

MERRILL CORPORATION



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

1051896

COMMISSIONER ROBERTS

AM2014/300

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/300)
Award flexibility**

Sydney

12.08 PM, TUESDAY, 19 MAY 2015

Continued from 05/05/15

PN915

THE COMMISSIONER: Appearances remain the same, do they?

PN916

MR NGUYEN: Yes, Commissioner.

PN917

MS BLEWETT: Yes, Commissioner.

PN918

MR FERGUSON: Yes, Commissioner.

PN919

THE COMMISSIONER: I forget case to case, so I like people to tell me. All right. Now we are waiting for the esteemed Mr Zaltsman, are we?

PN920

MR NGUYEN: Mr Carleton, Commissioner.

PN921

THE COMMISSIONER: Mr Carleton, sorry. I got my Zs mixed.

PN922

MR NGUYEN: I think he's just looking for the hearing room.

PN923

THE COMMISSIONER: Is he in the hearing room now?

PN924

MR NGUYEN: He's arrived in the building. When I called him he'd just arrived at the building, so he's just looking for the hearing room.

PN925

THE COMMISSIONER: It's sort of a step at a time, isn't it? We've got him in the building at least, which is good. And then we follow with Mr Zaltsman.

PN926

MR FERGUSON: Commissioner, if we can, just while we've got a moment - - -

PN927

THE COMMISSIONER: Yes.

PN928

MR FERGUSON: Just a housekeeping matter. Before last date, we filed electronically a raft of material and authorities. My office did prepare a printed copy, I think, at the request of the chambers of the President. Is it of any assistance if I hand that up? I neglected to do so on the last occasion.

PN929

THE COMMISSIONER: Yes you may do so. So you want us to pass this on, do you?

PN930

MR FERGUSON: If that's possible. It may well be that chambers is had already printed it.

PN931

THE COMMISSIONER: Can be done.

PN932

MR FERGUSON: We killed the tree, so - - -

PN933

THE COMMISSIONER: I take it this is the only order of business today, the two witnesses?

PN934

MR FERGUSON: Yes. I understand there are some submissions about the witness evidence as well.

PN935

THE COMMISSIONER: Sorry, say the last bit?

PN936

MR FERGUSON: There may be submissions from the parties about the evidence.

PN937

THE COMMISSIONER: Yes, I expected that, yes.

PN938

MS BLEWETT: Your Honour, I just wanted to also apologise that I did tell Ross C that there would be an original - - -

PN939

THE COMMISSIONER: President Ross.

PN940

MS BLEWETT: I beg your pardon, President Ross.

PN941

THE COMMISSIONER: Mr Justice Ross.

PN942

MS BLEWETT: Justice Ross that there would be an original signed witness statement of Mr Zaltsman.

PN943

THE COMMISSIONER: Yes.

PN944

MS BLEWETT: However, I've only been able to get an electronic copy.

PN945

THE COMMISSIONER: Fair enough. Mr Zaltsman is turning up to attest in front of me, isn't he?

PN946

MS BLEWETT: Yes, he's appearing via video link.

PN947

THE COMMISSIONER: Well, I have a signed statement from Mr Zaltsman and he will attest to it in the witness box and that will suffice.

PN948

MS BLEWETT: Thank you, your Honour. I also have - do you need the physical copy of the time and wages records. They were filed yesterday.

PN949

THE COMMISSIONER: Well, it's up to you what material you tender. Do you wish to tender this material or what?

PN950

MS BLEWETT: Yes.

PN951

THE COMMISSIONER: You will do it at the appropriate time during Mr Zaltsman's evidence.

PN952

MS BLEWETT: Okay.

PN953

THE COMMISSIONER: It must be a very big building in Perth with long corridors. There he is. Mr Nguyen.

PN954

MR NGUYEN: Commissioner, the MWU proceeds to call Mr Carleton to the witness stand in Perth.

PN955

THE COMMISSIONER: Call Mr Carleton to the stand.

PN956

MR CARLETON: Hello.

PN957

THE COMMISSIONER: Yes. Just wait a moment, we'll get to your hello in a moment.

PN958

MS BLEWETT: Mr Zaltsman, you will have to leave the room.

PN959

THE COMMISSIONER: Mr Zaltsman has to leave.

PN960

MR ZALTSMAN: Yes, thank you.

PN961

THE COMMISSIONER: Mr Carleton, you will have to go into the witness box. You will be directed as to where it is. Do you wish to take an oath or affirmation.

PN962

MR CARLETON: Affirmation, thanks.

PN963

THE COMMISSIONER: You can remain seated during all of this process, given that you are on video.

PN964

THE ASSOCIATE: Please state your full name and address.

PN965

MR CARLETON: Zachary Maurice Carleton (address supplied)

<ZACHARY MAURICE CARLETON, AFFIRMED [12.12 PM]

EXAMINATION-IN-CHIEF BY MR NGUYEN [12.12 PM]

PN966

THE COMMISSIONER: Mr Nguyen.

PN967

MR NGUYEN: Mr Carleton, do you have a copy of your witness statement dated 19 March with you?--I do. I'll just acquire it from my little bag.

PN968

Do you have any amendments that you would like to make to the statement?--Yes, I do. Paragraph 15. I would like to delete that as I am now comfortable with my employer being aware of these proceedings. And also - - -

PN969

Sorry, Mr Carleton, can I just clarify - - -

PN970

THE COMMISSIONER: Step by step. Mr Carleton has asked me to strike paragraph 15.

PN971

MR NGUYEN: Did you want to delete the entire paragraph 15?

PN972

THE COMMISSIONER: That's what he said?--Yes, I'm now comfortable making my employer aware, so there is no need for that paragraph.

*** ZACHARY MAURICE CARLETON

XN MR NGUYEN

PN973

Anything else?

PN974

MR NGUYEN: Anything else, Mr Carleton?---Yes, statement 3, I've just recently found out that I'm on 13 cents more than the award. That's per hour, that's on my hourly rate.

PN975

THE COMMISSIONER: Where does that slot in, Mr Nguyen?

PN976

MR NGUYEN: Paragraph - - -

PN977

THE COMMISSIONER: Currently the paragraph "Hangs in limbo." I am currently employed under the Graphic Arts Printing and Publishing Award 2010 as" - blank.

PN978

MR NGUYEN: Sorry, Commissioner. The unredacted version says "as an adult apprentice in my second year."

PN979

THE COMMISSIONER: Do you have a copy of the unredacted version?

PN980

MR NGUYEN: Not with me, Commissioner.

PN981

THE COMMISSIONER: Well, if you will repeat the words to me again in paragraph 3, please.

PN982

MR NGUYEN: It reads:

PN983

After 2010 as an adult apprentice in my second year.

PN984

THE COMMISSIONER: Hang on, I don't print as quickly as you speak. "As an adult - - -

PN985

MR NGUYEN: Apprentice.

PN986

THE COMMISSIONER: Yes.

*** ZACHARY MAURICE CARLETON

XN MR NGUYEN

PN987

MR NGUYEN: "In my second year."

PN988

THE COMMISSIONER: Yes.

PN989

MR NGUYEN: Mr Carleton, which paragraph did you say you wanted to amend with your proper award rate?---Paragraph 3, "I am currently employed under the Graphic Arts Printing and Publishing Award 2010 as an adult apprentice in my second year." But I would like to correct that with being "on 13 cents more than the award rate."

PN990

MR NGUYEN: Yes.

PN991

THE COMMISSIONER: On 13 cents per hour above the award rate?---That's correct.

PN992

All right, that's done. Is there any other variations you wish to make, Mr Carleton?---No, that's fine.

PN993

MS BLEWETT: Your Honour, might I raise an objection to the first sentence of paragraph 12.

PN994

THE COMMISSIONER: Yes. Well, it hasn't been raised about entering it as evidence yet. So we will wait till he gets to that point and then I will take your objection. You will get your chance.

PN995

MS BLEWETT: Okay, thank you.

PN996

MR NGUYEN: Mr Carleton, as the statement is now amended, is it a true and accurate statement?---Yes. Yes, it is to my knowledge, unless where otherwise indicated.

PN997

Commissioner, the MWU seek to tender Mr Carleton's amended witness statement dated 19 March.

PN998

THE COMMISSIONER: I also - you are going to have to liaise with my associate at some stage about putting in the redacted bit. There are redacted bits in paragraph 1, paragraph 11 - the ones I can see here. So we just have to have an agreed version of what the witness statement actually is and you've tendered this document now?

*** ZACHARY MAURICE CARLETON

XN MR NGUYEN

PN999

MR NGUYEN: Yes, Commissioner. We did forward a copy to chambers, apologies, only to Ross P's chambers on 30 April. They'll be forwarded to your chambers as well.

PN1000

THE COMMISSIONER: That's the best way. And your objection?

PN1001

MS BLEWETT: Yes, your Honour. I seek to object to the first sentence of paragraph 12 of Mr Carleton's statement on the basis of opinion evidence. He states:

PN1002

I also thought that time off in lieu at time for time was not a fair for working overtime.

PN1003

It's clearly opinion.

PN1004

THE COMMISSIONER: Well, that's his opinion is it not?

PN1005

MS BLEWETT: Yes, but it is purely - - -

PN1006

THE COMMISSIONER: You can cross-examine him and the Bench will decide what weight to give to his statement.

PN1007

MS BLEWETT: Okay.

PN1008

THE COMMISSIONER: No, I will allow paragraph 12 to remain untouched. Any further objections?

PN1009

MS BLEWETT: No, your Honour.

PN1010

THE COMMISSIONER: Do you have follow-up questions, Mr Nguyen?

PN1011

MR NGUYEN: Yes, Commissioner.

PN1012

Do you seek to mark the witness statement?

*** ZACHARY MAURICE CARLETON

XN MR NGUYEN

PN1013

THE COMMISSIONER: I'm sorry, say again?

PN1014

MR NGUYEN: We seek to mark the witness statement now.

PN1015

THE COMMISSIONER: What a good idea. Sorry, I forgot that. The witness statement of Mr Carleton will be marked as exhibit AMWU2 in these proceedings.

EXHIBIT #AMWU2 WITNESS STATEMENT OF MR CARLETON

PN1016

MR NGUYEN: Thank you, Commissioner.

PN1017

Mr Carleton, can I ask you to recall for the Commissioner today the conversation that you had around March 2014 about working overtime?---Okay. So I was in the office-type area and - do you want me to just explain the situation from my own words?

PN1018

Yes?---Okay. So I was in the office area just querying a job and I was asked words to the effect of am I able to stay back. So I then asked, you know, would it just be for a couple of hours or what it is that they needed, so he said it would just be whatever I could do. And I said, "Would that be overtime?" And he said, "No, it would be time off in lieu." So I refused on that basis. If he had have offered me at the overtime rate for working overtime I would have accepted that offer, so that's the underlying what happened in my statement.

PN1019

And who was the person who offered you the overtime at time off in lieu?---It wasn't my normal supervisor, which confused me more. It was Graeme Dyer. He just works in the planning or scheduling department. So I was a bit unsure of what was actually happening at the time as well.

PN1020

That's all, Commissioner.

PN1021

THE COMMISSIONER: Anything you wish cross-examine on?

CROSS-EXAMINATION BY MS BLEWETT

[12.20 PM]

PN1022

MS BLEWETT: Yes, your Honour.

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1023

Mr Carleton, how were you first approached by the union to participate in this matter?---Through an online survey. I completed a survey and then I had a call

back asking me a few more questions about the survey and a bit more specific details. So that's how this first came about, through online.

PN1024

And you kindly asked for Mr Zaltsman's permission to partake in - - -?---Yes, I did later discuss this in the workplace with Neil Zaltsman and he encouraged me. He said, "We encourage you to do this", and you know, that they'd done the same survey online about time off in lieu. So he was comfortable for me to do it, and that's why I'd amended statement 15.

PN1025

Yes, so they had no problem with it?---Yes.

PN1026

And what did the survey ask?---Just if I had had experiences with time off in lieu or make-up time. There were some fairly general questions, just about experiences in general, whether you've experienced it or not and what is your opinion and just things like that.

PN1027

Okay?---Straightforward questions, yes.

PN1028

Yes, and you've just had this one experience?---Yes, that's all I could use as a basis for my time off in lieu experience, yes.

PN1029

In the incident regarding TOIL that you outlining your statement, you state that it occurred around March 2014. Is that correct?---Yes, approximately. I'm not sure exactly on dates, but it was around March. Yes.

PN1030

Who was your supervisor at the time?---I think it was Oliver Bogdan. He's just left in February this year.

PN1031

So your supervisor was not Mr Dyer?---That's correct. That's why I was a bit confused when he was asking me to stay back and, yes, for time off in lieu. It was even more confusing for me at the time.

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1032

Right. So did you query that at the time? I mean, if this was quite an atypical situation, should not any payment issues be discussed with Mr Bogdan generally?--- I did have a brief discussion with him about the subject are being asked to do overtime by Graeme Dyer, and I said, you know, "What's the go? He's offered me time off in lieu," and he said - like I said, I would have done it if it would - had it been overtime and he basically said, "The company is not in a position at the moment to pay overtime rates," and another time Oliver Bogdan has asked me, as well, to do overtime for time off in lieu. Not much was said at the time. It was quite straightforward, very general words were said to me, "Can I

stay back" and I replied, "Would it just be, what, an hour or two hours?" And he said, "Yes, just a couple of hours or whatever you can do," and I said, "Overtime, would it be overtime?" And he said, "No." He just shook his head and said, "Time off in lieu", and I just denied. So there was a few small examples like that where it was just very general words spoken. Yes, nothing specific at all.

PN1033

It appears strange to me that if you usually liaise with Mr Bogdan, why it just happens that on this once incident you had a - - -?---It was Graeme Dyer.

PN1034

Yes?---Yes, your ultimate question is why Graeme Dyer? Me too. I still to this day am confused and unsure as to the management system in that regard as to asking me to do overtime. I still do not have any information on that to go by, it's just - yes.

PN1035

Well, I've spoken to Mr Zaltsman who has spoken to Mr Dyer and he does not recall this whole - - -?---Okay. There was half a dozen other times where he'd walked past my area and to say, "Are you able to stay back, matey?" And, you know, I'd say, "Is it overtime," and he'd just go, "No, time off." And I'd just refuse on that basis. So - - -

PN1036

So now you're saying - - -?

PN1037

THE COMMISSIONER: Let him finish?---I don't imagine it would be documented in writing in the office. So there's not really much to go on in that regard. Sorry, I can't really provide much information on that.

PN1038

MS BLEWETT: All right. Moving on, at paragraph 7 of your statement, you state that, "The company did not pay overtime." Is that correct?---Yes.

PN1039

Yes, okay. Your Honour, I seek to tender the time and wages records.

PN1040

THE COMMISSIONER: Well, Mr Carleton won't have access to these, will he?---Is that from October?

PN1041

THE COMMISSIONER: Mr Nguyen has risen.

PN1042

MR NGUYEN: Commissioner, I haven't given - I did forward him a copy by email, but he wasn't able to open it, but I did outline to him in general terms that it shows that he was paid overtime on those highlighted dates.

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1043

THE COMMISSIONER: Well, he's enlightened about what's coming so that's okay. Do you want to tender?

PN1044

MS BLEWETT: Yes, your Honour.

PN1045

THE COMMISSIONER: Time and wages records for Mr Carleton will be marked exhibit PIA1.

**EXHIBIT #PIA1 TIME AND WAGES RECORDS FOR MR
CARLETON**

PN1046

MS BLEWETT: Thank you, your Honour.

PN1047

So at paragraph 7 when you say, "The company did not pay overtime," it's not completely correct, is it? Because if we look at - - -?---At the time I was - - -

PN1048

THE COMMISSIONER: You have to speak directly into the microphone, sir. You tend to fade in and out.

PN1049

MR NGUYEN: So if you can just pull the microphone down?---Yes, is that better?

PN1050

THE COMMISSIONER: Much, much better?---So where were we, sorry?

PN1051

MS BLEWETT: Paragraph 7 of your statement when you said - - -?---Paragraph 7.

PN1052

Yes?---Yes, so at the time that was correct. I didn't know anybody to receive overtime at the penalty rates during a period between March and towards the end of last year sometime. There was a good six months where I was aware that nobody was getting overtime rates.

PN1053

But you were also aware that the company was going through a difficult period in 2014?---I had been made aware, yes. It's over the last two to three years it's - it hasn't been improving, it's been getting a bit worse, so I am aware of the company's situation, yes.

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1054

On at least three dates subsequently you have been paid overtime?---In October, yes.

PN1055

Well, on the dates that are evidenced in the time - - -

PN1056

THE COMMISSIONER: Well, you want to take him through those dates. I take it they are the ones highlighted on the exhibit.

PN1057

MS BLEWETT: Yes.

PN1058

THE COMMISSIONER: Why don't you take him sequentially through them?

PN1059

MS BLEWETT: 3 March 2015?---Hey?

PN1060

THE COMMISSIONER: You might tell him what happened on 3 March. Just read out what's on there.

PN1061

MS BLEWETT: One moment, your Honour. May I get another copy?

PN1062

THE COMMISSIONER: Yes, sure.

PN1063

MS BLEWETT: So on 3 March 2015 you were paid overtime at double-time rate?---I don't actually have the payslip on mean for that date, but I assume so, if it's on the time records stop that must be correct.

PN1064

Okay, so you were immediately paid double-time on that day?---What day was that day in question?

PN1065

3 March 2015.

PN1066

THE COMMISSIONER: You were paid half an hour's overtime at double time, Mr Carleton?---There was - sorry, these is a pay slip where I'd received five hours of pay, but this is dated 18th of the 2nd this year to the 24th of the 2nd this year, and there is actually half an hour owed on that. So that could be when they sorted out a half-hour owing. Did you say it was a half-hour at double time?

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1067

THE COMMISSIONER: That sounds like a fair guess, given that it's half an hour at double time?---I'd say that that's the one. I've got it written down, "Point 5 hours owed", and - yes. So that must be that half-hour rolled over into the next week where I had queried that with my employer and had it arranged to be fixed up.

PN1068

MS BLEWETT: Okay. Well, you were paid overtime nevertheless on that date.

PN1069

THE COMMISSIONER: Next one.

PN1070

MS BLEWETT: The next incident was on 7 October 2014 where you were paid at time and half for five hours?---Okay, yes. What would you like to know about that?

PN1071

I'm just putting it to you that you were paid overtime, so that any alleged, you know, period of time where the company was requesting for, on a voluntary basis, employees to work overtime for TOIL, it would have been no longer than six months in your experience, because on the 7th - - -?---I'd say so, yes. Based on the facts that I had overtime in October last year that - yes, that obviously they'd stopped that at one point and decided that it was necessary to pay overtime rates and get more overtime done.

PN1072

Right. So the agreement to work overtime was entirely involuntary, is that correct?---I don't know. That's - I was absent for one company meeting, so I do not know what was discussed there and I was not followed up to be made aware of the discussions during that meeting. So - - -

PN1073

Okay, but at paragraph 5 you say you were asked - apologies, paragraph 4, you say you were asked, "Are you able to work back?" So it's put to you as a choice?---Yes.

PN1074

Yes?---Like overtime is always a choice.

PN1075

Yes. So it's a choice and it was a voluntary choice and you chose not to work it?---That's why I base - on the basis that it was for time off in lieu.

PN1076

THE COMMISSIONER: He chose not to work at on the terms offered.

PN1077

MS BLEWETT: Yes.

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1078

Moving to paragraph 11 of your statement, you say that you'd want to be paid overtime at penalty rates, either at time and a half or double time. Is that correct?---That's correct.

PN1079

Yes, but then in paragraph 12 you say if time off in lieu was at the overtime penalty rate you might have considered it?---Yes. Like, if they wanted me to work back four hours and then gave me six hours off, I would see that that is a fair exchange for my time and their time.

PN1080

So do you want to be paid at penalty rates or do you want to be paid overtime at a time off in lieu at penalty rates?---Well, if I - if I would like to do - if I was looking for time off in lieu I would organise that, after completing some overtime. Because the offer was to work overtime for time off in lieu at a time for time exchange, that's the reason why are denied. If it was at time and a half for time exchanged, like , as per the penalties, then I would have accepted.

PN1081

THE COMMISSIONER: What he says in paras 11 and 12 appears abundantly clear.

PN1082

MS BLEWETT: Yes, your Honour.

PN1083

THE COMMISSIONER: He's saying he would either want to work overtime at overtime rates all receive TOIL at time off equivalent to time and a half or double time.

PN1084

MS BLEWETT: Well, with respect, he does seem slightly confused as to what would be acceptable to him?---No, it's clearly stated.

PN1085

THE COMMISSIONER: Well, clarify it?---So if I'm not getting paid to do the overtime as per the penalty rate, if they are offering me time off in lieu for a time for time exchange, for hours worked for example, and four hours off, I do not think that's fair. I would be looking to get the time and a half hours off, given that the penalty isn't applied. So if I was to come in and do, let's just say, a Sunday six hours, I would consider that to entitle me to 12 hours off, considering the exchange. Does that make sense?

PN1086

MS BLEWETT: Yes, you would consider that you would be entitled to it?---Yes.

*** ZACHARY MAURICE CARLETON

XXN MS BLEWETT

PN1087

Right, okay. But Mr Carleton, you said that you were paid at 13 cents above award rates and you're an apprentice?---Michael must recently made me aware of

that. As far as I was aware before that, I was just being paid the award on the awards, so yes, I've just been recently informed I'm on 13 cents more.

PN1088

Right. Do you have any family responsibilities?---Yes. At the moment my mother has got bowel cancer. She hasn't been doing too well, so that's been up and down as well.

PN1089

Right. But I put it to you that at your stage of your career that being paid at penalty rates would be more important than accruing time off at the overtime rate?---Definitely, yes. Considering I accrue annual leave and, you know, can always book leave, yes.

PN1090

Right. And finally, this incident described in your statement only happened once, correct?---Sorry?

PN1091

The exchange described in your statement only happened once?---Well, which exchange?

PN1092

Going back to the conversation you say you had with Mr Dyer. It just happened once?---Yes. That - yes, yes.

PN1093

And the company has not taken any action against you because of your refusal to work overtime on that occasion?---Well, I don't know if there was more overtime that could have been worked in the future . After that incident that they just didn't ask to do, because of the fact of - that I did not want to do overtime for time off in lieu. That's, you know, above my head. I don't know anything about that.

PN1094

Yes, but you haven't - - ?---As far as I know, I wasn't punished or mistreated or, you know, denied a break because of that, no.

PN1095

Right. Thank you. No further questions.

PN1096

THE COMMISSIONER: Do you have any questions Mr Ferguson?

CROSS-EXAMINATION BY MR FERGUSON

[12.38 PM]

PN1097

MR FERGUSON: A very small number.

*** ZACHARY MAURICE CARLETON

XXN MR FERGUSON

PN1098

Mr Carleton, my name is Mr Ferguson from the Australian Industry Group. I just have a small number of questions for you?---Okay.

PN1099

In your statement you set out the conversation between yourself and Mr Dyer. This morning you've provided some elaboration or a different version to some extent with that conversation. I just want to clarify precisely what was said on a couple of points. At paragraph 5 you asked Mr Dyer whether the overtime would be - in effect you say, "Would it be for a couple of hours." And you say in your written statement he says, "Yes." Am I right that you are now saying he said, "Whatever you can do," or words to that effect?---Pretty much. Yes, it was so general that it seemed like I was giving him more information than what he was providing me, you know.

PN1100

Yes, so it's just subtly different. But he then goes on to clarify what you would be paid for working the extra hours and you say, "Sorry, I can't do the extra hours." That's right, isn't it?---Well, see, I asked him would it just be for a - - -

PN1101

Or you said - did you say something different?---I just said, "Would it just be for a couple of hours?" And he said, "Yes, just a couple of hours." And I said - like, because as I recall being told that the company did not pay overtime at that time, I'd asked what would I be paid for working those hours and that's when he responded that it would be time off in lieu.

PN1102

Yes?---He said, "Do you know what time off in lieu is?" I said, "Yes, that's" - you know, "where I work hours and then get those hours off." And he said, "That's right." And I said, "No, I can't do that. I can't do those hours."

PN1103

So your reply wasn't, "Sorry, I can't do those extra hours." You, in fact, had a discussion with him about what time off in lieu is, is that correct?---I do believe so, yes.

PN1104

So your statement is not right, but ultimately - - -?---This is all from last year - - -

PN1105

Yes?---And my brain is not a computer like all the rest of ours, and life happens, so this is to the best of my knowledge.

PN1106

Yes.

PN1107

THE COMMISSIONER: The witness has what I would describe as a certain narrative style in his answers. You will have to give him a chance to get it out.

*** ZACHARY MAURICE CARLETON

XXN MR FERGUSON

PN1108

MR FERGUSON: Just to be clear, you've recalled extra things since preparing your statement?---Either that or I'm getting two different, very similar situations confused. There was half a dozen other times when he had asked me to do overtime as well, so they're all very similar and along the same basic lines of being asked to do overtime for time off in lieu and not having the option of getting paid overtime for that work. It was straight out, "Can you work overtime for time off or nothing at all."

PN1109

I understand. And you said, "Sorry, I can't do the extra hours"?---That's right.

PN1110

Thank you. At paragraph 13 you say that there's been other circumstances where you've sought to have time off and worked to make up that time. Am I right to assume that that's time off during your ordinary hours?---Yes.

PN1111

So there have been occasions where you have had personal needs or requirements that have meant that you have wanted to take some time off work?---Yes.

PN1112

And on occasions you've been allowed to take that time off and make it up on another occasion without - instead of taking annual leave for example. Is that right?---That's correct, yes.

PN1113

Right. But just in your opinion you wouldn't do that yourself in lieu of payment for penalty rates?---No - - -

PN1114

If it was calculated at time for time no? But that's just your view of what you would - - -?---Yes, that's just my view. And that's just at this point in time as well, not to say that my needs won't change in the future or different situations might arise in my life where I could organise to, you know, do that time off in lieu.

PN1115

So are you saying that you might take time off in lieu if it's calculated on an hour-for-hour basis if you had a need, say, to care for your mother?---If it's something sudden, yes, and you know it was able to work out like that with the employer, then yes.

PN1116

So on those occasions, you might regard it as fair because it would suit your individual circumstances that you were faced with?---That's correct and as far as I've been told, the - in the award statement for TOIL for the printing and graphic arts, apparently it's supposed to be for the employee to initiate as well for flexibility purposes, is that correct?

*** ZACHARY MAURICE CARLETON

XXN MR FERGUSON

PN1117

Yes, I don't know about that?---Okay. That's my knowledge of that, TOIL, under the Graphic Arts and Printing Award.

PN1118

I understand, thank you?---Yes.

PN1119

Thank you. No further questions.

PN1120

THE COMMISSIONER: Thank you. Mr Nguyen, does anything arise?

RE-EXAMINATION BY MR NGUYEN

[12.43 PM]

PN1121

MR NGUYEN: Yes, Commissioner. Thank you.

PN1122

Mr Carleton, you were asked about the times that you were paid for doing overtime on 24 February, half an hour which you were paid on 3 March. Do you recall the conversation that you had which led to you doing that overtime?---Which one was that, in March this year?

PN1123

24 February, the week ending 24 February this year?---February this year. Yes, I do recall that. I was actually Alston Durham, my new supervisor, since Oliver Bogdan has left. He did request for me to stay back and do some overtime and I did say to him, "Would that be overtime?" And he said, "Yes." Like, you know, just standard overtime, so I accepted it on that basis that no time off in lieu was asked of me for that overtime.

PN1124

And you were also paid for overtime in October of last year. Can you outline the conversation that occurred which led to you doing that overtime last year?---Okay. From recollection that was still Oliver Bogdan as my manager and there had been, I think, about half a dozen times where I'd been asked to do time off in lieu for overtime and had refused and he - I was just approached in my work area. He requested if I could do any overtime I asked what he would need me to do and he said just whatever I could, like, "We just need to get more work out." So I said I could do, I think, a couple of hours or so and he said, "Yes, if you could," and I did make sure though at the time that it was at the overtime penalty and that he wasn't asking me to do time off in lieu. So once I was clear on the fact that he wasn't asking me to do time off in lieu I was ready to accept that then. Does that answer your question?

PN1125

Yes, thank you?---No worries.

*** ZACHARY MAURICE CARLETON

RXN MR NGUYEN

PN1126

Ms Blewett asked you whether you had queried at the time that Mr Dyer asked you to do - to work back. You outlined that you had queried what Mr Dyer had put to you, is that correct?---Yes.

PN1127

Can you outline what - how you made that query about what was put to you by Mr Dyer?---Just outline what was put to me by Mr Dyer? Well, it was just very general words. Just again, it was can I stay back - - -

PN1128

I think it was - sorry, I'll rephrase the question. I think Ms Blewett was asking you about whether you'd queried the fact that someone who wasn't your regular supervisor was asking you to stay back and you indicated that you had queried that. What - queried that he was authorised to ask me to do overtime or queried whether it would be time off in lieu for the overtime?

PN1129

That's right. You had queried that with Mr Bogdan?---Yes, yes. From my knowledge, yes, I did mention that to him and he did say yes, that, "We're not paying overtime - time off in lieu" and he didn't seem upset or confused or anything about Graeme Dyer having asked me to stay back. So for all I knew that was authorised. Does that answer your question?

PN1130

Yes. Anything you can recall from that conversation?---Just the fact that it was strictly for time off in lieu and no mention of overtime was - you know, if I mentioned overtime it was, "No, we're not doing that." So - not in those words, but ultimately you could take it like that. So they just weren't paying overtime rates. It was time off in lieu for any overtime worked.

PN1131

No further questions, Commissioner.

PN1132

THE COMMISSIONER: Thank you. That completes your evidence, Mr Carleton. You are free to step down from the witness box. You are also free to say in the court now, if you wish to.

PN1133

MR NGUYEN: Commissioner, if I can ask of the opportunity to recall Mr Carleton if something fresh arises from Mr Zaltsman's - - -

PN1134

THE COMMISSIONER: Well, you can make an application at the appropriate time.

PN1135

MR NGUYEN: Thank you, Commissioner.

*** ZACHARY MAURICE CARLETON

RXN MR NGUYEN

PN1136

THE COMMISSIONER: Whether you get it, I'll decide at the appropriate time.

PN1137

MR NGUYEN: Thank you, Commissioner. If I could just ask Mr Carleton to just remain outside the courtroom in case he is required again.

PN1138

Zach, if you can just remain outside, in case we're required to call you back after Mr Zaltsman?---Okay, no worries.

<THE WITNESS WITHDREW

[12.49 PM]

PN1139

MR NGUYEN: Thank you, Commissioner.

PN1140

MS BLEWETT: Your Honour, I see to call Mr Neil Zaltsman.

PN1141

THE COMMISSIONER: Please call Mr Zaltsman.

PN1142

THE ASSOCIATE: Please state your full name and address.

PN1143

MR ZALTSMAN: Neil Zaltsman (address supplied)

<NEIL ZALTSMAN, AFFIRMED

[12.50 PM]

EXAMINATION-IN-CHIEF BY MS BLEWETT

[12.50 PM]

PN1144

MS BLEWETT: Thanks for your attendance today?--- No problems.

PN1145

Could you outline for the Commission your position?---I'm employed with Worldwide Printing Solutions. It's our production hub. We have a manufacturing hub and we have a network of franchised outlets. My time is split between managing the franchising business and the production facility. So my primary role is operations manager at our production facility.

PN1146

Thank you. The trading name is Crystal Printing Solutions Pty Ltd?---Crystal Printing Solutions, trading as Worldwide Printing Solutions Production Hub, that's correct.

*** NEIL ZALTSMAN

XN MS BLEWETT

PN1147

Thank you. What are your duties?---My duties would include primarily managing the production facility in its entirety. Sales, graphic design, managing our management team. So we have a management team where we have a manager

assigned to each of the business disciplines being primarily print, so printing, job scheduling, pre-press, sales, artwork and administration. I would manage that team in being able to fulfil the needs of our network and customers.

PN1148

Thank you. And the company became aware that Zachary Carleton was giving evidence today on this issue?---Yes, that's correct.

PN1149

And the company were happy for Mr Carleton to give that evidence?---Yes, very, very - he spoke to us, you know, at an earlier date saying he was participating and we had absolutely no problem with that at all.

PN1150

Okay. Are you aware whether he's getting paid for this time to attend the Commission and give evidence?---To be truthfully honest, I'm actually not certain either way, but we wouldn't have a problem, you know, not being - sorry, being able to attend in working hours.

PN1151

Okay. And who was Mr Carleton's supervisor in March 2014?---It would have been Oliver Bogdan. Oliver Bogdan is - was our print manager. He was responsible for all of our printers of which Zach is a current apprentice.

PN1152

Right. And what is Mr Graeme Dyer's role?---Graeme is a scheduler, so Graeme reports to a gentleman by the name of Alston Durham and what the schedulers do is they schedule the work to be printed. So they look at the jobs that come into our work flow, primarily from our worldwide network and they will ascertain which jobs get printed on which presses. So they schedule the jobs in, check the work tickets for correctness and ensure that we - that our censors have, in fact, put the job together correctly for us to be able to print it. So he is a scheduler.

PN1153

So they don't have direct supervisory responsibilities?--- No, and particularly not Graeme. He reports to Alston. He report to me.

PN1154

Right. I understand - - - ?---Oliver - sorry, apologies.

PN1155

That's okay?---Oliver would report to me as a direct report and he would have all of the printers, print assistants and trade assistants reporting directly into him.

PN1156

Right. I understand you've had a conversation with Mr Graeme Dyer regarding this incident, is that correct?---Yes, that's correct.

*** NEIL ZALTSMAN

XN MS BLEWETT

PN1157

What has he said to you?---He said he absolutely categorically wouldn't have had a chat to Zach, only in that he - Zach has no reporting lines to him whatsoever. He would have no jurisdiction over any of the printers or anybody in the business. You know, he's - as I said, Graeme reports to Alston. Alston wouldn't even have had jurisdiction over the printers. So he says absolutely no question in his mind, there's no way he would have had a discussion or issued any instruction to Zach.

PN1158

Thank you. Mr Oliver Bogdan no longer works for the company, is that correct?---No, unfortunately we had to make him redundant as part of our requirement to right size our business in relation to the cost structure and the revenue that we were receiving. So no.

PN1159

Right. Mr Zaltsman, at paragraph 15 of your statement you state that:

PN1160

For a limited period during 2014, we did ask some of our employees if they would consider working overtime and then take TOIL off for hours worked. This was during a difficult period for Crystal Printing and we asked employees to consider doing it to assist our business.

PN1161

Could you elaborate a bit more on that?---Yes, sure. There's no doubt that - and I am sure everybody is aware of the industry we trade in. Our industry is battling at the moment. Back in 2014 we knew that there was a need to right-size our business. You know, we weren't a fat business, but there was - you know, the revenue and the margins that we were able to operate at was just not sustainable. We knew we had to make some reductions to our workforce. We were looking at every single opportunity to try and reduce our overheads, prior to us having to pull the trigger on further redundancies. One of those potential strategies was to explore the possibility of reducing the overtime bill by seeking to identify whether there were individuals who would want to work TOIL hour-for-hour. So we weren't prescriptive, it was a request. There were a number of employees who - because it suited them, I guess - worked the hour for hour and there were others who for whatever reason couldn't do that. So we pay them overtime. What we found over a period of time - and when I say period of time, probably less than a month, is that those who had worked hour-for-hour were doing so primarily because they could see the position the business was in and wanted to assist and they felt that it was unfair that they were working hour for hour whilst other co-workers were being paid their normal penalty rates. And it got more difficult for those who wanted to participate to say, "Yes, I will do it on an hour-for-hour basis." So we basically - we (indistinct) that it wasn't something that we could see was going to work in the long term and we ended up having to make further reductions to our workforce in order to manage our costs.

*** NEIL ZALTSMAN

XN MS BLEWETT

PN1162

Right, but at all times this temporary arrangement was entirely voluntary?---Absolutely 100 per cent and that's evident in some folk electing to work time for time and others being paid their penalty rates at the award rate.

PN1163

So even during this - - -?---Absolutely, absolutely 100 per cent, even during March 2014.

PN1164

Yes, so even during this really tough period the company was still at times paying overtime?---100 per cent.

PN1165

Right?---No question. The only reason we were exploring TOIL time for time was to see if that would have been a workable solution for the long haul.

PN1166

Yes?---Because it could have averted us potentially, you know, making some of the redundancies we had to make, but we could see it wasn't going to work and that's no - you know, it's not because the - and you can't hold that against staff; every single person has a different need and some were prepared to work the overtime hour for hour, others weren't and I can understand why those who were working hour for hour felt that it was unfair when their co-workers weren't prepared to do it. So neither party is - you know, neither party is wrong or right. People have different needs at different times of their lives. So we could just see it wasn't going to be a workable solution long term.

PN1167

Certainly, but it did cater to those individual needs at that time; people that worked overtime for TOIL at time for time?---It did. It did and we've got a particular lady, June, you know she's just taken - I don't know - six weeks holiday in America without any loss in pay and without having to take unpaid leave because she had accrued enough TOIL hours. But that was purely - that was elective on her behalf. So yes, it can be flexible, but you know I understand the position if somebody doesn't want to work hour for hour.

*** NEIL ZALTSMAN

XN MS BLEWETT

PN1168

Yes, okay. What would the impact on your business be if a measure was brought in that stipulated that any overtime worked for time off in lieu had to be accrued at the overtime rate? Let me rephrase; what would the impact on your business be if time off in lieu had to be accrued at the overtime rate?---Well, I suppose it would be not dissimilar to having to pay the overtime at the prescribed award rate. It just makes it more difficult for businesses, you know, to concede to it. And it's not because business - I'm not going to speak for other businesses - our business. The only reason we try and manage our overtime rates, be it a dollar value or hour and a half for hour, is there's not enough margin in the job to be able to cover those costs and remain sustainably viable. So in our business we try and not pay overtime wherever possible. It's not because we want to curtail anybody's earnings, it's because there just isn't the margin in the job. We can't go to our

customers and say, you know, "Can we get an extra 20 per cent GP on the job because we've got to finish it in the time that you need the job by." So it would make it more difficult to try and - well, to have guys come in on overtime. It's just not sustainable viable.

PN1169

Right, and it wasn't - it was hardly sustainable when it was offered at time for time. So there would be even - - -

PN1170

THE COMMISSIONER: I am very patient with your leading questions. I'm surprised Mr Nguyen hasn't been leaping to his feet on this matter, but you must not lead.

PN1171

MS BLEWETT: All right.

PN1172

THE COMMISSIONER: And the last question was verging on outrageous.

PN1173

MS BLEWETT: Would you ever consider offering time off in lieu at the overtime rate, if that was brought in?---Yes, we would. We would. And I suppose that would be no different to paying overtime at the prescribed award rate. The reality is it would be offered as often as overtime is being made available at the moment, which is very, very seldom. So if overtime – if you had a time and an hour for hour, and that was part of the working practice, and it was flexible that – you know, we would probably allow that to happen more often because there is no, you know, margin creep associated with the additional hours worked. So, yes, we would have to do it because there comes a time where, you know, you can't afford to lose a customer and you deliver the job when they need it. All that does is it eats into the nominal margin that you've got to associate with the job in the first instance. But printers do it because there's no new work out there. The only work that's around is work that you're stealing from one printer to another. So I know I'm answering this in a roundabout way, so, yes, you would have to do it, only because you couldn't afford not to do it.

PN1174

You would have - - - ?---But it makes it exceedingly different. If you – you know, we look at our overtime bill today, an hour overtime bill is probably in the region of about \$3000 a month, three and-half thousand dollars a month, which is not a lot when you consider you've got a workforce of just over 50. Now, two years ago, you know, that would've been well in excess of eight to \$9000 a month. Well in excess, with more staff to do the work. The only reason we can't do it is we cannot afford to. It's as simple as that. So if you had an hour and-a-half, if you had to pay TOIL at an hour and-a-half, you probably wouldn't do it, because you couldn't afford to.

*** NEIL ZALTSMAN

XN MS BLEWETT

PN1175

Thank you, Mr Zaltsman?---If you're doing it an hour for an hour, you know, you could afford to do it because there is no margin creep.

PN1176

So it makes it more difficult; is that correct?---Definitely. Yes, definitely.

PN1177

No further questions.

PN1178

THE COMMISSIONER: Do you have any questions, Mr Ferguson?

PN1179

MR FERGUSON: Just to clarify.

PN1180

THE COMMISSIONER: Yes.

CROSS-EXAMINATION BY MR FERGUSON

[1.07 PM]

PN1181

MR FERGUSON: My name is Mr Ferguson from the Australian Industry Group. I just have a very small number of questions to clarify with you?---No problem. Thank you.

PN1182

So I understand your business has some experience with the operation of time in lieu arrangements. Have employees indicated to you, in effect, that those arrangements suit their circumstances?---Well, you know what, I've got to say they haven't had a direct discussion with me, but the mere fact that it was elective, if it didn't suit their arrangements, like Zach, they would opt not to do it, so I would – and, you know, this is – I am making an assumption.

PN1183

Yes?---But the fact that they elected to do it, it must have suited them.

PN1184

Yes. I understand. If you had to calculate time in lieu at penalty rates rather than hour for hour, am I right that there'd be less incentive for you to agree to those arrangements if employees wanted them?---Yes.

PN1185

Yes.

PN1186

THE COMMISSIONER: Well, that's been his consistent evidence.

PN1187

MR FERGUSON: That's – I just got the - - -

*** NEIL ZALTSMAN

XXN MR FERGUSON

PN1188

THE WITNESS: But, you know what I will temper that, if you don't mind, just to be fair, I would temper that with saying that it would be more advantageous than paying a dollar value at time and-a-half, because at least you can have them take that extra half a day possibly when it's quieter at work. Yes? So one could

- - -

PN1189

MR FERGUSON: Yes. I follow that and I appreciate we're asking you, to some extent, to speculate, but as I'd understood it, the effect of your evidence was there'd be less incentive and you may not afford to do it, but it would depend on the circumstances; is that right?---Correct.

PN1190

Yes?---That's correct.

PN1191

Thank you. No further questions. Thank you, sir.

PN1192

THE COMMISSIONER: Yes. Mr Nguyen.

PN1193

MR NGUYEN: Hi, Mr Zaltsman, my name is Mr Nguyen. I work for the Australian Manufacturing Workers Union.

PN1194

THE COMMISSIONER: No, sorry, just wait a moment. Sit down again. I thought you were wending your way towards it, and then I forgot as well, you've never tendered his statement or asked him to attest to it. So if we can just pretend the cross-examination didn't start and we'll go back.

PN1195

MS BLEWETT: Apologies, your Honour. I seek to tender the statement of Neil Zaltsman.

PN1196

THE COMMISSIONER: Only after you've asked him the question. Mr Zaltsman, is this statement true and correct to the best of your knowledge and belief?---Yes, Commissioner.

PN1197

Thank you. The statement's been tendered. The statement is marked as exhibit PI – it's PIAA, isn't it?

PN1198

MS BLEWETT: PIAA.

PN1199

THE COMMISSIONER: PIAA2.

*** NEIL ZALTSMAN

XXN MR FERGUSON

EXHIBIT #PIAA2 STATEMENT OF NEIL ZALTSMAN

PN1200

THE COMMISSIONER: And the earlier one you tendered will be PIAA1. Thank you. Mr Nguyen?

CROSS-EXAMINATION BY MR NGUYEN

[1.10 PM]

PN1201

MR NGUYEN: Sorry, Mr Zaltsman, my name is Mr Nguyen, I work for the Australian Manufacturing Workers Union?---Good morning.

PN1202

I just have a few questions for you as well. Good afternoon. Do you have a copy of your statement in front of you?---I do, sir. Let me just go and grab it if you don't mind. It's on the table.

PN1203

Yes. That would be good, thanks?---Thank you.

PN1204

You read this statement before you signed it; is that correct?---Yes. That's correct.

PN1205

And Crystal Printing Solutions is currently trading as Worldwide Printing Solutions; is that correct?---That's correct.

PN1206

Can I get you to read the first sentence of the statement and tell me if that's correct?---

PN1207

I'm Neil Zaltsman of Crystal Printing Solutions Pty Limited trading as Crystal Printing of 112-114 Mallard Way, Cannington, Western Australia, say as follows:

PN1208

Is that statement correct, Mr Zaltsman?---I suppose we could say "trading as Worldwide Printing Solutions". Is there a problem with that?

PN1209

Mr Zaltsman, you didn't read the statement before you signed it, did you?---No, I certainly did read it.

PN1210

Okay. You would say that you comply with the award; is that correct?---That's correct.

*** NEIL ZALTSMAN

XXN MR NGUYEN

PN1211

You say that your employees understand what their award entitlements are; is that correct?---I would like to think so.

PN1212

You didn't provide any training of employees about their rights and entitlements under the award, have you?---No.

PN1213

And you don't provide access to a copy of the award to your employees, do you?---I'm not certain. I would – I haven't personally myself. No.

PN1214

You're not aware of any obligation for you to do so; is that correct?---No.

PN1215

I just have a question for you about the policy that you instituted in 2014, which is paragraph 15 of your statement. You indicated for a limited period, during 2014, you did ask some of your employees if they'd consider working overtime?---Yes.

PN1216

You weren't personally involved in any of the discussions asking employees to do overtime, were you?---No. I was involved in the discussions with our management team, who would have held tool box meetings and discussions with the staff. So, no, not direct. No.

PN1217

So you have no knowledge of whether or not your management team offered staff overtime on the basis that they would only be offered it if they accepted to do time off in lieu?---No, I didn't say that. We – I know- I have a full understanding of the discussions they had with their staff members and the feedback that they got from their staff members, which we covered earlier on. Some staff said they would elect to do TOIL at time for time, and others said it didn't suit them, and we went with that. Remember this whole exercise was about trying to understand and identify a strategy that would avert further losses within our workforce.

PN1218

You came to understand that some of your employees were not happy about taking time off in lieu because they weren't being offered overtime and to be paid for it; is that correct?---Repeat the question, because that's – I'm sure that's not what I said earlier on. Repeat the question for me, please, sir.

PN1219

You came to understand that some of your employees were unhappy about having to take time off in lieu because the option of being paid for the overtime wasn't given to them?---No.

PN1220

Is that correct?---No. Where did we ever say that it wasn't given to them? Where have we stated that? So, no, that is totally incorrect.

*** NEIL ZALTSMAN

XXN MR NGUYEN

PN1221

But, Mr Zaltsman, you weren't in attendance at any of those conversations where the overtime was offered, so you wouldn't know?---No, I would know because we had some staff members that elected to work – so in that same period, the same weekend that they would have worked, you would have had some employees who went hour for hour, and you would have had other employees who got paid overtime.

PN1222

But you weren't present for any of those discussions where those terms were negotiated with each employee, were you?---No, but I was very present in the discussion with our managers in communicating what it is we were trying to achieve, and it was along the lines of, "Guys, here's a strategy. Let's see if employees would be keen, willing participants in working hour for hour. If they are that's a potential strategy that we can utilize in order to manage our cost base. If they're not well then we pay overtime at the prescribed rates. Let's throw it out and let's see what guys want to do." But I know exactly what discussion they would have had with their employee because that's the message that was communicated. The outcome was – and it must have been effectively communicated because some folk chose to work the hour for hour and others chose not to without any form of vindication. They got paid at the prescribed rates. So, no, I wholly disagree with your statement.

PN1223

You didn't seek to inquire into how your managers increased the level of uptake of time off in lieu, did you?---Many apologies, can you repeat that again?

PN1224

You didn't seek to understand how they increased the level of uptake of time off in lieu in the workplace, did you? You didn't ask them how they convinced more people to take time off in lieu?---No, there was no need to convince them. It was purely an elective statement. "Guys, here is the strategy. Anybody keen?" So there was no need to try and convince anybody. Our business is fully aware of the pain that we are enduring and have endured. We have very regular meetings with our staff. We're appraising them of the situation; where we are; which clients we have been unable to pick up; where our margins are; what we're doing as a business to try and improve productivity, reduce costs, reduce waste. So our staff are fully appraised of the position, so there was no need to try and convince them. It was merely a case of trying a strategy which it didn't work. It was not sustainable.

PN1225

It wasn't sustainable because people found out that other people were being offered overtime and being paid for it; isn't that right?---Well, not found out, because it was wholly transparent from the get go. But, yes, folk felt that, you know, that it was unfair. Either we're all in or we're all out. And, you know what, I fully appreciate that.

*** NEIL ZALTSMAN

XXN MR NGUYEN

PN1226

Mr Dier has responsibility for allocating jobs to printers in the shop; is that correct?---No, he has the responsibility of scheduling the jobs for the printers in the shop. Not necessarily allocating them, no.

PN1227

And he - - - ?---That's the responsibility of either his manager or, at that stage primarily, Oliver Bogdan. So his role is to schedule the jobs merely. And scheduling means he just puts it on a plate, he produces the – he has the plates sent to the art room, and the plates are produced. He does not schedule the jobs, in terms of allocating which press it goes on and which printers print them and so forth. No.

PN1228

If Mr Dier was acting on instructions from Mr Oliver Bogdan or from Mr Alston Durham, you wouldn't be aware of that, would you?---No. But if I could add, that's almost impossible. He is not even a supervisor. If he went to any staff member and gave them instructions, the staff member would laugh them out of the room.

PN1229

You'd be happy for Mr Dier to come here and make that statement on oath, would you?---Most definitely.

PN1230

Just going to the time off in lieu and the benefit that the business might have financially from time off in lieu, you would agree that it's more beneficial for the business to allow an employee to take time off in lieu instead of paying that overtime in wages; is that correct?---Yes.

PN1231

It would be a financial benefit to the company, regardless of whether or not it would be at time for time or at the compensatory overtime rate; is that correct? More financially beneficial than paying the wages?---Yes.

PN1232

You indicated that there was an employee named June who had taken six weeks off because she'd accrued TOIL. Over the six weeks, how much of that is accrued TOIL?---Off hand I wouldn't be certain, but I would have thought at least two-and-a-half weeks.

PN1233

Over what period of time would she have accrued that two-and-a-half weeks of TOIL?---It would've been over a good 12 months.

PN1234

You're not aware that, under the Graphic Arts Award, an employee is required to take - - - ?---I beg your pardon?

*** NEIL ZALTSMAN

XXN MR NGUYEN

PN1235

You're not aware that, under the Graphic Arts Award, Mr Zaltsman, that an employee is required to take time off in lieu within four weeks from when they do the overtime? You're not aware of that, are you?---I'm not.

PN1236

I'll just confirm, you had no direct discussion with any of the employees who took the time off in lieu, did you? About why they took the time off in lieu?---I can't -- you know what I would like to say yes, because I would've probed some of the staff, but I'm going to say no, because I can't recall back 2014, the exact discussion. So Collin Holdyk is probably one of the employees I do recall speaking to.

PN1237

Sorry, what was his name?---Collin Holdyk. But if you had to say what was the -- you know, what was the discussion, honestly I couldn't recall it. But Collin is one of the employees that I enjoy bouncing ideas off because he's level headed; he's pretty senior in the business. You know, he's got his feet on the ground. So I -- therefore you would've spoken to Collin.

PN1238

Sir, you'd be aware that Collin wanted to take the time off in lieu at the penalty rate? Are you aware of this?---Beg your pardon?

PN1239

Are you aware that Mr Colin Holdyk wanted to take the time off in lieu at the compensatory overtime rate?---No.

PN1240

So you're not aware - - - ?---That's what I'm saying, I can't recall the discussion I had with any -- I would be making it up if I tried to remember a discussion I had which really I wouldn't have thought was that important, you know, 18 months ago.

PN1241

So you're not aware that he had a discussion with your superior, the owner of the shop, Mr Arnold Whiteside, and arranged to have his TOIL at the overtime compensatory rate?---No, but I was aware, and I have stated that some folk elected to be paid overtime, others elected not to, so he was probably one of them that wanted to be paid at the prescribed overtime rate, which really just goes support what we said from day dot, is that it was not, in any way, enforced on anybody, it was wholly elective. So if you've got -- you know, if you've got evidence or proof that he was paid at the overtime rate, is that not what part of today is all about?

PN1242

I understand that he wanted to take the time off in lieu at the compensatory rate. He wasn't paid for the overtime, but he was given time and-a-half off for the time that he worked?---Yes. Okay.

*** NEIL ZALTSMAN

XXN MR NGUYEN

PN1243

That seems plausible to you?---It does.

PN1244

THE COMMISSIONER: This is becoming a conversation between the two of you rather than question and answer. Okay.

PN1245

MR NGUYEN: Apologies, Commissioner?---Apologies, Commissioner.

PN1246

No further questions, Commissioner.

PN1247

THE COMMISSIONER: Thank you?---Thank you.

PN1248

Did I invite you, Mr Ferguson, or forget you?

PN1249

MR FERGUSON: No, I've already asked some questions. Yes.

PN1250

THE COMMISSIONER: You've done what you need to do?

PN1251

MR FERGUSON: I have.

PN1252

THE COMMISSIONER: Yes. Okay. Anything arising?

PN1253

MS BLEWETT: Just one further question.

PN1254

THE COMMISSIONER: Yes, sure.

RE-EXAMINATION BY MS BLEWETT

[1.28 PM]

PN1255

MS BLEWETT: Mr Zaltsman, when there was that tough period in 2014, and employees could elect to work overtime and get compensated at the time for time off in lieu, some employees chose this arrangement?---That's right.

PN1256

So it did suit some employees?---That's correct.

PN1257

The decision to abandon the temporary arrangement was driven by a wish to cater to the employees as a whole; is that correct?---Yes. That's correct.

*** NEIL ZALTSMAN

RXN MS BLEWETT

PN1258

Yes. Would you say that you would generally refuse time off in lieu of it was accrued at the compensatory rate, that is, time and-a-half and then for the first three hours and double time thereafter?

PN1259

MR NGUYEN: Objection. Leading question.

PN1260

THE COMMISSIONER: He's right.

PN1261

THE WITNESS: Sorry, can I answer that?

PN1262

MS BLEWETT: I'll have to - - -

PN1263

THE COMMISSIONER: Yes, you may.

PN1264

THE WITNESS: Thank you, Commissioner. If we were paying time off in lieu at time for time we would probably see that as a long-term sustainable working practice that would become part of our ordinary day-to-day working practice. It would be an every-day occurrence. If it was paid at the elective rate, time and-a-half or double time, I've got to say that would be more advantageous than having to pay a cash component, because one could potentially argue that your operational costs are not necessarily increasing. And I use the word "necessarily" because if you haven't got the work well you don't need the hours. If you have got the work well then there is an increase in cost. So it would be more advantageous than having to pay the cash component, but it would be used seldom because there is an increase demand that that would put on the business. So the answer is yes, it would be more advantageous but seldom used.

PN1265

MS BLEWETT: Thank you. No further questions.

PN1266

THE COMMISSIONER: Thanks. That appears to be a fine summary of his evidence at the end there. Sorry, you're rising again, are you?

PN1267

MR NGUYEN: Just one more question on that point.

PN1268

THE COMMISSIONER: Well, subject to further re-examination, I'll allow it. Yes. People often tell me one more question, and then there are several. There's going to be one more question?

FURTHER CROSS-EXAMINATION BY MR NGUYEN

[1.31 PM]

*** NEIL ZALTSMAN

FXXN MR NGUYEN

PN1269

MR NGUYEN: Just one more question, Commissioner. Mr Zaltsman, it's correct to say that the operational costs you say would not necessarily increase, but, in the circumstance where they would increase would be because you needed the hours and you had additional work, in which case the financial position of the company would be in a stronger position; is that correct?---No, not really. It depends on what margin you've had to sell the work at to win it, or whether – and the reality is there is very little new work that's going around. Print isn't growing, so where the urgency comes in in having to convert the job, is only because the work is invariably in the system. Your customer has just tapped you on the shoulder and said, "You know what, Neil, I know we said we wanted that job done by next week, Friday, but I actually need it by Wednesday." So, in most instances you're just having to bring the work forward, so I wouldn't say it's, you know, through additional sales or volumes, no. That is pretty rare.

PN1270

Thank you, Mr Zaltsman.

PN1271

THE COMMISSIONER: You've asked your question. Good. Does anything arise from that? If it does, feel free.

PN1272

MS BLEWETT: Nothing further.

PN1273

THE COMMISSIONER: Nothing further. Mr Zaltsman, thank you for your evidence. That completes it. You're free to step down, now?---Thank you, sir.

PN1274

Thank you.

<THE WITNESS WITHDREW

[1.33 PM]

PN1275

THE COMMISSIONER: Now, you've talked about possibly recalling Mr Carleton?

PN1276

MR NGUYEN: There will be no need to recall Mr Carleton.

PN1277

THE COMMISSIONER: I can't see any either. No. Where are we up to? That's the end of the witness evidence? Do the parties wish to address me about the evidence?

PN1278

MR NGUYEN: Yes, Commissioner. If it please the Commission, may I request a brief adjournment just to digest the evidence that's been put before the Commission before we make some - - -

PN1279

THE COMMISSIONER: If you didn't request one I was going to impose one on you. I need a sandwich. I'll be back at 2.15.

PN1280

MR NGUYEN: Thank you, Commissioner.

LUNCHEON ADJOURNMENT [1.33 PM]

RESUMED [2.19 PM]

PN1281

THE COMMISSIONER: Everybody ready? I take it the evidence, although it was at times glacially slow, it was to a couple of significant points, I thought, so I'm hoping we can pick up the pace in the submissions. Who's first?

PN1282

MR NGUYEN: I'll go first. Commissioner, I see the two key issues being did the conversation occur between Mr Carleton and Mr Dyer, and a subsidiary issue of whether Mr Dyer did have any authority in managing the scheduling of print jobs to ask people to stay back and do overtime in return for time off in lieu. In the evidence today we have a concession from Mr Zaltsman that he was not personally involved in any discussion asking employees to work back.

PN1283

THE COMMISSIONER: Mr Zaltsman also says at paragraph 9, in effect, that he has no knowledge of anything Mr Carleton is saying in paragraphs 4 to 12 of his statement, which relates to that conversation that you're talking about.

PN1284

MR NGUYEN: That's right but I think we can infer from – but his statement today in the witness box was that he did not have any direct involvement in the discussions. So the only point I was trying to make is that he's relying on his managers to seek for employees to do the overtime, and for the way in which they conducted those requests for overtime.

PN1285

THE COMMISSIONER: Yes.

PN1286

MR NGUYEN: His evidence did not go directly to the question of whether the strategy employed by his managers to increase the time off in lieu included not offering overtime. When I asked him the question, Mr Zaltsman conceded that Mr Dyer could have been acting on authority from the manager, Mr Ogden(sic). I do concede that he used the word unlikely but he conceded that it was possible, as Mr Dyer was under the control of Mr Ogden.

PN1287

THE COMMISSIONER: Mr Bogdan.

PN1288

MR NGUYEN: Mr Bogdan. We also have in Mr Carleton's answer to Ms Blewett that he did query the toil proposition put to him by Mr Dyer with Mr

Bogdan. He did not deny that the company was not paying overtime to Mr Carleton. Mr Zaltsman gave evidence also that the company did pay overtime to some employees and that, however, we say goes no way to addressing whether or not the offices of Crystal Printing sought to take advantage of Mr Carleton's weaker bargaining position and the direct requests for overtime that were put to him as an individual.

PN1289

It only goes to the fact that some employees may have had more bargaining power than others. The one employee Mr Zaltsman could reveal discussing toil with, was someone who he, himself, described as – and I quote – “senior” and from what I took from his statement he had respect for, which is a useful contrast to Mr Carleton's status as an adult apprentice.

PN1290

THE COMMISSIONER: Mr Carleton appears to have refused to do the overtime on the basis offered, if we accept his version of events, and no harm came to him.

PN1291

MR NGUYEN: That's correct. I guess the characteristic I'm wanting to draw attention to is the fact that Mr Carleton wasn't aware of his award entitlements and rights with respect to time off in lieu. Mr Zaltsman did give evidence about the conversation that he had with Mr Dyer. We submit that no weight should be given to the evidence from Mr Zaltsman about the conversation that he gave to Mr Dyer.

PN1292

The first aspect of it is it's hearsay, and also that it's a conversation where a senior employee was asking a subordinate whether he had done something wrong. In the circumstance where the manager, Mr Bogdan, has now been made redundant and is no longer working at the site, and who we say it's likely that Mr Dyer received instructions from with regards to his conduct.

PN1293

Mr Zaltsman indicated that if Mr Dyer sought to provide any direction to another printer, he would be laughed at. That gives a very clear indication about the power dynamic between Mr Zaltsman and Mr Dyer. We also submit – based on the fact that Mr Zaltsman and the Printing Industry Association knew about Mr Dyer being the other party to the conversation, the Commission should draw an adverse inference from the fact that the Printing Industry Association chose not to call Mr Dyer to attend today.

PN1294

I note that Mr Zaltsman, when I asked him, indicated that he seemed to take no issue with Mr Dyer coming forward as a witness. I also note that the evidence that we have is of Mr Zaltsman interrogating Mr Dyer, and it appears that the Printing Industry Association did not seek to find out for itself what Mr Dyer said; instead asking Mr Zaltsman to investigate his subordinate.

PN1295

In these circumstances, we say the Commission should draw an adverse inference following the High Court decision in Jones v Dunkel, which I have copies of for the Commission.

PN1296

THE COMMISSIONER: I think Jones v Dunkel is engraved on my soul, Mr Nguyen.

PN1297

MR NGUYEN: Also the Supreme Court of Victoria decision in Earle v Castlemaine Community Hospital, which has more direct relevance in its approval of Jones v Dunkel. In that circumstance, the witness that wasn't called was an employee of the party.

PN1298

THE COMMISSIONER: You have a copy of that judgment, do you?

PN1299

MR NGUYEN: Yes, I do.

PN1300

THE COMMISSIONER: Are there going to be multiple decisions handed up?

PN1301

MR NGUYEN: I was only going to hand up those two but if the Commission - - -

PN1302

THE COMMISSIONER: Give us Jones v Dunkel.

PN1303

MR NGUYEN: - - - is aware of Jones v Dunkel.

PN1304

THE COMMISSIONER: Give us Jones v Dunkel as well. It'll save me rabbiting out my copy.

PN1305

MR NGUYEN: My apologies, I only have a copy of the AustLII version. I can get a copy of the CLR version.

PN1306

THE COMMISSIONER: Don't worry, we can organise all that.

PN1307

MR NGUYEN: I can draw the Commission's attention to particular paragraphs that I think are pertinent or if you prefer to read the decision.

PN1308

THE COMMISSIONER: Point out the paragraphs you think are pertinent.

PN1309

MR NGUYEN: On page 730.

PN1310

THE COMMISSIONER: This is of?

PN1311

MR NGUYEN: Of Earle v Castlemaine District Community Hospital.

PN1312

THE COMMISSIONER: Yes.

PN1313

MR NGUYEN: Page 730.

PN1314

THE COMMISSIONER: Don't read the paragraphs to me. I'll mark them on my copy and then read them.

PN1315

MR NGUYEN: Approximately from line number 4 down to approximately line number 20.

PN1316

THE COMMISSIONER: What – from, “It is implicit”?

PN1317

MR NGUYEN: Yes.

PN1318

THE COMMISSIONER: Yes. So from the first pull paragraph down to where?

PN1319

MR NGUYEN: Down to, “would have exposed facts unfavourable to the party.”

PN1320

THE COMMISSIONER: Yes. I've marked it.

PN1321

MR NGUYEN: I also would like to draw your attention to the decision of Lush J at page 733. I think paragraphs between lines 18 from “The principle discussed” down to the end of that paragraph is also relevant.

PN1322

THE COMMISSIONER: So we're going from, “The principle discussed,” down to “silent party”. Correct?

PN1323

MR NGUYEN: Yes.

PN1324

THE COMMISSIONER: Thank you.

PN1325

MR NGUYEN: Also on page 734 from about line 34.

PN1326

THE COMMISSIONER: Sorry? Seven hundred and?

PN1327

MR NGUYEN: Thirty-four.

PN1328

THE COMMISSIONER: Sorry, I'm a little deaf. You'll have to speak up.

PN1329

MR NGUYEN: 734. Sorry.

PN1330

THE COMMISSIONER: Yes. From where?

PN1331

MR NGUYEN: From about line 35, that paragraph, "The Tozer Kemsley Case".

PN1332

THE COMMISSIONER: Yes.

PN1333

MR NGUYEN: Down to – just take the whole paragraph to make it easier.

PN1334

THE COMMISSIONER: All right. I've marked it.

PN1335

MR NGUYEN: Which goes over onto the next page.

PN1336

THE COMMISSIONER: Yes. So finishing at "to make his knowledge available to her"?

PN1337

MR NGUYEN: Yes.

PN1338

THE COMMISSIONER: Thank you. I'm with you.

PN1339

MR NGUYEN: Following these cases we also submit that the Printing Industry Association have put forward no evidence to support their claim that the conversations did not happen. The only evidence before the Commission is the affirmed evidence from Mr Carleton about the conversations which occurred. We'd also just seek to highlight some aspects which go to the credibility of Mr Zaltsman, in that he appeared to not realise that his statement was incorrect in relation to the trading name of the company.

PN1340

He also was not aware of his obligation to provide access to employees to the award and NES under the award, and also was not aware of the requirement under

the Graphic Arts Award that time off in lieu must be taken within four weeks. If I can go to the clause, which says at 33.9(a) of the award:

PN1341

The employee must take the time off within four weeks of working the overtime.

PN1342

In the circumstances he described of employee June, I think that goes to the biggest way in which directions were given to his managers and the supervisors about the manner in which they were to draw employee's attention to the time off in lieu provisions.

PN1343

THE COMMISSIONER: But it might equally be that despite being against the terms of the award, that June asked for it that way, to take her American trip, and someone said yes without looking closely at the four-week provisions.

PN1344

MR NGUYEN: Yes, that's correct but I asked Mr Zaltsman specifically if he was aware of the provision requiring four weeks and he wasn't aware.

PN1345

THE COMMISSIONER: Yes. He wasn't. No.

PN1346

MR NGUYEN: He wasn't aware. So the only point I want to draw from that is that the instructions which he gave to his managers and supervisors in requesting employees to take time off in lieu when they were asked to do overtime, appeared to have not been informed by the proper understanding of what entitlements are available to employees. That's all, Commissioner.

PN1347

THE COMMISSIONER: Mr Nguyen, you say that – I mean, in this much worked over conversation that Mr Carleton alleges he had with Mr – you can help me.

PN1348

MR NGUYEN: Mr Dyer.

PN1349

THE COMMISSIONER: Mr Dyer.

PN1350

MR NGUYEN: D-y-e-r.

PN1351

THE COMMISSIONER: D-y-e-r-, is it?

PN1352

MR NGUYEN: D-y-e-r, yes.

PN1353

THE COMMISSIONER: Yes. I haven't finished my question to you yet, so you can't do the answer. It stands for this proposition, doesn't it, that you say that he was in an inferior bargaining position and also wasn't aware of his rights under the award. Well, he appears to have exercised his rights, doesn't he? If we take that conversation at face value, the supervisor, Mr Dyer said, "Are you able to perform overtime?" I'm paraphrasing. Mr Carleton asked for how long. He then asked what he would be paid, and he was told it would be time off in lieu apparently at single time.

PN1354

Then in paragraph 11 of the statement he didn't accept it, and then he sets out his rights under the award and says that he might have accepted it if it was offered at overtime rates. If the quantum of toil was offered at time and a half of double time. So he appears to have been pretty aware, doesn't he, of his rights, and he exercised them?

PN1355

MR NGUYEN: Well, we say that his right would have been to accept the overtime and then request payment of that overtime. He wasn't aware that he could accept the overtime and request payment of that overtime, and that it wasn't at the pleasure of the employer, whether he was to take that as time off in lieu or to be paid.

PN1356

THE COMMISSIONER: I haven't got the award in front of me but is it or is it not open to the employer to say there's some overtime available if you're willing to be repaid in toil, otherwise there's no overtime available.

PN1357

MR NGUYEN: We would say, Commissioner, that that's not available to the employer. I understand that the Printing Industry Association has put that to the Commission at the previous hearing, that that's possible, but we would say that it's not possible, as refusing to allow someone to perform overtime because they choose to exercise their right to be paid for that overtime, we say would be adverse action against the employee for exercising - - -

PN1358

THE COMMISSIONER: I take your point. If the employer said, "You are going to work overtime today. It's reasonable for you to work two hours' overtime, but we're not going to offer you money for it. We're going to only offer you single time off in lieu," then the employer would be in trouble, wouldn't they? The answer is yes.

PN1359

MR NGUYEN: Yes.

PN1360

THE COMMISSIONER: But if the employer said, "Look, there's some overtime available but we haven't got the money to pay for it. You can have the overtime if you're willing to take it off as toil," I can't see a necessary problem in that. The overtime is not a right and it's not being imposed on the employee.

PN1361

MR NGUYEN: In the instance of our interpretation of the award clause, we would say that it has to be at the election of the employee to take the time off in lieu, and where that election hasn't – is not presented to the employee, I think that it's a very grey line with the protections, but we would say that the option has to be open to the employee that they receive payment. That appears to be our interpretation of what the facilitative arrangements provide for. The Commission determines that - - -

PN1362

THE COMMISSIONER: Yes. What if the employer then said, "Look, no, don't worry. We don't really need the overtime."

PN1363

MR NGUYEN: Well - - -

PN1364

THE COMMISSIONER: Is that an adverse action?

PN1365

MR NGUYEN: It depends on the further facts of the scenario, if overtime was offered to an employee. If it was offered to another employee because they chose to take time off in lieu then, yes, it would be.

PN1366

THE COMMISSIONER: That could be, yes. Okay. You're finished?

PN1367

MR NGUYEN: Yes, Commissioner. Sorry, I just recall I just wanted to also put on the record that the Printing Industry Association and AI Group were both informed that the supervisor in Mr Carleton's statement, was Mr Graeme Dyer by email at 10.30 am on 30 April, at the same time that the un-redacted version of the statement which was attached to that email was provided to them.

PN1368

THE COMMISSIONER: I take it that their witnesses said that it would have been Mr Dyer. So are you wrong there, Ms Blewett?

PN1369

MS BLEWETT: Our witness maintains that the supervisor was Mr Bogdan, and that - - -

PN1370

THE COMMISSIONER: Is it conceivable that Mr Bogdan could have said to Mr Dyer, "Can you ask him"?

PN1371

MS BLEWETT: It's conceivable but we heard from Mr Zaltsman that would be unlikely.

PN1372

THE COMMISSIONER: But it appears we only have the evidence of Mr Carleton, don't we, as to the content of any conversation?

PN1373

MS BLEWETT: Yes. However, with - - -

PN1374

THE COMMISSIONER: Mr – what's his name?

PN1375

MS BLEWETT: With respect, Mr Carleton did appear a bit confused because when I put it to him that this was one conversation with Mr Dyer, he said yes, but then he referenced that there could have been half a dozen other conversations. And because it appears that there's some memory issues, and so we would say that it's just unclear who he had that conversation with.

PN1376

THE COMMISSIONER: I took it that he was clear that he had this conversation, the one that's in his witness statement, with Mr Dyer, and the other ones were all delightfully vague.

PN1377

MS BLEWETT: Yes, that's what Mr Carleton says. We dispute that evidence, on the basis that – or at least say it should be given little weight because any direction from someone who's not your supervisor shouldn't really be taken seriously. As Mr Zaltsman said, it would have been laughed off. As to the allegation of power imbalance, I mean, if someone's not your supervisor, then there's no - - -

PN1378

THE COMMISSIONER: Your counter to the evidence of Mr Carleton about the conversation relies on Mr Zaltsman statement that – I paraphrase him, that it would be inherently unlikely that Mr Dyer would make such a request. That's the counter, isn't it?

PN1379

MS BLEWETT: Yes, and Mr Zaltsman has affirmed that he has spoken to Mr Dyer and Mr Dyer denies that that exchange occurred.

PN1380

THE COMMISSIONER: Well, that raises the hearsay objection.

PN1381

MS BLEWETT: Yes. I would say firsthand hearsay and ask for it to be allowed.

PN1382

THE COMMISSIONER: Right. Anything more that you want to put to me?

PN1383

MS BLEWETT: Yes, your Honour.

PN1384

THE COMMISSIONER: I don't suppose I made it clear. I asked you a question but now I'm inviting you to submit.

PN1385

MS BLEWETT: Thank you. Commissioner, I think it's important not to forget the heart of why we're here today. That's the – the AMWU put on an application to change clause 33.9 of the award. However, we say that the evidence put on today by Mr Carleton actually didn't really involve or enliven clause 33.9 at all.

PN1386

Rather, it was an ancillary trial arrangement instituted by the company as an idea for a short period of time where employees were asked, "Do you want to help the company out. Work a few hours' overtime and get time off in lieu at time for time. If that works for you, that would really help our company out, and if you don't want to do it, that's fine."

PN1387

During the same period of time, some employees worked overtime and were paid overtime. So that's just enlivening the overtime provisions of the award on a standard basis. So we say that while they were trialling this ancillary agreement that we say was not in breach of the award at all because it doesn't even enliven clause 33.9, it was an - - -

PN1388

THE COMMISSIONER: That's the general evidence of Zaltsman and I understand that.

PN1389

MS BLEWETT: Yes.

PN1390

THE COMMISSIONER: But all Carleton's evidence is, when you boil it down, is this one alleged conversation with Mr Dyer, isn't it?

PN1391

MS BLEWETT: That's right and what - - -

PN1392

THE COMMISSIONER: The fact that he doesn't make any other statements or admissions of a general nature, he gives evidence about the time that he can recall being asked to do overtime on the basis of time off in lieu. That's it?

PN1393

MS BLEWETT: Yes, that is it. We say it's not relevant to a proceeding today which doesn't even involve clause 33.9 really. Yes. To continue on what you have alluded to, it was one conversation that came to the attention of the union through a survey. So presumably if this survey had any credibility there would be a reasonable sample size. Many union members, non-union members would have been invited to take part in the survey, and this survey hasn't been provided to the Commission.

PN1394

All we've got is one conversation that is quite, you know, quite mundane, to be frank. So we've got one incident in Western Australia and we say that that is not sufficient evidence that would merit changing clause 33.9 of the award that would affect the entirety of the industry.

PN1395

Further, we refute the allegation that there would have been any kind of abuse of power in offering time off in lieu at time for time to employees, as it was made clear by Mr Zaltsman that it was entirely voluntary. The heart of this matter is individual flexibility and choice. Employees enjoy that choice. As we heard, one employee was able to accrue time off and take a holiday.

PN1396

We heard from Mr Carleton that in the future he may need to take time off to attend to his personal circumstances, perhaps his ill mother. So in that circumstance, the value of time becomes more important than money. It's an individual choice, and we say that it's that choice that needs to be maintained and promoted throughout the industry.

PN1397

THE COMMISSIONER: Don't forget, today we're talking just about the evidence which I've heard today. Carleton and Mr – my associate has taken the witness statement. The other gentleman from your side.

PN1398

MS BLEWETT: Yes.

PN1399

THE COMMISSIONER: So you're that Mr Carleton's evidence in effect stands for nothing.

PN1400

MS BLEWETT: We say it's not relevant because it didn't enliven the award.

PN1401

THE COMMISSIONER: Mr Zaltsman. I keep forgetting his name.

PN1402

MS BLEWETT: Yes. But even if it was to be accepted, it's one anecdote where in the statement it's – Mr Dyer wasn't named, so that's still a point of contention, and we say that, therefore, at best it should be given little weight. Mr Nguyen raised some credibility issues and alleged some credibility issues with respect to Mr Zaltsman, but we say that none of that is actually relevant to whether clause 33.9 should be amended. Nothing further, your Honour.

PN1403

THE COMMISSIONER: Thank you. Mr Ferguson.

PN1404

MR FERGUSON: Thank you, Commissioner. I'll be brief. Really, the first thing that the evidence today demonstrates is that the views of employers and employees in relation to the utility of toil arrangements will vary depending on their circumstances.

PN1405

In this case we saw the evidence of the employee that they – he saw it of some value in some circumstances, and the employer saw it of some value in his particular operating circumstances. But really what we say is this really demonstrates the limited utility of bringing individual witnesses or employers or employees in the context of these sorts of proceedings, because at best they're just going to be demonstrative of the types of issues that might arise but views will vary between individuals. But in terms of looking at the employer witness, quite clearly there was evidence suggesting that some employees valued the toil arrangements for potentially various reasons.

PN1406

One example was given obviously of the employer, that the employee took an extended holiday and accessed part of the leave for that purpose. Others was that clearly some employees saw value in assisting their employer through a difficult time. That's not to be criticised either. That potentially is in their interest as well. Quite clearly, although the witness quite credibly conceded he couldn't recall direct discussions, but his evidence does suggest, particularly his evidence that it all occurred by the election of these employees or by their choice, that employees did see some utility in these arrangements.

PN1407

The other real, I think, theme that came through from the employer's witness evidence, was that in his view there would clearly be less benefit to toil arrangements, from the employer's perspective, to agreeing to them, if they had to be calculated at penalty rates, rather than hour for hour rates. I think at one point he said that if they had to be calculated at the penalty hour for hour rates, they would seldom be used by the company. So, I mean, he did – you know, he was upfront about the fact that they may still be of some benefit and they may be utilised at times, but clearly there was less incentive.

PN1408

That has been a big element of the AI Group's case in these proceedings, that the importance of hour for hour is that it in part creates an incentive to an employer to agree to these sorts of arrangements. Arrangements that can only operate when the employee so chooses. I think the evidence that has been brought forward, aptly demonstrates that.

PN1409

If we then look to the employee evidence. Look, there is, in the written statement of course, as Commissioner you've pointed out, really only evidence of one particular conversation, which he sets out. I think in assessing the weight that can be given to the evidence, that has to be reduced by the fact that I think by the witness' own admission there was some confusion around his recollection of the conversation, and it may be that conversations he had over a period of time were

sort of – well his recollections of those were melding into the conversation he relayed in his written statement.

PN1410

I don't put it higher than that but he did admit that there was some sort of confusion about that. But if we then look to the actual words that he said, and I think confirmed in his oral evidence, when he was asked ultimately about whether he would perform this work he said, "Sorry, I can't do the extra hours." He didn't say, "I don't want to do them because I want overtime rates," or, "I don't want it unless it's at a higher rate accrual of toil." That may well have been his thinking but that's not what he told – on his own evidence, that's not what he told the supervisor. He said he can't do the extra hours.

PN1411

THE COMMISSIONER: It is relevant what lay behind him.

PN1412

MR FERGUSON: Of course, but I don't think we can assume that it was all – that the supervisor necessarily thought more than that.

PN1413

THE COMMISSIONER: True. I grant that part.

PN1414

MR FERGUSON: Yes, and I took him to the statement – to paragraph 10 to confirm that's what he said. But in either event, I mean, really quite clearly the employee, by his own admission, might have been confusing various conversations and we don't have any of the detail about the other conversations. They're just vague references to things that might have happened. None of it really was put beforehand, so it's difficult to assess the extent to which it could have been tested, but it wasn't really set out in any level of specificity that would allow any weight to be given to it anyway.

PN1415

So all in all it doesn't take the union terribly far. But I think what was helpful was when we explored the witness' motivations for why he didn't want to take toil. Now, as I understand, the thrust of the evidence was that at the moment he put a premium on the penalty rate, the remuneration. But there was a concession that in different circumstances he might well value taking the time off on an hour for hour basis.

PN1416

Now, I think that was put to him. Either way, he very much confined his views to the circumstances he's faced with now. Now, the employers in this case aren't arguing that everyone would want to access toil. It's just that in some circumstances they may, and that's exactly what this employee said. In fact, he even confirmed - - -

PN1417

THE COMMISSIONER: And at what rate they would access it.

PN1418

MR FERGUSON: Sorry?

PN1419

THE COMMISSIONER: And at what rate they would access it.

PN1420

MR FERGUSON: That would colour their thinking but then on the broader circumstances, for example, I think he acknowledged that if his circumstances changed with his mother, he may well want to take it even at the lower rate. It depends on the whole situation and the circumstances. His current circumstances as an apprentice, he may value the penalty rates. Understandable and no one's arguing for him to not have that entitlement.

PN1421

The other point he did make was that he, himself, had taken time off during ordinary hours. Now, happily, there was another flexibility that he has accessed in that he worked make-up time. But what it does show is that he's had a need or a desire to take time off in ordinary hours. Now, if the employer wasn't willing to grant him make-up time, maybe that may have changed his value on toil as well. He may have wanted to access in that circumstance. Again, it shows that people do have a need for flexibility and that's the case. Really, there has been nothing put today to counter that proposition.

PN1422

Just touching upon the points raised by the union in relation to Jones v Dunkel, I think the Commission should be cautious about accepting that those sorts of inferences should be drawn in the current context. We're dealing with a review. It's not a party/party matter. I wouldn't accept in those circumstances that necessarily a party needs to raise that every – rise to every single inference that gets put by one of the countless parties that can choose to participate in these proceedings.

PN1423

I mean, that would be a very dangerous precedent to set. The reality is, parties are working under a difficult workload; they just can't be expected to rise to everything. Especially not in the context, for example, of the current proceedings where the witness' identity was kept confidential until all but a matter of a few days before the hearing. Actually, the supervisor's name was never even in the evidence. It only came up today.

PN1424

I don't think an email from the union to some of the associations but not to the company, counters that. All I'm saying is that it can't be assumed that the material or the other evidence wasn't called out of any fear that a negative inference would be called. There is a quite natural explanation that potentially could be advanced by various parties.

PN1425

But if there is an inference to be drawn, I think the curious thing that's arisen here is that the AMWU seems to have done a survey of its members' views about toil

arrangements and making up pay. It's not put forward as a document. I mean, it does beg the question of why not, and call into question whether or not it revealed that perhaps there is no basis to the union's various claims about the employees having concerns in relation to those arrangements.

PN1426

Presumably, the reason it hasn't been called is that employees don't have a problem with these arrangements. Certainly there hasn't been any employee, apart from this one, that has said anything to the contrary.

PN1427

THE COMMISSIONER: It's just intriguing speculation, isn't it?

PN1428

MR FERGUSON: It is. It is, but it did bear commenting on, as it's arisen. Nothing further.

PN1429

THE COMMISSIONER: Thank you. Do you wish to say anything in reply, Mr Nguyen?

PN1430

MR NGUYEN: Yes, Commissioner. I'll just make a comment about the survey. There was an email that was sent out to members, inviting them to comment about their experiences with toil in a very general sense. We haven't provided that survey to the Commission because there was – it was only, if I could characterise it, an invitation for members to come forward if they had any experiences that they wished to discuss.

PN1431

We had a very low response to that survey, which we do admit and is consistent with our case that time off in lieu is not used often by employees. It's not a flexibility that employees would consider to their advantage or that they would use often. We're happy to provide it but only approximately 40 responses were provided.

PN1432

THE COMMISSIONER: I suppose it could stand for the proposition that toil is not a hot issue amongst your membership.

PN1433

MR NGUYEN: It's not a flexibility that's used often at the moment, which is why we're seeking for the compensatory rate to be improved to the overtime rate, so that it may be more enticing for some of our members to use as flexibility to balance their other responsibilities outside of work. I just note also that in the response, Mr Carleton indicated that Mr Zaltsman had indicated he also had responded to an employer survey, and that's also not available.

PN1434

That's probably not the main point that we would like to make, which we made at the hearing, which is that all of these toil arrangements are currently in the creaky

filing cabinets of the members of the AI Group and the Printing Industry Association, and they have access to all of these written agreements, which they're required to keep under the current award. There's a requirement in the award that these are written and that they're kept in the time and wages records.

PN1435

None of these written agreements have been provided. No assessment of the figure or assessment of what, you know, their members may or may not – in terms of their usage. So if there's an inference to be drawn about documents that may or may not have been provided, I think that is a weightier consideration for the Commission.

PN1436

THE COMMISSIONER: I think the point that was raised against you was more that if you ran this survey, the evidence of Mr Carleton alone wasn't of much utility in showing any widespread view amongst your membership, if I can put it that way.

PN1437

MR NGUYEN: We concede that.

PN1438

THE COMMISSIONER: That's how I read it.

PN1439

MR NGUYEN: Yes, we concede that there was a low response rate to the survey which we included in - - -

PN1440

THE COMMISSIONER: I hope it wasn't only Mr Carleton, was it?

PN1441

MR NGUYEN: Sorry?

PN1442

THE COMMISSIONER: It's - - -

PN1443

MR NGUYEN: No. There was approximately 40 responses, which is a low turnout in comparison to other surveys the union has conducted. I mean, there's a whole range of factors which would go towards why that was the case but I don't think the Commission should give any weight to the fact that we haven't provided that survey, which was only – I would characterise it not as a survey but just as an invitation for employees to come forward with their experience.

PN1444

THE COMMISSIONER: Right. I'm only concerned with the evidence which was given today, Mr Nguyen.

PN1445

MR NGUYEN: Yes, Commissioner. I'll move onto a different matter raised by Ms Blewett which is that the evidence didn't enliven the clause. We would say

that the evidence of the experience of Mr Carleton does enliven how this clause may or may not play out, in fact, when it is rarely used by employers and employees. Where it is used, it appears in the rare circumstances that it's susceptible to abuse and susceptible to employers taking advantage of employees who may not be totally cognisant of their entitlements or - - -

PN1446

THE COMMISSIONER: Well, how does Carleton's evidence stand for that proposition?

PN1447

MR NGUYEN: Mr Carleton's experience demonstrates that he put to Mr Dyer would he be paid for the overtime. Now, I understand that Mr Ferguson says that there's no assumption that the supervisor thought anything more than he couldn't do the time, but if you look back at the conversation, actually he did ask whether he would be paid for the overtime. So it's clear from the stream of the conversation that in response, Mr Dyer said, no, you will be taking it as time off in lieu, and on that basis - - -

PN1448

THE COMMISSIONER: He replied, "No way, Jose," didn't he?

PN1449

MR NGUYEN: On that basis he declined because he wanted to be paid. The assumption – I mean, his motivations were expressed to the Commission today about why he did that. It's not in that stream of conversation but it's clear I think from his witness evidence today that the reason why is because he wasn't able to be paid for that overtime.

PN1450

His witness statement does indicate as well that he asked the question because he was aware that the company wasn't paying overtime during that period. So it's clear that that's the reason and the underlying context of the conversation. I don't think it's right to say that there's no assumption from the supervisor other than that he wasn't available for those hours.

PN1451

THE COMMISSIONER: No. Mr Zaltsman was quite open in saying that the company did float this process of offering toil, not overtime, for a while but it didn't go terribly well and they stopped doing it.

PN1452

MR NGUYEN: That's right, and they've provided no evidence about - - -

PN1453

THE COMMISSIONER: He puts it more elegantly in his statement but, I mean, that's what he says. Yes, we did try this out. It didn't work. We don't do it anymore.

PN1454

MR NGUYEN: Well, I think that's – I mean, that is a key point that we think has come out of the evidence as well. He's very vague on what he means by don't do it anymore. What is this strategy. Currently under the award it is always available to employees to elect to take time off in lieu if the employer agrees. He gave in his evidence that June, an employee, recently has taken time off which she had accrued over a period of 12 months.

PN1455

So clearly they are still allowing employees to take time off in lieu but what is this strategy that apparently they were employing. My assertion to him was that the strategy was implicit in his direction to his managers that they try to reduce the cost of overtime by getting employees to agree to take time off in lieu instead of being paid for it.

PN1456

THE COMMISSIONER: Yes, that's exactly what he said. That they tried that out as an idea and it didn't work terribly well.

PN1457

MR NGUYEN: That's right. The evidence that we have before us is that the manner in which that was carried out was that the option of being paid was not made available.

PN1458

THE COMMISSIONER: That's correct.

PN1459

MR NGUYEN: That's right.

PN1460

THE COMMISSIONER: I thought – perhaps my summary wasn't sufficiently clear. They did for a while, for financial reasons, offer overtime at toil only payment, and that didn't go terribly well and they stopped doing it.

PN1461

MR NGUYEN: That's correct. That's what we say has happened.

PN1462

THE COMMISSIONER: Well, you're ad idem with Mr Zaltsman then.

PN1463

MR NGUYEN: Yes, that's right. I did – yes, that's correct, Commissioner. If I can move onto the comment that Mr Dyer wasn't named in the witness statement. At the time that it was drafted, certain details were omitted, including that Mr Carleton was an apprentice, et cetera, to try not to identify the employee.

PN1464

However, I'll just say again that we did on 30 April provide to the Printing Industry Association and the AI Group by email, when we attached the un-redacted version of the statement, a statement in the email on that day to the effect that the supervisor in the conversation in this statement is Mr Graeme Dyer. So I

don't think it's fair for the Printing Industry Association and AI Group to now say, well, it wasn't in the actual statement when they were made aware of who the person was on 30 April.

PN1465

The same day they were made aware of who the company was, which is the same amount of time that they had been given to put forward their case about what actually happened during this conversation. They chose not to call Mr Dyer. I don't think that they should be able to use the excuse that, well, it wasn't in the actual written statement when we did provide that information to them.

PN1466

I just note also that when I did find out that Mr Dyer wasn't providing a witness statement, I had also emailed the Printing Industry Association at 11.29 forwarding my previous email on 30 April. I forwarded that on 15 May at 11.29 am, querying if they were going to call Mr Dyer. Following that, the Printing Industry confirmed that they weren't going to.

PN1467

We have no objection to him being called or if it's appropriate for the Commission to subpoena him to attend just to answer the question, if that resolves the issue. However, he would be potentially a hostile witness to us, we think, given those terms, and we would expect that he should be called by the Printing Industry Association since it's in their benefit to have someone who was there recount what had happened.

PN1468

THE COMMISSIONER: Well, they didn't and you're asking the Full Bench to draw an adverse conclusion from that, aren't you?

PN1469

MR NGUYEN: That's correct, Commissioner.

PN1470

THE COMMISSIONER: You'll just have to wait and see whether we do.

PN1471

MR NGUYEN: If I can just make a comment about the views that were expressed by Mr Zaltsman and also Mr Carleton about the utility. The AI Group just made some comment about the witness is providing evidence about the utility of the provisions. It is worth noting that Mr Zaltsman confirmed that it would still be more financially beneficial to the company to provide time off in lieu even if it's at the compensatory rate, than it would be to pay that money in wages – in overtime wages.

PN1472

He did concede that and I think he reiterated that a couple of times in his conclusion as well. That goes to our case of saying that we need to improve the incentive for employees to take up this option. It's clear from our awareness, and we're happy to provide the survey if it's necessary, that it's not a flexibility that's

utilised frequently by our members. We didn't receive very many responses when asked if toil was something that they had an experience of.

PN1473

I note also that the Printing Industry Association also put forward a similar view that their members at the previous hearing rarely used toil as a flexibility currently. But it's important in these proceedings that we did hear from Mr Zaltsman that it would still be more financially beneficial to him to provide toil even if it's at the compensatory rate, than it would be to pay the overtime rate. So that incentive is still there.

PN1474

Whatever he might make about the comparison between toil at overtime, and toil at time for time, the reality is that that benefit is still there for employers financially. Under the current laws, if it's exercised properly, the employer should always retain that overtime as a liability just in case the employee exercises their right to call for payment in any event.

PN1475

There was an argument that weight should be reduced because Mr Carleton seemed to be confused about which conversations had occurred. I think it was pretty clear from his evidence – and we can check the transcript about this but it's pretty clear from the evidence that his confusion wasn't about the content of the conversation as it went to the fact that he asked whether he would be paid, and then subsequent to that was told, no, he wouldn't be paid.

PN1476

So to the extent that there might be confusion about other matters, such as when those conversations occurred or how many times, he was quite clear that the substance of those conversations were in the same terms as the conversation which he did recall in March, which was one of the first conversations which he had in those terms. That's the only thing that was - - -

PN1477

THE COMMISSIONER: That's as I understood his evidence, yes.

PN1478

MR NGUYEN: Yes. We say the employee's evidence about taking time off as make-up time is not relevant to the time off in lieu proceedings. We made submissions about the difference between make-up time as it is valuable to an employee and to an employer and the value of time, in our submissions. So I'll just leave it there to refer the Commission in response to arguments put by Mr Ferguson about make-up time. I refer the Commission to those aspects of our written submissions.

PN1479

In terms of the arguments about this being a review and it being not a proceeding that Jones v Dunkel would be readily applied to, we would just say that in the circumstances there has been an opportunity provided and so the rules should apply because it's not a circumstance where procedural fairness hasn't been given

to the employers or they haven't been given an opportunity, or that there's some lack of resources which we're not aware of particularly in these proceedings.

PN1480

Of course I would concede with Mr Ferguson that all the parties are under pressure in the four-yearly review of modern awards, however in this particular circumstance the time at which the parties were informed about Mr Dyer's existence was at the same time that they were provided with the company name. It wasn't like I just told them about it when I got Mr Zaltsman's witness statement.

PN1481

THE COMMISSIONER: I think we've been there.

PN1482

MR NGUYEN: Yes. Thanks, Commissioner. That concludes my response.

PN1483

THE COMMISSIONER: You were looking anxious to hop up, Ms Blewett. This is a reply to a reply, is this?

PN1484

MS BLEWETT: Commissioner, just in fairness, I just want to reiterate that it is the union's application. It's up to them to subpoena Mr Dyer, to subpoena the written agreements if they are so anxious to have them tested. But they didn't do that. That, you know, as you mentioned, that this – by the admission of Mr Zaltsman, this is a temporary arrangement that he tried out and it didn't work very well.

PN1485

During the same period of time that this temporary arrangement was tried out, overtime was paid during that time. So it caused perhaps some unrest in that workplace. He, therefore, made a business decision to stop offering it. Perhaps – this is mere speculation but perhaps if he had taken the stance that, no, we will not pay overtime at all, and it will only be toil, and actually breached the award and enforced it, you know, that, yes, there would have been more people that actually utilised the flexibility.

PN1486

But he's actually tried to be reasonable, and I think in the stand today he was very credible. He stated that he would still consider offering time off in lieu at the compensatory rate but it would just make it much more unlikely and much more difficult. I just remind the Commission that an object of the Act is to encourage flexibility. It's on both sides we've heard that this clause isn't utilised very much.

PN1487

It's not working that well. Amending it to further – to make it even more difficult for employers would not go to encouraging that individual flexibility which is at the heart of the modern awards' objective and the Act as a whole. Nothing further.

PN1488

THE COMMISSIONER: Thank you. I take it we're all finished now. Thank you. These proceedings are adjourned.

ADJOURNED INDEFINITELY

[3.13 PM]

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