[2020] FWC 6400 [Note: This decision is varied and the answer to the arbitral question is 'no' - refer to Full Bench decision dated 8 April 2021 [2021] FWCFB 1903]

DECISION

Fair Work Act 2009
s.739—Dispute resolution

United Workers' Union
v
Princes Linen Services Pty Ltd
(C2020/2182)

DEPUTY PRESIDENT HAMILTON MELBOURNE, 27 NOVEMBER 2020

Alleged dispute about any matters arising under the enterprise agreement and the NES; [s186(6)] – Clause 18.6.1 – Entitlement to a meal allowance.

[1] On 7 April 2020, the United Workers Union (UWU) filed an application with the Fair Work Commission concerning a dispute with Princes Linen Services Pty Ltd (PLS) over the application of the *Princes Linen Services PTY LTD Enterprise Bargaining Agreement Altona 2019 - 2020* (the Agreement). The UWU applies on behalf Ms Trang Ly, an employee of the Respondent at a worksite located in Altona, Victoria.

[2] Conferences were held on 22 April 2020, 21 May 2020, and 9 July 2020. On 13 July 2020, my Chambers issued directions to the parties for the submission of materials they sought to rely on in the matter.

[3] I have had regard to all submissions and evidence.[1]

[4] This may be a matter where to some extent the utility of proceeding was outweighed by the benefits of reaching agreement. I think that it is likely that the parties were ill-served by an inability to compromise, but negotiation over a new agreement may assist.

Background and arbitral question

[5] The respondent submitted a proposed agreed statement of facts and arbitral question and the applicant agreed with it:[2]

> "1. On or after the 28 January 2020:
>
> a. Trang Ly was a weekly employee of Princes Linen Services (PLS) to whom the Princes Linen Services Pty Ltd Enterprise Bargaining Agreement Altona 2019 – 2020 (PLS EA) applied;

[1] Appendix 1 contains a summary of submissions.

[2] UWU Submissions, [20].

b. Trang was engaged by PLS as an employee other than a shift worker and rostered to commence work at 7.00am and finish work at 3.30pm;

c. Trang did commence work at 7.00am;

d. at some time between 7.00am and 3.30pm, Trang was approached by a PLS Supervisor who asked her if she wanted to work additional hours beyond her rostered finish time on applicable overtime rates;

e. Trang agreed to work additional hours beyond her rostered finish time on applicable overtime rates;

f. Trang finished work at 5.30pm;

2. Was Trang entitled to be paid a meal allowance pursuant to cl.18.6.1 of the PLS EA?"

[6] No objection was raised by either party with respect to the Commission being able to determine the question in accordance with the dispute settlement procedure, and I so find. Clause 10.2.3 provides:[3]

"If the matter cannot be resolved, a party may refer the dispute to the Fair Work Commission for resolution."

The Agreement

[7] Clause 18.6.1 of the Agreement provides as follows:

"An employee other than a shift worker who is required to work two (2) hours overtime which overtime finishes after 4.30pm, or is required to work after 6.30pm, (whichever is the earlier) without being notified on the previous day or earlier that he will be so required will receive an allowance in accordance with clause 18.7."

[8] Accordingly, clause 18.7 provides for a meal allowance to the amount of $15.36.

[9] The parties differ in their interpretation of the word 'required'. The employer submits that the employer has to direct an employee to do the work, and the meal allowance is some form of payment or penalty for the 'imposition'. The applicant submits that it is enough that the employer needs the work.

[10] As we will see the respondent faces difficulties including that the word 'required' on its ordinary meaning can also mean that the work is needed (see *Telstra Corporation Limited v Peisley*[4] and the Macquarie Dictionary), the meal allowance is in the allowances clause and not the overtime clause where other penalties are, along with first aid allowance, protective clothing allowance, soiled linen allowance, there are provisions for meal breaks and soiled linen breaks which do not appear to be a penalty but are about meals and soiled linen, it is not clear to me that I can ignore the meal aspect of the clause and focus only on the monetary aspect, it is agreed

[3] *Princes Linen Services PTY LTD Enterprise Bargaining Agreement Altona 2019 – 2020*, cl. 10.2.3.

[4] [2006] FCAFC 79.

that meals and meal breaks have a wider aspect than the monetary amount and are relevant to whether employer directions are reasonable and have a safety and fatigue aspect, they are relevant to the duty to maintain a safe workplace, and arguably analogous decisions refer to the purpose or reason of such meal breaks on the basis of the meal aspect, for example the inability to arrange a meal from home given short notice, and do not deal only with the monetary allowance. As we discuss later, the *Telstra* Full Court decision involves overtime at Telstra which in each case was agreed (*'[i]n each situation in which Mr Peisley worked overtime, he did so as a result of a specific agreement to do so';*, paragraph 36), and which was held to be 'required' by Telstra within a clause in a statute not an agreement or award. This appears to provide some support for the applicant's case.

[11] On one level it is somewhat odd that an issue which is agreed to be important for health and safety, meals, is subject to proceedings of this kind, given the level of agreement on safety issues.

Authorities

[12] The approach to interpreting an enterprise agreement was summarised by a Full Bench of the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Ltd*.[5] I do not propose to set out the summary, although I follow it. Another summary was made by the Full Court of the Federal Court in *Workpac Pty Ltd v Skene*[6] as follows:

> "[197] The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of Wanneroo v Holmes* (1989) 30 IR 362 (Holmes) at 378 (French J). The interpretation "… turns on the language of the particular agreement, understood in the light of its industrial context and purpose …": *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241; 138 IR 286 (Amcor) at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (Holmes at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (Holmes at 378–9, citing *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents 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: see *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); Amcor at [96] (Kirby J)."

Consideration

[13] Clause 18.6.1 of the Agreement provides as follows:

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[5] [2017] FWCFB 3005, [114].

[6] [2018] FCAFC 131.

"An employee other than a shift worker who is required to work two (2) hours overtime which overtime finishes after 4.30pm, or is required to work after 6.30pm, (whichever is the earlier) without being notified on the previous day or earlier that he will be so required will receive an allowance in accordance with clause 18.7."

[14] Clause 24.1 provides:

"**24 BREAKS**

24.1 REST PERIODS

24.1.1 There will be a rest interval of fifteen (15) minutes in the forenoon and finish five (five) minutes early of each day Monday to Friday inclusive for each employee. Saturday work there will be a ten (10) minute break. The rest time is to count as time worked. In the case of shift workers similar breaks will apply.

24.1.2 Subject to the provisions of this clause rest periods may be staggered.

24.2 MEAL INTERVAL (OTHER THAN SHIFT WORKERS)

24.2.1 If an employee is required to work for five (5) or more hours in a day, the employee must be given an unpaid meal break of no less than thirty (30) minutes.

Employees who are required to handle soiled articles will be allowed five (5) minutes washing time before lunch and before finishing time daily. Where an employer provides washing facilities in the immediate workplace washing time will be two (2) minutes."

[15] The agreement passed the 'better off overall test'. Relevant award provisions of the *Dry Cleaning and Laundry Industry Award 2020* which apply to the respondent are:

"**17. Breaks**

17.1 Meal breaks

(a) An employee will be entitled to an unpaid meal break of at least 30 minutes per day or shift. The break must be taken not later than 5 hours after starting work.

(b) Where an employer requires an employee to work during their meal break, the period worked will be treated as time worked and paid at 150% of the minimum hourly rate until released for the meal.

(c) An employee who is required to work more than one and a half hours overtime will be entitled to a meal break of at least 20 minutes. This break will be paid at ordinary rates of pay and will be taken at a time agreed to between the employee and employer.

…

20.3 Expense-related allowances

(a) Meal allowance

(i) An employee required to work overtime for more than one hour after the usual finishing time on any day will be reimbursed for the purchase of a meal or paid a meal allowance of $10.50. Clause 20.3(a) does not apply where the employer provides the employee with a meal of equivalent value.

(ii) Clause 20.3(a)(i) will not apply where the employee has been notified on the day prior to when they will be required to work overtime. Where an employee has been notified of the overtime and such overtime work is cancelled after the employee has provided a meal, the employee will be paid the allowance of $10.50."

Award and agreement history

[16] The provisions of many enterprise agreements have their origins in award provisions, whether improving on the award provisions or adopting them, although the respondent submission that one cannot simply equate the two is well made.[7] One historical description of award meal allowances was that:

> "This is usually payable when overtime is called on at short notice."[8]

[17] In relation to meal periods and rest breaks the handbook says:

> "Most awards provide that a meal be taken after five hours of work."[9]

[18] These observations are roughly descriptive of the agreement and award provisions. It is possible that the agreement clauses have no relationship to traditional award provisions, and that they were developed entirely independently of award clauses which developed in a similar way, but that would surely be an odd coincidence. Alternatively, the agreement provisions are related to award provisions which developed in the same or similar form, although it may be that the exact history has not been fully elucidated, as the respondent submitted. Award clauses often are similar to each other and were developed by agreement and arbitration. They have been redrafted in recent years as part of a coordinated process of reform such as the award modernisation process, discussed later. Before that coordinated process of reform there were other coordinated processes of reform such as award simplification and award restructuring.

[19] The respondent referred me to *King v Melbourne Vicentre Swimming Club Inc*[10], in which Wheelahan J said:

> "[126] The significance of history and context as an aid to the construction of awards was referred to by Burchett J in *Short v F W Hercus Pty Ltd* in another frequently cited passage, at 518 –

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[7] PLS submissions in Reply, [1]-[18].

[8] John Carrol, *CCH Australian Industrial Relations Handbook,* 1983 2nd ed, 63.

[9] Ibid, 66.

[10] [2020] FCA 1173, [126]-[129].

> 'Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form, only a kind of wilful judicial blindness could lead the court to deny itself the light of that history, and to prefer to peer unaided at some obscurity in the language. "Sometimes", McHugh J said in *Saraswati v The Queen* [1991] HCA 21; (1991) 172 CLR 1 at 21, the purpose of legislation "can be discerned only by reference to the history of the legislation and the state of the law when it was enacted". Awards must be in the same position.'

[127] The authorities relating to the construction of industrial instruments illustrate that context may shed light on the proper meaning to be given to expressions that take their colour from the industrial context. The history of provisions of an industrial instrument may also demonstrate that particular expressions have been the subject of interpretation by the courts or industrial tribunals, which may then be taken to have an accepted meaning when, in the same or a similar context, they find their way into later instruments: *Short v FW Hercus Pty Ltd* at 517-518. Practices in the relevant industry may provide material context. An illustration is *Transport Workers Union v Linfox Australia Pty Ltd* [2014] FCA 829; 318 ALR 54, where Tracey J held that evidence about the morning commencement time of work in the transport industry, together with an examination of the history of relevant award provisions, informed the construction of the term "day shift" with the consequence that ordinary day workers were not to be regarded as shift workers for the purposes of the award, and were therefore not entitled to "crib time".

[128] Part of the context in construing an industrial instrument may, in an appropriate case, be a recognition that the instrument may have been drafted by lay persons with a practical bent of mind, with the consequence that the construction of ambiguous terms should favour a sensible and practical industrial result, shorn of narrow legalism and pedantry: see, *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* [2019] FCAFC 59; 269 FCR 262 at [5] (Allsop CJ); *Kucks v CSR* Ltd at 184 (Madgwick J). There are, however, limits on the extent to which the resolution of questions of construction may be driven by reference to history and context, and a liberal approach to construction, because ultimately what is to be determined is the proper construction of the instrument based on the objective meaning of the text. The Fair Work Act contains provisions that require the Commission to publish its written decisions, reasons, approved enterprise agreements, and variations to modern awards, with the consequence that they are widely available to members of the public: s 168, s 601. There is much to be said for the notion that instruments such as awards should be reasonably capable of being understood and implemented by the participants in the industries to which they apply by reference to the language employed in the instrument itself, without having to investigate and ascertain the pedigree of the instrument in order to identify some latent meaning to be discerned by an analysis of the mental states or purposes of others: see, *The Nine Brisbane Sites Appeal* at [8] (Allsop CJ). In *City of Wanneroo v Holmes* at 380, French J stated –

> 'Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.'

> [129] In addition, industrial instruments such as awards are liable to be binding on persons who took no part in their making. To adapt the words of Lord Simon of Glaisdale in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 237, in a society living under the rule of law, employers and employees are entitled to regulate their conduct according to what an award says, rather than by what it was meant to say, or by what it would have otherwise said if a newly considered situation had been envisaged."

[20] Having regard to those observations, and apparent lack of a clear agreed agreement history, I need to interpret the agreement clause. I note with respect that it would have been open to the respondent to provide a more accurate history of the provisions, which might have assisted the matter. It is true as the employer submits in reply that the agreement provides that it be read in conjunction with the *Laundry Industry (Victoria) Award 1998*:

> "Clause 5 of the PLS EA, however, describes the Laundry Industry (Victoria) Award 1998 (1998 Award) as the "Parent Award" to the PLS EA. That clause provides that the 1998 Award (not the modern award) is to be read and interpreted wholly in conjunction with the PLS EA. Notably, the 1998 Award did not contain a meal allowance clause."

[21] This does not however mean that the parties had no regard to the modern award, the *Dry Cleaning and Laundry Industry Award 2020*, in drafting the enterprise agreement. It might in fact be surprising if they did not have regard to it.

Ordinary meaning of the word 'required'

[22] Firstly, looking at the ordinary meaning of the word 'required' in the agreement clause 18.6.1, in *Telstra Corporation Limited v Peisley*[11] Wilcox, Conti and Stone JJ said:

> "33 The word 'require' is of wide import including 'to have need of' as well as 'to call on authoritatively, order or enjoin', and 'to ask for authoritatively or imperatively': see The Macquarie Dictionary (3rd ed.), which additionally extends the meaning 'to [inter alia] impose, need or occasion' as well as 'to place under an obligation or necessity' and 'to wish to have'. That scope of meanings indicates the importance of the context in which the word is used. In a modern context, the subs 8(2) notion of 'required to work' must necessarily take into account the nature and extent of the mutuality of an employment arrangement and its particular incidences, including the likely relationship between Telstra employees undertaking duties and functions such as those performed by Mr Peisley and their supervisors."

[23] The word can have the meaning of both compulsory and needed or desired.[12] The ordinary meaning does not necessarily only mean a formal employer direction. The agreement could have used the common law contract term of employer direction but did not. The word 'required' can have the additional meaning of work which is desired or needed.

Issues of context

[24] Secondly, looking at issues of context, both the applicant and respondent submitted that I should look at the clause in context consistent with *Berri* and referred to other clauses which

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[11] [2006] FCAFC 79.

[12] *The Universal English Dictionary*, 1002; *Roget's Thesaurus* (Penguin 1998), 1196.

used the word 'required'. I have looked at the various clauses in the agreement and referred to in submissions by the respondent, as well as the applicant.

[25] Prima facie a meal allowance may be there for a reason related to the monetary amount and the meal. However, the respondent submits that the meal allowance is paid as some sort of penalty allowance for the unilateral imposition of the overtime and appears to place less emphasis on the meal.[13] The respondent interpretation is possible but raises the issue of why there is not simply a penalty for imposition of overtime, rather than a penalty in the form of a meal. Why is the penalty not included in the overtime clause, which contains penalties for overtime:

> "**22. OVERTIME**
>
> 22.1 All work done:
>
> a) in excess of 38 hours,
>
> b) outside the spread of hours fixed in 14.1 day workers,
>
> c) in excess of 8.5 hours or the agreed number of hours under clause 14.2,
>
> d) outside the hours fixed in clause 19 for shift workers, will be paid for at the rate of time and a half for the first two (2) hours and double time thereafter.
>
> 22.2 An employer may require any employee to work reasonable overtime at overtime rates. An employee will work overtime in accordance with such requirements. An employer must not request or require an employee to work overtime unless the additional hours are reasonable:
>
> 22.3 The employee may refuse to work additional hours if they are unreasonable. In determining whether additional hours are reasonable or unreasonable the following must be taken into account:
>
> (a) any risk to employee health and safety from working the additional hours;
>
> (b) the employee's personal circumstances, including family responsibilities;
>
> (c) the needs of the workplace or enterprise in which the employee is employed;
>
> (e) any notice given by the employer of any request or requirement to work the additional hours;
>
> (f) any notice given by the employee of his or her intention to refuse to work the additional hours;
>
> (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

[13] PLS Submissions, 5-6 [19(a)].

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) any other relevant matter.

22.4 Unless the period of overtime is less than one and a half hours (1.5), an employee will he allowed a meal break of twenty (20) minutes, paid for at ordinary rates, before starting overtime after ordinary working hours."

[26] Instead the meal allowance clause is in the allowances clause, along with first aid allowance, soiled linen allowance, and protective clothing allowance, which suggests that the reason for the allowance is important, namely meals, soiled linen, protective clothing, and first aid. Is the meal simply irrelevant, and this one out of four allowances is simply a means to impose a penalty for an 'imposition' of additional hours? There are also authorities which suggest that the meal aspect may also be relevant, such as *Re Storemen and Packers (Wool Stores) Award*[14] and *Construction, Forestry, Mining and Energy Union v Southern Star Windows Pty Ltd,*[15] which I discuss later.

Hours of work clauses

[27] The respondent submitted that hours of work clauses in the agreement are relevant. I accept that the agreement objectives set out in clause 1 of the agreement are relevant. The objectives of efficiency and consultation do not require an interpretation of employer direction only. Employee wellbeing, for example, is part of an efficient workplace. Further, as the respondent submits, the meal allowance is the only allowance payable for 'the hours of work required to be performed' (clause 19).[16] The respondent is correct in much of its analysis of the work period and overtime provisions of the agreement, (clauses 14-21 of the agreement), but this does not necessarily mean that clause 18.6 only applies where there is a formal employer direction to work.

[28] As the respondent submits,[17] the overtime provision has a different wording:

"22.2 An employer may require any employee to work reasonable overtime at overtime rates. An employee will work overtime in accordance with such requirements. An employer must not request or require an employee to work overtime unless the additional hours are reasonable" [emphasis added]

[29] A distinction is made in this clause between a request or requirement, and the clause does not deal with meals or allowances. This does not necessarily mean that in any case where a clause does not distinguish between 'request or require', the word 'require' means a formal employer direction only. These agreements are as was pointed out in *Kucks*[18], drafted by people of a practical bent of mind rather than professional draftsmen and women, and the word 'required' has a potentially broader meaning than a formal employer direction.[19]

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[14] (1961) 97 CAR 155

[15] *Construction, Forestry, Mining and Energy Union v Southern Star Windows Pty Ltd* [2017] FWC 2274.

[16] PLS Submissions, 6 [19(b)].

[17] Ibid, 7 [27].

[18] (1996) 66 IR 182 at 184

[19] PLS Submissions, 2 [8].

Meal clauses

[30] If the meal allowance is related to the issue of a meal as well as the monetary amount, there may also be relevance in examining other clauses which link meals to employer 'required' work. Meals are arguably a discrete issue, to some extent. In clause 24.2 above if 'an employee is required to work for five (5) or more hours in a day, the employee must be given an unpaid meal break of no less than thirty (30) minutes'.

[31] If the respondent interpretation of the word 'required' were used, this would mean that there would be no unpaid meal break within clause 24.2.1 unless a formal direction was given. If the employee had in some way volunteered to work for example additional rostered hours because there was a business need or requirement for the work, or there was simply a lack of a formal employer direction, then the meal break would not be an entitlement. Similarly, if the employee had in some way volunteered to work to handle soiled articles additional to ordinary hour work of that kind rostered to him or her, the employee would not be entitled to five (5) minutes washing time before lunch and before finishing time daily.

[32] Why would an employee not need a meal break after five hours? Why would an employee not need a meal if they have not planned the work and brought in meals? There seems to be no simple answer to these questions. If a meal break and meal after five hours is a desirable thing to deal with fatigue and hunger, why would we distinguish between employees with notice and employees without? Both are equally affected by the need to rest and have a meal. Neither meal breaks nor meal allowances are a windfall profit for an employee, but a relatively prudent measure compatible with arbitral decisions on awards to help an employee with hunger and rest arising from longer hours. I have every sympathy for employer costs. These are always difficult issues for employers. However these clauses have to be interpreted, and a compromise was not made.

[33] What about the need to clean after soiling? Does it matter whether or not notice has been given? Presumably the soiling is also the same, and there is the same need for cleaning. The respondent's preferred interpretation would undermine the possible or arguable purpose of such clauses. I note the employer submission that these clauses are:

> "38 This clause is drafted in similar terms to cl.18 of the PLS EA. That is, the entitlement to an unpaid meal break is referable to the hours worked by an employee, and the additional washing time is referable to the nature of the work performed by an employee. In both instances, the hours and the nature of work are unilaterally imposed by the employer and are requirements known to the employee in advance. In recognition of the disadvantage of the employer's imposition, the employee is afforded the benefit of a break. As is the case with cl.18, there is no ability for the employee to vary the operation of cl.24.2 with the employer."

[34] Again this seems unlikely. If meal breaks are a penalty for the employer imposition, why do they not take the form of a penalty payment rather than a meal break, or a soiled break? Meal breaks and soiled breaks on the ordinary and natural meaning of the language raise issues of the need for a meal break, and for a soiled break, having regard to hunger and fatigue and the nature of the work such as soiling. These things are recognised to some extent in arbitral decisions making the award provisions already quoted for example.

[35] The meal breaks and washing up time may be linked to a disability in the work, namely the length of it, measures to compensate for the fatigue and hunger given the length of it, and the nature of it in the case of soiled articles. In the breaks clause the word 'required' clearly has the sense that the employee is doing work needed or desired by the business, not entirely conditional on a formal direction that the work be done.

[36] As I said earlier, these agreement clauses have a similarity to award provisions and may have their origins in award provisions, although it is important that we do not, as the employer submitted, simply adopt reasoning used with respect to different clauses in a broad brush way.[20] Many agreement provisions have their origins in award provisions, which is obvious from for example the nature of the provisions and the wording. Modern enterprise bargaining is a derivative to some extent of earlier award bargaining, and there were until recently many award enterprise agreements with their origins in awards made by the Commission subject to a public interest test, and there still may be some. The clear delineation between agreements and awards developed gradually. If decisions about meal award provisions or other agreement clauses provide any guidance, such clauses provide an employee with needed subsistence during a period in which the employee does not have access to ordinary subsistence at home.

[37] There is award and agreement authority for the proposition that a meal allowance is provided where an employee is not able to provide himself or herself with meals because he or she has no notice. In *Re Storemen and Packers (Wool Stores) Award*[21] the Commission had regard to interference with the normal practice of meals and the consequent need of the employee to purchase meals and said:

> "At the present time an employee called upon to work overtime for more than thirty minutes after the usual finishing time is entitled to a meal allowance of 7s. This provision has been contained in awards covering the industry for a considerable period of time and, on occasions, employees rostered to cease ordinary duty at or before 5 p.m. qualify for a 7s. meal allowance. During proceedings which led to the 1960 Award, the Association argued that meal money be not payable before 5.30 p.m. on an ordinary working day, but as no claim for such a limitation was before the Commission at the time, the meal provision contained in the 1956 Award was continued without alteration.
>
> I am reluctant to alter a condition of employment which has persisted in an industry for a considerable period of time but payment of meal money is not justified, in my opinion, unless overtime duty interferes with normal practice outside ordinary working hours. There is no interference with normal practice in relation to the evening meal where an employee ceases duty before 5.30 p.m., consequently, part I of the award is hereinafter varied to provide that an employee shall be entitled to meal money when required to continue working beyond an hour after the usual finishing time or beyond 5.30 p.m., whichever time is the earlier. The Union claimed payment of a meal allowance after each four hours of overtime worked on a Saturday or a Sunday. The employers' representatives conceded payment of the allowance where an employee commences overtime before noon and is required to continue that overtime after noon on a Saturday, Sunday, or holiday, provided an employee has not been advised by the employer not later than the previous day of an intention to work past noon on any of the said days. During the season employees are frequently required to work a full Saturday on

[20] PLS submissions in Reply, [1]-[18].

[21] (1961) 97 CAR 155

overtime duty. Occasionally, work is also performed on Sundays and public holidays to meet the urgent needs of the industry. No meal provision is contained in the award for the days in question. It is reasonable to prescribe a meal allowance for employees required to continue overtime after noon on a Saturday, Sunday or holiday where employees have not been notified the day before that overtime will continue beyond noon. If overtime continues on any of the said days beyond 5 p.m. it is reasonable, also, in my opinion, that an additional evening meal allowance be payable to employees concerned." [emphasis added]

[38] This is similar to the comments made by the Commission in *Construction, Forestry, Mining and Energy Union v Southern Star Windows Pty Ltd*[22] quoted by the applicant at paragraph 16 of their submissions in response, where the Commission said:

> "The effect of the exception is that a meal allowance for rest breaks during overtime work is not relevantly payable "if the employee is a day worker and was notified no later than the previous day that they would be required to work such overtime". The evident purpose of the exception is that, with notice, an employee is able to make appropriate arrangements concerning the provision of a meal for consumption during the rest breaks, for example, by bringing a meal from home. Without notice, a meal may need to be purchased by the employee, hence the allowance."
>
> …
>
> The third requirement is more problematic for the Respondent. It seems to me that the words "would be required to work such overtime" connote that when an employee is notified, that notification must be accompanied with a clear statement that the employee will be required to work overtime the following day. Having regard to the evident purpose of the exception, I also consider that the Respondent will need to notify an affected driver of the likely duration of the overtime, at least for the purpose of avoiding a meal allowance on each occasion a rest break would fall due. This is because the evident purpose of the exception would be defeated if an employee were left to guess how many meals he or she needed to provide for an unidentified period of overtime. Thus, where overtime work is required but the period is not specified (at least by reference to the rest breaks for which provision is made in clause 27.7), the Respondent will be liable to pay the requisite meal allowance if a rest break falls due during the overtime.
>
> …
>
> In my view, this is not sufficient to avoid the obligation to pay a meal allowance in clause 27.6 because it is merely notification that an employee "may be required to work overtime the following day". The exception in clause 27.6(a)(i) is engaged only when the employee is notified that he or she "would be required to work" overtime. Thus, notification of the overtime must be certain and not merely circumspect, as appears to be the case with the roster." [emphasis added]

[39] I note the respondent submissions in reply that:

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[22] *Construction, Forestry, Mining and Energy Union v Southern Star Windows Pty Ltd* [2017] FWC 2274.

"10. Given the focus of that dispute, the Deputy President's reasons should not be read as espousing some general purpose behind all meal allowances. Rather, the observation quoted in the UWU's Reply Submissions is directed towards the importance of being "notified", for the purpose of that particular clause - being a central issue in that dispute.

11. In any event, the reasoning of Gostencnik DP does not assist the UWU. In that case, the Deputy President considered that, for the purpose of that meal allowance clause, an employee is "notified" if the employer has told the employee, written to the employee, sent a text or email to the employee, or set out in a roster which the employee is required to consult, that the employee will be required to work overtime the following day. This reasoning is consistent with an employer unilaterally communicating the requirement for overtime work to the employee."[23]

[40] It is true that the CFMEU case concerned sufficient notification the previous day in order to avoid paying the meal allowance, and not the nature of a requirement on the same day, which is the present matter. However the decision does deal with what is said to be the purpose of the meal allowance in a clause which provides that it is not payable if notice was given the day before, enabling an employee to organise a meal from home. That decision concerned a clause which provided:

"27.6 Meal Allowance

27.6(a) An employee is entitled to a meal allowance of $12.73 on each occasion that the employee is entitled to a rest break in accordance with sub clause 27.7, except in the following circumstances:

(i) if the employee is a day worker and was notified no later than the previous day that they would be required to work such overtime;

(ii) if the employee is a shift worker and was notified no later than the previous day or previous rostered shift that they would be required to work such overtime;

(iii) if the employee lives in the same locality as the enterprise and could reasonable return home for meals.

27.6(b) If an employee has provided a meal or meals on the basis that he or she has been given notice to work overtime and the employee is not required to work overtime or is required to work less than the amount advised, he or she shall be paid the prescribed meal allowance for the meal or meals which he or she has provided but which are surplus.

27.7 Rest Break

27.7(a) An employee working overtime must be allowed a rest break of 20 minutes without deduction of pay after each four hours of overtime worked if the employee is to continue work after the rest break.

[23] PLS Further Submissions in Reply, 3 [10]-[11].

27.7(b) Where a day worker is required to work overtime on a Saturday, Sunday or Public Holiday or on a rostered day off, the first rest break will be paid at the employee's ordinary rate of pay.

27.7(c) Where overtime is to be worked immediately after the completion of ordinary work on a day or shift and the period of overtime is to be more than one and a half hours, an employee, before starting the overtime is entitled to a rest break of 20 minutes to be paid at ordinary rates.

27.7(d) The employer and employee may agree to any variation of this sub clause to meet the circumstances of the work in hand provided that the employer is not required to make any payment in excess of or less than what would otherwise be required under this sub clause."

[41] The two clauses are different. In clause 27.6 the meal allowance is payable not if work is 'required', but if an employee 'is entitled to a rest break in accordance with sub clause 27.7'. However, it is a requirement that the employee was not notified 'no later than the previous day that they would be required to work such overtime'.

[42] The two decisions quoted above discuss the meal allowance in the context of the need of employees for a meal. They do not treat the meal allowance as simply yet another monetary payment. They refer to the issue of an employee not being able to have their ordinary meal times at home or to make arrangements for a meal because of lack of notice. None of the clauses are identical, and the reasoning cannot simply be automatically applied. Nevertheless these decisions provide some support for the interpretation adopted by the applicant, because they propose a reason for the clause beyond for example a simple penalty for lack of notice, a reason related to the need for employees to obtain meals. The interpretation adopted by the respondent is not supported by this reasoning, to the extent that it is relevant.

[43] The respondent also seeks to distinguish other decisions in which the word 'required' is not confined to an express employer direction including *Tempo Services Ltd v Robinson,*[24] and *Telstra Corporation Limited v Peisley.*[25]

Meals linked to issues of fatigue, safety, and reasonable employer directions

[44] It is at least partly agreed that there is some form of link between meal allowances and safety and fatigue issues. The respondent submitted that:

"13. As to paragraph 18, there is no dissonance within the example posited. The reason for the disparate treatment of employees is based upon whether they agree or are required to work overtime is obvious. The PLS EA expressly provides for circumstances where an employee is permitted to refuse to work additional hours (cl 22.3). <u>It must be accepted that one of those circumstances includes whether or not they would be getting a meal allowance</u> (or otherwise had access to a meal)." [emphasis added]

[45] This is a reference to the reasonable overtime provision in the agreement, clause 22.3, which provides:

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[24] [2005] SASC 161.

[25] [2006] FCAFC 79.

"22.3 The employee may refuse to work additional hours if they are unreasonable. In determining whether additional hours are reasonable or unreasonable the following must be taken into account: (a) any risk to employee health and safety from working the additional hours; (b) the employee's personal circumstances, including family responsibilities; (c) the needs of the workplace or enterprise in which the employee is employed; (e) any notice given by the employer of any request or requirement to work the additional hours; (f) any notice given by the employee of his or her intention to refuse to work the additional hours; (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works; (h) the nature of the employee's role, and the employee's level of responsibility; U) any other relevant matter." [emphasis added]

[46] Meal breaks and meals are almost certainly relevant to the general duty to provide a safe workplace under occupational health and safety legislation, and in determining for example whether additional hours are reasonable under s.62(2) and (3) of the Act. Section 62(3)(a) specifically refers to safety risks to employees which can include consideration of breaks and meals, both being measures to alleviate fatigue:

"…any risk to employee health and safety from working the additional hours."[26]

[47] It is important that employees are to safely perform work, having regard to the fatigue and hunger caused by longer hours.[27]

[48] In *CFMMEU v. Hay Point*[28] the Full Court of the Federal Court considered a clause of the agreement and s.62 of the Act and said its purpose included protecting employees from being compelled to perform unreasonable overtime:

"It ought also be presumed that cl.34.1 was intended to be effective and produce a sensible industrial outcome. In that respect, and consistently with the purpose of s.62(1) of the FW Act, the purpose of the clause must be recognised to include the purpose of protecting employees from being compelled to perform unreasonable overtime."

[49] There are limits to what the employer can direct an employee to do. Under the common law an employer may only make lawful and reasonable directions[29]. It cannot be the case that an employer direction which is unreasonable has the effect that the meal allowance, meal breaks, and washing up time benefits disappear. That would be an unlikely result, and a result of the employer approach. It may also be that employer 'requests' can conceivably be difficult in practice on occasion to differentiate from directions, although this is not alleged in this case. However, I note that in their final submissions the respondent submitted:

"23. The construction put forward by PLS simply applies the agreed facts in a common-sense manner to the ordinary meaning of the words of cl.18.6.1.5 Ms Ly was asked on a particular shift if she wanted to work overtime and she agreed to do so. In these circumstances, such agreement does not result in her being "required" to work overtime.

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[26] *Fair Work Act 2009* (Cth), s.62(3)(a).

[27] Eg see *Toll Transport Pty Ltd T/A Toll Shipping v Transport Workers' Union of Australia [2018] FWC 3573*, [123]; Four yearly review of modern awards [2017] FWCFB 1913.

[28] (2018) 282 IR 228.

[29] *R v Darling Island Stevedoring & Lighterage Co Ltd* [1938] HCA 44; (1938) 60 CLR 601.

24. If Ms Ly said that she did not want to work overtime but PLS said she was directed to stay back nonetheless, this would enliven the allowance clause as she was required to work overtime without the prescribed notice. There is no deprivation of practical effect of the clause in this scenario."

[50] This suggests that there could be cascading requests, first a request which could be refused, and then a direction given which has to be complied with. Then the request could be refused as not reasonable, which could be tested. This is an elaborate set of steps which might cause problems in implementation, and seems unlikely.

Award modernisation

[51] In the *June 2018 Award Modernisation Decision*[30] the Full Bench recognised the need not to interrupt employee meal breaks, because of the policy need for such breaks, these being presumably the health and safety and other factors I have mentioned above. It said that:

> "[181] In this instance, we agree with the AWU that the effect of the use of the term 'minimum hourly rate' in the present circumstances would mean that an employee entitled to higher weekend or public holiday penalties would be entitled to a *lesser* amount under the circumstances contemplated by clause 9.1 of the Exposure Draft. The intention of the clause is to create a disincentive for employers to delay or interrupt employees' meal breaks. In order to achieve this, the rates under clause 9.1 must be in excess of that which employees are otherwise entitled." [emphasis added]

[52] These observations were adopted and applied by a Full Bench in *4 yearly review of modern awards – Gas Industry Award 2010.*[31]

Other decisions in relation to the word 'required' in the context of employment

[53] I was referred to a number of decisions which concerned different but arguably analogous circumstances. In *Telstra Corporation Limited v Peisley*[32] the Full Court decided that the word 'required' in that case encompassed overtime at Telstra which in each case was agreed rather than directed or forced in some way. The Court considered an appeal from the AAT which granted an entitlement in favour of the respondent Christopher Peisley ('Mr Peisley') under ss 8(2) and 19 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('the SRC Act') to compensation for average weekly overtime. In particular the Court considered the provisions of s.8(2). The Court said that section 8(2) provides that:

> "[w]here an employee is required to work overtime on a regular basis, the normal weekly earnings of the employee before an injury shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period under the formula:
>
> NH x OR
>
> Where:

[30] [2018] FWCFB 5602.

[31] [2019] FWCFB 4559.

[32] [2006] FCAFC 79.

NH is the average number of hours of overtime worked in each week by the employee in his or her employment during the relevant period; and

OR is the employee's average hourly overtime rate of pay during that period." [emphasis added]

[54] Wilcox and Conti JJ (Stone J agreeing) said:

"32. We are of the view that Telstra has failed to demonstrate error in the reasoning of the Tribunal and that the appeal must therefore be dismissed. Telstra's approach to the construction of subs 8(2) fails to take adequately into account the nature and scope of work required to be undertaken by an employee such as Mr Peisley, including the incidences encompassing or involving varying geographical locations of engagement and varying distances from Telstra's place or places of administration to or with which Mr Peisley was required from time to time to report and liaise, and the difficulties which may be encountered in communications between Mr Peisley and his superior or supervisor located at some central point of administration. Put another way, Telstra's approach to construction of the statutory notion of '*required'* does not adequately take into account the incidents of performance of the wide ranging duties of Telstra's employees in Australia, and the manner in which Telstra employees, such as Mr Peisley, would communicate with their supervisors in relation to the hours they are to work. In an Australian workplace, relationships between supervisors and trusted employees are likely to be informal; the language is one of request and agreement rather than command.

33. The word 'require' is of wide import including 'to have need of' as well as 'to call on authoritatively, order or enjoin', and 'to ask for authoritatively or imperatively': see The Macquarie Dictionary (3rd ed.), which additionally extends the meaning 'to [inter alia] impose, need or occasion' as well as 'to place under an obligation or necessity' and 'to wish to have'. That scope of meanings indicates the importance of the context in which the word is used. In a modern context, the subs 8(2) notion of 'required to work' must necessarily take into account the nature and extent of the mutuality of an employment arrangement and its particular incidences, including the likely relationship between Telstra employees undertaking duties and functions such as those performed by Mr Peisley and their supervisors.

34. Consequently we think the word *'required'*, in this context, includes situations where the employee is placed under obligation by the employer, even by a separate agreement that may not be legally enforceable but which constitutes an authority to work the additional hours. Particularly should that be so in the context of services to paying customers of the employer, which are to be provided by skilled, unsupervised employees working sometimes at a distance from the employer's places of administration. And of course to the extent that such giving of authority would tend to occur in the normal course, the statutory notion of '*on a regular basis'* would also be satisfied.

35. In reaching those conclusions, it is appropriate to bear in mind that subs 8(2) of the SRC Act is in the nature of social legislation, related as it is to employee entitlements. Accordingly, in line with *Bortolazzo*, and as the AAT emphasised, it ought to be construed liberally in favour of Telstra employees.

36. Viewing subs 8(2) in this way, we think that the AAT was further correct in its determination, and for its reasons which it gave, that when Mr Peisley was working on recall in the varying circumstances described in the evidence, he was indeed working overtime and was required by Telstra to do so on a regular basis within the normal usage of overtime for the purposes of subs 8(2) of the Act. As the AAT emphasised, *'[i]n each situation in which Mr Peisley worked overtime, he did so as a result of a specific agreement to do so';* being an agreement forming an incident to his contract of employment by Telstra, and moreover, that '*[i]t was the existence of this agreement, whether or not it amounted to a binding contractual obligation, which brought about Mr Peisley's working of overtime and thus brings it within the normal usage of "required"'.* Indeed as the AAT also found in any event, '*[i]n the case of weekend work, this was done as a result of an earlier agreement, usually made the previous Wednesday*'."

[55] The respondent submits that:

"27. Nevertheless, the majority in Telstra held at [34] that the word "required", in the context of that statute, includes situations "where the employee is placed under obligation by the employer". This is at odds with the UWU's submission. More fundamentally, this situation does not arise from the agreed facts." [emphasis added]

[56] The respondent has inadvertently omitted the full quotation from *Telstra:*

"Consequently we think the word *'required'*, in this context, includes situations where the employee is placed under obligation by the employer, even by a separate agreement that may not be legally enforceable but which constitutes an authority to work the additional hours." [emphasis added]

[57] The omission of the rest of the quotation inadvertently changes the quotation from one that appears to support the respondent to one that appears to support the applicant, because it makes it clear that there was a separate agreement of the applicant in each case. I also note paragraph 36 above, which refers to the overtime worked by Mr. Peisley as subject to agreement in each situation it was worked:

"As the AAT emphasised, '[i]n each situation in which Mr Peisley worked overtime, he did so as a result of a specific agreement to do so'; being an agreement forming an incident to his contract of employment by Telstra, and moreover, that '[i]t was the existence of this agreement, whether or not it amounted to a binding contractual obligation, which brought about Mr Peisley's working of overtime and thus brings it within the normal usage of "required"'. Indeed as the AAT also found in any event, '[i]n the case of weekend work, this was done as a result of an earlier agreement, usually made the previous Wednesday'." [emphasis added]

[58] If the word 'required' in that case encompassed overtime at Telstra which in each case was agreed rather than directed or forced in some way, then this provides little support for the respondent, and arguably considerable support for the applicant's case, although again it involves statutory entitlements not agreement entitlements. The circumstances of work at Telstra and here at Princes Linen are by no means identical, and Telstra involved legislation not

an agreement clause, as the respondent submitted.[33] However, in Telstra 'the language is one of request and agreement rather than command', and this was sufficient in the context of that work. The language in the present matter is one of 'at some time between 7.00am and 3.30pm, Trang was approached by a PLS Supervisor who asked her if she wanted to work additional hours beyond her rostered finish time on applicable overtime rates; Trang agreed to work additional hours beyond her rostered finish time on applicable overtime rates', which is not necessarily dissimilar. If an employee agreed to work additional hours with the respondent, because 'a PLS Supervisor who asked her if she wanted to work additional hours beyond her rostered finish time on applicable overtime rates', this may also not be legally enforceable even if the employer now expects the employee to work those additional hours.

[59] I was also referred to the decision of White J in *Tempo Services Ltd v Robinson*[34] in which he said:

> "39 I do agree that the expression "*required to work*" in Clause E4(c) does seem to contemplate some element of compulsion. However, in my opinion, an element of compulsion is present whenever an employee works permanently the afternoon or night shift. That element of compulsion may arise from an express term of the contract of employment that the employee work permanently on afternoon or night shift or from a direction of the employer. An employer who calls on the employee to work the permanent night shift to which the employee expressly agreed as part of the contract of employment requires, in the sense contemplated by Clause E4(c), the employee to work night shift in the same way as does an employer who issues a direction to the employee that he or she is to work the night shift. The two circumstances to which I have referred will, for practical purposes, encompass all of the circumstances in which an employee works permanently on the afternoon or night shift. That being so, the expression "*required to work*" can quite naturally be understood as meaning the same as "*an employee who works*"."

[60] Again, the circumstances are not identical in that case and in this case, as the respondent submits.[35] There was a degree of compulsion in this matter that arose from a permanent pattern of work, and the lack of a formal direction beyond that did not matter in the particular context. I note that the pattern of work was part of a contract of employment, which is an agreed document, and has elements of the voluntary, and is different from for example a direction that additional hours to those agreed in the contract be worked.

Some conclusions

[61] In the present case clause 18.6 meal allowance can be interpreted as a monetary payment only, as a penalty, or a monetary payment having regard to the issue of meals. The second appears to be more consistent with authority. A meal allowance is not simply another monetary payment. It also deals with meals. I respectfully refuse to ignore this aspect of the clause. Hours of work can have consequences for employees in terms of need for meals and rest. This is recognised in the Act and the agreement and is partly agreed by the respondent in relation to clause 22.3 for example. I accept that there can conceivably be penalties for the inconvenience or imposition or similar of a direction, but why this takes the form of a reference

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[33] PLS submissions in Reply, [27].

[34] [2005] SASC 161.

[35] PLS Further Submissions in Reply, 5-6 [21]-[28].

to a meal is not clear. There are a number of authorities which support the applicant's interpretation if circumstances are analogous or arguably so. The need of a worker to purchase a meal because of short notice means that one is not brought from home and fatigue management concerns and similar are of some importance and apply equally to both directed and desired work. This suggests that no distinction should be made, if the subject matter of the clause is had regard to.

[62] However, it is important that a balanced approach be taken and all relevant matters given weight. As the respondent correctly submits, issues of efficiency are of importance in this agreement.

Conclusion

[63] This is a decision in relation to one clause in one agreement only. It has no application to other clauses. Words such as 'required' are somewhat malleable and depend on the particular clause in question, depending on the context and nature of the clause as discussed in *Berri* and elsewhere. I have had regard to all the submissions put. It is a reflection of the complexity of our labour relations system that such a simple question has involved so much debate. The agreed question to be determined is as follows:

> "Was Ms Trang Ly entitled to be paid a meal allowance pursuant to clause 18.6.1 of the PLS Enterprise Agreement."

[64] The answer to that question is 'yes'.

DEPUTY PRESIDENT

Appendix 1: Submissions

UWU Submissions

1. The UWU submit as follows:

- The purpose of clause 18.6.1 is to compensate employees who had not received notification prior to the day that they would be working overtime. It is not accepted that employees always had an expectation that they would be working overtime on any given day, but regardless of expectation being present or not, clause 18.6.1 does not permit the meal allowance to not be paid if an employee has an expectation – this is irrelevant. What is relevant is when they were given the notification that the overtime was needed. Nor does clause 18.6.1 make any reference to Clause 22 of the Agreement – Overtime which is specific to when reasonable overtime may be required by the employer. The meal allowance clause is not limited to those occasions. If it had

been the intention of clause to operate only on occasions when an employee was required to work overtime, so much so would have been specified in the clause.[36]

- Understanding the purpose of the meal allowance clause can be gleaned by the history of how the clause is modelled in the *Dry Cleaning and Laundry Industry Award* (the Award). The purpose of the meal allowance is to compensate an employee for having to provide or purchase an additional meal.[37] The Agreement contains similar exceptions for when the allowance is not payable, in particular the exception that it is not payable where an employee is notified the day prior.

- The Respondent's submissions that the meal allowance is payable as some sort of allowance for being forced to work overtime. This would result in an employee who agrees to work overtime and having to provide an additional meal would not be compensated for that additional meal. Only where an employee is forced to work overtime would they stand be compensated. The UWU rejects this submission. The purpose of the meal allowance clause, as suggested by the name of the allowance, is to compensate for the provision of an additional meal. The purpose of the meal allowance clause has remained consistent throughout the various iterations in the relevant Awards and in the Agreement; that purpose being to compensate employees who worked a length of overtime such that it was likely that they needed to provide an additional meal and having not been provided with notice prior to the day the overtime was worked, had not been able to provide such a meal before receiving notification.[38]

- The UWU question whether an employee could be compelled to work overtime with such short notice as by the Respondent's definition of the meal allowance, no-one would ever receive it. From this perspective, the meal allowance clause is completely superfluous and could never be claimed as an employee is only ever requested to work overtime, there is never a unilateral imposition.[39]

- The word require appears fifty-six times in the Agreement and the clause can be taken mean 'an employee who works' as it is the work that is required or needed not the employee that it compelled. The approach adopted in *Telstra Corporation Limited v Peisley*[40] by Honourable Justice Stone when considering whether overtime was required if an employee agreed to perform it or volunteered to do so is the correct approach to take with respect to this current matter.[41]

- The word 'required' in the Agreement cannot be limited in its meaning to simply refer to something being unilaterally imposed and taking every use of the word 'required' in the Agreement to mean 'unilaterally imposed' would produce some odd outcomes out of line with what is intended. Adopting the approach taken in *Telstra Corporation Limited v Peisley*[42] , it can be found that the overtime was worked and can be taken to

[36] UWU Submissions, 2-3 [19]-[25].

[37] UWU Submissions in Reply, 1-2 [6]-[15].

[38] Ibid, 3-4 [17]-[23].

[39] Ibid, 4 [25]-[28].

[40] [2006] FCAFC 79, [32]-[33], [40]-[42].

[41] UWU Submissions in Reply, 5-7 [29]-[39].

[42] [2006] FCAFC 79.

mean it was required and it being undertaken in a voluntary fashion does not mean it was not required. AS overtime was worked, it was therefore required, and the meal allowance is owed.[43]

- The allowances in clause 18.1, 18.2, and 18.3 are not necessarily an imposition by the employer. The First Aid allowance is paid where an employee has first undergone training, thus there needs to be agreement between the employer and employee. It is not a case of the employer unilaterally appointing an employee to that position. Further, it is unclear how an employer would unilaterally require an employee to handle soiled linen given that this is implicit in the type of work carried out. Even if it were the case that employees were required to handle soiled linen this does not result in a conclusion where an employee can be forced to work overtime with two hours' notice and that a meal allowance is only payable in those circumstances. The protective clothing allowance makes clear that the requirement is by the employer. Again it is notable that the meal allowance clause does not contain such words.[44]

- The Respondent states that no employees experience a disadvantage by not being paid the allowance, however the disadvantage the employee faces is not receiving the meal allowance of $15.36 when more than two hours overtime was required and the employee was not notified of that overtime the previous day. The fact that employees receive a different benefit does not in any way offset the obligation to provide another entitlement unless explicitly stated. The meal allowance clause provides exceptions for when the clause is not payable, the provision of a rest break is not one of those exceptions.[45]

- In summation, overtime that the company requires or needs to be worked and that overtime period worked is two or more hours in duration, in circumstances where confirmation of that overtime being only provided on the day it was worked, and where a meal may not have been provided by the employee and a meal is not provided by the employer, an allowance is payable to cover the cost of that meal. The arbitral question must therefore be answered in the positive.[46]

Princes Linen Submissions

2. PLS submit as follows:

- Clause 1 of the Agreement highlights an overarching primacy to notions of flexibility and consultation within the Respondent's enterprise.[47]

- Clause 18 in the Agreement provides for four separate allowances. The first aid allowance is payable where an employee has the relevant qualification and has been "*appointed by the employer*" to perform first aid. The soiled linen allowance is payable where an employee "*is required to handle*" foul/soiled laundry. The protective clothing allowance is payable where "*the employer requires an employee to wear*"

[43] UWU Submissions in Reply, 8 [42]-[47].

[44] Ibid, 8-9 [48]-[54].

[45] Ibid, 9 [55]-[59].

[46] UWU Submissions, 3-7 [26].

[47] PLS Submissions, 3 [10]-[12].

certain clothing in order to perform their tasks. The meal allowance is payable where an employee "*is required to work*" certain hours without sufficient notice.

- The allowances noted above are paid to employees as an imposition by the employer to the employee. There is no ability for an employee to "agree" with the employer to vary any part of cl.18 and they are therefore payable as a recognition of the disadvantage the employer's action has imposed on an employee. Additionally, the first three allowances are referable to the nature of work required to be performed by the employee (be it first aid duty, handling of soiled linen, or wearing of protective clothing); whereas the meal allowance is referable to the hours of work required to be performed.[48]

- Clause 14 of the PLS EA is entitled "Hours of Work" and Clause 20 of the PLS EA is entitled "Rostering". These clauses provide the framework for how employees will be rostered by PLS. The starting and finishing times "will be fixed" by PLS and "will not be changed" by PLS unless seven days' notice has been given except in a case of emergency. However, cl.14 and 20 of the PLS EA also empower the employee to participate in how their hours are rostered. This is an emanation of the overall objective of the PLS Enterprise Agreement – a flexible and adaptive workforce with trust, consultation and cooperation.[49]

- Clause 21 of the Agreement is entitled "Allocation of Overtime" and is reflective of the general practice of the Respondent - a flexible and adaptive workforce with trust, consultation and cooperation. Overtime hours are distributed evenly and fairly to *volunteers* that have been asked prior to performing the overtime work. This is antithetical to the notion of an employer "requiring" an employee to work overtime hours, and certainly does not match the circumstances of unilateral imposition of overtime.[50]

- Clause 22 is entitled "Overtime" provides as follows:

  > "An employer may require any employee to work reasonable overtime at overtime rates. An employee will work overtime in accordance with such requirements. An employer must not request or require an employee to work overtime unless the additional hours are reasonable."

- The clause above expressly recognises the distinction between the employer making a "request" of an employee to work overtime, and the employer "requiring" an employee to work overtime. If the employer makes a "request" of an employee to work this is not a "requirement" that the employee work overtime. Merely requesting that an employee work overtime (who then agrees) does not mean the employee is unilaterally "required to work" overtime.[51]

- The above interpretation is supported by looking to other clauses in the Agreement and how they are designed to operate. For example, clause 22.4 provides that that if

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[48] Ibid, 5-6 [14]-[19].

[49] Ibid, 6-7 [21]-[24].

[50] Ibid, 7 [25]-[26].

[51] Ibid, 7-8 [27]-[29].

an employee agrees to work overtime, they will not suffer any real unfairness in not being paid the meal allowance under cl.18.6 as they are still entitled to a paid meal break. Clause 23 relates to weekend work and is consistent with the employee being "required" to work by way of a roster fixed by the employer ahead of time. Further to this, being consultative and flexible is demonstrative of there being no need for any formal requirements as to how or when agreements are entered into. Clause 25 as it relates to public holidays and clause 24.2 meal interval (other than shift workers) makes reference to a requirement to work are indicative work which is being unilaterally imposed by the employer and is known to the employee in advance. In recognition of the disadvantage of the employer's imposition, the employee is afforded the benefit of a break.[52]

- Ms Ly was not unilaterally imposed with a requirement to work overtime, she was approached by a supervisor, asked if she wanted to work overtime hours, and she agreed. The entitlement of an employee to participate in the variation of their own starting and finishing times by agreement is expressly envisaged by the Agreement. The allowances provided for in cl.18 are afforded in the unique circumstance where PLS imposes a disadvantage on an employee who otherwise did not agree to it. In circumstances where Ms Ly was consulted about, and agreed to, work overtime hours, it cannot be the case that she was "required to work" those hours as contemplated by cl.18.6 of the Agreement. The arbitral question must therefore be answered in the negative.[53]

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[52] Ibid, 8-10 [30]-[38].

[53] Ibid, 10 [39]-[43].