v CSR Limited*[34] the framers of industrial instruments were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.[35]

**[27]** In this regard the distinction in clause 10.1 between paid and unpaid breaks is an important textual and contextual consideration in determining the meaning of the phrase "total worked hours for the day" in clause 10.2. That there is a distinction suggests that the paid break is counted as part of the ordinary hours worked. This is consistent with the practice at the Project site that ordinary hours are concluded at the end of 7.2 hours excluding the unpaid

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[30] Transcript PN174

[31] *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [2] per Gleeson CJ and McHugh J; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197]

[32] *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362 at 378; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197]

[33] Ibid at 378–9; *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197]

[34] [1996] IRCA 166; (1996) 66 IR 182; *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [96] per Kirby J; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197]

[35] Ibid at 184; see also *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16]; *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [96] per Kirby J; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197]

meal break. Thereafter overtime is paid. Were it otherwise and the 10 minute paid rest break were not counted as time worked, overtime would commence 10 minutes later.

**[28]** Downer also says that other provisions of the Agreement provide contextual support for the construction for which it contends. It says that the Agreement contains other provisions which delineate between time "worked" on the one hand, and other periods – such as meal breaks, rest breaks, and rest periods – during which an employee may be on-site, and indeed may be paid, but which are not time "worked". These are discussed below.

**[29]** First, Downer points to clause 11.4 which deals with payment for the "30 minute combined rest period/crib break" prescribed for weekends and public holidays under clause 11.3 and provides that the combined break and all subsequent crib breaks "must be paid as if time worked at the appropriate rate". Downer contends that the provision shows that periods of rest are not considered "time worked" and will only be recognised as time worked for certain limited purposes where expressly provided otherwise. I disagree. The provision is not concerned with whether the combined break and subsequent breaks are to be counted as time worked but rather it is concerned with ensuring the employees are paid as if the time were worked "at the appropriate rate", ensuring that the break is paid at weekend overtime rates (clauses 11.2.1 and 11.2.3) rather than ordinary time rates and that on public holidays it is paid at the appropriate higher public holiday rate (clause 11.2.5). The "appropriate rate" being the rate for working overtime on a particular day with which the clause is concerned.

**[30]** Secondly, Downer points to clause 14 which provides that "an employee kept waiting for wages on-site on pay day . . . for more than a quarter of an hour after the usual time of ceasing work, shall be paid at overtime rates after that quarter hour within a minimum of a quarter of an hour". It says that clause distinguishes between the performance of "work" on-site on the one hand, and an employee's presence on-site for different purposes on the other. This is true, but the clause is not concerned with work at all. It imposes a penalty on the employer for keeping an employee waiting on site on a pay day to receive payment. It does not lend support for Downer's contention that the paid rest break is not part of the hours worked calculation required by clause 10.2.

**[31]** Thirdly, Downer points to clauses 24.1 – 24.16 which deal with the cessation and resumption of work due to inclement weather. Downer says these provisions similarly distinguish between periods of "work", and periods of "suspension of work" which are paid on a limited basis referable to the "time lost due to inclement weather". Again, though this is correct the provisions do not make good or advance the contention that the rest break in clause 10.1 is not to be counted as part of the hours worked in a day for the purposes of clause 10.2. The inclement weather provisions deal with the concept of work and its suspension or cessation primarily from the perspective of whether it is safe to perform work during periods of inclement weather. A secondary perspective is the payment for periods an employee is on-site but not performing work because of the inclement weather and a third the circumstances in which an employer will not require an employee to remain on-site notwithstanding that the usual working hours for the day have not concluded. Under the provisions an employee who has been prevented from working because it has been raining for a period of two hours at the beginning of the shift will not have been working but will be paid two hours at ordinary time rates. Once the rain ceases and appropriate dewatering of the affected site has occurred, the employee will resume working. If the employee works a further six hours, the employee will have completed the eight ordinary hours for which the Agreement provides. In the factual context the subject of this application, the employer would continue working beyond the eight

hours for the scheduled overtime. That employee will, under the terms of the Agreement, be entitled to be paid the appropriate overtime rate for all hours worked beyond the eight hours which would include two hours that the employee did not work at the beginning of the shift because the employee was prevented from doing so because of rain. Pursuant to the practice on the Project site, that will be 7.2 ordinary hours (including the first two hours) rather than the eight for which the Agreement provides. Those two hours are nonetheless regarded under the Agreement as hours worked and would be part of the hours worked for the purposes of calculating the entitlement under clause 10.2.

**[32]** Fourthly, Downer points to clause 39.3 which provides that "paid maternity leave shall count as time worked for calculation of leave and other entitlements". Clause 39.3 does not lend contextual support for the construction Downer advances. The provision is concerned with an employee on "paid maternity leave" and the reference to the period counting as time worked is primarily for the purpose of the calculation of accrued and other service related entitlements, such as accrual of personal leave and long service leave. The reference to the period of leave being counted as time worked is akin to a reference to "continuous service" and the period counting towards the calculation of a period of continuous service. That this is so suggests that the words "worked" and "work" used at various parts of the Agreement are not a term of art. Rather they gain a meaning depending on the context in which the words are used.

**[33]** This is aptly underscored by the definition of "continuous work" found in clause 2 of the Agreement defined as ". . . work carried out on consecutive shifts throughout the twenty four hours of each of at least five consecutive days without interruption except during breakdowns or meal breaks or due to unavoidable causes beyond the control of the Employer". On this definition a rest break or a crib break is part of the "continuous work" even though no actual work is performed during such times.

**[34]** Fifthly, Downer points to clause 6.2(c)(iii) of Appendix B, which deals with crib breaks for continuous shift workers on "Major Metal Engineering on-site Construction projects" and provides for a 20-minute period of "crib time" which "must be counted as time worked". However contextually, this is just another way of expressing that the crib time during which no work is performed is to be paid. So much is clear from clause 6.2(c)(i) which provides that a shift will consist of not more than eight hours, inclusive of crib time.

**[35]** Next, Downer says that a purposive approach favours that construction. It contends the purpose of rest breaks is to provide respite from work. So much is plain from the fact of the maximum periods of "work" that typically may be performed before such breaks are required to be taken. Though this is correct, there is nothing inconsistent with providing a respite from work for which payment is made and counting that period of paid respite as forming a total period of hours worked after which a particular further entitlement accrues.

**[36]** Finally, Downer argues that its construction reflects the conceptual distinction between work and non-work periods discussed in *R v Galvin; Ex parte Metal Trades Employers' Association*.[36] That was a case in which the High Court considered the question of whether variations to award provisions concerning tea breaks would relate to hours of work, or to conditions of work. That in turn involved assessment of whether a tea break involved "work" such that its abolishment would alter the employees' hours of work. The Court said:

[36] (1949) 77 CLR 432

> "Where hours of work are determined by an award, the award specifies certain hours as working periods as distinct from non-working periods. During a non-working period, the employees are not subject to the control of the employer in relation to the work for doing which they are employed. An hour during which no work is to be done cannot be called an hour of work. So also a shorter period during which no work is to be done is not part of "hours of work." Thus a luncheon interval is not a period of work. If an award prescribed that working hours should be from 8 a.m. to 5 p.m. with one hour for lunch, there would be eight hours of work. If the award were altered so as to provide that the working hours should be from 8 a.m. to 5 p.m. with seventy-five minutes for lunch or with forty-five minutes only for lunch, the hours of work would be altered. No distinction can be drawn between such a case and the alteration of an award by providing a new tea-break of fifteen minutes or by abolishing an existing tea-break of fifteen minutes. In either case the hours of work would be altered."[37]

**[37]** Downer contends that the 10-minute morning rest break is a 'shorter period during which no work is to be done,' which the High Court in *Galvin* found not to contribute to the overall 'hours of work'. *Galvin* is distinguishable. First, *Galvin* was concerned with breaks for which no payment was required under the award the subject of the judgment. That is not the case with the rest break in clause 10.1 of the Agreement, which is to be paid. Secondly, for the reasons given earlier on a proper construction of the Agreement the paid rest break is part of the eight ordinary hours of work (or in practice the 7.2 hours since the RDO is taken to be accrued and paid out) in a day. Thus, *Galvin* provides no assistance in construing the provision in issue.

**[38]** I consider that on a proper construction of the Agreement the paid rest break for which provision is made in clause 10.1 is counted in the assessment of the total hours worked in clause 10.2. I consider that "total worked hours for the day" means all hours worked in the day including any rest breaks for which payment is required by the Agreement.

**[39]** I turn next to the issue of whether the 30-minute unpaid meal break is to be counted for the purposes of calculating the total hours worked in a day in clause 10.2. As earlier indicated, although the Applicants were circumspect in their written outlines on this issue, it became clear during oral argument that the Applicants do not contend the meal break period is counted.[38] Given the construction I favour above, that is also my conclusion. The 30-minute unpaid meal break in clause 10.1 is not counted in assessing the total hours worked in a day under clause 10.2.

**[40]** That leaves the 30-minute period after 5:00pm incorporating the bus trip from the Project site to the car parks (or time spent by an employee driving a private vehicle away for the Project site car park). The Applicants' essential proposition is that this time is to be counted because the employees are paid until 5:30pm.[39] There is some uncertainty in the evidence about the precise times at which the employees "clock off" from work, however it is clear that employees leave the Project site for the bus pick-up point or the Project site carpark between about 5:05pm and 5:10pm. That leaves a period of approximately 20 to 25 minutes of this period (from 5:05/5:10pm until 5:30pm) and which I will hereafter refer to as the

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[37] Ibid at 446-447

[38] Transcript PN62, PN102, PN200; PN425

[39] Transcript PN361

"afternoon commute" that the Applicants say is within "total worked hours for the day" for the purposes of clause 10.2 because it is paid. That contention is rejected for several reasons.

**[41]** First, there is no entitlement under the Agreement that employees be paid for the afternoon commute. This is unsurprising since the evidence discloses that the employees ceased performing duties upon the conclusion of the close-out meeting at around 5:05pm. The afternoon commute is not described in the Agreement at all, much less that there is an entitlement under the Agreement to be paid. The Agreement does not treat the afternoon period as if it were time worked, or as some other period of paid break.

**[42]** In truth it appears that the afternoon commute is paid by Downer because of, *inter alia*, an agreement or arrangement it made with the Applicants after the Agreement commenced operation. Although not the subject of any evidence, the agreement or arrangement was the subject of an exchange recorded in the transcript as follows:

> "THE DEPUTY PRESIDENT: Because if the morning bus trip is not regarded as work what is the difference between the morning bus trip and the afternoon bus trip?
>
> MR TERZIC: The agreement between the parties that it will count as work.
>
> THE DEPUTY PRESIDENT: Which I find where?
>
> MR TERZIC: As I said, the employer directs the employees to do certain things.
>
> THE DEPUTY PRESIDENT: Presumably it directs them to be at the car park by a particular time, and the bus - - -
>
> MR TERZIC: Yes.
>
> THE DEPUTY PRESIDENT: Otherwise they won't be able to start work at 7 am.
>
> MR TERZIC: It seems to be on the face of it - it's slightly evident in the statements that it was something that was simply agreed between the parties, one will be paid, one won't, maybe the idea that we split it down the middle.
>
> THE DEPUTY PRESIDENT: Mr Terzic, do you want an adjournment?
>
> MR TERZIC: So it appears, on seeking further instructions, one won't find it expressly written in any contract or arrangement that the trip in in the morning on the bus is on the employees' time and the trip out in the afternoon is on the employer's time.
>
> THE DEPUTY PRESIDENT: Yes.
>
> MR TERZIC: But that's what was agreed, that was applied and that was what was paid.
>
> THE DEPUTY PRESIDENT: Yes, but not pursuant to the agreement.
>
> MR TERZIC: Not pursuant to any instrument, but that was the way in which it was agreed, and the employer then adopted that practice and treated the employee as being on the payroll for the trip back but not for the trip in, and if that was the arrangement

that was made - appears on a handshake - that was maintained, that was paid and those hours worked for the purposes of clause 10.2.

THE DEPUTY PRESIDENT: But from a construction point of view, putting to one side the agreement of the parties, ultimately you're asking me to determine that the trip on the bus home is time worked because there's a separate agreement outside this agreement that employees be paid, but the trip in is not work because there's a separate agreement between the parties that that should not be paid.

MR TERZIC: Yes."[40]

**[43]** There is also no evidence of contractual entitlement that employees be paid for the afternoon commute. The evidence discloses that the employment contracts entered into by the employees covered by the Agreement provide that "[A]ll travel to and from the Project will be in your own time".[41] This is consistent with the absence of an provision in the Agreement which would entitle the employees to be paid for such travel or for part of such travel, namely the afternoon commute. But even if such an entitlement existed, that would not alter the result since here we are concerned with the meaning of the word "total worked hours" in clause 10.2 of the Agreement, not with whether there is an extraneous entitlement to be paid for the afternoon commute. The Agreement provides for no such entitlement. So much is accepted by the Applicants.[42]

**[44]** Secondly, as with the morning commute, several features of the afternoon commute lack the requisite 'control' of the employer. The employee did not sign off at either of the car parks just as they do not sign on there in the morning. Employees sign off at the close-out meeting and they sign on after the morning bus trip. Employees do not participate in any briefing, or perform any tasks, during either commute on the bus or upon their arrival at the car parks. Moreover, commuting on the bus was not compulsory. Although Downer preferred that its employees did so in order to minimise congestion at the Project site to ensure that sufficient parking was available, it did not require them in all cases to do so.[43] Employees who live locally were permitted to drive to and from the Project site, as were employees who had a need to arrive at the Project site late or leave early.[44] In addition, employees who elected not to take the bus left the Project site in their own vehicles following the close-out meetings. Absent some justification in the Agreement there is no basis to distinguish these employees from those electing to take a bus service provided at Downer's expense. Neither class of employee was working during the afternoon commute and there is no basis in the text of the Agreement for treating this time, which though paid because of the earlier mentioned side deal, as part of the total worked hours in clause 10.2.

**[45]** I agree with Downer's contention that the Applicants' argument for including the afternoon commute period as forming part of the "total worked hours for the day", which revolves around the fact that Downer paid the employees to 5:30pm covering the period of the afternoon commute, is insufficient to make good the principle contention that such time is part of the "total worked hours for the day".

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[40] Transcript PN396 – PN411

[41] Exhibit 1, RC-3 at Schedule A, clause 5

[42] Transcript PN396 – PN411

[43] Exhibit 2 [42].

[44] Ibid at [42], [44]-[45]

**[46]** For the avoidance of doubt, I do not consider that Downer's decision to pay employees for the afternoon commute supports a conclusion that it did so based on any common understanding that the Agreement required it to do so. As already noted, and it seems accepted by the Applicants, there is no provision in the Agreement requiring Downer to pay employees for the afternoon commute.

**[47]** Finally, to the extent the Applicants rely on the sign on/sign off sheets to substantiate at least 10 "total worked hours", I do not accept that these make good the point. The time sheets are completed each day by the employees and show that employees recorded a finish time of 5:30pm. It seems to me clear enough that their purpose is to facilitate payment for the afternoon commute pursuant to the earlier mentioned arrangement rather than as a record showing "total worked hours for the day". The time sheets do not establish any more than that Downer was honouring the commitment to pay the employees for afternoon commuting, though no such obligation existed under the Agreement.

**[48]** For these reasons the period of the afternoon commute is not counted as part of the "total worked hours for the day" for the purposes of clause 10.2.

**[49]** It follows, on the evidence and on a proper construction of the Agreement, the total worked hours for the day by relevant employees pursuant to the rostering arrangements described above at the Project site was less than 10 hours. Clause 10.2 was thus not engaged.

**[50]** The applications are dismissed.


DEPUTY PRESIDENT

*Appearances*:

*B Terzic and L Aksu*, for the Applicants
*R Dalton QC and A Pollock* of counsel, for the Respondent

*Hearing details:*

2020
Melbourne
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*Final written submissions:*

*Applicant*, 21 February 2020
*Respondent*, 14 February 2020

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