



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT DEAN

C2022/8245

s.739 - Application to deal with a dispute

Richard Forshaw

and

**The ACT Government represented by the Justice and Community Safety Directorate
and the ACT Ambulance Service T/A ACT Emergency Services Agency
(C2022/8245)**

Canberra

10.00 AM, THURSDAY, 11 MAY 2023

PN1

THE DEPUTY PRESIDENT: Good morning, it's Deputy President Dean. Mr Maling, can you hear me?

PN2

MR MALING: Yes, I can, Deputy President.

PN3

THE DEPUTY PRESIDENT: Thank you. Mr Chilcott, can you hear me?

PN4

MR CHILCOTT: Yes, I can hear you. Thank you, Deputy President.

PN5

THE DEPUTY PRESIDENT: Okay, thank you. All right, Mr Maling, perhaps over to you.

PN6

MR MALING: Thank you very much, Deputy President. By way of just brief opening the crux of this matter really seems to boil down to which base rate of pay applies in these circumstances. I thank my friend for his detailed submissions and I think that we are at quite an advanced stage where we can really go to the crux of the matter today.

PN7

On our interpretation of annexure A of the enterprise agreement, which I will take the Commission through today, we say that there are two base rates of pay which could apply to an intensive care paramedic. One applies to an intensive care paramedic who does not work or is not rostered to work the 10/14 roster, and the other circumstance is where the intensive care paramedic is rostered on that basis.

PN8

The provision which we really dispute over, E13.3, uses the word 'pay' and doesn't really provide us with indication as to which base rate of pay would apply in the circumstances, and hence we say that there needs to be a process of interpretation and regard to the particular worker's circumstances.

PN9

Now, I'm not here saying that in all circumstances it will be the composite base rate of pay, nor do I take necessarily my friend's submissions to be that in all circumstances it will only be the base rate of pay to the paramedic who is not rostered to work. We say that it will depend very much on the employee's particular circumstances in order to answer that question.

PN10

That's really the crux of where we're at today. What I plan, and I don't expect to require more than about 40 minutes of submissions, I will first address and seek to get admitted into evidence Mr Forshaw's two statements, (indistinct words) of the facts. I will then turn you, Deputy President, to the key parts of the documents that we have provided because we have provided in this matter a fair volume of

documents, and not all aspects require your immediate attention, but there are snippets of that, and I will take you to that. I will then deal with submissions in relation to the enterprise agreement. Turning now if I (indistinct) to admit the evidence of Mr Forshaw's statement.

PN11

THE DEPUTY PRESIDENT: We will just issue an affirmation and we will deal with his evidence now.

PN12

MR MALING: Thank you.

PN13

THE ASSOCIATE: Mr Forshaw, please state your full name and address for the record.

PN14

THE DEPUTY PRESIDENT: You're just on mute, Mr Forshaw.

PN15

MR FORSHAW: Sorry. My full name is Richard William Forshaw, (address supplied)

<RICHARD WILLIAM FORSHAW, AFFIRMED

[10.03 AM]

EXAMINATION-IN-CHIEF BY MR MALING

[10.03 AM]

PN16

MR MALING: Thank you. Mr Forshaw, could you please provide your date of birth?---My date of birth is 15 November 1972.

PN17

And what is your current occupation?---Occupation; currently I am employed as an Intensive Care Paramedic 1 at the ACT Ambulance Service. I'm currently working for the education directorate as a work health and safety adviser.

PN18

Thank you. Do you have a copy of the court book readily available?---I do.

PN19

Could I please turn you to page 87 of the book?---Yes.

PN20

So at page 87 you agree that there's a document that says 'Statement' and (indistinct) the name is Richard William Forshaw?---I do, yes.

PN21

And that document extends to page 98 of the court book, correct?---That is correct, yes.

*** RICHARD WILLIAM FORSHAW

XN MR MALING

PN22

And in the version that you have there in the final paragraph is numbered 48, correct?---I have number - - -

PN23

Forty-seven?---Forty-seven, yes.

PN24

And there is a signature above the name Richard William Forshaw. Is that your signature?---That is my signature.

PN25

You authored this statement?---I did.

PN26

Its contents are true and correct to the best of your recollection?---Yes, they are.

PN27

Have you read that statement recently?---I have, yes.

PN28

Are there any changes you wish to make?---There's a typographical error on page 95. The very last line there's a dollar figure in brackets which should read 125,239 instead of 29.

PN29

Is that at paragraph 36?---Paragraph 36, that's correct.

PN30

125,239; is that correct?---That's correct, 239, yes.

PN31

Any other changes you wish to make?---No, there's not.

PN32

I tender that into evidence, that statement.

PN33

THE DEPUTY PRESIDENT: Thank you. Mr Chilcott, any objections?

PN34

MR CHILCOTT: There's no objection other than what I'd noted at paragraph 8 of our submissions, which is a submission that suggests that the contents of the statement are largely irrelevant, but on that basis this is a question of whether or not you take into account what weight will be placed on the statements, but we don't object to its tender.

PN35

THE DEPUTY PRESIDENT: All right, thank you.

*** RICHARD WILLIAM FORSHAW

XN MR MALING

EXHIBIT #1 STATEMENT OF RICHARD WILLIAM FORSHAW

PN36

MR MALING: Thank you, Deputy President. Can I now turn you, and going backwards in the court book, to page 15?---Yes.

PN37

And you agree that page 15 is a document that says 'Applicant's statement'?---I do.

PN38

And that document extends to page 20 of the court book?---It does. That's correct, yes.

PN39

And you agree that the final paragraph is numbered 51?---I do.

PN40

And there is a signature there. Is that your signature?---That is my signature.

PN41

Did you write this statement?---I did.

PN42

Are its contents true and correct to the best of your recollection?---They are, yes.

PN43

You've read the statement recently?---I have.

PN44

Are there any changes that you wish to make to that statement?---Again just a contextual error, page 19. It's paragraph 1 top line, which is paragraph 36, sorry, the first paragraph of page 19. The top line replace the word 'consider him' to 'me'.

PN45

Are there any other changes that you wish to make?---No, there's not.

PN46

Deputy President, I tender the statement into evidence, please.

PN47

THE DEPUTY PRESIDENT: Thank you. Any objections, Mr Chilcott?

PN48

MR CHILCOTT: No. Only that you accept on the same basis that I made the submission in relation to exhibit 1.

PN49

THE DEPUTY PRESIDENT: Okay, thank you.

*** RICHARD WILLIAM FORSHAW

XN MR MALING

EXHIBIT #2 FURTHER STATEMENT OF RICHARD WILLIAM FORSHAW

PN50

MR MALING: Thank you, Deputy President. I have just a couple of questions for Mr Forshaw just in relation to his statement, and this will take a little bit of backwards and forwards between the documents annexed to the statement before we get to the crux of the question. So page 15 paragraph 7 you say:

PN51

(Indistinct) composite pay payable throughout the year. It should not depend on whether I work (indistinct) day. (Audio malfunction) paragraph annexed to this statement and marked (indistinct) A is a copy of the payslip.

PN52

If I can turn you to page 21 of the court it should have attachment A?---Yes.

PN53

And that's the pay period 18 August 2022 to 31 August 2022, correct?---Agree, yes.

PN54

And you were on some form of leave over that period?---You just went a bit digital there, Mr Maling. I believe you asked if I was on some form of leave. Yes, I was, I was on annual leave then.

PN55

And there's a box that refers to the payments, correct?---Correct.

PN56

On the left-hand side. And the total payments is listed at \$5,335.02; yes?---Yes.

PN57

And there's a breakdown of what that's made up of, composite penalty, composite overtime and annual leave, correct?---Yes, that's correct.

PN58

At paragraph 43 of your statement, which is on page 19 of the court book - - - ?---Thank you. Just a moment. Yes.

PN59

- - - you provide information about the role you're currently working as, an Administrative Services Officer Level 6 and you annex your latest payslip at that point in time, which is at H - which is marked, sorry, as H and that's at page 43 of the court book?---Forty-two and 43, yes.

PN60

And that's for the pay period it says of 2 March 2023 to 15 March 2023?---That's correct.

*** RICHARD WILLIAM FORSHAW

XN MR MALING

PN61

The total payments are listed as \$5,811.74?---Correct.

PN62

Were you on leave at that point in time or were you working?---I was working. I believe I had a personal leave day, had the flu, somewhere in the middle of that period, pay period, yes. Just one day.

PN63

Now, the amount that you're paid there of \$5,811.74 is more than the amount that you were paid in the other payslip that was shown which was \$5,335.02. Are you able to explain why there's a difference?---Yes, I can. The period in 2022, so the first payslip that we turned to, I was on annual leave during that period which means I am paid only the pay that I would be entitled to receive which is not inclusive of the worker's compensation payments in lieu of the injury. You don't get paid compensation payments when you're on a period of leave. However, the remainder of the pay, which was the two composites and the normal salary was listed as annual leave, is payable during periods when you're on leave. Sorry, just to continue the answer to that question. Part 2 of that is when - so the second payslip that you've referred to, the 2023 payslip, I was working during that period which means I was receiving worker's compensation payments during that period of time, and the worker's compensation payments are determined by what's called - I think it's called the normal weekly earning, which is a period of time that is taken, an average prior to the date of a worker's compensable injury and any sum of moneys paid to the worker prior - or in that, within that period, and then it's averaged out. So during the period the NWE was applied to me prior to my injury. I had been working overtime and that was taken into consideration during that period. So it's a higher rate of pay on the NWE because of the averaged overtime during that period.

PN64

THE DEPUTY PRESIDENT: Mr Maling, can I just ask a quick question, and, Mr Chilcott, you might have a view about this as well, so please feel free to express it at an appropriate time, but are the worker's compensation payments in annexure H effectively just a top up?---Yes. Yes.

PN65

Thank you.

*** RICHARD WILLIAM FORSHAW

XN MR MALING

PN66

THE WITNESS: And by way of explanation, and if this is known you can tell me to move on, but the Safety Rehabilitation and Compensation Act the relevant provision is section 19 and it has a tiered system in which after 45 weeks there's basically incentive for workers to be able to work more hours within their capacity if they can and the top up will be more. So if a worker is totally incapacitated for work they're entitled to 75 per cent of what their normal weekly earnings were. However, if they're able to do certain amounts of work that percentage of what they will get or topped up to will increase to the extent that if they're above a

certain level - I don't have the provision right here - they will receive a top up of 100 per cent to what - - -

PN67

THE DEPUTY PRESIDENT: Great. Thank you. Mr Chilcott, did you have a different view about that?

PN68

MR CHILCOTT: Not for practical purposes. In my submission this is irrelevant to the issue that's before the Commission in any event. I don't make any submissions about it.

PN69

THE DEPUTY PRESIDENT: Okay, thank you. Sorry.

PN70

MR MALING: No. I welcome questions as they arise. Mr Forshaw, you mentioned there your normal weekly earnings took into account overtime. What else to the best of your recollection does it take into account?---It takes in whatever normal pay you receive from your employer for the performance of your duties again in that same period. I think from memory it was six weeks, but I stand to be corrected on that one. But, yes, it would include your pay plus any penalties, additional payments, et cetera, throughout that period inclusive obviously of overtime as well.

PN71

So for you your normal pay, what is your understanding of what that was?---So my normal pay received every fortnight would consist of the two composite payments and the salary as referred to on the payslip.

PN72

Thank you. Before I ask this next question I will leave it open to my friend to say if he has any objections. I provided him with an email this morning which isn't in evidence before the Commission. I think it was received only last night. I plan to ask Mr Forshaw to describe its contents, but noting it's not before the Commission and my friend received it late I'm happy to give him the opportunity to make any comment or objections in relation to me leading that evidence in now.

PN73

MR CHILCOTT: Thank you. I will be honest with you I have seen the email and that's all I have done. I haven't been able to give it any consideration. Again I'm back to the point that I don't quite understand its relevance to the interpretation issue that is before the Commission. I probably would object on that basis. I do object on that basis.

PN74

MR MALING: In terms of its relevance the evidence goes to how - certainly an aspect of the Australian Capital Territory considers what Mr Forshaw's base rate of pay currently is for the purposes of payments of the leave payment.

*** RICHARD WILLIAM FORSHAW

XN MR MALING

PN75

THE DEPUTY PRESIDENT: Sorry, for purposes of payment of what?

PN76

MR MALING: Of leave, of long service leave.

PN77

THE DEPUTY PRESIDENT: Isn't part of the issue, Mr Maling, that if we take the SRC Act for example it's got a particular legal or regulatory framework in terms of how payments are calculated and made. Just so I'm clear what do you say is the relationship between that particular formulation of a particular type of payment and the matter that I have to decide?

PN78

MR MALING: The submission made is that - - -

PN79

THE DEPUTY PRESIDENT: Actually I have to apologise now, I probably shouldn't have asked that question halfway through Mr Forshaw's evidence. Can we just flag it and hold it until we have finished his evidence and then I would like to be clear about that today.

PN80

MR MALING: Certainly. Noting my friend's objection I won't press that issue. I have evidence in, in relation to how the ACT is presently paying him, so I'm happy to move on from that point. I have no further questions for Mr Forshaw.

PN81

THE DEPUTY PRESIDENT: Okay, thank you. Mr Chilcott, any cross-examination?

PN82

MR CHILCOTT: No, thank you, Deputy President.

PN83

THE DEPUTY PRESIDENT: All right. Thank you, Mr Forshaw, that concludes your evidence?---Thank you, Madam Deputy President.

<THE WITNESS WITHDREW

[10.19 AM]

PN84

MR MALING: Deputy President, if I now can just take you to some of the documents that have been filed just to pinpoint I suppose just the relevant aspects of what's occurred. In terms of - - -

PN85

THE DEPUTY PRESIDENT: Sorry, just before you start there. So, Mr Chilcott, I notice - - -

*** RICHARD WILLIAM FORSHAW

XN MR MALING

PN86

MR MALING: - - - I've also filed - - -

PN87

THE DEPUTY PRESIDENT: Sorry, Mr Maling, just before you continue. So there's no other evidence you wish to tender just before we proceed?

PN88

MR MALING: I dropped out then. I was just saying that in terms of formalities I filed the transfer of a skills assessment document previously and wish to tender that into evidence.

PN89

THE DEPUTY PRESIDENT: What page of the court book is that, just let me find it.

PN90

MR MALING: That commences at page 44 of the court book.

PN91

THE DEPUTY PRESIDENT: Any objections to the tender of that document, Mr Chilcott?

PN92

MR CHILCOTT: The same observation as before, and on that basis no objection.

PN93

THE DEPUTY PRESIDENT: Noted, thank you.

EXHIBIT #3 TRANSFER OF A SKILLS ASSESSMENT DOCUMENT

PN94

MR MALING: Thank you. Now, while we're dealing with the transfer of a skills assessment at that page the relevant part that we particularly rely on is page (audio malfunction) of that document.

PN95

THE DEPUTY PRESIDENT: I'm sorry, you just broke up there.

PN96

MR MALING: On that page - page 46 of that document.

PN97

THE DEPUTY PRESIDENT: Yes.

PN98

MR MALING: There's a heading of 'Potentially suitable classifications equivalent to base salary', and the equivalent classification there is listed as an Administrative Services Officer Class 6. In the right-hand part of that box a heading 'Basis for recommendation'. There's the content:

PN99

Mr Forshaw's pre-injury classification was an Intensive Care Paramedic Level 1. Mr Forshaw's base salary was equivalent to ASO6 classification as per the current enterprise agreement.

PN100

The same comments are made in relation to the second row. I won't read that out. It's in relation to a different classification, it's the office of Regulatory Services Inspector 6.

PN101

If I can now turn to the annexures of Mr Forshaw's statement. It's page 28 and it's annexure D. I will explain the relevance of these once I've gone through them. It should be a letter of Ms Beatty dated 6 June 2022. The first paragraphs notes that a referral for re-employment has been made to the head of service. The second para says:

PN102

This referral has been made on the basis that you are unable to undertake your nominal role as an intensive care paramedic and we will (audio malfunction) we will take you being considered for vacancies at the Administrative Services Officer 6, ASO6 level, across the ACT Public Service. As previously advised the ASO6 level is considered equivalent to your normal classification (audio malfunction) purposes.

PN103

If we turn over then to annexure E of the statement which begins at page 30.

PN104

THE DEPUTY PRESIDENT: Yes.

PN105

MR MALING: That is an email dated 29 June 2022. It's in relation to essentially minutes of a meeting that occurred the day prior. Thankfully we're looking at a top page. It's the second dot point, so it's easy to identify, and it's an email from Ms Groot of the Territory.

PN106

The work level equivalent is based on base pay (indistinct) Intensive Care Paramedic 1. A search for suitable vacant positions across the SIRS will be added an ASO6 or equivalent classification.

PN107

The three parts that I've highlighted demonstrate that the assessment which the Territory has made in relation to what it says to be the equivalent classification has very much determined the scope in which they are conducting searches for the possible alternate roles for the purposes of a transfer.

PN108

It highlights really the importance of which we say getting the classification right is of utmost importance, because as I say is evident from E13.3 it commences by saying that current skills and experience are the focus about what the proposed

transfer needs to be in line with, the qualifying section being that the position must be in line with that current skill and experience, and then must not vary the top increment by 10 per cent.

PN109

And here we say that rather than necessarily focusing on Mr Forshaw's current skills and experience there's been a focus on pay and what it says to be the pay level, what the respondent says to be the pay level, and it's really the crux of the dispute here while the matter hasn't been able to proceed.

PN110

Prior to turning to the elements of interpretation and then dealing with some of the issues that you may raise I note that the evidence - - -

PN111

THE DEPUTY PRESIDENT: Mr Maling, sorry, can I just ask one question, and again this may not be relevant, but I will ask the question anyway. Is it the case that Mr Forshaw would no longer receive worker's comp payments after any transfer is effected, and relevantly in that context is there some suggestion that he wouldn't then be receiving top up payments?

PN112

MR MALING: No, there's no suggestion. So providing that he remains incapacitated for work as a result of his injury, meets those qualification aspects of the Act, he would receive his top up payment regardless of the work that he is doing. As always there's qualifications for that. There's an examination as to whether he's undertaking suitable duties and earning remuneration, which he was able to do. But I don't think there was any suggestion in this case that if he were transferred to that level that that would disentitle him. He would in fact, we say, receive the top up payments.

PN113

And so this matter is not about him losing wages if he is transferred, though his evidence is that the value of his leave will significantly change, even if that's paid at the base rate of pay at the time which the leave is taken. Does that answer your question, is that clear?

PN114

THE DEPUTY PRESIDENT: Yes, thank you.

PN115

MR MALING: In terms of my friend's observations that the evidence we've submitted is of general no relevance we take the point, we are here for an interpretive aspect which is a legal exercise. However it is a precondition under the enterprise agreement at G6 that certain steps have been taken prior to the parties being able to raise the matter at the Fair Work Commission in order for its determination, and in particular G6.12 says:

PN116

Unless the parties agree to the contrary FWC must in responding to the matter have regard to whether a party has applied the procedures under this term and acted in good faith.

PN117

And G6.7 states:

PN118

If the dispute remains unresolved after this procedure the parties to the dispute may refer to the Fair Work Commission.

PN119

And the procedure outlined there is ways in which the parties hopefully resolve the matter internally where initially raising it with a manager and if it cannot be resolved raising it with a higher delegate. And again that's a precondition (audio malfunction) jurisdiction, and I note that there's been no objection raised to the jurisdiction, but we say that that material is relevant to put before the Commission to satisfy you that you do have jurisdiction because certainly there has been an attempt by Mr Forshaw to raise this internally in his evidence. There is some criticism that after raising the issue with Mr Wren, who is the chief paramedic, I think that's the correct way to title him, there was no response, but in any event we say that there has been attempts to comply.

PN120

Then in a more general context these disputes always arise out of a factual set of circumstances, so the material has been put to you to provide you with that information. And if I will develop this argument, as I stated at the start the crux of this matter is which base rate of pay applies. The evidence that we have tendered this morning will establish that the Territory, for example when Mr Forshaw is on annual leave, is paying annual leave on the basis that he's entitled to the composite basis and noting that annual leave is paid on a base rate of pay. The Territory is presently treating Mr Forshaw as if his base rate of pay does include the composite, which I will address and attend to shortly.

PN121

In relation to the subject (indistinct) which is really in dispute if I can turn now to the enterprise agreement and I will spend some time going through the provisions of the enterprise agreement. E13.3, which is page 50 of the enterprise agreement, is the provision which we are asking you to provide some interpretation in relation to.

PN122

Now, we have filed some agreed questions, there are four. As is often the case once matters that proceed to hearing get finalised then there is some refining of what the issues are. The real crux of the matter is 3, what is a level of pay at the top increment for the applicant's classification for the purpose of clause E13.3.

PN123

I will note that question 4 having regard to the answer at 3 above, 'What is the applicant's equivalent classification under the ACT Government Administrative Service Officer Class 1 to 6 and Senior Officer Grade C (indistinct)

classifications', that's a document that we haven't put before the Commission, and it may well be that the answer to that question is that we cannot answer it. For the purpose of arbitrating this matter it would certainly be sufficient for the parties to receive an answer to question 3, 'What is the level of pay?'

PN124

In relation to the first two (indistinct) saying they're relevant. They certainly are relevant to matters of interpretation and how the parties have outlined their submission. The point I make is that 3 is the real crux, it goes to the crux of the matter. Now, E13.3 says that despite the provision (audio malfunction) in 27 of the PSM Act, which is the Public Sector Management Act:

PN125

A medically unfit employee may by agreement with the employee be transferred to any position within the employee's current skill level and experience, classification of which is a maximum pay which is not to vary the top increment of the employee's classification (audio malfunction).

PN126

I just highlight there that there is a use of the possessive employee's (apostrophe 's). There's also the use of 'a' and 'the' which I submit in their case that's referring to a particular employee.

PN127

There is some variance in the submissions between the parties, but we seem to have agreement that it requires a comparison between two state of affairs. The present state of affairs, what is the current top increment for the classification, and then what the proposed pay or increment of the other classification would be, and it must be the case (audio malfunction). There's the use of the word 'a' there and that section doesn't provide the guidance as to what the meaning of 'pay' actually is. In that respect regard must be had to some of the other provisions in the enterprise agreement to establish what pay is.

PN128

Section C, which is at page 31, establishes rates of pay and allowances. That goes to details at C2.1, 'Employees be paid in accordance with their classification and rates of pay', set out in annexure A of this agreement. It doesn't say base rate of pay, but I think that that should be interpreted as base rate of pay.

PN129

Section C then goes on to detail other provisions such as higher duty and allowances, payment for shift workers, overtime, on-call allowances, other types of allowances. So it distinguishes between the base rate of pay which is at annexure A and then allowances which would be payable on top of that. Base rate of pay is not given separate meaning under the enterprise agreement to that which is found at section 16 of the Fair Work Act. Now, I note that section 16 of the Fair Work Act says:

PN130

The base rate of pay of a national system employee - - -

PN131

There's no disagreement that this covers Mr Forshaw.

PN132

- - - is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following: (a) incentive-based payments and bonuses; (b) loadings; (c) monetary allowances; (d) overtime or penalty rates, and (e) any other separately identifiable amounts.

PN133

Base rate of pay is a very important concept as you're well aware. It takes a range of things, including payment for annual leave. That's provided for at section 90 of the Fair Work Act, which says:

PN134

An employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay.

PN135

I pause there and say that we've admitted into evidence a payslip after Mr Forshaw was injured in which he is paid annual leave, which does not include the worker's compensation amount, in which the annual leave is inclusive of the composite payment.

PN136

THE DEPUTY PRESIDENT: Mr Maling, can I just interrupt you there for one moment. Mr Chilcott, just before we move off this point, so C2.1, is there any disagreement from your perspective that the reference to pay there is effectively base rates of pay?

PN137

MR CHILCOTT: Not for my purposes, no.

PN138

THE DEPUTY PRESIDENT: Okay, thank you. Thanks, Mr Maling.

PN139

MR MALING: Thank you, Deputy President. Just to I suppose emphasise the point, again in relation to personal leave it's section 99 of the Fair Work Act. Again it establishes that if an employee takes a period of paid person/carer's leave the employer must pay the employee at the employee's base rate of pay. I am ahead, but I will take you so slow, there is provision under the enterprise agreement which states that employees, intensive care paramedics who work the roster are paid personal leave, annual leave and long service leave inclusive of the composite. So the submission is going to be that that's indicative, that under the enterprise agreement that's the base rate of pay for an Intensive Care Paramedic 1 doing that roster is inclusive of those payments, the composite payments.

PN140

THE DEPUTY PRESIDENT: Sorry, what clause was that, Mr Maling?

PN141

MR MALING: That's at N19.2. I am turning to N now.

PN142

THE DEPUTY PRESIDENT: Okay.

PN143

MR MALING: There's a specific reference to N19.2, it's on page 135. Now, N1, this is commencing at page 127, and I have addressed this in our written submissions as well, it's really the qualification part. The section applies to all intensive care paramedics, ambulance paramedics, employees who work a 10/14 roster or variation thereof.

PN144

Certainly in the submissions that we have raised there needs to be some interpretation of what the meaning of who work is. I accept that if you find that it is simply the case that Mr Forshaw does not work that any more and the literal interpretation applies, then it's likely that you would find in favour of the respondent's argument.

PN145

We say that the provision of who work at N1.1 must be interpreted with regard to other provisions of section N. And specifically at N - and I've referred to this as well in our written submissions - N3.3, or N3 identifies the rates of pay in relation to the composite amount, and you see here a reference of ordinary hours, shift penalty payments and also overtime. I pause here, that shift penalty payments of 26.65 per cent and rostered overtime 7.13, those percentages are listed in annex A as well. So the reference to two percentages in annex A match N3.1.

PN146

N3.3 says that where an employee's entitlements change or the 10/14 shift pattern changes other than for personal leave then the employee's wage payment for that week will be calculated on a pro rata basis. We have placed a lot of emphasis in our written submissions on the use of personal leave as being a factor that's excluded in changing the payment of the composite amount.

PN147

So for example if an intensive care paramedic is unable to work for a period of time, is on personal leave, they are still paid the composite amount even though they are not actually working by operation of N3, but then also by operation in 19.2.

PN148

Section N generally provides a quite comprehensive description of the various entitlements that arise for an intensive care paramedic or ambulance paramedic meeting that qualification who works the 10/14 roster. There's additional personal leave and annual leave accrual provisions at N4 and 5, annual leave and public holidays at N6. So it's quite comprehensive.

PN149

If I can turn now to page 134. They provide some description about the composite penalties. N19.1 says:

PN150

Where applicable additional payments (indistinct) in a duty in accordance with the 10/14 roster pattern will be averaged over the cycle of shifts so that additional payments made to an employee (indistinct words).

PN151

That is the employee is receiving equal pay, a regular pay, a wage, however you want to describe it, each pay period regardless of what actual days have worked in that roster period. Of course there is provision for overtime if they work in addition to that. The heading here is 'Composite penalties'. I ought to have noted this previously at 127, that N3.1 refers to composite salary as opposed to composite penalties. I don't think much turns on that. I think they're clearly the same thing. It's just a different usage of the word there.

PN152

At page 135, which is still part of N19.2:

PN153

Composite penalties paid during periods of ordinary leave, periods of annual, long service leave and personal leave; periods of approved roster training and roster special duties deemed by an employer (indistinct) periods of ordinary duty and accrued days off.

PN154

Now, having regard to the provisions which I read out earlier, section 90 of the Fair Work Act and 99, payments of personal and annual leave are made at an employee's base rate of pay. This must mean that even though composite is listed as being, or is described in great detail as being something paid in addition to a payment for what says what is ordinary hours at N31.1, notwithstanding that the enterprise agreement provides some details about how the payment is made, it must mean that the composite penalties are part of the base rate of pay for an intensive care paramedic.

PN155

The issue here for Richard is that by way of his injury he is no longer working doing the 10/14 actual shifts. That's clear, and hasn't for some time. So the issue is to what extent does he remain for the purposes of E13.3 entitled to his base rate of pay for the purposes of that provision. Now, we have already established, and the evidence isn't countenanced, that his leave is certainly paid at a base rate of pay on that basis. Now, the submissions that - - -

PN156

THE DEPUTY PRESIDENT: Just a moment. So just before you move on, Mr Maling, in terms of the top of page 135 'Composite penalties are payable during', and then four parts there, is ordinary duty a defined term in the agreement?

PN157

MR MALING: I am unsure. My answer to that is unsure. I would open the floor to my friend if he has any particular - - -

PN158

THE DEPUTY PRESIDENT: I suppose I am curious about what's not covered. It obviously doesn't say it's payable for all purposes, because that would be an easy thing to do if that was the intention, if it was intended to be paid regardless of whether someone was performing that roster pattern or not. There has obviously been some agreement about the circumstances in which that payment is made, and I'm making an assumption, but I want to give you both the opportunity of correcting me if I'm wrong. There must be times when it's not payable, because otherwise you would just say it was payable for all purposes.

PN159

MR MALING: Yes, I would agree with that, and I apologise, Ms Stanos is doing a quick search of my e-version of the enterprise agreement. My submission is that it's not payable for all (indistinct). Of course that's not the case, and there are provisions at N3.3 which (indistinct) will certainly account if the shift pattern changes, or if they're working pro rata or the time has changed, then a reduced amount would be payable. And one would expect that if the intensive care paramedic or ambulance paramedic is no longer working the 10/14 roster or a variation thereof, or either may do reduced shifts, a six hour shift or something entirely different, then they would no longer be entitled to be paid at what we say is the base rate of pay.

PN160

THE DEPUTY PRESIDENT: Okay, thanks.

PN161

MR MALING: But I do place considerable importance on the fact that payable during periods of leave to establish that that is the base rate of pay, it's not something that is for example where it's only dependent on working the actual shift on an actual day; for example a registered nurse who works overtime on a Sunday for example under the relevant enterprise agreement will be entitled to a penalty and overtime rate. But that's dependent on actually having worked that actual day. But this is something distinct and it's different. And I place considerable importance on the wording of personal leave (indistinct) by N3.3, and it's (indistinct) N19.2. It operates to basically preserve a person's payment while ever they are medically unable to work.

PN162

Now, of course Mr Forshaw is not on personal leave, he's on worker's compensation leave. In my submissions I have gone into some detail about how that operates, and the crux of that submission is that worker's compensation leave in his circumstances is paid in lieu of personal leave. In theory it would be possible, or in practice it would be possible and likely that if a person doesn't suffer from a work caused injury, but is nonetheless unable to work, they can access personal leave.

PN163

For example if you have an employee who has a healthy personal leave balance of eight, nine months, worked for a long time and been fortunate enough to have good health, they then suffer from an illness that prevents (audio malfunction) for work and is not work related they then access personal leave. It's paid at the base rate inclusive of composite and then 3.3 preserves their status in terms of (indistinct) they're considered to not be working the roster. Now, if that person for example seeks approval and takes that leave at say half pay it extends to 18 months.

PN164

There would be circumstances where it would be possible that over that period they may be medically unfit, considered medically fit and the process under E13.3 would then potentially, hypothetically apply. Now, in that circumstance we say that the law there would be quite clear in terms of (indistinct) rate of pay is preserved on personal leave, so the base rate of pay is inclusive of the composite and they are still somebody who works.

PN165

The problem here is that personal leave, which it is on worker's compensation leave, which is paid in lieu of the personal leave, and our submission is that for the interpretation of that provision personal leave ought to include worker's compensation leave. Otherwise you would have a situation where the worker who has a work caused injury and that who doesn't would be treated differently under the relevant provision and it would be treated unfairly. I think we have established that there is a difference between the base rates of pay between somebody who is an intensive care paramedic who is not rostered to work, and somebody who is rostered to work. And so that personal leave aspect is particularly important.

PN166

THE DEPUTY PRESIDENT: Mr Maling, if Mr Chilcott's interpretation is correct, it wouldn't matter whether it's personal leave or worker's comp leave, would it, because we're actually - - -

PN167

MR MALING: No, look, it wouldn't matter. You're right, it wouldn't matter. I agree with that proposition. The problem is that there are, I submit, two base rates of pay in relation to an intensive care paramedic, and so there must be regard to the particular employee's circumstances to work out which base rate of pay applies in that particular case.

PN168

It ought not be the case that regardless of whether it's personal leave or worker's compensation leave, it is always the base rate of pay of somebody who is not rostered, as is the same, and I'm not suggesting that it is always the case, the base rate of pay is inclusive of the composite. It's very much fact dependent. The submissions are very much fact dependent in relation to this particular matter.

PN169

THE DEPUTY PRESIDENT: All right.

PN170

MR MALING: And it's probably remiss of me not to take you previously, though it is in the material to Annexure 8 which commences at 148 of the enterprise agreement. It's listed, 'Classifications and Rates of Pay.' It starts off with Ambulance support officers, which just adds one base rate of pay listed. There are other numbers but that's in relation to the annual increases.

PN171

The same with the patient transport officers at 149; the same for an ambulance manager, 150; then we turn to student ambulance paramedics, ambulance paramedic and intensive care paramedics, starting at 151. So, if we go to the one that's presently relevant, intensive care paramedic, it's at 152. And in green, also (indistinct) in green denotes the two base rates of pay.

PN172

So, there's a pay rate in relation to what somebody would receive, and in the first column, we say if they did not work – and there are, and I don't think it's in contention that there will be some intensive care paramedics who do not work that roster, otherwise (indistinct) that specific provision, and then the second green column is that, for example, the total at 9/12/2021 is inclusive of the composite amounts.

PN173

So, our submission is very much that there are two base rates of pay, and it's a question as to which one applies in the particular circumstances of the employee, which must then have consideration as to that particular employee's circumstances.

PN174

I emphasise that when I asked him for Mr Forshaw's earnings prior to him being injured, and we've established that on his evidence, his normal weekly earnings, and inclusive of an overtime rate, that was above and beyond just the base rate inclusive of composite. That's not what we're asking for here. I'm asking for the top (indistinct) of his classifications being inclusive of the composite.

PN175

Just in terms of maybe some final points, the matter does, I say, raise an interesting point of interpretation on a range of points. I know I've laboured personal leave. I have made the submission that personal leave ought to be inclusive of, and construed as being inclusive of, worker's compensation.

PN176

I submit that that is not a strange interpretation, but given the complexity of the matter, given that E13.3 was unclear as to what level would actually apply, but that's certainly open to the Commission to find. I note that just in general terms, 578 of the Fair Work Act in relation to performing its function, some of the factors that the Fair Work Commission must take into account.

PN177

It is without doubt that you must take into account the interpretation and the meaning of the words. In doing so, it's noted that there's a general consideration

of promoting, and this is at subsection (c), the elimination of discrimination, and we have made submissions in relation to how we say the operation of the Discrimination Act 1991 would apply in this circumstance, in relation to the difference between how an injured, and work-caused injured and a non-work caused injured worker would be affected by the interpretation being suggested by the respondent.

PN178

In relation to - - -

PN179

THE DEPUTY PRESIDENT: I just want a view, Mr Maling, in terms of agreement interpretations is, and if you look at Berri or any of the other – Golden Cockerel or any of those.

PN180

MR MALING: Yes.

PN181

THE DEPUTY PRESIDENT: It may be that the parties have made certain agreements that aren't necessarily fair in all the circumstances, or might be on one view of it, absurd, but that's not our job. Our job is not to make it right, in that sense. It's to interpret the agreement as the parties have made it.

PN182

MR MALING: Yes, and I agree. I agree with that. And I'm certainly not asking the Commission to rewrite the agreement, nor am I asking the Commission to write in an aspect in relation to personal leave, to write in worker's comp.

PN183

My submission is that personal leave, given the commonality in terms of the definition of 'personal leave, as I have written in my submissions under the Fair Work Act, and what 'incapacity' would mean for the purpose of worker's compensation, that's it is open, and indeed in the trial we say the Commission should interpret personal leave to be inclusive of worker's compensation payments.

PN184

If you are minded to agree with me that whilst on personal leave, Mr Forshaw's base rate of pay remains that under section M, but you disagree with me in relation to worker's compensation, it would mean that the immediate time in which he became a worker's compensation recipient, there would be a substantial change in the value of annual leave entitlements, which we say is not a preferable interpretation, but it is one that is open to interpretation.

PN185

It's not one that I think can be disposed on there being a plain meaning. I think, without it being arrogantly, but I think both parties have submitted detailed submissions covering the field, which I say that, at the very least, shows that there are two reasonable interpretations that could be open with your difficult job, to

then make a binding determination as to which is the interpretation that arises from the facts.

PN186

I think we are clear that E13.3 provides the base rate of pay. I think there is agreement there. It's just, in this case, which base rate of pay.

PN187

THE DEPUTY PRESIDENT: Yes.

PN188

MR MALING: I have the SRC Act interaction that was raised earlier. I apologise. I don't recall all the specificity that was the question, and to what extent does the SRC, or how relevant is the interaction with the SRC Act to the interpretation of – or to your job here in interpreting the enterprise agreement. Is that correct?

PN189

THE DEPUTY PRESIDENT: Yes.

PN190

MR FORSHAW: Your findings must be based on the enterprise agreement. The submissions in relation to the SRC Act, yes, are a separate piece of legislation that create separate and distinct entitlements that are paid to a worker, but there is a commonality there. It's the employment relationship.

PN191

Of course, the worker's compensation entitlements being paid to Mr Forshaw are not paid under the enterprise agreement and there is no suggestion that that's the case. But the submission is that the worker's compensation payments are paid in lieu of Mr Forshaw's personal leave which he would otherwise have to take if he had not been a recipient of worker's compensation, and so that's the extent of the interaction.

PN192

I, again, wish to emphasise that the purpose of this is not for Mr Forshaw to receive his normal weekly earnings and his pay. He will receive that for hours worked, so long as he remains a recipient of worker's compensation. He has recently undergone an assessment for permanent impairment for the purpose of that legislation, and has had an assessment that he suffers a permanent impairment, and I think the agreement is that unfortunately Mr Forshaw is not going to be able to return, hence the redeployment process.

PN193

But the import is very much in relation to the value of his leave, but then also to see that this process is done correctly, and I think that it's an open interpretation on the material that I've referred to, that the identification of the ASO6 level has blinkered the approach taken by the Territory in this matter, which has been a source of frustration for Mr Forshaw.

PN194

I think the email I have referred to of 29 June in relation to the meeting minutes, certainly by the Territory if they conveyed what Mr Forshaw said in the meeting, certainly convey a degree of frustration there. But for the purposes of the interaction between the two, worker's compensation payments are paid in lieu of personal leave. Was that clear in relation to what our submission is?

PN195

THE DEPUTY PRESIDENT: Yes, thank you, Mr Maling.

PN196

MR MALING: I'm almost done. I've got a (indistinct) of my forward estimate and I apologise for that. I would only observant that, well, two points – one, I think my friend's submissions of 24 April may have been left out of the court book, inadvertently. I certainly, in the version that I had - the respondent's materials from line 20 to 125 are submissions of 9 February. I nonetheless searched these submissions and have them, but I'll just make that note that they are there, and I certainly thank my friend for those submissions.

PN197

I submit that my submissions that I've made, in general, address the points that have been raised and the reasons for the disagreement. I will note that at paragraph (indistinct) 2, my friend says that 'the respondent's approach to the proposed transfer is to identify a position within the applicant's skill level and experience, and which has a maximum pay which does not vary from the top increment of the classification.'

PN198

I think we could be fraught with semantics here, but what has actually happened here is the opposite, as my submission has been, that no, they have identified what they think the pay is, and then they've gone to look for positions based on that aspect. Otherwise, I think the points my friend makes are fair in many respects, in terms of, we are in agreement but there is a comparison between two positions.

PN199

At paragraph 26 there is disagreement but some agreement. He says that if submitted, the top increment does not include the amount that is payable as a composite, it is the amount that is payable to an officer as the officer's base rate of pay. We agree, base rate of pay, but we say the composite is inclusive in the base rate of pay of somebody who qualifies for it.

PN200

Otherwise, in just some final remarks that Mr Forshaw is being paid, his base rate of pay when on annual leave, has his evidence in the matter, which means as is evident in the payslip, which means there's a portion of the territory that still considers his base rate of pay to be that inclusive of the composite, even though he is not rostered to work, and it must be by operation of 19 - of course, N3.3 and 19 which, in effect, says - preserves the status in relation to working the roster, as its referred to in 1.1.

PN201

Otherwise he wouldn't be entitled and would not receive those payments, and as soon as a person was not on that roster, they would no longer be eligible to be paid that base rate of pay. Otherwise they're the submissions I wish to make, other than there may be a required – or any questions that you have?

PN202

THE DEPUTY PRESIDENT: Mr Maling, yes, one question I've just realised when I just checked my notes, that I didn't ask earlier, so you tendered the statement of Mr Forshaw, so if you look at the court book, the statement which is at document number 5, starting at page 15, obviously with those annexures - - -

PN203

MR MALING: Yes.

PN204

THE DEPUTY PRESIDENT: The Transferrable Skills Assessment Report, which is document 6 in the court book, and then Annexure 1 to the F10, which is the other statement of Mr Forshaw.

PN205

MR MALING: Yes.

PN206

THE DEPUTY PRESIDENT: So, they were annexures to the F10. I just want to check. You didn't tender Annexure 2 to 8 of the F10. Are they documents that were intended to be – so they're not in an exhibit box.

PN207

MR MALING: That's an oversight by me, thinking that they were annexures of the statement. No, I haven't - - -

PN208

THE DEPUTY PRESIDENT: They're all annexures to the - - -

PN209

MR MALING: Yes. Yes.

PN210

THE DEPUTY PRESIDENT: They're annexures to the F10 of the statement, so - - -

PN211

MR MALING: Thank you for clarifying that. Yes, I would seek that that be tendered, and I apologise for that oversight.

PN212

THE DEPUTY PRESIDENT: Mr Chilcott, is there any objection then to the tender of the documents which are Annexure 2 to 8 of the F10?

PN213

MR CHILCOTT: I haven't checked them but I doubt that there would be.

PN214

THE DEPUTY PRESIDENT: It seems that some are particular sections of the agreement, and there's some correspondence, and the referral. So that if you have a look at the court book, then it's what you'd expect of the court book.

PN215

MR CHILCOTT: Yes. Look, just to save time in relation to that issue, I mean, you've heard my general submission in relation to the evidence that's been tendered and I'll be addressing that in a moment, again, but on that basis I think there's no objection.

PN216

THE DEPUTY PRESIDENT: All right, so I'll mark Annexures 2 to 8 of the form F10 as exhibit 4. We'll just do it as a bundle.

EXHIBIT #4 ANNEXURES 2-8 OF FORM F10

PN217

MR CHILCOTT: Thank you.

PN218

THE DEPUTY PRESIDENT: All right, thanks Mr Maling. That was the only other I had to raise.

PN219

MR MALING: Thank you.

PN220

THE DEPUTY PRESIDENT: All right, Mr Chilcott, thanks.

PN221

MR CHILCOTT: Thank you, Deputy President. The parties to this enterprise agreement agree that there needs to be mechanisms to deal fairly with situations that may interrupt the normal employment relationship, such as illness and injury that may affect an employee's ability to continue to perform the duties of a role to which they have been appointed.

PN222

Clause E13 is such a provision. It operates to do two things, in my submission, and I'll briefly touch on that and then return to it in a little more detail, shortly. But it does two things, perhaps three things.

PN223

It identifies a person who is subject to the operation of clause E13 of the agreement; 2), it puts in place a procedure, if you like, to deal with the fact that they can no longer work in a particular role, and what can be done under the agreement to rectify their situation so there can be a continued employment relationship; and three, it creates a tool for making certain determinations to allow point 2 that I've just identified, to be given effect.

PN224

My approach today in my submissions will be to rely on the submissions that I made on 24 April. I had not intended to rely on those submissions which were more of an aide memoire for an earlier hearing in relation to – sorry, the early submissions dated – I can't recall the date but the February submissions, I'll call them, that were provided as an aid in relation to matters that were raised in the earlier hearings in relation to this matter.

PN225

However, I will be touching on some of the content of those submissions, I realised as I listened to what my friend had to say in relation to it. I want to thank my friend in relation to his submissions today. I will be mainly expanding on the submissions that have been made, and addressing his submissions in reply, which were a succinct and appropriate use of the submissions in reply.

PN226

In relation to the evidence which is just the matter that we just touched on, clearly there has been no cross-examination of the applicant in any respect of that material. The respondent's position is that the material is largely irrelevant to the task that you have before you, and that's perhaps, in my submission, illustrated by the fact that whilst there has been some reference to that material, there's barely been much reference to what is a considerable amount of material in the statements and in the annexures to the statements.

PN227

This is primarily an issue of the proper construction of clause E13 of the agreement, in my submission, and again, I'd like to think, and I hope and will submit, that the submissions that are dated 24 April actually approach the issue before you in that way. So, I will turn to the submission in reply first, and I'll just simply refer generally to paragraph 3 of the submissions in reply, where it's stated that the 24 April submission ignores the fact that section E13.3 is only about transferring a particular employee. It is person centred.

PN228

In my submission, that response is both correct and incorrect, at the same time. Yes, it is about the transfer of a person, but it is setting up what can be done in relation to that transfer and how that transfer can be effected, and to that extent, it is a set of provisions that have a personal element but equally, are to be applied objectively to all persons in that position, and that is the position that is described in E13.2, the position of a medically unfit employee.

PN229

E13.3 then goes on to describe who is a medically unfit employee. Because what becomes apparent in E13.3 that with the agreement of that employee, that employee can be transferred, in general terms. So, we're not ignoring that. That's what this case is actually all about. It's about the transfer of a medically unfit employee to another role, which he or she can perform without being impacted by the health reason that prevents him or her from continuing in their, what I'll call, the original role.

PN230

I want to work through clause E.13.3, in relation to the opening words of E13.3 which are, 'Despite the provision of Section 27 of the PSMA Act.' That has been addressed in our submissions and I don't need, in my submission, to refer to those again, other than just simply to refer to the paragraph number, which is paragraph 15 of the submissions.

PN231

The second point is that by agreement with the employee, which is irrelevant to the discussion that we're having at the moment, that person be transferred to any position within the employee's current skill level and experience. So, this is the first point, that where there is a subjective element that comes into play, its in relation to the medically unfit employee's current skill level and experience, and that needs to be done.

PN232

That needs to be assessed and that's the document which I recall is exhibit 3, the Transferrable Skills Assessment which is being undertaken in relation to determining his - in this case, Mr Forshaw's, current skill level and experience. It is a transfer to any position, the classification of which has a maximum pay which does not vary from top increment of the employee's classification by more than ten per cent.

PN233

So, that is the agreement between the parties that says that a transfer of a medically unfit employee is appropriately and fairly made to another job, but not any job. It has to be the classification which has a maximum pay which does not vary from the top increment of the employee's classification by more than ten per cent.

PN234

So, the issue there is that there's no reference there to the employee's current pay. It is a reference to the maximum pay which does not vary from the top increment of the employee's classification. So, in other words, there is a comparative exercise that's created within there to allow – to determine to which roles a person can be transferred with their agreement, without having to – in an advantageous sense, and I don't mean that in a critical way, but in a sense that as I've indicated in the written submissions where, for example, merit selection isn't a requirement for their appointment or transfer to the new role.

PN235

In other words, the only assessment that is made is about that the new position is within the person's current skill level and experience, to allow a person to be transferred without having to go through a merit process, which is a reference to some of the provisions of Section 27 of the Public Sector Management Act.

PN236

Clause E13.3 then goes on to say that – there's a sentence that the parties have agreed, was required to provide clarity as to what was intended. So, in other words, the purpose of what appears in the previous sentence was said to require some clarification, in the following way. And it's stated that, for clarity, 'This

allows transfer between alternate classification streams, but does not allow for the transfer of an officer within the same classification stream.'

PN237

An example is given as, 'SOG B transfer to a SOG A, or an AM2 Transfer to an AM3. So, the approach of the respondent in this matter has been to – well, it's set out in paragraph 2 of the submissions, where it's written in short, 'The dispute arises from the respondent's approach to the process of redeployment.' I won't read that out, again, but reliance is placed on that.

PN238

But what the respondent has done, is looked at the top of the increment range of the ordinary rate of pay, using that wording in a non-technical sense for the moment, for the respondent in the position as an intensive paralegal(sic); 2), and compared it with other maximum rates of pay across the public sector to determine, give or take the latitude provided by what I'll call the ten per cent rule, to determine what positions the applicant might be eligible to be transferred to, subject, of course, to him having the required skills and experiences that are required by E13.3.

PN239

So, what this provision does, and the purpose of the provision, is to provide a situation where a person who has sustained an injury or illness that brings them within its operation, to continue to be employed in another role with some advantage over the wider workforce, those who are subject to the same terms and conditions as that which is in – or they're all subject to the same terms and conditions, recognizing the difficulties that have applied, but also recognizing that they are being transferred level, they're not taking an advantage and not receiving, what I'll call, a de facto promotion in the process.

PN240

And that brings me back to the submissions that were made in February, where the issue of promotion was raised, whereas I didn't do so in the April submissions, and without rehearing those again, they are contained at page 4 of the February submissions at paragraph 17, thereafter. I won't go into those, again. But to put it colloquially, E13.3 is not a backdoor to a promotion.

PN241

It is a means of determining a fair redeployment of an injured worker who can no longer continue to perform a role, a situation that may apply to any person subject to this agreement, and it's designed to create fairness, vis-à-vis, to that person as against his or her colleagues, but at the same time, not giving them an added advantage at all times in relation to matters which all employees are subject to, for example, merit selection processes.

PN242

The fact that the provision applies to all persons subject to this agreement, in my submission suggests that the reference to the Discrimination Act that has been made is irrelevant because the operation of the provision applies to all the employees, not to the applicant because of his injury. It applies to any employee who might be injured, and caught by the operation of its provisions.

PN243

In my submissions I have not gone into the interpretive provisions in relation to the enterprise agreements and the duty that you have in your approach to the interpretation. As you indicated in your exchange with my friend, they are relatively uncontroversial, and from my perspective at the moment the interpretation that we have advanced is one that is based on the natural words of the provision, in the context where they appear.

PN244

And therefore, in my submission, the natural interpretation, the natural use of the language there, leads to the conclusions that we have advanced in the submissions before you.

PN245

Just to go back to the comparative exercise in relation to what has actually occurred, in the agreement, what is recognized is there needed to be a mechanism to give effect to that fair and appropriate treatment of medical unfit employees. And the objective test that has been recognised in the agreement, is the top of the range of the position from which the person needs to be moved from, and the top of the range of an alternative position for which he or she may be eligible.

PN246

It is a case of attempting to compare apples and apples, rather than apples and pears, to use the old analogy. It is not based on the hours that are worked, because that might lead to a variation of the party. If it weren't for the composite pay arrangement, that would clearly be a regular occurrence, that the pay for an individual in the applicant's position, working the hours and the times that he worked, would lead to variations from week to week of a considerable nature.

PN247

The purpose of a composite salary, amongst other things, was to even out those variations which they don't do, and that is recognise for example, in – and I turn again to my submissions at clause 28, where the composite pay is made up by ordinary hours, shift penalty payments, and rostered overtime. And that is recognised in clause N of the agreement, primarily.

PN248

There, the emphasis is on time, both time worked and the time when work is performed. So, ordinary hours are the ordinary hours expected of an employee to work; shift penalty goes to the time when a person works; and rostered overtime, obviously goes to the amount of overtime that a person works, and for that the composite salary is set in the way that it's described in clause N. And from memory, it's around clause N17 to 19, or thereabouts.

PN249

A person who, to come to the point about whether there are two means of paying an intent soliciting this context, and the answer is yes, and that's set out at paragraph 27 of the submissions, where I submit that an intensive care paramedic is first appointed to an office with a classification, so there's an appointment to the

office. And then secondly, the decision is made, and it may be that it's not made, as to whether or not to place that employee on a roster.

PN250

And it is the placement of that person on a roster that attracts the composite payment. So, in other words, and it's the composite payment that recognises the time aspects of the work that is performed, that I've just referred to, and that is all set out in paragraph 27 of the submissions. I'm just going to deal with a housekeeping matter that page 7, paragraph 37 on page 7 of the submissions, there's a rather – and I've got to concede, I don't know what I meant – a typographical error is correct in that I don't – I'd probably just simply as you to ignore for that purpose and if you require the answer to paragraph 37, I can provide that separately, later. I just recognised that as we were working (indistinct).

PN251

THE DEPUTY PRESIDENT: Sorry, do you mean to explain the bit about, is it worth putting the salary in here?

PN252

MR CHILCOTT: Exactly, yes. That must be a note to myself, at some point.

PN253

THE DEPUTY PRESIDENT: I assume that was a note to yourself, at some point.

PN254

MR CHILCOTT: It was, yes. The issue with what I've just dealt with is, raises an issue, the issue that was touched on by my learned friend several times during his submissions to you. He said that effectively, the operation of clause 13.3 are fact dependent, and to some extent, yes, they are. The facts will be, for example, current skills, skill level and experience, the maximum pay levels and so forth.

PN255

However, that issue of fairness that arose, which I think is inherent within the operation of the clause, in my submission, becomes apparent when you actually say that a paramedic on a rostered shift arrangement attracting the composite pay, might receive differential treatment when it comes to the operation of E13.3, in terms of the assessment for transfer, than a paramedic who is not so rostered and is receiving either no overtime payments or shift loading allowances, or less so because of the nature of the work that person is performing.

PN256

Yet, as I said at paragraph 37, both are appointed effectively, to the same role. The difference that occurs in relation to their pay can only be in relation to the time they've worked. And what is being required to be assessed by E13 is the suitability of a person who performs a particular role at the moment, to be able to perform another role at basically the same level. Again, I keep coming back to the simply idea that it's an attempt by the parties to the agreement to achieve a comparison between jobs, apples to apples, rather than apples to pears, or bananas or some other piece of fruit.

PN257

So, in summary, in my submission that the natural interpretation of the clauses is that which is set out in our submissions, that the clause E13.3 is designed to indicate what happens to a medically unfit employee, and how it will happen. In other words, it creates the tool to enable what might happen to that employee, which is a redeployment, how that might happen, and it's designed to do that by creating a situation that is fair to all the parties to the agreement, and it's not one based on the subjective circumstances of a particular employee and the pay that he or she receives, based on the hours that they work. They are my submissions, if it please.

PN258

THE DEPUTY PRESIDENT: Thanks, Mr Chilcott. Anything in reply, Mr Maling

PN259

MR MALING: Just in relation to the issue of promotion, and I don't mean to put words in my friend's mouth, so he can certainly correct me if I'm overstating this, but that perhaps the suggestion that our interpretation, if it was to be accepted, may result in some form of promotion or windfall for the applicant, there is protection – well, two points.

PN260

One, the lawful operation of the provision, if indeed our interpretation is the lawful operation, cannot be considered to be a windfall. That submission could go both ways, in terms of we could, maybe too, characterise this as leading to a demotion. Secondly, there is a safety net built into E13.3 to protect against a situation where the top level increment of a particular employee may result in a windfall or a promotion if transferred to another stream, and that is that it can only match, the position can only be in relation to the person's current skills and experience.

PN261

So, if a person could not do a particular office, and did not have that skill and experience, then the transfer could not be effected pursuant to E13.3.

PN262

THE DEPUTY PRESIDENT: I think that was the issue that we might have explored, and perhaps with a clunky example on my part, in once of the conferences earlier where there might be a whole range of roles which are classified as a level 6 but have a very different – so, you know, taking into account your normal job sizing components for whatever job – I don't know what sort of job sizing tool you use, Haye or Mercer or whatever it might be, Mr Chilcott, but there'll be a variety of roles that might be assessed at a particular level, of the skills or experience required to perform those roles might vary.

PN263

MR CHILCOTT: Yes. Yes, and my recollection is similar to that. That was dealt with in conference in one of the conciliations.

PN264

But apart from that, no, I think that's the only response I would put, save to say that we rely on our written submissions and those submissions we made earlier.

PN265

MR FORSHAW: Can I just add to what's just transpired between you in relation to that question. That's what the transferrable skills assessment is about. So, that that is answered through that process, and clearly, I mean, to use a silly example, there's no way that a person would have the required skill level and experience if they were there equivalent in the library service, for example, to come in and do an intensive care paramedic job. I mean, that's quite clear.

PN266

THE DEPUTY PRESIDENT: Yes.

PN267

MR CHILCOTT: So that, from an evidential perspective, is brought out through the transferrable skills assessment.

PN268

The other point is a point that I meant to raise earlier, but I do need, if I can, seek leave to make it now. Can I take you to E13.4 of the enterprise agreement, and importantly, it says, 'An employee will not be redeployed in accordance with subclause E13.3 unless there is no suitable vacant position of the employee's substantive classification within their directorate.'

PN269

So, to put it another way, E13.3 applies to redeployments across the service but you can't get to E13.3 unless there's no suitable vacant position that the employee's substantive classification within their directorate. And in my submission that supports the submission that we've advanced, that we are at all times, trying to compare apples with apples when we look beyond the classification at which the employee is working.

PN270

For example, and I'll say straight away there's no such position, but E13.4 would not allow the transfer, and the example in E13.3 would do the same, of a person from a paramedic 2, to the hypothetical position of paramedic 4, should there be a vacancy at that level. It just wouldn't allow it to occur.

PN271

And yet, that's the outcome that the submissions and interpretation that you're invited to accept from my friend on behalf of the applicant, that's the type of conclusion it would lead to in relation to a redeployment when we are talking about a redeployment from a SOG 6 level, or equivalent to, for example, a SOG C level or above. Thank you.

PN272

THE DEPUTY PRESIDENT: Mr Maling, is there anything you wish to say? We won't keep going back and forward, obviously, but if there's something, given that additional submission, you want to say in response, please do so.

PN273

MR MALING: No, I don't think there is. I think I've canvassed off all of our submissions in relation to the matter. I think the parties have quite helpfully outlined their positions clearly and I certainly thank my friend for that. There was one thing I was remiss to say before, just in relation to my friend's comments on the Discrimination Act to a (indistinct) person.

PN274

There mere fact that there's reference and it applies to a (indistinct) person doesn't mean that the interpretation of it in a particular circumstance cannot be discriminatory in nature. I have outlined in my written and reply submissions as to the relative provisions and the protected attributes which we rely on in support of that. That's all I would say on that issue.

PN275

THE DEPUTY PRESIDENT: Thank you both for the submissions this morning, they've been very helpful. Obviously I will consider the submissions and the evidence, and a decision will be issued in due course. Otherwise, we'll stand adjourned. Thank you.

PN276

MR MALING: Thank you.

ADJOURNED INDEFINITELY

[11.41 AM]

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