



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

34015109

DEPUTY PRESIDENT GOSTENCNIK

C2023/720

s.739 - Application to deal with a dispute

United Workers' Union (108V)

And

**Flavour Makers Pty Ltd T/A Flavour Makers Pty
(C2023/720)**

Melbourne

PN1

THE DEPUTY PRESIDENT: Mr McDonald, you're appearing for the applicant?

PN2

MR L McDONALD: Yes, Deputy President.

PN3

THE DEPUTY PRESIDENT: Yes, good morning. Mr Pollock, for the respondent?

PN4

MR A POLLOCK: Yes, Deputy President. I understand permission has already been granted.

PN5

THE DEPUTY PRESIDENT: It has, yes. Thank you. Yes, Mr McDonald.

PN6

MR POLLOCK: Deputy President, before my learned friend addresses you it might be convenient to just very briefly deal with a very small base of objections to the evidence that my learned friend seeks to adduce. The reason for dealing with that at the outset is that subject to how those are dealt with, there may be no need for cross-examination and we can simply tender those two statements.

PN7

THE DEPUTY PRESIDENT: Yes, all right.

PN8

MR POLLOCK: Dealing first with the statement of Navjot Marwaha, which appears at page 31 of the court book - Deputy President, do you have a copy of the court book that I think my instructors have prepared? If not, I can have my instructor hand it up.

PN9

THE DEPUTY PRESIDENT: I have a hearing book that my associate prepared. I don't have your version, so we may as well work off the same version.

PN10

MR POLLOCK: Yes, and I think my instructor has a copy for my learned friend, as well.

PN11

THE DEPUTY PRESIDENT: Thank you. Page 31, did you say?

PN12

MR POLLOCK: Yes.

PN13

THE DEPUTY PRESIDENT: Thank you, yes.

PN14

MR POLLOCK: Now, the objection is to paragraph 8. Paragraph 8 reads:

PN15

I asked why we weren't receiving penalty rates on multiple occasions and in response I was told that it was a management decision or that we had agreed to start at 5 am.

PN16

You will recall, Deputy President, we took issue with evidence in that form in the written submissions and nothing further has been put on in reply. Of course it doesn't identify when those occasions were, to whom those questions raised and who it was that provided those responses. In circumstances where the applicant has had the opportunity to put on reply material to address those concerns and elected not to do so, does put us at prejudice to admit evidence of that nature in circumstances where we are simply not in a position to test it sensibly and put on evidence in response.

PN17

THE DEPUTY PRESIDENT: Yes, I understand the objection. Mr McDonald?

PN18

MR McDONALD: Thank you, Deputy President. I think the prejudice it brings is minimal and it's up to the respondent to cross-examine in regard to those specifics. I think it's appropriate evidence to lead, but we will be mindful of the Commission's decision.

PN19

THE DEPUTY PRESIDENT: Well, it's the applicant's obligation to put its case, including its evidentiary case. If there was a conversation, what should be put is when the conversation happened, on how many occasions approximately, with whom and presumably whether the same person gave different responses or the same responses.

PN20

MR McDONALD: Yes, Deputy President.

PN21

THE DEPUTY PRESIDENT: The respondent can't possibly take instructions on any of that, much less respond, so unless there's something else I'm not inclined to admit it. Paragraph 8 will come out.

PN22

MR POLLOCK: Thank you, Deputy President. The next objection is to the statement of Dennis Hope and it is to paragraphs 6 and 7. Really it's the same objection, we say the form of the evidence is such that it would be identical – we have the same concern.

PN23

THE DEPUTY PRESIDENT: Yes. Mr McDonald?

PN24

MR McDONALD: Deputy President, my answer would be the response to the previous one. If you're minded to strike it out, we understand that.

PN25

THE DEPUTY PRESIDENT: Yes, yes. Paragraphs 6 and 7 will come out.

PN26

MR POLLOCK: Thank you. Deputy President, the statements being admitted in that amended form, we wouldn't seek to cross-examine either witness so we are content for those statements to be simply tendered.

PN27

THE DEPUTY PRESIDENT: Yes, all right. Mr McDonald, is that a convenient course?

PN28

MR McDONALD: Yes, Deputy President. I do have the witnesses here. Would you like me to call them in - - -

PN29

THE DEPUTY PRESIDENT: I don't need them to adopt their statements. I'm content for them to be taken as read.

PN30

MR McDONALD: On that, would I be able to just go and alert the witnesses that they're not required to be called in?

PN31

THE DEPUTY PRESIDENT: Yes, go ahead. Are they outside?

PN32

MR McDONALD: Yes, they're outside.

PN33

THE DEPUTY PRESIDENT: Yes, do that.

PN34

MR McDONALD: Thank you.

PN35

THE DEPUTY PRESIDENT: They can come in and sit in the courtroom if they like. Yes, all right. Mr McDonald, I'll mark the witness statement of Navjot Marwaha as exhibit 1, which comprises 10 paragraphs, dated 3 April 2023, noting the exclusion of paragraph 8.

**EXHIBIT #1 WITNESS STATEMENT OF NAVJOT MARWAHA
DATED 03/04/2023 EXCLUDING PARAGRAPH 8**

PN36

THE DEPUTY PRESIDENT: I will mark the witness statement of Mr Dennis Hope, also dated 3 April 2023, comprising 11 paragraphs excluding paragraphs 6 and 7, as exhibit 2.

**EXHIBIT #2 WITNESS STATEMENT OF DENNIS HOPE DATED
03/04/2023 EXCLUDING PARAGRAPHS 6 AND 7**

PN37

THE DEPUTY PRESIDENT: Mr McDonald, is that the applicant's evidentiary case?

PN38

MR McDONALD: Yes, Deputy President.

PN39

THE DEPUTY PRESIDENT: Yes, all right. Thank you. Yes, Mr Pollock.

PN40

MR POLLOCK: Thank you, Deputy President. I call Michael Paynter.

PN41

THE DEPUTY PRESIDENT: Yes, all right.

PN42

MR POLLOCK: I should indicate, Deputy President, in the circumstances where we have filed a written outline of submissions I wasn't intending to provide you with an opening.

PN43

THE DEPUTY PRESIDENT: Yes, I'm content with that. Are all the witnesses out or in the courtroom?

PN44

MR POLLOCK: Mr Paynter should be outside the courtroom.

PN45

THE DEPUTY PRESIDENT: Okay.

PN46

THE ASSOCIATE: Can you please state your full name and address.

PN47

MR PAYNTER: Michael John Paynter. Currently (address supplied).

<MICHAEL JOHN PAYNTER, SWORN [10.16 AM]

EXAMINATION-IN-CHIEF BY MR POLLOCK [10.16 AM]

PN48

MR POLLOCK: Mr Paynter, just for the benefit of the transcript can you please repeat your name and your business address?---Yes, Michael John Paynter, (address supplied).

PN49

Mr Paynter, you can sit down - - -?---I would prefer to stand actually, thanks. It's a bit low down there.

PN50

I well understand the issue.

PN51

THE DEPUTY PRESIDENT: I'm sure the chair can come up, or at least I hope I can?---Thank you, your Honour. I'll remain standing.

PN52

But stand if you will?---Thank you.

PN53

MR POLLOCK: Mr Paynter, you're an industrial relations consultant at Peregrine Industrial?---Yes, I am.

PN54

Can you just explain the nature of engagement that you had briefly with Flavour Makers?---Yes, I had two engagements, one in 2019 and the other last year, 2022, both concerning the initial commencement or implementation of an enterprise agreement for the company. The second one was a renewal a couple of years later of that agreement.

PN55

You have made a witness statement in this proceeding, haven't you?---I have.

MICHAEL JOHN PAYNTER

XN MR POLLOCK

PN56

Now, if my instructor can just make sure that the witness box has a copy of the court book from which we're working. Perhaps the associate can have that.

PN57

THE DEPUTY PRESIDENT: Yes. Thank you.

PN58

THE WITNESS: Thank you.

PN59

MR POLLOCK: Mr Paynter, can I ask you to turn to tab 14 of that folder?---Yes, I have it.

PN60

Can I just get you to confirm that the document that appears there, which runs to 42 paragraphs and has seven annexures labelled MP1 through to MP7 – can I just get you to confirm that that is the witness statement you prepared in this proceeding?---Yes, that's my witness statement.

PN61

You have had an opportunity to review that statement recently?---I have, this morning with a cup of coffee.

PN62

Is that statement true and correct?---Yes, it is. Save for the change of address, yes.

PN63

Save for the change of address and that change of address is the address that you have - - -?---Yes, that's correct.

PN64

- - - told us at the start of your examination-in-chief?---Yes.

PN65

Subject to that correct, is your statement otherwise true and correct?---Yes, it is.

PN66

Do you wish to adopt that statement as your evidence in the proceeding?---I do.

PN67

I tender the statement with the annexures, Deputy President.

PN68

THE DEPUTY PRESIDENT: Thank you. Mr McDonald, any objection to the tender?

PN69

MR McDONALD: No, Deputy President.

*** MICHAEL JOHN PAYNTER

XN MR POLLOCK

PN70

THE DEPUTY PRESIDENT: Yes. Thank you.

PN71

MR POLLOCK: Nothing further in-chief.

PN72

THE DEPUTY PRESIDENT: Thank you. I will mark the witness statement of Michael Paynter, comprising 42 paragraphs and dated 28 April 2023, together with the seven annexures thereto, as exhibit 3.

**EXHIBIT #3 WITNESS STATEMENT OF MICHAEL PAYNTER
DATED 28/04/2023 PLUS ANNEXURES**

PN73

THE DEPUTY PRESIDENT: Cross-examination, Mr McDonald?

PN74

MR McDONALD: Yes, Deputy President.

CROSS-EXAMINATION BY MR MCDONALD

[10.19 AM]

PN75

MR McDONALD: Good morning, Mr Paynter. I have some questions. I first wanted to make clear your only involvement with Flavour Makers has been the two enterprise bargaining negotiations; is that correct?---Yes, it is.

PN76

Can I get you to look at paragraph 17 of your statement. We're starting with 17 of your statement. Here, through to 28, you talk about your involvement in the 2019 negotiations of the enterprise agreement; is that correct?---Sorry, could you repeat that. I was just reading the clause, just to refresh my memory.

PN77

Yes, that's all right. Yes, so from here through to paragraph 28, I believe you talk about your involvement in the 2019 enterprise bargaining?---Yes, that's right.

PN78

And on 8 March you tabled a draft of the agreement?---I did.

PN79

The NUW raised 11 queries regarding the draft, one of which was in regard to the early morning shift issue as they put it; is that correct?---Yes, that's quite right.

PN80

Then there were some discussions and some advice was tabled by Flavour Makers that it obtained from PwC?---Yes.

*** MICHAEL JOHN PAYNTER

XXN MR MCDONALD

PN81

You have said here that you formed the view that the issue was no longer subject of debate; is that correct?---It is, yes, that's correct.

PN82

How did you form that view?---Well, it wasn't pursued in any way once – and I don't recall word for word, but I recall the matter being raised, I recall the company's response having obtained that advice and then I recall it no longer being agitated in any way.

PN83

Besides it not being agitated in any way, was there anything that made you form that view? Anything from the union saying that it accepted the advice of Flavour Makers?---That's a good question. I don't propose to use any exact words because I wouldn't be able to remember any exact words. However, to explain as I do in my statement, the union at the time was very well represented by quite competent negotiators and I recall a very strong impression that after that discussion about that matter, that it died. It simply was no longer a matter for any of us to concern ourselves with and, as I also note in my statement, at the next meeting we tabled – you may be getting to this. I may be going too far in my response, but I remember when we tabled the letter from PwC at the subsequent meeting, again there was no discussion that I can recall about that.

PN84

Yes. Thank you very much. I think you answered a couple of my next questions - - -?---Yes, I thought I might have gone too far.

PN85

Moving on, can you please go to paragraph 31 of your statement?---Which number?

PN86

Paragraph 31. This is when you have entered the 2020 bargaining – 2022?---You're doing 31?

PN87

Yes?---Yes, go ahead.

PN88

So you say in your impression there had been a clear breakdown in negotiations when you entered; is that correct?---Well, that's why I was engaged. I had retired to the seaside.

PN89

That must have been nice?---It is.

*** MICHAEL JOHN PAYNTER

XXN MR MCDONALD

PN90

This issue, this morning rates issue, was one of the central issues to the breakdown; that's correct?---So I understood, yes, and I'm happy to assist you. It was mentioned quite early in negotiations that that had been the reason, so I have a clear recollection that that had been a major problem.

PN91

Yes, and you urged the parties to deal with it outside the bargaining?---Yes, I did.

PN92

You feel they did so?---Yes, yes, they did, and I'll repeat what I said in my statement that I was never intending that the parties should negotiate on award matters.

PN93

Yes, fair enough. You have stated that you have over 30 years of - - - sorry, 30 years' experience - - -?---It's 40 now, 42.

PN94

Forty years' experience in industrial relations; correct?---Yes.

PN95

Does that relate only to enterprise bargaining or is it general industrial relations?---It's particularly in respect of enterprise bargaining and almost exclusively in the building and construction industry.

PN96

Do you have any experience dealing with underpayment matters outside this?---Yes. Well, for a time I was engaged by an industry association – the Metal Trades Industry Association – for quite a number of years and we would have dealt with those issues, although if pressed I wouldn't remember a particular company. It was in the 90s when I worked for MTIA, so I would have had previous experience with those matters, yes.

PN97

So in your experience have employees ever come forth with underpayment claims that have gone on for several years?---I would say they have, yes.

PN98

And have these been the subject of dispute and maybe gone back and forth over a long period of time?---You are pressing me. I know you would like me to say yes, but I can't recall that. I can't answer that.

PN99

Fair enough?---It's a long time ago.

PN100

No, fair enough. I won't press you. The last question is do you agree that an employee could work for several years while being underpaid and then raise the issue?---Regrettably, yes.

PN101

MR POLLOCK: Sorry, I object to the question, Deputy President. How can this witness's opinion in such general terms assist you at all?

*** MICHAEL JOHN PAYNTER

XXN MR MCDONALD

PN102

THE DEPUTY PRESIDENT: I accept that. He has given his answer. Yes, continue, Mr McDonald.

PN103

MR McDONALD: That's all I have, Deputy President. Thank you.

PN104

THE DEPUTY PRESIDENT: Any re-examination?

PN105

MR POLLOCK: No re-examination.

PN106

THE DEPUTY PRESIDENT: Mr Paynter, thank you for giving evidence. You're excused?---Your Honour.

<THE WITNESS WITHDREW

[10.25 AM]

PN107

THE DEPUTY PRESIDENT: Yes, Mr Pollock.

PN108

MR POLLOCK: Thank you, Deputy President. I call Steve Gogos.

PN109

THE ASSOCIATE: Can you please state your name and address for the record.

PN110

MR GOGOS: It's Steve Gogos, (address supplied).

<STEVE GOGOS, SWORN

[10.27 AM]

EXAMINATION-IN-CHIEF BY MR POLLOCK

[10.27 AM]

PN111

THE DEPUTY PRESIDENT: Mr Gogos, you're quietly spoken as I am. That microphone is not for amplification, it's just for recording, so you will need to speak up?---Will do, yes.

PN112

Thank you.

PN113

MR POLLOCK: You took the words right out my mouth, Deputy President.

PN114

THE DEPUTY PRESIDENT: Yes, Mr Pollock.

*** STEVE GOGOS

XN MR POLLOCK

PN115

MR POLLOCK: Mr Gogos, just for the benefit of the transcript can you please repeat your full name and your business address?---Steve Gogos. The business address is 223-225 Governor Road, Braeside.

PN116

What role do you hold with Flavour Makers?---I'm currently the director of operations at Flavour Makers.

PN117

What does that involve on a day-to-day level?---Basically it involves the running of all the operational side of the business from the planning, procurement, operational and warehousing.

PN118

You have made a witness statement in this proceeding, haven't you?---Yes.

PN119

Can I get you to open the folder that is in front of you and turn to tab 13. I'll just get you to confirm – have a look at that document and just confirm that the document that appears there, which runs to 52 paragraphs and has 12 annexures labelled SG1 to SG12, that is the witness statement you have prepared in this proceeding?---Yes.

PN120

You have had an opportunity to review that statement recently?---Yes.

PN121

Is that statement true and correct?---Yes, it is.

PN122

Do you wish to adopt that statement as your evidence in this proceeding?---Yes, I do.

PN123

I tender the statement and the annexures, Deputy President.

PN124

THE DEPUTY PRESIDENT: Thank you. Mr McDonald, any objection to the tender?

PN125

MR McDONALD: No, Deputy President.

PN126

THE DEPUTY PRESIDENT: Yes, thank you, Mr McDonald. I will mark the witness statement of Mr Steve Gogos, comprising 52 paragraphs and dated 28 April 2023, together with the 12 annexures thereto, as exhibit 4.

**EXHIBIT #4 WITNESS STATEMENT OF STEVE GOGOS DATED
28/04/2023 PLUS ANNEXURES**

*** STEVE GOGOS

XN MR POLLOCK

PN127

MR POLLOCK: Nothing further in-chief.

PN128

THE DEPUTY PRESIDENT: Thank you. Cross-examination?

PN129

MR McDONALD: Yes, Deputy President.

CROSS-EXAMINATION BY MR MCDONALD

[10.29 AM]

PN130

MR McDONALD: Good morning, Mr Gogos. Do you have your statement in front of you?---Sorry, what number was that again?

PN131

Number 13, I believe - yes?---Yes, I do.

PN132

Can you please go to paragraph 12 of your statement?---Yes.

PN133

Here you outline the chain of management at Flavour Makers; is that correct?---Yes.

PN134

If a production manager had a query about wages or entitlements brought to them that they couldn't answer, I assume they would escalate it to a manager; is that correct?---Could you repeat that, sorry.

PN135

Yes. If a production manager had a query brought to them about wages and entitlements that they couldn't answer, I would assume that they would escalate it to their manager; is that correct?---Yes, that is correct.

PN136

And if the site manager couldn't answer the query, would they escalate it to you?---Yes, that is the process.

PN137

Would I be correct to state that if a query was able to be answered by a low level manager, then you may not hear about the query?---No, I don't believe that would be the case.

PN138

So if a site manager was brought a query about wages that they were capable to answer, you would think that they would tell you that they answered a query about that?---Yes.

*** STEVE GOGOS

XXN MR MCDONALD

PN139

How often are queries about wages or entitlements escalated to you or are you told about them?---Very rarely.

PN140

Very rarely, yes. Can you go to 20 of your statement, please. I believe that's two pages over?---Yes.

PN141

Here you state that there are approximately nine employees in total at the wet site and three employees in total at the dry site who commence prior to 6 am; is that correct?---Yes.

PN142

That's still correct at this time?---Yes.

PN143

How many production managers did these 12 employees fall under?---At the wet site we have five production managers. At the dry site we have two production supervisors.

PN144

Can then I please get you to turn to number 49 of your statement?---Yes.

PN145

At 49 you talk about the JCC and how it was a forum for employees to raise any issues they had about their pay or entitlements; is that correct?---Yes, it's a forum to raise any issues, yes.

PN146

How often would issues about pay or entitlements be raised in the JCC?---To my recollection it was only once.

PN147

Can you go back to tab number 43. It's about two pages back. Here you've said that the question of employees' entitlements to payment for working overtime prior to 6 am has never been raised with you by an employee in any form and that the matter has only ever been raised by the union; is that correct?---Yes, that's correct.

PN148

Would it be fair to say that you would expect to have heard about a pay issue before the union raised it with you?---Sorry - - -

PN149

I will rephrase. Would it be fair to say that you would expect an employee would have told you about an issue they had with their pay before the union brings it to you?---Yes.

*** STEVE GOGOS

XXN MR McDONALD

PN150

Was the issue of the first aid allowance ever raised with you by an employee?---No.

PN151

So when the union raised the issue of the first aid allowance, amongst other allowances, that was the first time that you had heard about the issue?---So when we did the investigation about (indistinct) that's when we definitely identified the first aid allowance.

PN152

So before that investigation or before the letter from the union, you didn't consider there to be an issue with the first aid allowance?---Yes.

PN153

Thank you, Mr Gogos. That is all the questions I have.

PN154

THE DEPUTY PRESIDENT: Yes, thank you. Any re-examination?

PN155

MR McDONALD: No re-examination.

PN156

THE DEPUTY PRESIDENT: Thank you, Mr Gogos, for your evidence. You're excused?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[10.34 AM]

PN157

THE DEPUTY PRESIDENT: Yes, Mr Pollock.

PN158

MR POLLOCK: We're making good time, Deputy President. I call Watwiboon Praemongkol.

PN159

THE ASSOCIATE: Please state your full name and address.

PN160

MR PRAEMONGKOL: Watwiboon Praemongkol, (address supplied).

<WATWIBOON PRAEMONGKOL, AFFIRMED

[10.36 AM]

EXAMINATION-IN-CHIEF BY MR POLLOCK

[10.36 AM]

PN161

THE DEPUTY PRESIDENT: Thank you, Mr Praemongkol. Could I just ask you to raise your voice when you're giving your answers?---Yes.

*** WATWIBOON PRAEMONGKOL

XN MR POLLOCK

PN162

Thank you. Yes, Mr Pollock.

PN163

MR POLLOCK: Thank you, Deputy President.

PN164

Mr Praemongkol, just for the benefit of the transcript can you please repeat your full name and your business address?---Yes, my name is Watwiboon Praemongkol. The business address is 223-225 Governor Road, Braeside.

PN165

You're a production manager at Flavour Makers?---Yes, that's correct.

PN166

Can you tell the Commission just briefly what does that role involve on a day-to-day basis?---So my role involve to ensure that the production line run smoothly and managing the team, and also ensure that the production is finished within the timeline within the budget.

PN167

You have made a witness statement in this proceeding, haven't you?---Yes.

PN168

Now, I understand that you – well, perhaps first can I ask you to – there is a copy of a statement in front of you. Can I ask you to look at that statement and confirm that that is the witness statement that you prepared in this proceeding. It runs to some 28 paragraphs?---Yes.

PN169

I understand that there are a small number of changes that have been made to this statement?---Yes.

PN170

Can I take you to paragraph 18 - - -?---Yes.

PN171

- - - which is on the third page. Do I understand the changes that you wish to make are those that are set out there? That is, there is a line through the words 'at either 5.30 or 7 am' in subparagraph (a) and it's replaced with 'between 5.30 and 7 am'?---That's correct, yes.

PN172

The corresponding changes in subparagraph (b) and (c)?---Yes.

PN173

Also at paragraph 23 on page 4 you seek to amend the word 'workers' to 'blenders'?---Yes.

*** WATWIBOON PRAEMONGKOL

XN MR POLLOCK

PN174

Subject to those changes is your witness statement otherwise true and correct?---Yes, it's correct, yes.

PN175

Do you wish to adopt that statement as amended as your evidence in this proceeding?---Yes.

PN176

I tender the statement as amended, Deputy President.

PN177

THE DEPUTY PRESIDENT: Any objection, Mr McDonald?

PN178

MR McDONALD: No, Deputy President.

PN179

THE DEPUTY PRESIDENT: Thank you. I will mark the witness statement of Mr Watwiboon Praemongkol, comprising 28 paragraphs and 28 April 2023, noting the amendments to paragraphs 18(a), (b), (c) and paragraph 23, as exhibit 5.

**EXHIBIT #5 AMENDED WITNESS STATEMENT OF
WATWIBOON PRAEMONGKOL DATED 28/04/2023**

PN180

MR POLLOCK: Nothing further in-chief.

PN181

THE DEPUTY PRESIDENT: Thank you. Cross-examination?

PN182

MR McDONALD: Yes, just a couple of questions, Deputy President.

PN183

THE DEPUTY PRESIDENT: Yes.

CROSS-EXAMINATION BY MR McDONALD

[10.39 AM]

PN184

MR McDONALD: You have got your statement in front of you still?---Yes.

PN185

At the start, at paragraph 3 you've stated you started your current role around October 2020?---Yes.

PN186

Were you employed with Flavour Makers before this?---No.

*** WATWIBOON PRAEMONGKOL

XXN MR McDONALD

PN187

Can you please go to paragraph 10 of your statement. From paragraphs 10 to 16 you go through the process of how you would induct a new employee and state that they generally would know their pay and conditions, but if they had any questions you would answer them; is that correct?---Yes.

PN188

Do employees often ask any questions about their pay and conditions during the induction process?---No.

PN189

Can you please go to 20 of your statement. It's at the bottom of the third page?---Yes.

PN190

You say here that you usually roster at least one blender who is reliable and experienced to start at 5.30. Have you ever rostered a blender employee who had just been employed to start at 5.30?---Yes, with an experienced blender, yes.

PN191

So experienced from outside Flavour Makers?---What do you mean, sorry?

PN192

If they are a new employee they have experience from a previous job. Is that what you're saying?---No, no. Their experience within the business, yes.

PN193

So being inducted over the site or your area, not a new employee?---Sorry, I don't understand what you mean.

PN194

You said that they would be an employee with experience. If they were being inducted, does that mean that they're not a new employee?---So what I mean in here is - so the one blender who is reliable and experienced within the business. If the person that have experience outside from the business - they have experience, the blender from another company - I still not roster them by themselves, but I will roster them with people – with a blender that work within the business.

PN195

Thank you very much. Can you go to number 26 of your statement and here you say that you have never had anyone raise the issue of the rate of pay for the early shift with you. Has anyone raised any other issues of shift penalties with you? For example, the afternoon shift penalty?---No. Not with me, no.

PN196

Thank you. That was all the questions I have.

PN197

THE DEPUTY PRESIDENT: Thank you. Any re-examination?

*** WATWIBOON PRAEMONGKOL

XXN MR MCDONALD

PN198

MR POLLOCK: No re-examination.

PN199

THE DEPUTY PRESIDENT: Thank you for your evidence?---Thank you.

PN200

You're excused?---Thank you, your Honour.

<THE WITNESS WITHDREW

[10.42 AM]

PN201

THE DEPUTY PRESIDENT: Is that the evidentiary case for the respondent?

PN202

MR POLLOCK: That is the case for the respondent, Deputy President.

PN203

THE DEPUTY PRESIDENT: Yes, Mr McDonald.

PN204

MR McDONALD: Thank you. We have heard the evidence and unless the Deputy President has any questions, and if the respondent is amenable, I propose to take a five-minute break and then give some closing arguments.

PN205

THE DEPUTY PRESIDENT: You would like a five-minute break?

PN206

MR McDONALD: Yes, I would.

PN207

THE DEPUTY PRESIDENT: Certainly. All right. We'll adjourn.

SHORT ADJOURNMENT

[10.43 AM]

RESUMED

[10.49 AM]

PN208

THE DEPUTY PRESIDENT: Yes, Mr McDonald.

PN209

MR McDONALD: Thank you, Deputy President. I propose to make some short closing remarks if that is - - -

PN210

THE DEPUTY PRESIDENT: Sure.

*** WATWIBOON PRAEMONGKOL

XXN MR MCDONALD

PN211

MR McDONALD: Thank you. As I say, I intend to keep these short. There are four questions for the Commission to determine in this matter. The first goes to the evidence that we have heard today and the second, third and fourth questions which go to interpretation. In regard to the first question, the applicant says that an agreement has not been reached to meet the spread of ordinary hours between any of the groups that an agreement could be reached.

PN212

There has been the evidence of the applicant's witnesses that they worked hours prior to 6 am and that they did not make an agreement. In our initial submissions we argued that the onus of proof is upon the respondent to prove that there had been agreement. We submit that they have not met that onus. If an agreement had been reached then it would be reasonable that there would be some written record of that agreement, especially given the discussions about this matter happened around the most recent enterprise bargaining. There is no such document.

PN213

As to an agreement wholly in writing, a court or tribunal can examine the subsequent conduct of the parties for the purpose of identifying an agreement was reached and, if so, its terms. The respondent's evidence and submissions in support of the existence of this agreement have relied upon the conduct of its employees. In this matter there has not been a date that has been specifically identified when this agreement was stated to have come into effect and then the subsequent period is not clear.

PN214

The witnesses of the respondent have been working there since 2020. Mr Hope began his employment in 2013 and says that he did not reach an agreement. Mr Marwaha started in 2010 and began working before 6 am around 2017 or 2018, and he says he did not reach an agreement. The applicant contends it's more likely that the spread of hours has never been moved and the spread of hours was moved in the past on a date that cannot be identified.

PN215

We hold that there is no proof of an agreement and that the conduct of employees working their rostered shifts cannot be taken to be indicative of an agreement, as an employee who did not work their rostered shift would face disciplinary action probably leading up to termination eventually. We submit that the answer to question 1 is no for all the potential - - -

PN216

THE DEPUTY PRESIDENT: Well, why would that follow?

PN217

MR McDONALD: Because if an employee was not to show up for their shift - - -

PN218

THE DEPUTY PRESIDENT: That assumes that the direction given was a lawful and reasonable one, and on your analysis it wouldn't be.

PN219

MR McDONALD: I would say that a direction to show up to work would be - - -

PN220

THE DEPUTY PRESIDENT: At a particular time if it's contrary to or is made in the absence of an agreement as required, then why would that be a lawful direction?

PN221

MR McDONALD: An agreement is not required to roster the workers to start at a time. An agreement is required to not pay them whatever relevant penalty, whether it be an early morning shift or overtime, to start work before then.

PN222

THE DEPUTY PRESIDENT: The ordinary hours of work on your construction are between 6.00 and 6.00.

PN223

MR McDONALD: Yes.

PN224

THE DEPUTY PRESIDENT: That can only be altered by relying upon the incorporated award terms to vary the spread of hours, yes?

PN225

MR McDONALD: Yes.

PN226

THE DEPUTY PRESIDENT: On your construction there was no agreement, so how does a direction to come in at 5 o'clock constitute a lawful direction, on your construction?

PN227

MR McDONALD: On my construction I would say a lawful direction – a worker could start work at any time as long as associated penalties were applied. The ordinary spread of hours is not a restriction to only trading within those hours.

PN228

THE DEPUTY PRESIDENT: Well, that's an argument about whether or not the person is a shift worker, yes?

PN229

MR McDONALD: Yes.

PN230

THE DEPUTY PRESIDENT: Here we're talking about day workers, we are not, so how does a direction to a day worker to start at 5 am constitute a lawful direction on your construction?

PN231

MR McDONALD: It could not be a lawful direction and if at that time - - -

PN232

THE DEPUTY PRESIDENT: So any concern about the employee showing up to work in fear of being disciplined or engaging in misconduct doesn't stand up, does it?

PN233

MR McDONALD: I would say that it's not an argument that an employee having received their roster would be able to make generally.

PN234

THE DEPUTY PRESIDENT: All right.

PN235

MR McDONALD: I'll go to questions 2 and 3 which I will address together as consideration is mostly the same. These questions go to whether an employee is entitled to the early morning shift penalty under clause 12.2(a) dependent upon the answer to the first question. Clause 12 of the agreement provides that:

PN236

All ordinary hours of work performed between midnight on Sunday to midnight on Friday shall be subject to overtime at the relevant shift penalty.

PN237

The applicant submits that those workers who start work before 6 am are working an early morning shift and are entitled to that early morning shift penalty. The respondent has submitted the only workers who fit the definition of shift workers as prescribed by the agreement get this penalty, but we say that the submission is flawed and should not be accepted.

PN238

The term 'shift' is used in the enterprise agreement to refer to any period of work, not just the period of work in the shift bracket. For example, clause 11.2 of the agreement uses the term 'shift' when providing for breaks and it's clear that this break structure is applied to the respondent's workers, and part of that has been included in the evidence.

PN239

When considering question 2, consideration of clause 24.1 of the award is relevant as it can allow for the early shift penalty window to be moved. As we detail in our submissions, we contend that this is inconsistent with the enterprise agreement because the enterprise agreement provides for a shift penalty window that does not have a function to be moved.

PN240

THE DEPUTY PRESIDENT: Sorry, I don't understand that submission. I don't understand it. You may have to put it in another way.

PN241

MR McDONALD: Yes, Deputy President. I'll take instruction. The agreement provides for an early morning shift penalty - - -

PN242

THE DEPUTY PRESIDENT: Yes.

PN243

MR McDONALD: - - - in set times. The award provides for the early morning shift penalty in set times, as well, but specifies that those times can be moved based on - - -

PN244

THE DEPUTY PRESIDENT: Pursuant to the flexibility provisions, yes.

PN245

MR McDONALD: Yes. The agreement not containing those flexibility provisions for the shift penalty, we would say means that it is inconsistent with the award and that the agreement would prevail to that specific clause.

PN246

THE DEPUTY PRESIDENT: Yes, all right, but you say that the early morning shift penalty applies to a day worker who works – or is asked to work or agrees to work at a time commencing before 6 am?

PN247

MR McDONALD: Yes, Deputy President.

PN248

THE DEPUTY PRESIDENT: And the definition of 'shift worker' in the agreement is somebody who either works rotating shifts or permanent night shifts.

PN249

MR McDONALD: As we have said in our submissions, that definition is quite limited and does not meet with the practice of how this would actually be applied. There are workers who will work the afternoon shift and are paid relevant penalties.

PN250

THE DEPUTY PRESIDENT: Sorry, who work afternoon shifts other than on a rotating basis?

PN251

MR McDONALD: Yes.

PN252

THE DEPUTY PRESIDENT: So there is evidence about that, is there?

PN253

MR McDONALD: The evidence in the respondent's submissions. I may be incorrect about that, if that's in evidence.

PN254

THE DEPUTY PRESIDENT: All right. Continue, Mr McDonald.

PN255

MR McDONALD: Do you have any more questions in regard to questions 2 or 3?

PN256

THE DEPUTY PRESIDENT: No.

PN257

MR McDONALD: I will turn to question 4, the final question, and this question is related to if determines that no agreement has been reached and that the early morning shift penalty does not apply, and it can determine whether clause 12.2(e) of the award provides. We say that clause 12.2(e) of the award provides that work performed for the ordinary hours before 6 am must be paid at overtime rates and that any work that is continuous with part of the 38 hours of work.

PN258

I don't plan to re-state in detail the submissions of the parties on this clause. There have been two central disputes; first, the incorporation of the clause, what is incorporated, and what is the effect of the clause. It's the applicant's submission that the entirety of this clause is incorporated - - -

PN259

THE DEPUTY PRESIDENT: The entirety of which clause?

PN260

MR McDONALD: The entirety of clause 12.2(e).

PN261

THE DEPUTY PRESIDENT: Which is it that you contend the employees are entitled to; early morning shift penalty or overtime? Surely you can't be contending for both.

PN262

MR McDONALD: I believe there is a position where that could be both based upon the Commission's decision. If they're not entitled to the early morning shift penalty and if the window of hours has not been moved, then those hours before 6 am would be overtime, it's our submission.

PN263

THE DEPUTY PRESIDENT: That's an alternative submission. It's not an argument for both.

PN264

MR McDONALD: Yes, apologies.

PN265

THE DEPUTY PRESIDENT: Yes, all right. Why do you need that clause to be incorporated? Doesn't 11.3(a) say the same thing?

PN266

MR McDONALD: 11.3(a) provides that – let me just double-check I'm referring
- - -

PN267

THE DEPUTY PRESIDENT: It says:

PN268

For all work outside of ordinary hours on any day or shift.

PN269

PN270

MR McDONALD: But the agreement defines 'ordinary hours' to mean:

PN271

Hours worked in an enterprise, fixed in accordance with clause 11.3 –

PN272

which provides the ordinary hours of work would be an average of 152 hours ordinary hours per four-week cycle.

PN273

THE DEPUTY PRESIDENT: Yes, and then it goes on to deal with what is day work, and it sets a span in the day provisions.

PN274

MR McDONALD: Yes.

PN275

THE DEPUTY PRESIDENT: So a day worker who works hours outside of day work would be entitled to the payment under 11.3(a), would they not?

PN276

MR McDONALD: Yes. Part of the arguments that have happened in the submissions is that by that clause – I don't want to represent the respondent's argument, but by part of the clause that they say can be incorporated or should be incorporated, we would say that the work before 6 am becomes ordinary hours and, therefore, is not paid at overtime. Apologies if I've misrepresented that.

PN277

THE DEPUTY PRESIDENT: Yes, all right. Continue.

PN278

MR McDONALD: That's all I have, Deputy President.

PN279

THE DEPUTY PRESIDENT: Thank you, Mr McDonald. Yes, Mr Pollock.

PN280

MR POLLOCK: Thank you, Deputy President. Dealing firstly perhaps where my learned friend left off, my learned friend touched on the ordinary hours provision within the agreement which of course, Deputy President, you were taken to. Clause 11.3(b) defines 'ordinary hours' as –

PN281

the hours worked in an enterprise, fixed in accordance with clause 11.1.

PN282

Clause 11.1 defines 'ordinary hours' as being –

PN283

an average of 152 ordinary hours per four-week cycle.

PN284

Each of the questions that have been posed, of course - that is, question (1), whether or not there had been agreement to shift a span of hours - is predicated on the - - -

PN285

THE DEPUTY PRESIDENT: A particular construction, yes.

PN286

MR POLLOCK: - - - assumption that notwithstanding this definition of 'ordinary hours' which would simply couch ordinary hours in terms of what in practice happens, that there is a span that's imported from the incorporated award - - -

PN287

THE DEPUTY PRESIDENT: Yes.

PN288

MR POLLOCK: - - - or, arguably, from the shift work provision as you have touched upon. Now, we don't resile from the primary proposition that 'ordinary hours' means what the agreement says it means - - -

PN289

THE DEPUTY PRESIDENT: Yes.

PN290

MR POLLOCK: - - - but all of this is couched in the alternative if we do have a span of hours - - -

PN291

THE DEPUTY PRESIDENT: Your principal position is that the hours provisions, so far as they are relevant here, of the award are not incorporated at all. They're inconsistent with the broad definition of - - -

PN292

MR POLLOCK: Yes, but if we - - -

PN293

THE DEPUTY PRESIDENT: To the extent, sorry, that they fix a spread and allow for variation of the spread, they're inconsistent with 11.1.

PN294

MR POLLOCK: Yes. That is the primary position and if we're right on that then of course none of this matters.

PN295

THE DEPUTY PRESIDENT: Yes.

PN296

MR POLLOCK: But all of this proceeds on the footing that there is a span of hours imported from the incorporated award provisions and that's where questions of whether or not agreement has been reached - - -

PN297

THE DEPUTY PRESIDENT: Yes.

PN298

MR POLLOCK: - - - and so forth comes into play. Now, as to that first question, of course my learned friend has touched on some of the principles that we're articulated in our written submissions. In circumstances where that is not in writing, of course, Deputy President, you can look at subsequent conduct to determine whether agreement has been reached and the identification rather than the construction of those terms.

PN299

Now, we set out several points in the written submissions upon which we rely. Principally, Deputy President, the employees and the business have at all times conducted themselves in accordance with that state of affairs. Mr Praemongkol's evidence touches upon his discussions in inductions. He explains ordinary start, finish and break times. The employees

receive notice of their rostered start time on noticeboards throughout the site. None of that has suggested that it's overtime or that penalty rates will attract. Employees attend for work and of course they're paid on that basis. They receive pay slips on that basis and not a single complaint or query from any employee as to this issue under either the '19 or the '22 agreements.

PN300

You have also heard the evidence concerning the way in which this issue was raised and on Mr Paynter's evidence resolved in bargaining for the 2019 agreement. The union raised a query about it. Flavour Makers went and got advice, it tabled that advice – somewhat unusually - and the issue is not subsequently ventilated. There is no evidence of the union continuing to press any claim on that issue.

PN301

There is no evidence of any communications that the union might have given to employees taking up that issue thereafter, there is no evidence of a 'vote no' campaign, the sorts of things that one would expect to see if this issue was still live and the employer was marching forward to a vote with a proposed agreement that didn't address the issue to the union's satisfaction.

PN302

Can I also just briefly draw your attention, Deputy President, to how the issue was framed in bargaining for the 2022 agreement. If one looks at annexure SG2 – and this appears commencing at page 71 of the court book – this is the union's log of claims for the '22 agreement and then over on page 72 we see the (indistinct) itself. Claim 1, that:

PN303

The current agreement forms the basis of the new agreement, ie, current terms and conditions of employment continue subject to this log of claims and any relevant legislation.

PN304

Point 4, that:

PN305

All current conditions are maintained.

PN306

That is the position that was on foot under the '19 agreement. It was understood – was put forward by the UWU as being the footing on which the '22 agreement would be negotiated and those claims - if one goes to annexure MP5, you'll see the list of claims set out there. Claim 1 is agreed and claim 4, that the wages and conditions are maintained, is also agreed. So the it was the mutual intention of the parties and, therefore, the relevant objectivity; the intention of the parties to the '22 agreement bargain that the state of affairs in 2019 underpin the terms in the '22 agreement.

PN307

The third point, this can't be mere common inadvertence. The issue has been raised and dealt with in bargaining in 2019, but of course it was also raised in toolbox meetings in August of 2022. Mr Gogos gave evidence about that, specifically raising the concerns the UWU had recently flagged. No questions or concerns raised in those toolbox meetings by any employee and, importantly, no questions or concerns raised thereafter.

PN308

This dovetails into the fourth point, Deputy President. There is a joint consultative committee which is tasked with dealing with issues of this type. Mr Gogos gives evidence at paragraph 49 of another underpayment issue that was raised in that forum. Each of Mr Marwaha and Mr Hope, whose statements were tendered on behalf of the union, are members of that committee. Now, they say that they never agreed to these things. Well, one would expect if they didn't agree, as members of this committee cognisant of the fact that underpayment issues were being raised through that committee, that they might have had something to say about it.

PN309

Deputy President, true it is that we can't point to any written agreement that sets out agreement to shift that spread of hours, but when one looks at the totality of the circumstances which, Deputy President, you are permitted to do in this context, all of those circumstances are consistent only with a common understanding at the site over an extended period of time that that is how the ordinary hours are organised. It can't simply be sheeted home to mere inadvertence. That's all we say on the first question.

PN310

The second and third questions are dealt with together and the UWU has taken the same approach. Deputy President, I think you in your exchange with my learned friend touched on the heart of our argument here. Put simply, these employees are day workers, they're not shift workers. My friend properly conceded as much.

PN311

Now, that being so, when one looks at the framing of clause 12 it becomes plain that the shift penalties that are set out there simply aren't attracted. There is no dispute, of course, that these employees don't work rotating shifts between day, afternoon and night. Flavour Makers only operates day and afternoon. These employees, as you will see from Mr Praemongkol's evidence, any rotation is confined to rotating between 5.30 am and 7 am starts, ie, all of these employees relevantly are day workers.

PN312

Now, when one has a look at clause 12, you've got a series of definitions and I'll return to those definitions in a moment. Clause 12.2 is where the shift penalties are set out, but all of this is predicated at the outset with the opening paragraph:

PN313

A shift worker will be required to make themselves available –

PN314

and that of course is defined in clause 12.1 as an employee who works on rotating shifts or permanent night shift. What one sees there of course is that the penalties set out in that clause are – I think we say it in the written submissions – quid pro quo for the requirement of shift workers to make themselves available to work shifts as determined by the employer from time to time. They don't stand alone.

PN315

That is given further force when one sees in the second paragraph of clause 12.2 the obligation of Flavour Makers to provide sufficient notice of rosters and roster changes. That really doesn't sit comfortably, in my submission, Deputy President, with what is in essence a day work arrangement. That is, employees working set hours that rarely change.

PN316

Now, that's all I wish to say on those questions, Deputy President. Unless there is anything else I can assist you with, I propose to move to question 4.

PN317

THE DEPUTY PRESIDENT: I'm still struggling to understand how it is that the hours provisions of the award which enable a variation to the spread - - -

PN318

MR POLLOCK: Are imported?

PN319

THE DEPUTY PRESIDENT: - - - are imported.

PN320

MR POLLOCK: Yes.

PN321

THE DEPUTY PRESIDENT: The reason I raise that is this: if one looks at the award in relation to shift workers at clause 24, you'll see - - -

PN322

MR POLLOCK: Give me one second, Deputy President, I'll bring a copy of the award up.

PN323

THE DEPUTY PRESIDENT: That's all right.

PN324

MR POLLOCK: Yes, clause 24.

PN325

THE DEPUTY PRESIDENT: Yes, so if one looks at the definitions in clause 24.1 and paragraph 30, the 'early morning shift' definition, it's for a shift starting between 3 am – no, which is a different – 2 am, et cetera - - -

PN326

MR POLLOCK: Yes.

PN327

THE DEPUTY PRESIDENT: - - - and 6 am or 5 am if the span of ordinary hours is varied. Now, the early morning shift definition in clause 12 doesn't include those words and so if the variation – the capacity to vary by agreement, the hours is incorporated, it just seems to me a difficult proposition to make that it's incorporated for the purposes of shift work. The provisions seem to be inconsistent. The hours in clause 12 by reference to the early morning shift definition are fixed. That is, the early morning shift is a shift starting at or after 4.00 - - -

PN328

MR POLLOCK: Yes.

PN329

THE DEPUTY PRESIDENT: - - - and before 6.00, that's it, as compared to the definition in the award which is at 6.00 or 5.00 if the span has been varied.

PN330

MR POLLOCK: That's so, but, Deputy President, perhaps we are at cross-purposes. Clause 24 of the award is a provision titled 'Special provisions for shift workers'.

PN331

THE DEPUTY PRESIDENT: Yes.

PN332

MR POLLOCK: Now, altering the span of hours for day workers would be a question that would attract clause 12 of the award - - -

PN333

THE DEPUTY PRESIDENT: I understand that. My point is that it seems at least that the alteration of hours for shift worker provisions - - -

PN334

MR POLLOCK: Yes.

PN335

THE DEPUTY PRESIDENT: - - - or the alteration of the span in clause 12(d) is not incorporated for shift workers.

PN336

MR POLLOCK: That might be so. To conclude, Deputy President, in circumstances where my learned friend properly concedes that we're dealing here with relevantly day workers, I'm not sure that's something that needs to trouble you.

PN337

THE DEPUTY PRESIDENT: Well, I am then trying to understand how it is that it's incorporated for day workers.

PN338

MR POLLOCK: I was intending to address on that in the context of question 4.

PN339

THE DEPUTY PRESIDENT: All right. Go ahead, yes.

PN340

MR POLLOCK: Perhaps the first point to observe is going to where I started, which was none of this matters if we're right that ordinary hours are that which are set out – which are worked in the enterprise fixed in accordance with clause 11.1(a) of the agreement. On its terms it doesn't impose any span. Now, if we're right on that then none of this matters, but let's assume for the moment - - -

PN341

THE DEPUTY PRESIDENT: And on that basis the definition of 'day work' in clause 12 is confined to day work which is a shift.

PN342

MR POLLOCK: Yes, quite right. Now, perhaps if I can return to question 4. Deputy President, as I said, clauses 11.1 and 11.3 are the starting point. Let's assume that we are wrong and let's assume that there is some role for a span of hours provision to be incorporated because on its face clauses 11.1 and 11.3 don't impose that.

PN343

Well, one goes to clause 12.2(d) of the award which sets a span between 6.00 and 6.00, and the ability to move one hour forward or one hour back by agreement. That of course is not confined, Deputy President, shift workers. That's a provision that applies more broadly. Of course clause 24 that deals with shift workers in the award contemplates that kind of change being made and it refers to a change being made in accordance with that, but it doesn't confine it only to shift workers.

PN344

THE DEPUTY PRESIDENT: That's really my point, Mr Pollock, because the reference in the early morning shift definition to a change to the span of ordinary hours in 12(d)(ii) is a change to the ordinary hours of a day worker.

PN345

MR POLLOCK: Yes.

PN346

THE DEPUTY PRESIDENT: So what that does is preserve or alter the early morning shift arrangements because day workers have agreed to work earlier than 6 am.

PN347

MR POLLOCK: Yes.

PN348

THE DEPUTY PRESIDENT: So it means that the day worker who has so agreed isn't an early morning shift worker.

PN349

MR POLLOCK: Correct. That's so.

PN350

THE DEPUTY PRESIDENT: And given the exclusion from the early morning shift definition in the agreement of any reference to 'span' alteration - - -

PN351

MR POLLOCK: Yes.

PN352

THE DEPUTY PRESIDENT: - - - how is it that that - - -

PN353

MR POLLOCK: A shift worker could - - -

PN354

THE DEPUTY PRESIDENT: Well, how is it that there can be any incorporation of an alteration, because the alteration is in relation to day workers. There is no span of hours reference for day workers in the agreement.

PN355

MR POLLOCK: Well, Deputy President, that is why I said we started that our primary submission; that is, if ordinary hours are simply what is worked in the enterprise and there's no span, well, there's no need to incorporate the span of hours provision, but that also means that we are not in a world of - there's no question of a shift penalty or overtime being - arising here. The agreement just says what it says.

PN356

I'm approaching question 4, and indeed all of these questions, on the assumption that we are wrong on that and there is some role for an incorporated clause 12.2(d) of the award, but I must say on a - - -

PN357

THE DEPUTY PRESIDENT: But that - - -

PN358

MR POLLOCK: The reason I raise it is - - -

PN359

THE DEPUTY PRESIDENT: - - - would mean that if somebody were rostered to work permanently finishing after 6 pm - - -

PN360

MR POLLOCK: Yes.

PN361

THE DEPUTY PRESIDENT: - - - that person wouldn't be an afternoon shift worker because they're not a shift worker as defined.

PN362

MR POLLOCK: Correct. That's so, and we don't - - -

PN363

THE DEPUTY PRESIDENT: Given the definition of 'shift worker' and the fact that an afternoon shift finishes after 6 pm seems to support the notion that there are no spread of hours for day work.

PN364

MR POLLOCK: Yes. Now, we don't shy away from that, Deputy President; that's what the agreement says. I don't think I can put it any more plainly than that.

PN365

THE DEPUTY PRESIDENT: No, I understand. I can see how that – when the agreement is read as a whole, even though we're not talking about shift work here, we're talking about day work - - -

PN366

MR POLLOCK: Yes.

PN367

THE DEPUTY PRESIDENT: When one reads the shift work provisions and then looks at the hours that a day worker might otherwise work, that would normally be shift work but on this agreement it isn't shift work because of the definition - - -

PN368

MR POLLOCK: Yes.

PN369

THE DEPUTY PRESIDENT: - - - that might lead to a conclusion that the spread of hours provisions in the award are not incorporated or they're inconsistent with - - -

PN370

MR POLLOCK: Yes, that's right. If that's so, then these employees when they're working before 6 am because those are their ordinary rostered hours and that's communicated to them from induction, and that's what is rostered to them each and every week, those are their ordinary hours for the purposes of clause 11.3(b) and 11.1 of the '22 enterprise agreement.

PN371

THE DEPUTY PRESIDENT: Yes.

PN372

MR POLLOCK: So, as I said, that's the primary position. If we are wrong about that and if the award provision concerning spread of hours has some work to do, then we say this: firstly, that clause 12.2(e) is also incorporated and that is the provision that says, you will recall, any work performed outside the spread of hours must be paid for at overtime rates. However, any work performed by the employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work, is to be regarded as part of the ordinary hours of work.

PN373

Now, there is no dispute of course that the work that these employees were doing prior to 6 am is relevantly that type of preparatory work. We say of course that is consistent with the provisions structure, its text, its context and authority governing similar provisions in another award which I'll take you to, Deputy President, but that second sentence commencing with the word 'However' is a caveat or a qualification to hours outside the spread of work being paid at overtime rates. That is, hours which are ordinary hours are not overtime hours.

PN374

We say that firstly as a matter of structure - that is, were these to be distinct concepts - then one would expect it to appear in different clauses, but the way in which they appear, one rule followed immediately by the next best caveat, would suggest that they're intending to deal with the same subject matter. Secondly, as a matter was text, including the word 'however' indicates a qualification and that could only be given sensible work to do if it does operate in that way. That is, as a relevant qualification.

PN375

We also set out – you'll see in the written submissions at paragraph 37 - by way of contrast the (indistinct) provision in the Seafood Processing Award which includes some words are not included here. The effect of this is it says the same thing, but then includes the words 'but will still be paid at overtime rates'. Now, we attach great significance to the fact those words do not appear here and you'll see in the written submissions we refer to the judgment in the Federal Circuit Court in De Costi Seafoods.

PN376

I've set out the relevant analysis at paragraphs 38 to 40 of the written submissions. They make clear that the court there but for those additional words in the Seafood Processing Award which don't appear here, the court would have concluded that those hours – or that work performed prior to the spread in preparatory duties would have been considered to be ordinary hours and not attract the overtime payment.

PN377

We also approach that question on a second limb if we are wrong about all of that, as a question of construction. You are then left in a world, Deputy President, where – if we're wrong about all of that, then clause 12.2(e) doesn't operate as a caveat. Well, you then have an inconsistency between clause 11.3(a) of the agreement and 12.2(e) of the award. That is, clause 11.3(a) provides that overtime is paid only on work outside ordinary hours and clause 12.2(e) would provide that the pre-shift work constitutes ordinary hours but nonetheless attracts overtime pay.

PN378

That would be a direct inconsistency and the way in which clause 5 – which relevantly incorporates award terms – would operate, we say, that it could not pick up clause 12.2(e) in a way which would place overtime rates of pay to be payable on ordinary hours. It would have to give way to the agreed term which makes clear that overtime rates are payable only on work outside of ordinary hours.

PN379

So on any view of it, Deputy President, whether on our primary argument that all this is ordinary hours because that's what the enterprise agreement says without any regard being needed to be had to incorporating award provisions or, on the proper construction of 12.2(e), or even if we're wrong on both of those points by virtue of the inconsistency that would arise and the way in which clause 5 would pick up and apply clause 12.2(e), on any view of the world these employees are not entitled to overtime paid for that preparatory work.

PN380

THE DEPUTY PRESIDENT: There is a definition of 'day work' in the shift work provisions of the agreement. Has that always in its predecessor form been part of the shift work framework?

PN381

MR POLLOCK: As I understand it, those provisions didn't change between the '19 and '22 agreements. I'll just confirm that, Deputy President. I might need to pull that up. They appear to be relevantly identical on the first reading, Deputy President. At least there doesn't appear to be any substantive difference between the clauses.

PN382

THE DEPUTY PRESIDENT: It seems to me at least under the award – putting the agreement to one side – the relevant employees would be working an early morning shift unless it could be established that there has been an agreement to alter the spread of hours or, alternatively, that paragraph (e) has the effect that you say it has and that the employees are performing the readiness for production work, because the award doesn't have a similar caveat or descriptor of what is shift work as the agreement does.

PN383

MR POLLOCK: Well, that might be a nice question of construction, Deputy President, and I raise that – taking this without notice, one would look at, for a start, the title of clause 24, 'Special provisions for shift workers.'

PN384

THE DEPUTY PRESIDENT: Yes.

PN385

MR POLLOCK: One then sees, for example, clause 24.3, 'Rates for shift workers.'

PN386

THE DEPUTY PRESIDENT: Yes.

PN387

MR POLLOCK: Clause 24.4, 'A shift worker must be paid 150 per cent - - -'

PN388

THE DEPUTY PRESIDENT: I understand that, but the definition of an early morning shift, for example, feeds off there being either an agreement or not an agreement (indistinct) day worker - - -

PN389

MR POLLOCK: Yes, I understand that point, Deputy President.

PN390

THE DEPUTY PRESIDENT: It doesn't matter - - -

PN391

MR POLLOCK: Yes.

PN392

THE DEPUTY PRESIDENT: - - - for present purposes. The reason I'm simply raising it is that it seems to me that there has been some thought to how the agreement operates which raises at least in my mind whether there is any room for the operation of the corresponding provisions given those provisions.

PN393

MR POLLOCK: And our primary submission of course is that those observations are well founded, Deputy President. The agreement says what it says and really that's a complete answer to all of this.

PN394

THE DEPUTY PRESIDENT: Yes, and it might have a view about whether or not – yes, but, in any event – whether or not it's a reasonable outcome or whatever, but it does seem to me that, as I say, there has been a particular framework adopted in relation to shift work.

PN395

MR POLLOCK: I think that's so, Deputy President, and as to reasonableness or otherwise, well - - -

PN396

THE DEPUTY PRESIDENT: That's not for me to – no, I understand.

PN397

MR POLLOCK: - - - I don't need to trouble you all on the path of Kucks and anterior notions.

PN398

THE DEPUTY PRESIDENT: No.

PN399

MR POLLOCK: It is what it is.

PN400

THE DEPUTY PRESIDENT: Yes.

PN401

MR POLLOCK: Thank you, Deputy President.

PN402

THE DEPUTY PRESIDENT: Yes, thank you.

PN403

MR POLLOCK: Unless there is anything further - - -

PN404

THE DEPUTY PRESIDENT: No, thank you. Mr McDonald, anything in reply?

PN405

MR McDONALD: Nothing further, Deputy President.

PN406

THE DEPUTY PRESIDENT: All right. Can I thank the parties for their helpful written and oral submissions. I propose to reserve my decision. I'll publish my decision in due course. We are otherwise adjourned.

ADJOURNED INDEFINITELY

[11.35 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #1 WITNESS STATEMENT OF NAVJOT MARWAHA DATED 03/04/2023 EXCLUDING PARAGRAPH 8	PN35
EXHIBIT #2 WITNESS STATEMENT OF DENNIS HOPE DATED 03/04/2023 EXCLUDING PARAGRAPHS 6 AND 7	PN36
MICHAEL JOHN PAYNTER, SWORN	PN47
EXAMINATION-IN-CHIEF BY MR POLLOCK.....	PN47
EXHIBIT #3 WITNESS STATEMENT OF MICHAEL PAYNTER DATED 28/04/2023 PLUS ANNEXURES	PN72
CROSS-EXAMINATION BY MR MCDONALD.....	PN74
THE WITNESS WITHDREW	PN106
STEVE GOGOS, SWORN.....	PN110
EXAMINATION-IN-CHIEF BY MR POLLOCK.....	PN110
EXHIBIT #4 WITNESS STATEMENT OF STEVE GOGOS DATED 28/04/2023 PLUS ANNEXURES	PN126
CROSS-EXAMINATION BY MR MCDONALD.....	PN129
THE WITNESS WITHDREW	PN156
WATWIBOON PRAEMONGKOL, AFFIRMED	PN160
EXAMINATION-IN-CHIEF BY MR POLLOCK.....	PN160
EXHIBIT #5 AMENDED WITNESS STATEMENT OF WATWIBOON PRAEMONGKOL DATED 28/04/2023.....	PN179
CROSS-EXAMINATION BY MR MCDONALD.....	PN183
THE WITNESS WITHDREW	PN200