DECISION

Fair Work Act 2009
s.739—Dispute resolution

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
v
Civmec Construction & Engineering Pty Ltd T/A Civmec Construction and Engineering
(C2023/3586)

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) (188V)
v
Civmec Construction & Engineering Pty Ltd T/A Civmec Construction and Engineering
(C2023/3650)

DEPUTY PRESIDENT BEAUMONT PERTH, 28 AUGUST 2023

Alleged dispute about any matters arising under the enterprise agreement; [s 186(6)]

1 Issue

[1] The Australian Manufacturing Workers' Union (**AMWU**) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) have referred to the Commission a dispute for determination under s 739 of the *Fair Work Act 2009* (Cth) (the **Act**) and the grievance resolution procedure at clause 28 of the *Civmec Construction & Engineering Pty Ltd Kwinana Greenfields Project Agreement 2022* (the **Agreement**).[1]

[2] The dispute is about Civmec Construction & Engineering Pty Ltd's (**Civmec**) withdrawal of rostered overtime for employees working at the Covalent Lithium Project (**Project**) in Kwinana, Western Australia (**relevant employees**) on 31 May 2023.

[3] Clause 8.4 of the Agreement sets out the prescribed circumstances whereby overtime can be withdrawn on a weekday. The clause provides at subparagraph (a):

> a) The Employer shall not, without good reason and without a minimum of two (2) hours' notice, withdraw rostered or additional overtime on any days Monday to Friday. Periods of notice shall

> be within the rostered working day or for the minimum period at commencement of wok on an overtime shift.

[4] The AMWU and CEPU (the **Unions**) contend that at 1:15 PM (or thereabouts but definitely after 1:00 PM) on 31 May 2023, work crews at the Project were informed by supervisors they were being sent home and that normal rostered overtime and project hours would not be worked that day due to inclement weather.

[5] For the most part, it is uncontroversial that relevant employees start work at 6:30 AM and finish the day at 5:15 PM, hence working 10.25 hours. The standard Project Hours average 50 hours a week excluding meal breaks[2] and consist of 'Ordinary Hours', 'RDO accrual hours' and 'Regular Scheduled Overtime'.[3] During the course of Monday to Friday, once a relevant employee has worked 7.2 Ordinary Hours and 0.8 hours toward their rostered day off (**RDO**), any additional hours worked are paid at the relevant overtime rate. It therefore follows that the Project Hours on any weekday comprise of:

a) 7.2 Ordinary Hours;
b) 0.8 RDO accrual hours; and
c) 2.25 hours paid at the overtime rate.[4]

[6] As noted, relevant employees are also entitled to a 0.5 hour unpaid meal break and a rest period of 15 minutes each morning without deduction of pay.[5]

[7] On 1 June 2023, Civmec supervisors informed the relevant employees that they would not be paid for the full day of 10.25 hours and would only be paid for the Ordinary Hours worked on that day. According to the Unions, the required two hours' notice of overtime withdrawal was not provided and therefore the relevant employees are due payment for the 10.25 hours.

[8] Essentially, the Unions and Civmec are in dispute about whether Civmec provided adequate notice to its relevant employees under clause 8.4(a) of the Agreement before withdrawing rostered overtime from its workforce at the Project on 31 May 2023. The AMWU and Civmec have asked the Commission to arbitrate the following question:

> On the proper construction of the Agreement, whether the employees who are the subject of the dispute are entitled to be paid for withdrawn rostered overtime hours pursuant to clause 8 of the Agreement.

[9] Whilst the CEPU decided to adopt the submissions of the AMWU as filed on 28 July 2023 and in respect of those filed on 14 August 2023, it noted that it advanced a slightly different question for determination than that agreed upon by Civmec and the AMWU. The CEPU's questions read:

> What is the proper application of clause 8.4 of the Civmec Construction & Engineering Pty Ltd Kwinana Greenfields Project Agreement 2022 as it ought to have applied on 31 May 2023?
>
> What, if any, steps should the parties take to resolve the dispute?

[10] The Agreement was approved on 30 August 2022 and reaches its nominal expiry date on 30 August 2025. The Unions are covered by the Agreement because, as noted in the approval decision, they were bargaining representatives for the Agreement and gave notice to the Commission under s 183 of the Act that they wanted to be covered by it. The grievance resolution procedure applies to 'a dispute' that relates to a matter arising under the Agreement or the National Employment Standards. Clause 28 states that, if the matter is not resolved, the matter may be referred to the Commission for conciliation and arbitration if necessary. As conciliation has not resolved the dispute and the Unions seek to further their applications, in the absence of express words limiting arbitral power to circumstances where parties are required to consent to arbitration, I am satisfied that the Commission is authorised to determine the present dispute.

2 Background

[11] The resolution of the dispute by reference to the question posed turns on the proper construction of the Agreement in the context of limited contested facts. The disparity in the evidence concerns the time at which employees were notified they were to go home, and whether they were informed they would be paid for 10.25 hours. The latter contentious issue is not relevant to the question asked and therefore is not considered.

[12] The background to this matter has been drawn from the evidence provided by Mr Maxwell Daly, welder, and Mr Frederick MacIvor, welder, on behalf of the AMWU, and Mr Robert Glenton, pipe fitter, and Mr Kevin O'Donnell, electrician, on behalf of the CEPU.

[13] Civmec relied on the evidence of its Construction Managers, Mr Charles McElhinney and Mr Paul Ross.

2.1 Evidence of the AMWU and the CEPU

[14] Turning first to the AMWU's evidence, Mr Macivor was rostered to work on the Project from 6:30 AM until 5:15 PM on 31 May 2023.[6] Mr Macivor stated that his rostered shift was composed of the following hours:

a) ordinary time: 6:30 AM to 2:30 PM; and
b) rostered overtime: 3:00 PM to 5:15 PM.[7]

[15] It was Mr Macivor's evidence that on 31 May 2023 he was told by his supervisor, Mr Travis Castle, that Civmec was sending him home early for the day due to poor weather conditions.[8] Mr Macivor expressed the view that Civmec had not provided him with two hours' notice before cancelling his rostered overtime, which was due to start at 3:00 PM on 31 May 2023.[9] Mr Macivor said that the company also did not pay him for that rostered overtime.[10]

[16] At hearing, Mr Macivor detailed having been told some time after 1:00 PM that the crew was to go home. In giving his evidence, Mr Macivor detailed that due to the inclement weather the welders had packed up their tools earlier in the day because the weather had made using the electrical work gear unsafe. Mr Macivor noted that prior to leaving the work site the crew would generally make the workplace safe. He further noted that the crib room where he and

the remaining crew were located was close to the exit gate. According to Mr Macivor, both he and Mr Daly knocked off at a similar time.

[17] Mr Daly's evidence mirrored that of Mr Macivor with the exceptions that his ordinary hours on 31 May 2023 were from 6:30 AM until 2:15 PM, and rostered overtime was between 3:00 PM and 5:15 PM.[11] Further, it was Mr Daly's evidence that he had been advised to go home at precisely 1:15 PM.

[18] Mr Daly gave evidence that when the notice to go home was provided by his supervisor, his bag was already packed (the crew had already had their lunch) and the crew got their timesheets signed. Mr Daly noted that when leaving an area of the site the crew make sure it is safe and that equipment is packed up. On the day in question the majority of the welding crew had already packed up, according to Mr Daly.

[19] Mr O'Donnell's witness statement was tendered into evidence with the consent of the parties. Within his statement, Mr O'Donnell explained that his usual full-time roster comprised of 50 hours a week, Monday to Friday.[12] On 31 May 2023, he started his shift at 6:30 AM and was due to finish work for the day at 5:15 PM. Mr O'Donnell said his half hour lunch break was scheduled for 1:30 PM.[13]

[20] On the day in question, Mr O'Donnell said there was a significant amount of rain and a stop/start day at work.[14] He noted that later that day, workers were sent to cribs to shelter because the weather had become increasingly worse.[15]

[21] Mr O'Donnell recalled that just after 1:00 PM his supervisor, Mr Derek Reemeyer, came into the crib rooms and said that the workers were going home.[16] Mr O'Donnell said that when Mr Reemeyer was asked a question on whether a full rostered day of 10.25 hours would be paid, Mr Reemeyer said, 'yes I presume so as it's after 1 pm'.[17]

[22] When Mr O'Donnell received his payslip, he observed that he had not been paid for the full day on 31 May 2023 and queried this with Mr Reemeyer, who assured him that he had submitted 10.25 hours for the day.[18] Mr O'Donnell asked why his full pay had not been received; he was told (presumedly by Mr Reemeyer) that Mr Tony Buik had changed the hours to less.

[23] Mr Glenton also worked a 50 hour week Monday to Friday and was rostered on from 6:30 AM to 5:15 PM on 31 May 2023.[19] Mr Glenton said he was due to take a 30 minute unpaid lunch break at 1:30 PM on that day.[20] However, at about 1:15 PM (but certainly between 1:00 PM and 1:30 PM) he was told that he could go home (with other co-workers who were in the crib shed due to the wet weather).[21] Mr Glenton clarified that they were not told that overtime was being withdrawn and that he expected that overtime would be paid because the notice was too late.[22]

[24] At hearing, Mr Glenton acknowledged that the Project site was quite large. He said that quite often (in inclement weather) the crew would go to the crib sheds to take shelter, not knowing if they are going to be sent home. Mr Glenton added that there was a high probability that prior to leaving the site (in circumstances of inclement weather) the crew would quickly go back out to lock up the site – however, he was unsure whether he went back out himself on

this occasion (31 May 2023). With regard to the time taken to walk from where he was working to the crib sheds, Mr Glenton said that it would probably take 15–20 minutes depending where a worker was on the site and the tasks to be done, such as having 'JHAs' signed and handed back in.

[25] Mr Glenton was taken to page 21 of Part 2 of the Digital Hearing Book, which was a record of the relevant employees' swipe card times when they had exited the site turnstile. Mr Glenton explained that at the end of a shift, the relevant employees swipe off through the swiping machine. The relevant employees then go for a short walk to the turnstiles where they again swipe off.

2.2 Civmec's evidence

[26] Mr Ross gave evidence that on 31 May 2023 he was approached by Project Manager, Mr Kyron Hales, at approximately 12:30 PM to discuss the ongoing wet weather and what to do with the workforce.[23] Mr Ross said it was agreed that the three Construction Managers would gather outside Office One to decide what to do.[24]

[27] At around 12:40 PM, the Construction Managers agreed that the rain would not clear up and therefore no further work could take place.[25] Mr Ross said that overtime was to be removed for the day and the workforce would be notified accordingly.[26]

[28] Mr Ross gave evidence that at approximately 12:45 PM, the three Construction Managers went to inform their respective crews.[27] Mr Ross noted that he walked into his office, which was one metre away, and informed his superintendents and supervision of the decision. Mr Ross said that they in turn informed their respective crews and ensured people signed off.[28]

[29] Attached to Mr Ross' witness statement was the record of the exit gate times for 31 May 2023. That document recorded exit times from '12:5' to '2:06'.

[30] Mr McElhinney similarly gave evidence that on the morning of 31 May 2023, his attention was drawn to the possibility of inclement weather affecting the construction site.[29] He said the issue was discussed at the daily morning management meeting where he attended with Mr Buik and Mr Ross.[30] Mr McElhinney stated that the weather forecast indicated the impending arrival of a substantial weather front around midday.[31]

[31] At around 12:45 PM, Mr McElhinney discussed the weather situation with Mr Buik and Mr Ross, and, according to Mr McElhinney, they concluded that it would be in the best interest of the workers' safety to withdraw overtime for the day and send the workforce home immediately.[32]

[32] Mr McElhinney said that after reaching the decision he took immediate action to notify his superintendents to begin the process of spreading the word amongst the workforce.[33] Mr McElhinney added that over the next 15 minutes, he ensured that all his reports and relevant personnel were informed about the decision to withdraw overtime and cease work due to inclement weather.[34]

[33] The next day, Mr McElhinney sent out an email that detailed the hours for timesheets related to the previous day's inclement weather, confirming, for 'Civmec Directs', that the notice for withdrawal of overtime was given at 1:00 PM, and they were entitled to be paid until 3:00 PM.[35]

3 The AMWU's submissions

[34] The AMWU submits that the dispute centres around the operation of clause 8.4 of the Agreement, from which the following principles can be derived:

a) the provision imposes some restrictions on Civmec's prerogative to reduce the number of rostered or additional overtime hours or the payment for such hours;
b) Civmec must have a good reason for withdrawing rostered or additional overtime hours;
c) it is not enough for Civmec to have a good reason for withdrawing overtime. It must also comply with the minimum notice requirement of two hours on a weekday and three hours on a weekend when communicating the withdrawal of overtime to an employee;
d) the notice of withdrawal of overtime must be given:
    i. if the employee's shift is an overtime shift, at the commencement of work on that overtime shift; or
    ii. otherwise, within the rostered working day;
e) if Civmec does not have a good reason to withdraw the overtime or otherwise does not comply with the minimum notice periods, then it must pay the employee for the rostered or additional overtime as if it was worked by the employee; and
f) Civmec is entitled to withdraw overtime from an employee without notice if industrial action affects the project.

[35] Essentially, the AMWU's case is that once Civmec had missed the two-hour notice deadline within clause 8.4(a), it was not permitted to withdraw any portion of an employee's rostered or additional overtime and must therefore pay the relevant employees for the entirety of the rostered or additional overtime for the shift.

[36] In respect of the reason for the withdrawal, the AMWU concedes that the poor weather on the day was a good reason for the purpose of clause 8.4(a) of the Agreement. However, in order to comply with clause 8.4(a) of the Agreement, Civmec needed to communicate the withdrawal of the overtime to Mr Daly and Mr Macivor by no later than 1:00 PM on 31 May 2023. According to the AMWU, Civmec failed to do so given the withdrawal of overtime was not communicated to Mr Daly or Mr Macivor until 1:15 PM.

[37] The consequence of Civmec's failure to provide adequate notice is, according to the AMWU, that Civmec was unable to withdraw the rostered overtime component of Mr Daly's and Mr Macivor's shifts – and therefore was required to pay Mr Daly and Mr Macivor for that rostered overtime.

[38] Civmec argues that subclauses 8.4(b) and (c) are irrelevant to the present dispute for the following reasons:

a) Civmec's conduct occurred on a weekday – which renders subclause 8.4(b) inapplicable; and
b) Civmec's decision to withdraw overtime was not because of industrial action affecting the Project – which renders subclause 8.4(c) inapplicable.

[39] In response to Civmec's submissions, the AMWU identified that such submissions contained inconsistent propositions in relation to the interpretive dispute:

a) first, Civmec had conceded that it cannot withdraw rostered or additional overtime without a minimum of two hours' notification to employees.[36] This submission aligned with the AWMU's case on the interpretive dispute;
b) second, Civmec appeared to have said that the rostered overtime between 3:00 PM and 5:15 PM on 31 May 2023 was a discrete 'overtime shift', and that Civmec could therefore withdraw that overtime by giving 2 hours' notice at the commencement of the overtime shift; and
c) third, Civmec said that it provided notice of withdrawal of overtime within the rostered working day, and therefore the notice limb relating to the commencement of work on an overtime shift was irrelevant.

[40] Concerning the proposition that the rostered overtime between 3:00 PM and 5:15 PM constituted a shift, the AMWU observed that the phrase 'overtime shift' only appears once in the Agreement, and the term is not defined. The AMWU pressed that on that basis it should be given its ordinary meaning – that is an entire shift which is overtime.

[41] The AMWU also considered that Civmec did not have the capacity to withdraw any period of overtime once the notice deadline had been missed. The AMWU submitted that Messrs Daly's and Maxwell's overtime was a single bloc that fell within their ordinary rostered working day. It was impossible to divide that overtime component of their shift on 31 May 2023 into small blocs of overtime for the purpose of the notice period in clause 8.4(a) of the Agreement.

[42] From an evidential perspective, the AMWU observed that it had relied on the evidence of Messrs Daly and Macivor who had provided largely the same evidence; the common elements of their evidence are listed as follows:

a) both gentlemen were employed by Civmec as welders;
b) both were rostered to work on the Project between 6:30 AM and 5:15 pm on 31 May 2023;
c) both were rostered to work overtime between 3:00 PM and 5:15 PM on 31 May 2023;
d) both were told by their supervisor, Mr Castle, at 1:15 PM on 31 May 2023 that Civmec was sending them home early due to poor weather conditions;
e) neither was provided with at least two hours' notice of the withdrawal of overtime; and
f) neither was paid for the rostered overtime component of their shift despite not being provided at least two hours' notice.

[43] The AMWU submitted that 31 May 2023 was a Wednesday, meaning that clause 8.4(a) of the Agreement, rather than clause 8.4(b), applied.

[44] The AMWU observed that Civmec rostered Mr Daly and Mr Macivor to work overtime between 3:00 PM and 5:15 PM on 31 May 2023. That rostered overtime was a component of their 6:30 AM to 5:15 PM shift. The overtime period was not an 'overtime shift' or 'additional overtime'. It was 'rostered overtime' within the 'rostered working day' for the purpose of clause 8.4(a) of the Agreement.

[45] Expanding upon this point further in its submissions in reply, the AMWU clarified that Mr Daly and Mr Macivor were working an ordinary shift that contained a component of rostered overtime on 31 May 2023, as evinced in the witness statements of Mr Daly and Mr Macivor.

[46] The AMWU submitted that it relied upon the evidence of Messrs Daly and Macivor that Mr Castle, their supervisor, did not advise them of the withdrawal of overtime until 1:15 PM on 31 May 2023. Regarding this point, the AMWU observed that Civmec had elected not to call Mr Castle and therefore invited the Commission to draw a *Jones v Dunkel*[37] inference that Mr Castle's evidence would not have assisted Civmec's case.

[47] Insofar as the provenance of clause 8.4 was relevant, the AMWU observed that the clause appeared to have come from the *Mt. Newman Mining Award 1977* (the **Mt Newman Award**).[38] The Mt Newman Award provided that whilst a worker was not obliged to work overtime, if it had been offered and accepted then:

> (b) except where an offer or acceptance of overtime is withdrawn in the recognised manner where a worker undertakes to work, overtime for a specified period or for the completion of a specified job –
>
> (i) he shall work in accordance with his undertaking unless prevented from so doing by illness, accident or injury; and
>
> (ii) he shall be guaranteed work or payment for the specified period for which he undertook to work….

[48] According to the AMWU, the custom and practice in the iron ore industry around the time of the Mt Newman Award was that when an employer had offered overtime to an employee and an employee had accepted that overtime, the 'recognised manner' of withdrawing that overtime was by either party giving 24 hours' notice to the other party.[39] What was unique about the overtime commitment in the Mt Newman Award was that it entitled payment for overtime that was not withdrawn in the recognised manner – which was more generous than what was offered by other employers at the time.[40]

[49] In June 1982, the Mt Newman Award was said to have been replaced by a new award in which the overtime commitment provision was modified to insert a 12-hour notice period for the withdrawal of overtime.[41] According to the AMWU that 12-hour notice period was eventually whittled down to two hours of overtime that occurred on weekdays and three hours for overtime on weekends. One of the earliest appearances of this change was found in clause 6.5 of the *Hot Briquetted Iron Project Agreement 1997*,[42] which read:

> (iii) Withdrawal of Overtime

> (a) The employer shall not, without good reason and without a minimum of two hours notice within ordinary hours (Monday to Friday) and three hours notice (Saturday and public holidays) withdraw regular overtime. Periods of notice shall be within the rostered working day or for the minimum period at the commencement of work on an overtime shift.
> (b) The employer may withdraw overtime without notice in the case of any industrial action which affects the project. Industrial action shall include strikes, bans, limitations or any other form of industrial restriction.
>
> (iv) Subject to paragraph (iii) above, no party to this Agreement will restrict the working of overtime which may be necessary for the employers to meet their project requirements. The practice of "one in all in" overtime will not apply on the Project. Overtime will be rostered on a fair and equitable basis as far as is practicable.

[50] The AMWU submitted that wording (or wording similar to it) has since become a staple entitlement in many industrial agreements, and that the inclusion of the 'withdrawal of overtime' entitlement in clause 8.4 of the Agreement indicates an intention by the parties to adopt the old Mt Newman Mining Company custom and practice of an overtime guarantee – as modified and developed with time.

[51] The AMWU concluded that despite its lengthy existence, there had been little litigation history concerning the wording of clause 8.4 of the Agreement. However, the AMWU did refer to the decision of Commissioner Harrison in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v CBI Constructors Pty Ltd*[43] in which it was said, in the context of a similar (but not identical) withdrawal of overtime provision:

> [44] Together these clauses impose some restrictions on the free reign of the Contractors' prerogative to reduce either the number of scheduled overtime hours and or the payment for such hours.
>
> [45] Generally speaking an employer operating under these agreements must have good reason for withdrawing scheduled overtime and provide a minimum of one to two hours' notice within the rostered working day. What is meant by `good reason' is not defined. In the case of `industrial action' no notice need be provided.
>
> [46] A Contractor is also entitled to deduct payment for any day upon which an employee cannot be usefully employed because of any industrial action.

4 The CEPU's submissions

[52] In respect of the different questions posed by the parties, the CEPU submitted that its questions were not so different to materially affect the nature of the case or what needed to be determined. However, the CEPU submitted that its question was preferred because it directed the Commission to resolve the dispute rather than performing 'ersatz declaratory relief'. The CEPU further submitted that to resolve the dispute the Commission would be required to determine the meaning of the clause, at least, to the extent of the relevant circumstances.

[53] The CEPU observed that the AMWU's submissions raised an important consideration in respect of the industrial history of the clause and the award history.

[54] Referring to the judgment of the Full Federal Court in *James Cook University v Ridd*,[44] the CEPU highlighted the principles relevant to the interpretation of an enterprise agreement, with a particular focus on the following principle extracted from that judgment:

> Recourse may be had to the history of a particular clause "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…" (*Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518) (**Hercus**).

[55] It expanded upon the abovementioned principle extracting more fulsomely the following passage from *Hercus* at page 518:

> The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. **When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment.** There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read. (Bold the CEPU's emphasis added)

[56] Regarding the interpretation of clause 8.4(a), the CEPU deconstructed the clause in the following manner:

a) the first expression tells us that the clause is a mandatory prohibition on Civmec;
b) the second expression 'without good reason and without a minimum of two hours' notice' provides two qualifications for the prohibition. If both conditions are met, the prohibition does not apply; and
c) the final expression tells us what is prohibited.

[57] Focusing on the second sentence, the CEPU identified that it addressed the second of two qualifiers, namely the notice period. The CEPU observed that:

a) the words 'periods of notice shall be…' indicate the sentence is directed to an essential or necessary quality of a valid notice period;
b) then two alternatives for a valid notice are presented: notice must be…
    i. within the rostered working day; or
    ii. for the minimum period at the commencement of working an overtime shift.

[58] The CEPU submitted that what was being dealt with was rostered overtime and not additional overtime. The phrase, 'for the minimum period at the commencement of working an overtime shift', was directed at additional overtime or whether rostered overtime was a whole standalone shift, and therefore was not relevant.

[59] The CEPU continued that 'rostered working day' is not defined in the Agreement, but it appeared to mean the hours on any given day as rostered. The CEPU contended that this interpretation was perhaps arguable taking the words in isolation and observed that the Agreement did not describe hours by reference to rostered hours, the focus of clause 8.1 orientated around Ordinary Hours and other times as additional – an approach that is consistent with the approach in clause 6.8.

[60] The CEPU pressed that the contrary approach is attached to the words 'Project working hours' at clause 8.2(c), which are said to 'average a fifty-hour working week, excluding unpaid meal breaks, Monday to Friday.'

[61] The CEPU submitted that whether overtime is included in approaching rostered working days is of little material significance. That is because even if overtime itself is within the rostered workday, the notice of the withdrawal of rostered overtime must be two hours before the commencement of overtime. The CEPU further observed that the unpaid meal break did not form part of an employee's rostered workday in any formula under the Agreement. It therefore followed that if Civmec was to have complied with clause 8.4(a), the notice for the withdrawal of overtime was required to have been given prior to 12:30 PM on 31 May 2023.

[62] The CEPU added that the natural meaning of the withdrawal of rostered overtime is that the 'rostered overtime' is to be withdrawn in total. It submitted that rostered overtime is a span of overtime – it has a beginning and an end. It follows that the withdrawal is of the whole of it and the notice of that withdrawal must precede the withdrawal.

[63] The CEPU pressed that if it were intended that rostered overtime could be incorporated into the notice this could easily have been expressed with clarity in the clause.

[64] It was the CEPU's position that notice should be given an interpretation consistent with conferring its beneficial purpose.[45] The interpretation, which the CEPU advanced as ordinary and natural in context, was consistent with the benefit of notice being two hours of paid ordinary time.

[65] Relating the relevant clause to the factual circumstances, the CEPU observed that Mr O'Donnell and Mr Glenton both gave evidence that they were notified that work would not resume and they could leave after 1:00 PM but before their lunch break at 1:30 PM.

5 Civmec's submissions

[66] Civmec submits that on 31 May 2023 a decision was made to send home relevant employees who could no longer work due to the inclement weather. That decision was made at around 12:45 PM and communicated to relevant employees promptly thereafter. Civmec's view is that notification of the relevant employees occurred before 1:00 PM. Relevant employees received payment for 2 hours at ordinary time in addition to payment for Ordinary Hours until 1:00 PM.

[67] Civmec observed that at the heart of the dispute is the purported inadequate notice for the withdrawal of rostered overtime, which was to commence at 3:00 PM and end at 5:15 PM.

[68] Having referred to the principles of interpretation as expressed in *WorkPac Pty Ltd v Skene* (**WorkPac**),[46] *Australian Manufacturing Workers' Union v Berri Pty Ltd* (**Berri**)[47] and *Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd* (**Golden Cockerel**),[48] Civmec specifically noted that where a term is undefined, it ought to be presumed that the draftsperson intended that the term have its ordinary meaning unless there is a contrary indication.[49] Civmec further referred the Commission to the decision of the Full Bench in *United Firefighters Union of Australia v Emergency Services Telecommunications Authority* where it was expressed:

> As stipulated in *Berri*, the starting point for interpreting an enterprise agreement is to have regard to the ordinary meaning of the words used. The text must be interpreted in the context of the agreement as a whole. Principles 7 and 10 elicited in *Berri* emphasize that ambiguity in a provision within an enterprise agreement must be identified before one is to have regard to evidence of the surrounding circumstances. However, principle 8 makes it clear that, in determining whether ambiguity exists, one may have regard to evidence of the surrounding circumstances. That is, such evidence can be used to identify and resolve any ambiguity.[50]

[69] According to Civmec, the interpretation task called for an examination of the 'ordinary meaning' of the relevant words, within the context and purpose of the Agreement. However, Civmec acknowledged that its prerogative to withdraw overtime is prefaced on the requirement of a 'good reason' and the provision of a minimum of two hours' notice. The period of notice, which must be at least 2 hours, must be within the rostered working day, said Civmec.

[70] Civmec submitted that a reasonable interpretation of the words 'good reason' simply required that withdrawal of any rostered or additional overtime be backed by valid justification – in essence, a 'good reason' which acts as a safeguard against arbitrary or capricious withdrawals.

[71] Civmec noted that it was not disputed that the reason for withdrawal was the existence of inclement weather, and that this plainly was and remains a good reason. Insofar as the weather was relevant to the reason for the notice, Civmec submitted that the Agreement itself contemplates inclement weather as a reason for employees not to work when the weather makes it unsafe to do so.

[72] Civmec clarified that the word 'notice', in the sense of advance warning, means 'notification or warning of something, especially to allow preparations to be made'.[51] The two-hour notice requirement simply acted as a bridge between employer prerogative and employee expectations. It balanced, according to Civmec, the practical realities of the workplace with the desired degree of predictability for employees and acted as a pragmatic compromise between operational efficiency and fairness on employees.

[73] Regarding the ordinary meaning and import of the requirement to provide a minimum of two hours' notice, and that this may create an impression of difficulty with respect to the interpretation of the requirement, Civmec submitted that there were no such difficulties. The employer under the Agreement cannot withdraw rostered or additional overtime without a minimum of two hours' notification to employees.

[74] Turning to what constituted 'overtime', Civmec, having considered the use of the word within the Agreement, contended that that the following could be fairly stated as the ordinary meaning of the words having regard to context and purpose:

a) *overtime* is any additional hours worked beyond 7.2 ordinary hours and 0.8 hours towards an RDO accrual, on any day Monday to Friday inclusive;

b) *Regular Scheduled Overtime* is the overtime component of the Project working hours (which is defined as an average of fifty hours a week and consists of Ordinary Hours, RDO accrual hours and Regular Scheduled Overtime);

c) *rostered overtime* is simply overtime (i.e. additional hours of work beyond ordinary hours and RDO accrual) which has been rostered;

d) *additional overtime* is any overtime which was not rostered, beyond that which was already rostered;

e) *overtime shift* is the overtime component of any shift, either rostered or additional depending on whether it is contiguous with ordinary hours or not; and

f) *overtime rates* are those set out in clause 8.5.

[75] Accounting for the meanings set out above, Civmec submitted that overtime under the Agreement may either be rostered or additional. An overtime shift can seemingly consist of either, regardless of its contiguity with 'Ordinary Hours'. Even if an overtime shift is standalone (i.e. not contiguous with any ordinary time), it must either be rostered in advance (in which case it is rostered overtime) or worked at shorter notice (in which case it is additional overtime).

[76] In Civmec's view, it was informative that under clause 8.4(a), the minimum period of notice for the withdrawal of overtime for an overtime shift can be provided at the commencement of that work. This is a practical provision that ensures that employees who are otherwise prepared to commence overtime at 3:00 PM after working their ordinary hours, are financially compensated for withdrawal of rostered overtime at the start of that shift.

[77] Expanding upon this point, Civmec argued that assuming the existence of a good reason, employees can be told at the start of a 3-hour overtime shift that remaining overtime will be withdrawn in 2 hours' time. There is nothing further required than the provision of 2 hours' notice that has been provided. The Agreement clearly permits this and in doing so, acknowledges the reality that overtime is simply time worked and paid at overtime rates, but which is divisible by its nature. Whether characterised as *rostered overtime* or *additional overtime,* overtime under the Agreement is not inviolable.

[78] In respect of the day in question, Civmec observed that under clause 8.4(a), periods of notice of withdrawal of rostered or additional overtime on any days Monday to Friday are to be:

a) within the rostered working day; or
b) for the minimum period at the commencement of work on an overtime shift.

[79] Civmec submitted that the rostered working day applying to the relevant employees on 31 May 2023 was 6:30 AM until 5:15 PM. It provided notice of withdrawal of overtime within the rostered working day. On that basis, argued Civmec, the second limb, as referred to above, was not relevant.

[80] According to Civmec, while the period of notice was equal to or greater than two hours before the commencement of overtime at 3:00 PM for most relevant employees, it acknowledged that practicality delayed prompt communication of this to some of the relevant employees. However, in addition to asking for the consideration of the abstract for one moment, as listed below, it further cautioned that it did not concede that the notification was provided after 1:00 PM:

a) in more normal circumstances, where employees may have been able to continue working after receiving notice of withdrawal of overtime (i.e. without inclement weather) those employees could foreseeably have continued working in accordance with their normal day for a further 2 hours after they were notified, and be paid according to the terms of the Agreement for the time so worked;

b) similarly, if, for example, a relevant employee received notice 1 hour 50 minutes prior to the commencement of overtime, Civmec would submit that allowing the employee to continue working for 2 hours from the time they were notified would satisfy the notice requirements. Consequently, a payment of this amount would place the employee no worse off than they would have been had they continued working.

[81] Civmec submitted that in the present situation, as relevant employees were unable to work on account of the weather, they were allowed to go home but received payment equivalent to the minimum period of notice as if they had worked. It should be noted that as a consequence employees received payment for a 30-minute meal break period, which is unpaid under the Agreement.

[82] Civemc contended that based on its submissions, the relevant employees were not entitled to any further payment of wages under the Agreement for the withdrawn overtime hours on 31 May 2023.

[83] At hearing, Civmec clarified when asked, that had the notice to withdraw rostered overtime been given at 1:30 PM, then in its view the relevant employees would have been entitled to an ordinary hour rate of pay until 3:00 PM and half an hour at the overtime rate of pay (until 3:30 PM). No other payment would be forthcoming in such circumstances.

6 Relevant legal principles

[84] The principles that govern the interpretation of enterprise agreements are well-established. In *WorkPac*, the Full Federal Court elucidated the following:

> 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 (*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 378-379, citing *George A Bond & Company 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).[52]

[85] The Full Federal Court in *WorkPac* went on to explain that where a term is undefined, unless there is a contrary indication, it ought to be presumed that the draftsperson intended that the term have its ordinary meaning.[53] And so, despite the broad purposive approach to be adopted when interpreting industrial agreements, that canon of construction regarding the 'ordinary meaning' remains applicable as a starting point.[54]

[86] The Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (**Endeavour Coal**),[55] *Berri*, and the earlier decision in *Golden Cockerel*, embraced such principles.

[87] *Berri* affirmed that the interpretation of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words, and as such requires a determination of whether an agreement has a plain meaning, or is ambiguous or susceptible of more than one meaning.[56]

[88] In determining whether ambiguity was at play, the Full Bench stated that regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.[57] If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.[58] But, if the language of the agreement is ambiguous or susceptible to more than one meaning, then evidence of the surrounding circumstances will be admissible to aid the interpretation of the agreement.[59]

[89] As to admissible evidence, the Full Bench said that it was the evidence of surrounding circumstances, limited, however, to evidence tending to establish objective background facts known to both parties that informed the subject matter of the agreement.[60] In this respect, evidence of the subjective intentions of the parties was not relevant.[61] Objective background facts were said to include evidence of prior negotiations, notorious facts of which knowledge is to be presumed and evidence of matters in common contemplation and constituting common assumptions.[62]

[90] The Full Bench cautioned about the admission of, and reliance upon, evidence of prior negotiations, due to the diversity of interests involved in negotiations.[63] However, it observed that what employees were told for the purpose of satisfying the explanation obligations under

s 180(5) of the Act may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.[64]

[91] Perhaps one of the most salutary propositions of the Full Bench was that whilst admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.[65]

7 Consideration

7.1 Clause 8.4(a)

[92] As outlined in *Endeavour Coal*, the decisions in *Golden Cockerel* and *Berri* make it clear that context and purpose are relevant to the construction of an agreement and must be considered even where the words of the provision being construed appear, on their face, to have a clear and unambiguous meaning.

[93] Clause 8.1 of the Agreement sets out the hours of work in the following terms:

> a) Ordinary hours for an employee will average thirty-six (36) hours per week over a defined work cycle and except in the case of shift employees are to be worked Monday to Friday between 6.00am and 6.00pm as required by the Employer. In addition, a further four (4) ordinary hours per week (i.e. 0.8 hours each day Monday to Friday) are worked and accrued towards a rostered day off. Once an employee has worked 7 .2 ordinary hours and 0.8 hours towards their rostered day off accrual on any day, Monday to Friday, inclusive, any additional hours worked will be paid at the relevant overtime rate in accordance with clause 8.5.
>
> b) The Employer will determine the actual method of working ordinary hours that best suits the operational requirements.
>
> c) Where the Employer wishes to vary the pattern of working the ordinary hours of work within the spread of hours outlined in subclause (a) of this clause, they shall seek the agreement of the employees involved. Failing agreement, the Employer shall give those employees one (1) weeks' notice of the change.
>
> d) The ordinary hours of work shall be consecutive except for an unpaid meal break, which shall not exceed half an hour.
>
> e) Unless agreed otherwise between the Employer and majority of affected employees, the meal break shall be scheduled to be taken no later than six (6) hours after commencement of ordinary hours of work, if not taken overtime rates shall apply…

[94] Clause 8.2 of the Agreement addresses 'Project working hours'. The term is not defined elsewhere in the Agreement, but is described in clause 8.2 in the following terms:

> a) The standard Project working hours consists of Ordinary Hours, RDO accrual hours and Regular Scheduled Overtime.
>
> b) An Employee may be required to work reasonable additional overtime as required by the Employer and as set out in clause 8.3 - Requirement to Work Overtime of this Agreement.

c) The Project working hours average a fifty (50) hour working week, excluding unpaid meal breaks, Monday to Friday.

d) Any variation to the Project working hours shall not be made without consultation of the Employees in accordance to clause 4 - Consultation of this agreement. Failing agreement, the Employer shall give those Employees one (1) weeks' notice of the change.

e) Project working hours shall commence at the Employees designated prestart location and finish at the inside of the site access gate.

[95] Before considering clause 8.3 of the Agreement that sets out the requirement to work overtime, it warrants mentioning that the term 'Regular Scheduled Overtime' as referred to in clause 8.2 is referred to once in the Agreement (in clause 8.2) and is otherwise not referred to or described.

[96] The requirement to work overtime is set out in clause 8.3, which provides:

Except as provided in this clause, the Employer may require any employee to work reasonable overtime. An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to employee health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice (if any) given by the Employer of the overtime and by the employee of their intention to refuse it; and

(v) any other relevant matter.

The assignment of overtime by the Employer to an employee shall be based on specific work requirements and the practice of "one in, all in" overtime shall not apply.

[97] Whilst clause 8.4(a) has been set out in full at paragraph [3] of this decision, clause 8.4 is repeated here for the sake of convenience:

a) The Employer shall not, without good reason and without a minimum of two (2) hours' notice, withdraw rostered or additional overtime on any days Monday to Friday. Periods of notice shall be within the rostered working day or for the minimum period at commencement of wok on an overtime shift.

b) The Employer shall not, without good reason and without a minimum of three (3) hours' notice withdraw rostered or additional overtime on Saturday or Sunday. Periods of notice shall be withing the rostered working day or for the minimum period at the commencement of work on an overtime shift.

> c) The Employee may withdraw overtime without notice in the case of any industrial action which affects the Project. Industrial action shall include strikes, bans, limitations, or any other form of industrial action.

[98] Clause 8.4(a) is applicable to 'rostered' or 'additional overtime' worked on Monday to Friday. As to what constitutes 'overtime', clause 8.1(a) informs that once an employee has worked 7.2 Ordinary Hours and 0.8 hours towards their RDO accrual on any day, Monday to Friday inclusive, any additional hours worked will be paid at the relevant overtime rate in accordance with clause 8.5. It can be surmised that hours worked on Monday to Friday in excess of the Ordinary Hours and the 0.8 hours worked toward the RDO, are hours that are paid at an overtime rate, and therefore constitute overtime.

[99] The Agreement at clause 8.4(a) clearly distinguishes between overtime that is 'rostered' and 'overtime' that is additional when worked on a weekday. The clause draws upon the disjunctive 'or' to distinguish between the two – 'withdraw rostered *or* additional overtime on any days Monday to Friday.'

[100] Turning first to overtime that is 'rostered'. Whilst not referred to as 'rostered' overtime, clause 8.2 of the Agreement provides that the 'Project working hours' consist of 'Ordinary Hours', 'RDO accrual hours' and 'Regular Scheduled Overtime'. The terms 'Ordinary Hours' and 'RDO accrual hours' are referred to in clause 8.1(a) of the Agreement. However, the term 'Regular Scheduled Overtime' is not found elsewhere in the Agreement. Notwithstanding, the word 'regular' denotes, amongst other meanings, 'conforming in form or arrangement', or 'recurring at fixed times; periodic', or 'observing fixed times or habits'.[66] The word 'schedule' means, amongst other things:

> noun 1. a plan of procedure for a specified project with reference to sequence of operations, time allotted for each part, etc.: the proposed schedule allows four weeks for the completion of the book.
>
> 2. a list of items to be dealt with during a specified time: I have a full schedule tomorrow.
>
> 3. a timetable.[67]

[101] It follows that the ordinary meaning to be assigned to the term 'Regular Scheduled Overtime' is a type of overtime which recurs at fixed times during the working week. Taking that one step further, the term 'Project working hours' incorporates a fixed component of overtime. The hours worked on the Project are an average of 50 hours per week over a Monday to Friday (excluding of course unpaid meal breaks). As the working hours average 50 hours over the working week and 7.6 hours constitute 'Ordinary Hours' and 0.8 hours constitute 'RDO accrual hours', it can be seen that the remainder of the hours on any one day of the working week will fall within what is understood to be the 'Regular Scheduled Overtime'. That is the remaining hours of the working day are 'rostered' overtime which is both regular and scheduled.

[102] Clause 8.2(b) sets out that an employee may be required to work reasonable additional overtime as required by the Employer. It is evident from the content of this clause and its position in the Agreement that the term 'additional overtime' in this context is overtime that is

in excess to that which is 'usual rostered overtime' or 'Regular Scheduled Overtime' (i.e. rostered overtime).

[103] This emphasis between the different types of overtime is again emphasised in clause 14(a) of the Agreement where 'Usual rostered overtime' is referred to in respect of a meal allowance – with an employee required to work 'additional overtime' for more than one and a half hours *beyond* the 'usual rostered overtime' of that day is to be supplied a meal or paid a meal allowance in certain circumstances. Those circumstances are where the employee was not notified on the previous day or earlier that they were required to work that additional overtime (that is overtime in excess of the rostered overtime).

[104] It is accepted that drafters of industrial instruments are likely of a practical bent of mind rendering it justifiable to read industrial instruments to give effect to their evident purpose, having regard to context, despite inconsistencies or infelicities of expression which might tend to some other reading.[68] Whilst the Agreement adopts the terms 'Regular Scheduled Overtime', 'usual rostered overtime', and overtime that is 'rostered', I do not consider much turns on these infelicities in drafting. Essentially, the different descriptors convey that the overtime that is rostered is distinguished from 'additional overtime' albeit it may still be characterised as 'reasonable' overtime (see clause 8.3).

[105] Clause 8.3 of the Agreement does not distinguish between overtime that is rostered or additional, referring simply to 'reasonable overtime' and what would constitute overtime that is unreasonable. The overarching tenant is that overtime, whether rostered or additional, is reasonable unless the working of such overtime would result in the employee working hours which are unreasonable when regard is had to the factors in clause 8.3(i)–(v).

[106] The Agreement at clause 8.4 addresses the withdrawal of rostered or additional overtime on any days Monday to Friday. Based on the evidence before me, the overtime that was purportedly withdrawn was 'rostered' overtime forming part of the 'Regular Scheduled Overtime'.

[107] It is uncontroversial that clause 8.4 provides a prohibition on the withdrawal of rostered overtime on a weekday. To withdraw the rostered overtime, two conditions must be met. First, there must be a good reason for the withdrawal and second, the rostered overtime shall not be withdrawn without a minimum of two hours' notice.

[108] As observed, there does not appear to be an interpretive difficulty that the withdrawal of the rostered overtime is predicated upon there being a 'good reason' and it is uncontroversial that the inclement weather on 31 May 2023 constituted a good reason for the purpose of clause 8.4(a) of the Agreement.

[109] However, where the interpretative difficulty appears to lie is with the requirement to provide a minimum of two hours' notice as referred to in the first sentence and when and if that two hours' notice is to be given, as described in the second sentence of clause 8.4(a).

[110] The second sentence of clause 8.4(a) commences with the phrase '[p]eriods of notice'. The reference to the 'period' being plural is understandable given the preceding sentence and must be understood in that context. At a *minimum*, the period of notice is to be two hours.

However, the employer is not precluded from providing a greater period of notice. Hence the reference to '[p]eriods' indicates that the notice may be of varying time lengths so long as it is of a minimum of two hours.

[111] At this juncture, it is relevant to observe that there are no words within the clause that suggest that payment in lieu of the period of notice may be provided. Where it is suggested that a period of notice may be circumvented such that a payment in lieu of the period of notice could instead be provided, such suggestion would amount to reading words into the Agreement that are not there.

[112] The period of notice is to be provided within one of two timeframes. The first is 'within the rostered working day'; the second is 'at the commencement of work on an overtime shift'. It is that latter timeframe I turn to first, to explain, in part, the operation of the clause.

[113] The second timeframe refers to circumstances where an overtime 'shift' is worked – this is to be distinguished from overtime hours that are, for example, performed as part of 'Regular Schedule Overtime' or 'usual rostered overtime'. The reference to overtime in this context is to that of an 'overtime *shift*', the emphasis being on the word 'shift'.

[114] Shift can be seen in two lights within the Agreement. The first is with regard to 'shift work'. The Agreement defines 'shift work' at clause 11 of the Agreement in the following terms:

> Shift work is deemed to be any arrangement of working hours where the majority of the ordinary hours are worked outside of the spread of hours specified in clause 8.1 hereof and when employees are working as such.

[115] Clause 11(c) of the Agreement further expands upon the Ordinary Hours for 'shift employees', and clause 11(d) speaks to the employer seeking agreement of employees involved prior to the commencement of 'shift work'. The second, is simply a 'shift', where its ordinary meaning is adopted – namely, 'the portion of the day scheduled as a day's work when a factory, etc., operates continuously during the 24 hours, or works both day and night: night shift'.[69]

[116] In respect of the second timeframe, the overtime hours form part of an entire overtime shift. The overtime shift is not compromised of Ordinary Hours, 'RDO accrual hours' and rostered overtime. Instead, it is comprised of additional overtime. Hence if the employer is to withdraw additional overtime it is to be done at the commencement of work on the overtime shift and the minimum period of notice is to be provided.

[117] The first timeframe concerns the withdrawal of overtime within the rostered working day. In respect of the Project working hours, the overtime (Regular Scheduled Overtime) is rostered and forms a component of the working hours for each weekday worked. The 'period of notice' is to be provided within the rostered working day, and the period must be a minimum of two hours but can, as explained, be of a greater amount. It follows that clause 8.4(a) prohibits the employer from withdrawing rostered overtime on a weekday – unless there is a good reason, and a minimum of two hours' notice has been provided within the same rostered working day that the rostered overtime is to be withdrawn. Where those factors have not been satisfied, the rostered overtime is unable to be withdrawn and must be paid to the employees.

[118] My consideration of the abovementioned factors and the submissions and evidence before me leads me to accept the central premise of the AMWU's position. I am satisfied that clause 8.4(a) is clear and absent ambiguity. As to the CEPU's argument that a period of notice is unable to incorporate the unpaid meal break, the argument is unable to be sustained based on the express words of the Agreement. The reference in clause 8.4(a) is to two hours' notice. No reference is made to the notice incorporating unpaid or paid time. It is a simple temporal reference to a period of time which does not warrant the deduction from it of an unpaid break. To interpret the clause otherwise would be to reach a conclusion as to what might be considered by one party to be fair albeit in circumstances where the Commission has been required to read words into the Agreement which are simply not there.[70]

7.2 Application to the facts

[119] The question remains whether the notice provided by Civmec for the purpose of clause 8.4(a) of the Agreement was of a minimum of two hours. The question is not difficult to comprehend. However, any attempt to answer it based on the evidence before me is.

[120] In the decision of *Jain v Infosys Ltd*, the Full Bench expressed the following view in respect to an evidential onus:

> In most cases the question of where an evidentiary onus (or something analogous to it) resides will be answered by asking; in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about that matter were given? The evidentiary onus will generally be the party that will fail in that event.[71]

[121] Turning first to the indubitable facts. Before 1:00 PM on 31 May 2023, three Construction Managers of Civmec discussed sending crews home early. According to the uncontested evidence of Mr Ross and Mr McElhinney, the discussion was held at either 12:40 PM or 12:45 PM. In that discussion it was decided to send the relevant employees home due to the inclement weather conditions. The three Construction Managers notified superintendents to begin the process of spreading the word amongst the workforce. According to Mr McElhinney, after the discussion he immediately communicated with his superintendents to spread the word amongst the workforce, and he personally ensured that all his reports and relevant personnel were informed about the decision to withdraw overtime and cease work due to inclement weather.[72] According to Mr Ross, he had informed his superintendents and supervisors of the decision who in turn informed their respective crews.[73]

[122] Mr Macivor's and Mr Daly's supervisor, Mr Castle, was not called to give evidence. In cross examination of the Unions' witnesses, it was disclosed that Mr Castle no longer worked for Civmec. In oral submissions, Civmec explained that whilst attempts to contact Mr Castle had been made, they had not proved productive. In closing submissions, the Unions invited the Commission to draw an adverse *Jones v Dunkel*[74] inference based on Civmec's failure to call Mr Castle.

[123] The rule in *Jones v Dunkel* has been described as a 'rule of common sense and fairness in relation to the fact finding process'.[75] In *Hyde v Serco Australia Pty Ltd*,[76] the Full Bench observed that the rule in *Jones v Dunkel* had been considered extensively in *Tamayo v Alsco Linen Service Pty Ltd* (**Tamayo**)[77] and outlined the observations made in that case. Observing that the Commission was not bound by the rules of evidence, that it could inform itself in

relation to a manner as it considers appropriate and that the Commission must perform its functions and exercise its powers in a manner that is 'fair and just', the Full Bench adopted the *Tamayo* observations. It continued that as the 'rule' in *Jones v Dunkel* is fundamentally concerned with issues of fairness the Commission will give consideration to its application in an appropriate case. It is of course accepted that when exercising discretion concerning the rule in *Jones v Dunkel*, the discretion is to be exercised in accordance with the dictates of common sense and fairness.[78]

[124] A *Jones v Dunkel* inference can be drawn where there is a conflict in the evidence on particular issues and there is an unexplained failure to call someone to explain that conflict. First, it should be said that it is not the case that the Civmec failed to explain why it did not call Mr Castle to give direct evidence; it submitted that whilst attempts were made to contact Mr Castle these attempts had proved unsuccessful. In the circumstances, I do not consider it reasonable to draw an inference adverse to Civmec based on this ground.

[125] Notwithstanding, Civmec decided not to call any other supervisors who had notified the relevant employees they were to go home. Whilst Mr McElhinney's evidence is such that he personally ensured all his reports and relevant personnel were informed about the decision to withdraw overtime and cease work due to inclement weather in the 15 minutes after the discussion,[79] the evidence of Mr Ross is not so compelling, and the third Construction Manager was not called to give evidence.

[126] As noted, Mr Ross' evidence is that he walked into his office, which was one metre away, and informed his superintendents and supervision of the decision and advised that they in turn were to inform their respective crews and ensure people sign off.[80] It is unclear from Mr Ross' evidence whether his supervisory staff did this prior to 1:00 PM, and whether he checked this was the case. In submissions, Civmec pressed that calling its supervisors who communicated the notification on 31 May 2023 would not have assisted given the passage of time and the impact of time upon their memory. The contention is speculative. In circumstances where Civmec seeks to persuade this Commission that more likely than not notification was provided prior to 1:00 PM, such that it may rely on the operation of clause 8.4(a), its supposition about the recall of its absent supervisors does not assist it.

[127] However, in support of its contention that relevant employees were notified prior to 1:00 PM, Civmec also placed reliance on the swipe card records (exit gate/turnstile records) that were tendered through the witness statement of Mr Ross. The records show the time that relevant employees exited the Project site.

[128] It would seem that Civmec asks this Commission to draw an inference that the swipe card exit times are indicative that notice to withdraw rostered overtime was provided before 1:00 PM. This is because the swipe card exit times are temporally proximal to the 1:00 PM timeframe.

[129] Further, evidence was provided at hearing by some of the Unions' witnesses to suggest that from the time of notification to the time of exit, relevant employees would need to walk, at a minimum, from where they were notified to the exit. Mr Glenton gave evidence that some relevant employees may have to have handed in 'JHAs' for signing. Mr Glenton said that from where he was situated, there was a bit of a walk from the crib sheds to where he was working.

Albeit he acknowledged that he was unsure whether he had left the crib shed to go back out and quickly lock up the site and pack up boxes (with equipment).

[130] Mr Daly and Mr Macivor gave evidence that before departing the Project site, it would be necessary to quickly clean up and pack up welding equipment and equipment in general. However, both witnesses gave evidence that on 31 May 2023 they had already packed up their gear (such as hot work gear) because of the rain – and that the majority of the welding crew had done the same.

[131] Civmec's argument appears to be that having notified relevant employees to go home, there would be a time delay between the notification and their exit from the Project site through the turnstiles. Civmec further submits that a delay in exiting the Project site would, in part, be also attributable to the relevant employees exiting the Project site at the same time – Civmec made submissions that some 500 employees exited the site that morning. However, the swipe card records provided to the Commission are not indicative that 500 employees departed the Project site but show approximately 161 records of exit gate times. Given such evidence was not contested, I have proceeded on the basis that the records represent the exit times of approximately 161 relevant employees.

[132] As noted, the Commission is required to draw inferences in this case. The principles in respect of the drawing of inferences from the evidence, were set out by a Full Bench of the Australian Industrial Relations Commission in *Smith v Moore Paragon Australia Ltd* (**Smith v Paragon**).[81]

[133] Having considered a range of authorities, the Full Bench summarised the statement of principles set out as follows:

- an inference is assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts;
- the drawing of an inference is part of the process of fact finding;
- an inference can be drawn if it is reasonably open on the basis of agreed or proved facts;
- the question whether a particular inference can be drawn from the facts found or agreed is a question of law;
- where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference;
- the circumstances must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture;
- matters to be taken into account in drawing an inference include circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed;
- generally it is not lawful to take into account moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations;

- the degree of probability required to found the necessary inference will depend on the nature of the proceeding:
  - in a criminal case the facts must be such as to exclude reasonable hypotheses consistent with innocence;
  - in a civil case you need only circumstances raising a more probable inference in favour of what is alleged;

- a party's failure to give inference on some issue in cases where it is within that party's power to provide or give evidence, may result in more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence.[82]

[134] The Full Bench in *Smith v Paragon* expressed that the circumstances must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture.

[135] As observed, Mr McElhinney's evidence is such that he personally ensured all his reports and relevant personnel were informed about the decision to withdraw overtime and cease work due to inclement weather in the 15 minutes after the discussion.[83] Mr McElhinney's evidence was uncontested and there is no purported reason why I should not believe what he had to say. On that basis, I find that where relevant employees fell within the remit of Mr McElhinney, they were informed prior to 1:00 PM that they were to be sent home.

[136] The swipe card exit times show Mr Glenton clocking off at 1:05 PM on 31 May 2023, Mr Macivor clocking off at 1:08 PM on 31 May 2023, and a Mr O'Donnell clocking off at 1:11 PM. My attention was not drawn to swipe card exit records for Mr Daly and he does not appear to be listed on the record of exit times annexed to the statement of Mr Ross. However, according to the viva voce evidence of Mr Macivor, both he and Mr Daly 'knocked off' at a 'pretty similar' time.

[137] Mr Glenton gave evidence that he was notified to go home about 1:15 PM but certainly between 1.00 PM and 1:30 PM. The swipe card exit time shows him departing the site at 1:05 PM. Given the difference between the time Mr Glenton perceived he was notified and the actual time of his exit from the Project site, I consider more likely than not that his recall regarding the time he was notified to go home is imprecise. As such, I consider that given his departure time from the site, he was informed to go home prior to 1:00 PM.

[138] Mr Macivor gave evidence that he was told to go home by Mr Castle at 1:15 PM. However, the swipe card exit times show Mr Macivor leaving the site at 1:08 PM. Given the difference in the time Mr Macivor perceived he was notified to go home and the time of his actual exit from the site, I consider his recall regarding when he was notified is imprecise, and more likely than not that he was informed to go home prior to 1:00 PM.

[139] Mr Daly gave evidence that he was told to go home by Mr Castle at 1:15 PM. Explanation was not provided as to why there was not a swipe card exit record for Mr Daly on the day in question. However, in circumstances where Mr Daly was seen to exit at a 'pretty similar time' as Mr Macivor, it would appear that Mr Daly's assertion that he was notified at 1:15 PM is unable to be sustained on the evidence. In the circumstances, I am unpersuaded by

Mr Daly's recall as to when he was notified to go home and consider more likely than not that he was informed prior to 1:00 PM.

[140] Mr O'Donnell stated in his witness statement that just after 1:00 PM his supervisor Mr Reemeyer came into the crib rooms and said 'we were going home'.[84] The swipe card exit times show Mr O'Donnell departing at 1:11 PM. The Respondent did not call Mr O'Donnell's supervisor to give evidence and it was accepted by the parties that Mr O'Donnell's witness statement would be accepted into evidence albeit he was unavailable for cross examination.

[141] Briefly stated, it is difficult to ascertain when Mr O'Donnell was notified. However, based on the evidence before me and noting Mr O'Donnell's exit time, I consider that more likely than not that Mr O'Donnell was notified after 1:00 PM. However, my position on this point would change in circumstances where the evidence was such that Mr O'Donnell reported into a supervisor under Mr McElhinney's remit. Again, I note that in all the circumstances there is no evidence before me that suggests that Mr McElhinney's account cannot be believed that he ensured that all his reports and relevant personnel were informed of the decision to cease work and withdraw overtime.

8 Conclusion

[142] The AMWU and Civmec asked whether on the proper construction of the Agreement the employees who are the subject of the dispute are entitled to be paid for withdrawn rostered overtime hours pursuant to clause 8 of the Agreement. My response to that question is that where an employee was not provided with a minimum of two hours' notice, the rostered overtime on 31 May 2023 was unable to be withdrawn. As to whether the 500 relevant employees were provided with the requisite notice within the timeframe stipulated in clause 8.4(a), that is difficult to ascertain based on the evidence relied upon by the parties at hearing.

[143] In light of my findings however, I would conclude that relevant employees reporting to Mr McElhinney whether directly or indirectly (i.e. through a supervisor or superintendent) were provided with good reason and given a minimum of two hours' notice in respect of the withdrawal of rostered overtime on 31 May 2023.

[144] Based on the evidence before me I am not similarly persuaded that relevant employees under the management of the two remaining Construction Managers were provided with two hours' notice. Albeit in respect of the remaining relevant employees who gave evidence at hearing, I observe the findings I have made in respect of the evidence of Messrs Macivor, Glenton, Daly and O'Donnell.

[145] Shortly stated, relevant employees who reported to Mr McElhinney, whether directly or indirectly, in addition to Messrs Macivor, Glenton, and Daly, are not entitled to be paid for the rostered overtime that was withdrawn on 31 May 2023. Relevant employees who reported directly or indirectly to the remaining two Construction Managers are entitled to be paid for the rostered overtime that was withdrawn on 31 May 2023, in addition to Mr O'Donnell (subject to the observation made at paragraph [141]). I appreciate that the conclusion is unsatisfactory such that it effectively divides the workforce into a group who will receive payment for the withdrawn rostered overtime and a group who will not. However, due to the evidence relied upon by the parties, I am limited to the conclusion drawn.

[146] It follows that Civmec is ordered to pay the rostered overtime which was withdrawn on 31 May 2023 to the relevant employees so named in this decision, being those relevant employees who reported to a Construction Manager that was not Mr McElhinney. Further, in circumstances where Mr O'Donnell did not report to Mr McElhinney either directly or indirectly (as denoted in the decision), he too is to be paid for rostered overtime which was withdrawn on 31 May 2023. As noted, Messrs Macivor, Glenton, and Daly, are not entitled to be paid for the rostered overtime that was withdrawn on 31 May 2023. An Order[85] to this effect is published concurrently.

[147] The CEPU asked what is the proper application of clause 8.4 of the Agreement as it ought to have applied on 31 May 2023. I consider that paragraphs [117] to [118] of this decision address that question. The CEPU further asked '[w]hat, if any, steps should the parties take to resolve the dispute?'. It does so on the basis that asking this part of the question ensured that the Commission was being directed to resolve the dispute rather than performing 'ersatz declaratory relief'.

[148] There are two points to make in respect of the latter contention regarding declaratory relief. First, the dispute that has arisen in relation to the operation of clause 8.4(a) is properly a dispute in relation to the operation of the Agreement and I therefore consider that the Commission has jurisdiction to deal with the dispute. Second, I further consider that the Commission is authorised to issue orders that Civmec compensate the relevant employees for rostered overtime that was withdrawn and not paid. In this respect, I do not consider that the Commission is exercising declaratory relief.

[149] The concept of arbitration in the context before me necessarily implies an outcome which is binding upon the parties that have submitted to the arbitration, which in this case the parties have.[86] And as is apparent from ss 595(2) and (3) and from clause 28 of the Agreement, arbitration is intended to be more than simply 'expressing an opinion' or issuing a 'recommendation' – both of which are not referred to in clause 28.[87] The parties have agreed to submit their dispute as to their legal rights and liabilities for resolution by the Commission and to accept the Commission's decision as binding on them. In this respect, the Commission does not exercise judicial power but engages in its arbitral function in accordance with the terms of the Agreement and the relevant provisions of Part 5-1 and Part 6-2 of the Act.[88]

[150] Turning to Part 5-1, s 595(3) empowers the Commission, when expressly authorised to arbitrate, to make any orders it considers appropriate. In *Construction, Forestry, Maritime, Mining and Energy Union v Falcon Mining Pty Ltd*, the Full Bench observed that this provision would operate in respect of any arbitration conducted pursuant to s 739(4) provided that the relevant dispute resolution procedure did not prohibit or restrict the making of orders by the Commission and thus engage the limitation on the Commission's powers contained in s 739(5).[89] Any order made by the Commission under the Act is given legal effect by s 675.

[151] If it is the case that the power to arbitrate is derived not from the statute but from the terms of the instrument, as s 739(4) has also been interpreted, then it is in the instrument where one would therefore find whether the parties have agreed that the Commission may arbitrate the dispute between them.[90] If this view is accepted, it is that agreement which is the source of

the power to arbitrate, and s 739 would merely authorise the Commission to act upon the parties' agreement.[91]

[152] If this view is accepted, then it remains that the Commission is authorised as a private arbitrator, acting under clause 28 of the Agreement, to make decisions as to the legal rights and liabilities of the parties to the dispute. That involves deciding all questions both of law and of fact that arise in the dispute, subject to any limitation on power in the dispute settlement clause, and a requirement not to make a decision that is inconsistent with the Act or a Fair Work instrument that applies to the parties. Orders compensating the relevant employees for any unpaid rostered overtime that was withdrawn can also be made. Though under this view it may be seen as akin to the exercise of judicial power, such power is not being exercised because the parties have agreed to permit the Commission to determine their dispute by private arbitration in accordance with the terms of the Agreement.[92]

DEPUTY PRESIDENT

Appearances:

J Fox for the CEPU
M Bronleigh for the AMWU
M McManus for Civmec Construction & Engineering Pty Ltd

Hearing details:

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Perth (by video):
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[1] AE517238.

[2] Ibid cl 8.2(c).

[3] Ibid cl 8.2(a).

[4] Ibid cl 8.1(a).

[5] Ibid cl 13.

[6] Witness Statement of Frederick Macivor, attachment MD-1.

[7] Ibid [3].

[8] Ibid [4].

[9] Ibid [5].

[10] Ibid.

[11] Witness Statement of Maxwell Daly.

[12] Witness Statement of Kevin O'Donnell, [2] (**O'Donnell Statement**).

[13] Ibid [4].

[14] Ibid [6].

[15] Ibid.

[16] Ibid [7].

[17] Ibid.

[18] Ibid [9].

[19] Witness Statement of Robert Glenton, [1]–[2].

[20] Ibid [2]

[21] Ibid [3].

[22] Ibid.

[23] Witness Statement of Paul Ross, [2] (**Ross Statement**).

[24] Ibid.

[25] Ibid.

[26] Ibid [3].

[27] Ibid [4].

[28] Ibid [4].

[29] Witness Statement of Charles McElhinney, [2] (**McElhinney Statement**).

[30] Ibid.

[31]Ibid.

[32] Ibid [4].

[33] Ibid [5].

[34] Ibid.

[35] Ibid [6].

[36] Respondent's Outline of Submissions, [30].

[37] (1959) 101 CLR 298.

[38] (1977) 57 WAIG 1687, 1690.

[39] *Mt. Newman Mining Company Pty Ltd v Amalgamated Metal Workers' and Shipwrights' Union of Western Australia* (1982) 62 WAIG 2439, 2443.

[40] Ibid.

[41] Ibid.

[42] *John Holland Construction & Engineering Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch* (1997) 77 WAIG 910, 914.

[43] [2003] AIRC 1380.

[44] (2020) 278 FCR 566, 580 [65(v)].

[45] Ibid 580–1 [65(vi)]. See also (in legislative context) D Pearce, *Statutory Interpretation in Australia* (9th ed, 2019) 312–15.

[46] (2018) 264 FCR 536 (**WorkPac**).

[47] (2017) 268 IR 285 (**Berri**).

[48] (2014) 245 IR 394.

[49] *WorkPac* (n 46) 581 [202].

[50] (2017) 272 IR 384, 394 [35].

[51] Oxford English Dictionary.

[52] *WorkPac* (n 46) 580 [197].

[53] Ibid 581 [202].

[54] Ibid.

[55] [2017] FWCFB 4487.

[56] *Berri* (n 47) 311 [114.7].

[57] Ibid 311 [114.8].

[58] Ibid 311 [114.9].

[59] Ibid 311 [114.10].

[60] Ibid 311 [114.11].

[61] Ibid.

[62] Ibid.

[63] Ibid 311 [114.13].

[64] Ibid.

[65] Ibid 311 [114.14].

[66] Macquarie Dictionary Online.

[67] Ibid.

[68] *Kucks v CSR Ltd* (1996) 66 IR 182, 184 (Madgwick J); *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, 270–1 [96] (Kirby J), 282–3 [129]–[130] (Callinan J).

[69] Macquarie Dictionary. See, eg, clauses 16(d), 19, 23, 32(b), and 32(d) of the Agreement.

[70] *National Tertiary Education Industry Union v La Trobe University* [2020] FWC 2594; *Berri* (n 47) 310 [114(2)].

[71] [2014] FWCFB 5595, [37].

[72] McElhinney Statement (n 29) [5].

[73] Ross Statement (n 23) [4].

[74] *Jones v Dunkel* (n 37).

[75] *Hyde v Serco Australia Pty Ltd* [2018] FWCFB 3989, [102] (**Hyde**).

[76] Ibid.

[77] (Australian Industrial Relations Commission, Ross VP, Drake DP and Commissioner Cargill, 4 November 1997).

[78] *Hyde* (n 75) [103].

[79] McElhinney Statement (n 29) [5].

[80] Ross Statement (n 23) [4].

[81] (Australian Industrial Relations Commission, Ross VP, Lacy SDP and Commissioner Simmonds, 21 March 2002).

[82] Ibid [42].

[83] McElhinney Statement (n 29) [5].

[84] O'Donnell Statement (n 12) [7].

[85] PR765536.

[86] *Construction, Forestry, Maritime, Mining and Energy Union v Falcon Mining Pty Ltd* (2022) 317 IR 367, 395 [71], 397 [75].

[87] Ibid 397 [75].

[88] Ibid 392–3 [60]–[63], 395 [68]–[70].

[89] Ibid 397 [76].

[90] *Tracey v BP Refinery (Kwinana) Pty Ltd* [2022] FWCFB 210, [45].

[91] Ibid.

[92] Ibid.