



**TRANSCRIPT OF PROCEEDINGS**  
*Fair Work Act 2009*

**COMMISSIONER BISSETT**

**C2023/3431**

**s.739 - Application to deal with a dispute**

**Mr Mark Hope**  
**and**  
**Gomed (Vic) Pty Ltd**  
**(C2023/3431)**

**Melbourne**

**9.40 AM, TUESDAY, 29 AUGUST 2023**

**Continued from 29/06/2023**

PN1

THE COMMISSIONER: Good morning. I'll take appearances, please.

PN2

MR J GARDNER: Thank you, Commissioner – Gardner, initial J, appearing for the applicant.

PN3

THE COMMISSIONER: Thank you, Mr Gardiner.

PN4

MS PRESTON: May it please the Commission: Ms Preston, initial R, appearing for the respondent with permission.

PN5

THE COMMISSIONER: Thank you, and I think I have granted permission.

PN6

MS PRESTON: Yes.

PN7

THE COMMISSIONER: Thank you. Okay, Mr Gardner.

PN8

MR GARDNER: Thank you, Commissioner. Given that we've both filed written submissions, unless there are any other preliminary matters that you wanted to deal with, I'll just call Mr Hope to give evidence.

PN9

THE COMMISSIONER: Certainly, thank you.

PN10

THE ASSOCIATE: Please state your full name and your address.

PN11

MR M HOPE: Mark Thomas Hope, (address supplied).

**<MARK THOMAS HOPE, SWORN**

**[9.43 AM]**

**EXAMINATION-IN-CHIEF BY MR GARDNER**

**[9.43 AM]**

PN12

THE COMMISSIONER: Thank you. Just before you start, Mr Gardner – it just seems a little bit dark down here. See if we can find some light. There we go. Amazing what light switches do. Thank you, Mr Gardner.

PN13

MR GARDNER: Thank you. Thank you, Mr Hope. I understand you've prepared two witness statements for these proceedings, is that correct?---Yes.

\*\*\* MARK THOMAS HOPE

XN MR GARDNER

PN14

I'll take you to the second tab in the court book. Is there a document, 'Witness statement of Mark Hope'?

PN15

THE COMMISSIONER: I think you'll find it on page 9, Mr Hope?---Thank you, yes.

PN16

MR GARDNER: Yes, page 9 – this is the first statement you've prepared?---Yes.

PN17

And it runs to two pages and 19 paragraphs?---Yes.

PN18

And is this statement true and correct?---Yes.

PN19

Are there any changes you would like to make to this statement?---No.

PN20

I tender the first statement.

PN21

THE COMMISSIONER: Thank you. I'll mark the witness statement of Mark Hope, dated 21 July 2023, found at court book page 9, along with its attachments, as exhibit A1.

**EXHIBIT #A1 WITNESS STATEMENT OF MARK HOPE DATED  
21/07/2023**

PN22

MR GARDNER: Now, Mr Hope, I'll take you to page 43 of the court book?---Yes.

PN23

Is this the second witness statement you've prepared?---Yes.

PN24

Now, are there any corrections you wish to make to this statement?---Yes – just on the – on page 44, up to the top it says: 'I worked on the Saturday and the Sunday, 10 and 11 June'. I actually didn't work. I was rostered to work that day but then I crushed my finger at work and I went on to WorkCover, thank you. I went on WorkCover. So then they didn't have suitable duties for me to work on that Saturday and Sunday so they made me come back to work on the Tuesday after the King's holiday but I was scheduled to work on those days but yes, I did not work on those two days.

\*\*\* MARK THOMAS HOPE

XN MR GARDNER

PN25

Okay, and other than that change, are there any other changes you wish to make to that statement?---No.

PN26

And other than that change to the statement, is it true and correct?---Yes.

PN27

I tender the second statement.

PN28

THE COMMISSIONER: Thank you. I'll mark – sorry, can I just clarify: is it intended to delete - - -

PN29

MR GARDNER: Yes, paragraph 7.

PN30

THE COMMISSIONER: Paragraph 7, okay. Thank you.

PN31

MR GARDNER: And then I suppose just for completeness, it would follow that paragraph 8, the figures would change accordingly.

PN32

THE COMMISSIONER: Okay, I will mark the witness statement of Mark Hope dated 22 August 2023 with paragraph 7 deleted and a consequential amendment to paragraph 8 in terms of the numbers of Sundays worked, as exhibit A2.

**EXHIBIT #A2 SECOND WITNESS STATEMENT OF MARK HOPE  
DATED 22/08/2023**

PN33

MR GARDNER: Mr Hope, I just have one further question of you. I'll take you to the – right at the end of the court book, there is a supplementary witness statement of Michael Allen?---Yes, page 57? Okay, yes.

PN34

So if you turn over the page, Mr Hope, there is an attachment – yes, the chart which is titled, 'PSB Organisation Structure'?---Mm-hm.

PN35

Have you ever been given a copy of this document?---No.

PN36

Have you ever seen this document?---No.

PN37

No further questions.

\*\*\* MARK THOMAS HOPE

XN MR GARDNER

PN38

THE COMMISSIONER: Thank you. Ms Preston.

**CROSS-EXAMINATION BY MS PRESTON**

**[9.48 AM]**

PN39

MS PRESTON: Thank you, Commissioner. Mr Hope, at paragraph 6 of your first statement – so you see that at page 9 of the court book – I'll refer you to the paragraphs so you can have a look at them as we speak because I don't want you to not understand what I'm talking about. You say that you work an average of 38 hours a week, four shifts of 10 hours?---Yes.

PN40

But those hours can and are rostered in different ways too, aren't they? So you could for example work lesser shifts of 12 hours, combined with 10-hour shifts?---Thirty-eight's the minimum. I could do obviously 40 hours or, yes, depending on – at the moment I can do 40.3 hours because we got the extra Moorabbin driving. So it does vary.

PN41

Your rostered hours are your ordinary hours, obviously – they're not your overtime hours?---Well, ordinary hours – yes, could be 38 and could be 40.

PN42

Yes?---Could be – yes, whatever they give to me, I do.

PN43

Okay, but in terms of the way in which you're rostered, you might be rostered for 10-hour shifts?---Correct.

PN44

You might be rostered for 12-hour shifts?---Correct, yes.

PN45

And what you're saying at paragraph 6 is that your usual roster pattern is that you work four shifts of 10 hours?---Yes.

PN46

That's right, is it?---Yes.

PN47

And at paragraph 9 you say that generally full-time employees are rostered to work on public holidays?---Mm-hm.

PN48

And whether or not a full-time employee is generally or actually rostered to work on a public holiday is just going to depend on the circumstances. Isn't that right?---Well, mostly full-times are scheduled to work on public holidays, correct.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN49

Yes, but whether or not they are will depend on the circumstances, including of that particular employee?---Yes, most of us – yes, most of the full-time employees do work because it saves the company money so they do get us to work most public holidays, for sure.

PN50

And you say you've worked the majority of public holidays?---Yes.

PN51

That's as a full-time employee?---Yes.

PN52

But you haven't worked all public holidays as a - - -?---Not all, no.

PN53

No – for example, as a full-time employee you haven't worked Easter Sunday?---I didn't work Easter Sunday, correct.

PN54

You did not?---I did not work Easter Sunday.

PN55

And you never have as a full-time employee while working at Gomed, isn't that right?---Yes, I've only been – yes, I haven't, no. No, I haven't, yes.

PN56

And that's consistent with the fact that you're not ordinarily rostered to work on Sundays, period?---Well, I am rostered to work Sundays.

PN57

But part of your ordinary work, you wouldn't say that those hours are part of your ordinary schedule so you ordinarily would work mid-week, obviously, Monday to Friday?---No, no – normally, we could be Saturday, Sunday. That's all my ordinary hours is four days. Could be any four days over the seven days. That was part of my contract when I signed – when I signed at the beginning, that I would work Monday to Sunday, 24/7. So ordinary – I am scheduled at least once a month to work a Sunday, to work a Saturday sometimes twice a month. I am scheduled all over. It's not just – due to the beginning of the week.

PN58

But you do say in your evidence, don't you, Mr Hope, that in the regular course, you accept that employees' preferences are taken into account in rostering. Is that correct?---I – I don't know what other employees put into account. But as far as for my perspective, I respect that they do try and get me not to work Sundays but I'm just trying to say that I do work Sundays as well. I am rostered – I'm rostered at least once a Sunday. Even if I go forwards now, you know, I'm rostered a Sunday in August, a Sunday in September, you know? So I am rostered to work Sundays.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN59

We've seen your rosters for the last 12 months, they're in evidence?---Yes.

PN60

So we can see when you're working and in terms of the regularity of work, you wouldn't regularly work Sundays, would you?---I believe I do – I believe it's once a month, which is regular to me.

PN61

But in the period of - essentially for the last year, you worked only three full shifts on a Sunday. Isn't that right?---No. You might have that down as working on that Sunday. In my evidence I believe I've worked a lot more Sundays than that, particularly in – sometimes I don't finish till 5.30 on a Sunday morning, 4.30 on Sunday. I know it's stated as a Saturday shift but it was finishing work at 4.30 or 5.30 on a Saturday. Sometimes it was one shift, for instance, I didn't finish till 9.30 on a Sunday after starting at 6.30 at night. This – what I'm trying to say is because we do go overtime, so that does also stop me – you know, I'm working on a Sunday, still.

PN62

Okay. So if you have a look at the supplementary statement of Mr Allen – you'll find it at page 78?---Page 78 - - -

PN63

I'm not sure, actually. It won't be 78, sorry. It's the addendum to the tribunal book, yes?---Yes.

PN64

You say at paragraph 9 – you see paragraph 9 of that statement?---Mark Hope shifts – is that the one we're talking about? Paragraph 9: 'I refer to paragraphs 6 and 7'?

PN65

Yes, Mark Hope shifts?---Yes.

PN66

Can you see there that it says that you say you worked 19 Sundays across the year August to August?---Well, I've worked – yes, yes.

PN67

That's gone down to 18 now?---Yes.

PN68

On six of those Sundays you only worked one hour?---Mm-hm.

PN69

You don't regard that as a Sunday shift, do you?---Not really, no.

PN70

And it says that on nine of those Sundays, only four and a half to five and a half hours were worked?---Yes.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN71

You don't disagree with that, do you?---No, well, it's obviously in the – yes, I've worked those. Some of those Sundays, that's what we've got scheduled but with our job there's overtime. I'm not always getting off at, you know, at 4.30 in the morning, 5.30 in the morning. As I mentioned I can get off at 9.30 in the morning, which I have done on a Sunday.

PN72

Yes, we're just talking about ordinary times?---Yes.

PN73

So on nine of those Sundays only four and a half to five and a half hours' work, which is consistent with the fact that when you're rostered to work on a Sunday it would be exceptional for you to be rostered to work the day shift. You don't disagree with that, do you?---No.

PN74

And when you are rostered to work on a shift that flows over or starts on a Sunday it would almost always be to work that night shift. Isn't that right?---I'd like to have a look at my roster at the moment because I'm pretty sure I've got one in a couple of weeks' time which goes for the whole day. So it does vary and yes, I do – the majority would be starting at 18.30 and I appreciate that. It allows me to go to church with my family so I'm thankful for that.

PN75

Yes, that's all I'm asking you?---Yes, okay.

PN76

So that leaves us, isn't there, of those 18 Sundays, take out six, that leaves us with 12, so that's the paragraph 8. So 12 Sundays in an entire year, you're actually working Sunday shifts, in your mind?---Mm-hm, yes.

PN77

And then nine of those Sundays you're only working half a shift on the Sunday?---Okay, yes.

PN78

So that leaves you with three Sundays shifts over the course of a year. You accept that, don't you?---Yes, well, I've already done more than that this year and going forward into the future. My current rosters, they'll be above the three for sure. You know, I'm well above that.

PN79

Well, because you're including the half days of work?---Well, I'm including next weekend, not this weekend, the weekend after – I'm starting at 6.30. So, you know, I'm doing it regularly. As I said, I do it at least once a month.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN80

But, I mean, the data speaks for itself, doesn't it? I mean, we've got the actual rosters in evidence - - -?---Mm-hm.



PN81

- - - that actually sets out those hours. Are you saying that that's not really the case?---No, I'm just saying I do work Sundays, is what I'm trying to say.

PN82

We understand that you work Sundays?---Yes, yes.

PN83

And so despite the fact that the vast majority of shifts that you even are rostered to work Sundays are only rostered on four and a half to five and a half hours of ordinary hours, you say that you should be paid the full 10 hours for those – for a public holiday that falls on that day?---9.5 hours.

PN84

9.5 hours?---We don't get paid for the holiday.

PN85

Yes despite how rarely you actually work 9.5 hours on that day?---Yes, as an employee for (indistinct) the outcome under the collective agreement - - -

PN86

Yes?--- - - - and under – which has been there since 2009 and myself – and what's why I went forward as a pay inquiry. It was about, you know, reading that clause, 19.4, which talks – I don't have it. I know it's in here, but the wording – if I can use that wording.

PN87

THE COMMISSIONER: Excuse me?---If I could use that wording – it says: 'Where a full-time employee (which is myself) is not required to work on a public holiday (I wasn't required to work on an Easter Sunday, that's correct) the employee is entitled to be paid their ordinary rate of pay for the day'. And that's why I'm seeking clarification, that's why I'm here.

PN88

Yes, so you're saying your ordinary rate is the full 9.5 hours - - -?---9.5 hours.

PN89

Even though even when you were rostered to work, it wasn't for 9.5 hours – that's your position?---But when we pay for public holidays, you pay for the day. You don't pay – you don't go into half days, do we? We go into the full day.

PN90

Okay?---It's just – you know, yes.

PN91

And at paragraph 13 of your statement – sorry, that's page 10?---Yes, yes.

PN92

You say that when you realised you hadn't been paid for Easter Sunday you contacted Ms Dawson?---I did, by email, yes.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN93

And you contacted her because that's who you contact?---Yes.

PN94

If there are pay errors that need fixing?---Yes.

PN95

And that's who you're encouraged to contact if there are pay errors that need fixing?---Yes.

PN96

And that's because Ms Dawson manages pay roll?---Manages pay roll, yes.

PN97

So you did what you did the year prior, in 2022 – you contacted Ms Dawson to fix up your pay for the Easter Sunday?---I did.

PN98

Except this time the issue wasn't resolved to your satisfaction?---Mm-hm.

PN99

And that's how a dispute emerged between yourself and Gomed about whether you should be paid for the Sunday?---Yes, well, I put forward – I did ask about that clause, 19.4, in the email and the response came back as: '(Indistinct) this matter's been dealt with. Seek clarification through Fair Work Australia', and that's what I've done. I've simply just followed what they've asked me to do.

PN100

Okay, so did you contact the Fair Work information line to find out whether that was the correct - - -?---I seek my union for what was my right and I seek the union and the union on behalf of me did reach out to (indistinct) services to Alyce and to Doug, with nil response and that's what's led us here today.

PN101

So instead of calling the Fair Work information line you approached your union, which you're entitled to do?---I probably wouldn't know what to do if I went to Fair Work Australia, no.

PN102

And you didn't raise that dispute about whether you should be paid with any of your immediate supervisors for resolution?---Simply because in everybody who has a pay roll dispute does go through to Alyce within our company – everybody.

PN103

Yes, but you didn't take it back to your immediate supervisor to discuss it?---Well, once I got told as far as PSV are concerned this matter's been dealt with and that's come from the executive manager.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN104

Yes?---Where do I go? I'm not going to go back down to general manager because she's already told me - the one above them has told me, 'This matter's been dealt with'.

PN105

Yes, so you say as a matter of practicality, it didn't make sense to speak to your immediate supervisor?---Well, coming from her – you know, I've never had to go through managers to go through to Alyce before. Alyce has always been there to answer my emails as she has.

PN106

Yes, and you've never raised a dispute before under the agreement?---I've never – no, I haven't.

PN107

And you have no doubt who your immediate supervisors are?---Well, I understand – I've never been told who my immediate supervisor is. Never have I been told that. But I know that if, you know, Tom's here today. If I have something wrong with a vehicle or COVID I'll go to him. Something's wrong with pay roll, I'll go to Alyce. Something's wrong with my rosters, I'll go to Casey. Michael's helped me with, you know, with the finger – you know, compensation, workers' compensation, whatever. So they have different roles.

PN108

Yes?---You know, I'm looking at your – I was looking at this before just then. I was never given that. I was never given that and none of our company has ever got an email to say that Casey (indistinct) and Tom Dawson were general managers. This just appeared on their emails at the bottom and that's the word of mouth – oh, look, they've got this under their title now. No one was ever informed about that – no one.

PN109

You knew that they were general managers?---No one's ever informed us. We knew they were general managers but we knew they've got their specific roles. No one knows that - - -

PN110

But that organisation chart is hardly surprising to you, is it, Mr Hope?---It is surprising. I – we haven't been told the way to go, no. I haven't.

PN111

Mr Hope, when I first began asking questions of you, you were saying that you didn't go to your immediate supervisors because Ms Dawson was the one that you would normally address pay roll queries to. That was your evidence?---Well, I'm – I still now, I do go to Ms Dawson, who is the executive manager. Yes, I did go to her like I have in the past.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN112

Yes, and that your specific responses were that you didn't go to your immediate supervisors because you address pay roll queries with Ms Dawson?---Because I

got told as far as PSV are concerned, this matter's been dealt with. I have nowhere else to go.

PN113

Yes, but you're not honestly telling the Commission that you report to Ms Dawson, are you?---For what?

PN114

As a – you're familiar with the workplace, aren't you, Mr Hope?---I – I work there as – whatever. I think there's 86 other employees with me at the moment and every one of us would go to Ms Dawson for pay dispute.

PN115

And in terms of who your – forget who you'd go to. I'm talking about who your immediately supervisor is?---I've never been told who my immediate supervisor is.

PN116

But you know who your immediate supervisor is?---I know who they are but I don't know – I've never been told that they're my supervisor and I know they've got different roles but not to raise a dispute, no.

PN117

Yes, so you just said you know who they are. You know who your immediate supervisor is?---Yes, because it's written here and we know that – as I said, if I've got an issue with Tom in regards to a vehicle, I go to Tom. If I go to Casey – so they're got their different roles.

PN118

Yes. But you just said your know who your immediate supervisors are. That's correct or not because - - -?---No, I've never been told - - -

PN119

- - - your evidence is all over the place, Mr Hope - - -?---Is it?

PN120

And I think you should be very consistent and honest in the responses that you're giving?---I work for – I'm just trying to be honest here.

PN121

Yes, so you know who your immediate supervisor is?---I know that they're general managers now but I haven't – we've never really been informed as an email or anything like that, no. I've never been given – no one's ever been given that.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN122

And you knew that you reported to general managers, you just didn't know who they were. Is that - - -?---I just – I just followed what I've done and went to Ms Dawson, who's looked after pay roll. That's all I've done. I did it the year before,

she helped me. I've done it other times, she's helped me and I just followed the same path I've always followed.

PN123

Were you given a position description when you started your role?---Position – yes, I was.

PN124

And did that position description say who you reported to?---I don't have it on me, I don't think, but I can't recall that.

PN125

We can provide you with a copy of that position description?---I do know obviously I've been going through the bottom recently just looking at, you know, my ordinary days are Monday to Sunday.

PN126

Would it surprise you to hear that on your position description it says that you report to the general managers?---As I said, it's never been – I know – it's never been enforced. It's never been – I've never – I've never – we've always just gone to Alyce in our company.

PN127

You're not answering the question. Would it surprise you to hear that - - -

PN128

MR GARDNER: Commissioner, I think Mr Hope has answered the questions and this line of questioning is going nowhere. He's answered every question honestly and we're dancing around something which I'm not sure what my friend is aiming for and as for the position description, the respondent has had ample opportunity to produce that as evidence, so I would object to it being introduced now.

PN129

THE COMMISSIONER: Thank you, Mr Gardner. Ms Preston, perhaps we could move on.

PN130

MS PRESTON: I'm getting a whole variety of answers - - -

PN131

THE COMMISSIONER: Well, that might be the case.

PN132

MS PRESTON: Yes.

PN133

THE COMMISSIONER: I'm not quite sure that asking the question another five times is going to necessarily change that.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN134

MS PRESTON: Yes, okay. Can we just have a straightforward – would it surprise you to hear that your position description says that you report to the general managers?---If it's on there then yes, but as I said I haven't got – when I joined the company two and a half years ago I did sign my thing and I go to them for – there's various reasons, you know. I never had to raise a dispute before.

PN135

THE COMMISSIONER: I think there's an objection to it being tendered, Ms Preston, so you're going to have to deal with that.

PN136

MS PRESTON: Well, it's probably pertinent evidence to be addressed on this question of whether Mr Hope understands who – and has been told – who he reports to and who his immediate supervisors are.

PN137

THE COMMISSIONER: I assume you sent it to chambers? I'll see if we've got it. Have you sent it to the applicant?

PN138

MS PRESTON: I've sent it to - - -

PN139

THE COMMISSIONER: Mr Gardner?

PN140

MS PRESTON: - - - (indistinct).

PN141

THE COMMISSIONER: Yes.

PN142

MR GARDNER: I think we have a copy.

PN143

THE COMMISSIONER: We will have to get that printed off which we're just going now. Are there other questions you intend to ask, Ms Preston?

PN144

MS PRESTON: Yes, I'll move on.

PN145

THE COMMISSIONER: Perhaps you can move on and we can come back, deal with the objection then, Mr Gardner.

PN146

MS PRESTON: It's actually the end of the questions that I have to ask.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN147

THE COMMISSIONER: Okay, we'll just adjourn for five minutes while we get that printed off, thank you.

**<THE WITNESS WITHDREW [10.10 AM]**

**SHORT ADJOURNMENT [10.10 AM]**

**RESUMED [10.15 AM]**

PN148

THE COMMISSIONER: Mr Gardner, you maintain your objection?

PN149

MR GARDNER: Commissioner, I agree that the position description is relevant evidence. I just would like to record my concern that it wasn't tendered previously and that the witness was asked if he was surprised about what it said when he hadn't been shown a copy of it.

PN150

THE COMMISSIONER: Thank you. We'll provide a copy to the witness. Thank you. Ms Preston.

**<MARK THOMAS HOPE, RECALLED [10.16 AM]**

**CROSS-EXAMINATION BY MS PRESTON, CONTINUING [10.16 AM]**

PN151

MS PRESTON: So this is the position description for your new job as ambulance attendant?---Yes.

PN152

And you can see there that it says that you report to the general manager, the PSV management team?---Yes, I'm just – up the top there, yes?

PN153

THE COMMISSIONER: Sorry – Ms Preston, just hold for one minute, please. Sorry about that – continue.

PN154

MS PRESTON: So you accept, don't you, that you report to the general managers?---Yes.

PN155

And that you've been informed that you report to the general managers?---On this sheet, yes.

PN156

Yes?---I've never really been – no, obviously, I read it. Yes, I have.

\*\*\* MARK THOMAS HOPE

XXN MS PRESTON

PN157

Nothing further.

PN158

THE COMMISSIONER: Thank you, Ms Preston. You wish to have that position description marked?

PN159

MS PRESTON: It's not necessary.

PN160

THE COMMISSIONER: Okay. Mr Gardner, any re-examination?

PN161

MR GARDNER: Yes, thank you, Commissioner.

**RE-EXAMINATION BY MR GARDNER**

**[10.17 AM]**

PN162

Mr Hope, I just have a couple of questions about this position description. Now, the first – it says, 'Reports to general manager-PSV management team'. What would you understand by the term, 'PSV management team'?---Management team involves all of them, including Doug as well as including Alyce Dawson.

PN163

Okay. Now, Mr Hope, I'll take you to the last paragraph that's entitled, 'Additional conditions of this position description'?---Yes.

PN164

I'll just read you the first sentence. It says: 'This position will be required to work as part of a rotating roster comprising various shifts, including night shifts, afternoon shifts, branch locations and weekends as directed by the company'. What is your understanding of that requirement?---My understanding is I've done everything they asked me to do.

PN165

And did you ever negotiate an alteration to this condition?---Obviously I did ask, you know, by conversation once that I could – you know, if I could – is it possible not to be rostered so many Sundays so I could barely work with my family – I mean, go to church with my family. But whenever they've rostered me, I've worked. I've not gone to them and said, 'I'm going to church on Sunday, can I change it'? I've never done that.

PN166

Yes?---I've always – what they've given me, I've done.

PN167

And you have been directed to work these various shifts: night shifts, afternoon shifts, weekends?---Absolutely, yes.

\*\*\* MARK THOMAS HOPE

RXN MR GARDNER

PN168



No further questions.

PN169

THE COMMISSIONER: Thank you. Can I just clarify, Mr Hope – so you have requested not to be rostered Sundays, is that - - -?--No, I just said is it possible to sometimes – you know, I want to go to church with my family – try and keep me away from Sundays as much as they can. Yes, I have had that in conversation via phone call. But I still get rostered and I don't – I don't ask to have that changed. I go in on my Sunday and do what they ask me to do. I only brought it up once and I've kept it as that once in our conversation on that phone call.

PN170

Thank you. Any matters arising from that? Ms Preston? Mr Gardner?

PN171

MR GARDNER: That's fine.

PN172

THE COMMISSIONER: Okay, thank you very much, Mr Hope – you're excused.

**<THE WITNESS WITHDREW**

**[10.20 AM]**

PN173

Mr Gardner, did you want to mark the position description?

PN174

MR GARDNER: Yes.

PN175

THE COMMISSIONER: Having that come along – thank you. I'll mark the position description – I'm actually not quite sure it tells me what the position is. But I'll mark the position description as - - -

PN176

MS PRESTON: Ambulance attendant, Commissioner – at the title.

PN177

THE COMMISSIONER: Thank you. I'll mark the position description as exhibit A3.

**EXHIBIT #A3 APPLICANT'S POSITION DESCRIPTION**

PN178

Thank you.

PN179

MR GARDNER: Commissioner, that concludes the applicant's case.

\*\*\* MARK THOMAS HOPE

RXN MR GARDNER

PN180

THE COMMISSIONER: Thank you. Ms Preston.

PN181

MS PRESTON: Thank you. There's just one witness for the respondent and may I call him (indistinct).

PN182

THE COMMISSIONER: Certainly – Mr Allen.

PN183

THE ASSOCIATE: Please state your full name and your address.

PN184

MR M ALLEN: Michael Rhys Allen, (address supplied).

<MICHAEL ALLEN, AFFIRMED

[10.21 AM]

EXAMINATION-IN-CHIEF BY MS PRESTON

[10.21 AM]

PN185

THE COMMISSIONER: Thank you. Ms Preston.

PN186

MS PRESTON: Mr Allen, you've prepared two statements?---Yes, I have.

PN187

Do you have copies of those? I think you'll find them in the court book there? If you've brought some documents, perhaps just put them to the side?---I haven't brought documents.

PN188

THE COMMISSIONER: Page 57?---Thank you.

PN189

MS PRESTON: And then I think the supplementary statement's separate in front of you?---Yes.

PN190

I should request leave to rely on that supplementary statement, as it wasn't part of the orders that we filed.

PN191

THE COMMISSIONER: Mr Gardner.

PN192

MR GARDNER: No objection.

PN193

THE COMMISSIONER: Thank you. Yes, leave is granted.

\*\*\* MICHAEL ALLEN

XN MS PRESTON

PN194

MS PRESTON: So you see the first statement's at page 77?---Fifty-seven, yes.

PN195

Sorry – that's the supplementary statement. Sorry, yes, 57 – and if you can turn to paragraph 15 of the statement?---Yes.

PN196

You say that:

PN197

*Mark did not meet with me to discuss a dispute. He also did not meet with any other supervisor to discuss the dispute. I know this because I've had conversations with Mark's other supervisors, Tom Dawson, Dough Dawson and Casey, to ask whether Mark has met with them to discuss the dispute as required by the agreement.*

PN198

Yes.

PN199

Are there any corrections you'd like to make to that paragraph?---Just that Doug Dawson is not actually an immediate supervisor to Mark or any of the people on the floor. He's actually the CEO of the business, so he's the top of the tree.

PN200

Okay?---So that should be struck from – so it should be myself, Tom and Casey.

PN201

And what you're saying there though is that you also spoke to Doug?---Yes.

PN202

And do you otherwise say that that statement is true and correct in every particular?---Yes.

PN203

And as to the supplementary statement, which is a statement dated 24 August 2023 – I think you'll find that next to the folder rather than in the folder?---Oh, okay, yes, yes.

PN204

Yes, so you see that's a statement of nine paragraphs?---Yes.

PN205

And two annexures – MA3 and MA4?---Yes.

PN206

Is that true and correct in every particular?---Yes, it is.

PN207

Do you rely on those statements for the purposes of this proceeding?---Yes, I do.

\*\*\* MICHAEL ALLEN

XN MS PRESTON

PN208

I tender each of those, Commissioner.

PN209

THE COMMISSIONER: Thank you. I'll mark the witness statement of Michael Allen, dated 15 August 2023, consisting of 15 paragraphs and two attachments as exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF MICHAEL ALLEN  
DATED 15/08/2023**

PN210

And I'll mark the supplementary witness statement of Michael Allen dated 24 August 2023, consisting of nine paragraphs and two attachments as exhibit R2.

**EXHIBIT #R2 SUPPLEMENTARY WITNESS STATEMENT OF  
MICHAEL ALLEN DATED 24/08/2023**

PN211

MS PRESTON: And only one question arising out of the position description – do you have a copy of that in front of you?---I don't – yes, I do.

PN212

You can see in that statement it says that Mr Hope reports to the general manager, PSV management team?---Yes.

PN213

What is that intended to say?---That's to immediate supervisor of the paramedic management team, which is Casey, myself or Tom.

PN214

And what's the reference to PSV management team?---We call ourselves collectively as the PSV management team, so any emails that we send to staff in communication will come from the PSV management team.

PN215

And who is part of that PSV management team?---So it has different groups. We're the lower part of the group, myself, Tom and Casey, and then you've got Mark, our clinical manager, Alyce, our business manager and then Doug as the CEO.

PN216

Okay. Nothing further.

PN217

THE COMMISSIONER: Thank you. Mr Gardner.

**CROSS-EXAMINATION BY MR GARDNER**

**[10.26 AM]**

\*\*\* MICHAEL ALLEN

XXN MR GARDNER

PN218

MR GARDNER: Thank you, Mr Allen. I'll take you to page 30 of the court book. You see some email correspondence?---Yes, I can.

PN219

So this is the emails between Mr Hope and Alyce Dawson?---Yes.

PN220

And as email chains are it works backwards, so I'll just take you through it. As you can see initially, Mark has emailed Alyce to raise a query about the payment of the Easter Sunday?---Yes.

PN221

Ms Dawson has said: 'Hi, Mark. This is only considered a public holiday if would have worked this day'?---That's correct, yes.

PN222

Mr Hope has then said, 'Thank you for getting back to me. I refer you back to the collective agreement, 19.4'. States it pretty clear here'. Then if we turn back to page 29, Ms Dawson has said: 'Hi Mark, thank you for your email. From PSV's perspective this has been dealt with and I advise you to contact Fair Work for further clarification'. At this point, if Mr Hope had come and asked you about his entitlement to payment for the Easter Sunday public holiday in 2023, would you have had any authority to override Ms Dawson's decision?---No, but I would have had consultation with the business manager at the time, which is Alyce, and spoken about what the issue was. I'd speak to Mark personally, to come into the office and have a chat to me, what his case was for what he thought he'd be paid. I'd speak to Alyce about it. If there was no resolution, then I'd come back to Mark and say, 'Well, your next steps are to go to the Fair Work ombudsman to seek clarification'.

PN223

So Mark, having spoken to Alyce, if he came to speak to you, you would go speak to Alyce and then have a discussion with Mark about what Alyce told you?---As the pay roll person, yes.

PN224

Okay. And you would say that if that was resolved, after your discussion with him you would refer him to speak to the Fair Work ombudsman?---If it wasn't resolved, yes.

PN225

Now, Mr Allen, I'll take you to page 43 of the court book?---Yes.

PN226

So this is Mr Hope's second statement and in paragraph 6 there's a list of shifts that he's worked?---Yes.

\*\*\* MICHAEL ALLEN

XXN MR GARDNER

PN227

Now, there are a number of shifts here where it states as Saturday, the date, and then it's got the times of the shift, which have gone over into the following Sunday?---Yes.

PN228

Now, would you describe that as a Saturday shift or a Sunday shift?---It's a Saturday shift.

PN229

THE COMMISSIONER: It's a what, sorry?---A Saturday shift – so anything that starts on the day of, it's a Saturday shift.

PN230

MR GARDNER: Right – so then the other shifts which start on the Sunday – for example, (xiv) Sunday 12 March 2023, 18.30 to 04.30?---Yes.

PN231

So that started on Sunday and finished on Monday so that's a Sunday shift?---It started as a Sunday shift, yes.

PN232

Did it finish as a Sunday shift?---No, it finished on the Monday.

PN233

So a Sunday shift turned into a Monday shift?---It starts as a Sunday shift.

PN234

So the Saturday shifts that start on Saturday, do they end as a Sunday shift (indistinct)?---They started as a Saturday shift.

PN235

But do they end as a Sunday?---They end on a Sunday, yes.

PN236

Right, so are they a Saturday shift or are they a Sunday shift?---They're a Saturday shift.

PN237

But at the end, if they finish on a Sunday?---They're still a Saturday shift – that's the starting point.

PN238

And a shift that starts on a Sunday and finishes on a Monday - - -?---Is still considered as a Sunday shift, yes, yes.

PN239

Okay?---As you can see, it only works four or five hours.

PN240

That's okay (indistinct). No further questions.

\*\*\* MICHAEL ALLEN

XXN MR GARDNER

PN241

THE COMMISSIONER: Thank you. Can I just ask you, Mr Allen, why you would refer someone to the Fair Work ombudsman to deal with a dispute?---Because that's the next point of call – so did the same thing. So when a pay dispute comes through - - -

PN242

Where does it require a matter to be referred to the Fair Work ombudsman?---Well, it – that's the process that we go through because that's who we deal with if we're trying to find something that's not black and white, obviously. So we then go to refer to the Fair Work ombudsman to seek clarification, which is on that particular point that's what I did and that's the information that we were provided. So I said that's the next port of call and obviously he's got other avenues to go to if he wanted to. He didn't have to.

PN243

When did you go to the Fair Work ombudsman?---When the first original pay inquiry was asked.

PN244

So did that inform the comment then that Ms Alyce - - -?---Dawson.

PN245

Dawson, sorry – did that inform, then, her response to Mr Hope? Is that why she said – to the best of your knowledge - - -?---To the best of my knowledge, yes, because I contacted Fair Work to seek clarification around the ruling on the Sunday/Easter Sunday and then I just handed the information over to Alyce.

PN246

So Alyce came to you and said, 'I've got this query', you sent to the Fair Work ombudsman, went back to Alyce, said, 'This is what the ombudsman says'?---Yes, that's the information we were handed to, yes, yes.

PN247

Yes, that's fine?---Yes.

PN248

And then she responded to Mr Hope?---I believe so, yes.

PN249

Okay, thank you. Ms Preston.

PN250

MS PRESTON: Nothing further, Commissioner.

PN251

THE COMMISSIONER: Thank you. Thank you, Mr Allen, you're excused?---Thank you.

<THE WITNESS WITHDREW

[10.32 AM]

\*\*\* MICHAEL ALLEN

XXN MR GARDNER

PN252

Mr Gardner.

PN253

MR GARDNER: Yes, thank you, Commissioner.

PN254

THE COMMISSIONER: Are there any oral submissions you wish to make in addition to what you've provided?

PN255

MR GARDNER: Yes, there are, Commissioner.

PN256

THE COMMISSIONER: Yes.

PN257

MR GARDNER: We do rely on our written submissions but some further comments to make. Commissioner, I'll deal first with the jurisdictional issue. Our submission is that just like any other clause in an enterprise agreement, the Commission should construe the dispute resolution clause with a purposive approach and should avoid a narrow or pedantic approach that would result in an outcome that is unjust or just doesn't meet the objectives of the draft of the agreement. Ultimately the purpose of a dispute resolution procedure is to allow for the resolution of industrial disputes in a speedy manner and for them to be dealt with in the workplace before they're escalated to the Commission, if that is authorised in the dispute procedure.

PN258

While there aren't authorities that go directly to the issue which I understand was raised by the respondent, which is what is the meaning of, 'immediate supervisor', there are decisions that it considered the construction of dispute settlement procedures generally, notably the Qantas decision, which is included in the materials, and in that case – this was in the second Qantas decision of Flick J – Flick J said that each of the requirements of the dispute settlement procedure should be construed with a degree of flexibility. This was at paragraph 61 of that decision.

PN259

We say that accordingly the dispute settlement procedure in this case should be construed with a degree of flexibility and specifically, the question of who is an immediate supervisor for the purposes of resolving a dispute and particularly this dispute. In this case, in Mr Hope's matter, he has raised his concerns with management. They were aware of – that there was a dispute. He has raised it with the person that he believed was the appropriate member of the management team to deal with a dispute. It's recognised by Mr Allen that Alyce Dawson is the person who employees should raise pay issues with, although he distinguishes this from pay disputes, although we note that in the correspondence between Mr Hope and Ms Dawson, what started as what could be characterised as a pay query, evolved over that conversation into what could be described as a pay dispute with a differing interpretation of the agreement.



PN260

It's acknowledged that each of the members of the management team at the respondent have different, particular responsibilities and when he raised this dispute with Ms Dawson he was not told that he should speak to his supervisor, whoever that may be. Instead he was told eventually that the matter was resolved, from PSV's perspective, and that he should raise it with Fair Work. As we've heard today, in fact Mr Allen was involved in these discussions. Ms Dawson spoke to Mr Allen. He contacted or received advice from the Fair Work ombudsman and reported it back to Ms Dawson.

PN261

We say it would be illogical for Mr Hope, having had this discussion with Ms Dawson, who had responsibility for these matters, having been told that the matter is resolved, speak to Fair Work, that he then be expected to raise the matter with another manager who didn't have responsibility for these issues. Instead, at that point he did contact his union and the union on his behalf has escalated the matter to Mr Doug Dawson, who is the CEO and is therefore a more senior level of management. So in these circumstances, we would say that for the Commission to conclude that this clause strictly requires that an employee raise any dispute with the person who the employer identifies as the supervisor, would be unnecessarily pedantic and would not deliver a sensible industrial outcome and would only delay the resolution of the dispute.

PN262

We say that by first reason, the matter with Ms Dawson and then having the matter escalated to Mr Dawson, the matter not being resolved that the Commission's jurisdiction has been enlivened, the Commission has attempted to resolve the dispute through conciliation. That was unsuccessful, therefore we say the Commission has jurisdiction to arbitrate this matter. I will turn now to the substantive issue, which we say is in two parts. The first is to determine the appropriate construction of clause 19.4(a) and then second, to apply that clause to Mr Hope's circumstances, and the question of whether he ought to have been paid for the Easter Sunday public holiday this year. In terms of the clause, it's quite brief so I'll just read it out again. The clause in dispute is 19.4(a). It says:

PN263

*Where a full-time employee is not required to work on a public holiday, the employee is entitled to be paid their ordinary rate of pay for the day.*

PN264

We say this would be on an (indistinct) record. It has two parts. The first part of the sentence is the qualifying part of the statement and the second part of the sentence is entitlement an employee receives if they meet the criteria for the first part. We look at the first part, it says:

PN265

*Where a full-time employee is not required to work on a public holiday - - -*

PN266

We would submit that there is no need to go beyond a literal reading of these words. An employee is a full-time employee or they're not. It's clear a public

holiday is defined in clause 19 and an employee is either required to work on those holidays or they're not. And if they're not required to work on a public holiday, they satisfy the criteria and then they're entitled to what comes next. That part of the sentence is slightly more complex. It says that they're entitled to be paid their ordinary rate of pay for the day. 'Ordinary', in this sense qualifies the rate of pay for the day. It does not form part of the qualification. There is no need and we'd say there is no – it would not be appropriate to read in a requirement into the first part of the sentence, that an employee must ordinarily work on a particular day.

PN267

It does not define what it means to ordinarily work on a day and that phrasing is not used elsewhere in the agreement. The word, 'ordinary', throughout the agreement modifies rates of pay, which is consistent with the normal industrial meaning of the term: that is ordinary hours and ordinary pay is in contrast to overtime. It's exclusive of penalty rates and other allowances. As for the meaning of, 'the day', there is a requirement to work out what constitutes a day. The agreement does not define, 'a day's work'. An employee can be rostered to work between three and 12 hours.

PN268

Mr Hope's evidence is that the majority of his shifts – what he considers to be a normal day – is a 10-hour shift with a half-hour unpaid meal break, or 9.5 hours. The evidence that Mr Allen has provided shows that Mr Hope either works shifts of 10 or 12 hours' duration. So we would say that the ordinary rate of pay for the day, simply means an employee's ordinary rate of pay, i.e. their base rate of pay, for what is a day's pay, which we would say is 9.5 hours. This isn't the only circumstance in which you'd be required to define a day. If an employee was on annual leave or long-service leave, and there was no requirement to plan the roster for them in advance, it would still be incumbent upon the respondent to assign a number of hours as a day to work out their entitlement to payment while on leave.

PN269

THE COMMISSIONER: Sorry, can I just ask, Mr Gardner – does the enterprise agreement actually specify what people get paid when they're on annual leave? I think it's the clause beforehand.

PN270

MR GARDNER: It does. It's clause 18.2. It says: 'An employee is entitled to four weeks' annual leave on ordinary pay'. And then at 18.8 it defines ordinary pay as, 'The employee's base hourly rate of pay and in addition includes over agreement payments for ordinary hours worked'.

PN271

THE COMMISSIONER: It actually doesn't tell you how much gets deducted her pay.

PN272

MR GARDNER: No.

PN273

THE COMMISSIONER: Or paid per day.

PN274

MR GARDNER: That's right.

PN275

THE COMMISSIONER: Thank you. Sorry, I thought it might have provided some guidance.

PN276

MR GARDNER: That would be helpful. The applicant submits that there is no need to go beyond a plain reading of the words of clause 19.4(a) but nevertheless, we say that the context does – the relevant context – support these conclusions. 19.4(a) is not the only entitlement in relation to public holidays.

PN277

Clause 19 really has three different entitlements. The first is 19.1(a), which stipulates that a full-time or part-time employee shall be entitled to public holidays without loss of pay. We say that covers circumstances where, if an employee is rostered to work on a particular day, they are entitled, as they are under the National Employment Standards, to be absent on that day without loss of pay.

PN278

19.4(b) states that:

PN279

*Where a full-time or part-time employee is required to work on a public holiday, the employee is entitled to be paid double time and a-half for the day.*

PN280

So that clause covers the circumstance where an employee is actually required to work on the day.

PN281

19.4(a), we say it must have some work to do. It doesn't simply replicate what is contained in 19.1. What it does is create a separate entitlement beyond circumstances where an employee - a full-time employee only - is rostered to work on a day, because there would be no need to say that a full-time employee who is rostered to work on a day is entitled to be paid their ordinary rate of pay for the day because that's provided for in 19.1. So it provides for an additional entitlement and that entitlement is that where they are not required to work on a public holiday and are not rostered to work on that day, they are entitled to be paid their ordinary rate of pay for the day.

PN282

There must also be a reason why it distinguishes between full-time and part-time employees, and we say that is wholly consistent with the nature of full-time and part-time employment.

PN283

A part-time employee under the agreement has fixed hours and days of work. They have days which are non-working days where they can never be rostered to work because that's not part of their agreement. They may agree to work overtime on those days, but they can never be rostered to work on those days. In contrast, a full-time employee, in accordance with the agreement, also in accordance with the position description that we have seen today, a full-time employee can be rostered to work on any day of the week, day shift, night shift, afternoon shift, Sunday, Saturday, public holidays. Therefore, there are no non-working days; there are only days they are rostered on and days they are not rostered on, which would normally be termed rostered days off, although that language is not used in the agreement.

PN284

So there is a reason for a difference between the full-time and the part-time employees and there is a reason why this entitlement distinguishes between them.

PN285

THE COMMISSIONER: So if I'm a part-time employee who has agreed to work Monday, Tuesday, Wednesdays, then that's what I work, Monday, Tuesday Wednesdays; I'm not going to find myself working on Good Friday or being rostered to work Good Friday, for example?

PN286

MS PRESTON: Yes, that's correct.

PN287

THE COMMISSIONER: Yes.

PN288

MR GARDNER: In addition to the context that comes out of the other clauses of the agreement or the other parts of the agreement, we also say that the industrial context that is particular to this industry supports a conclusion that a full-time employee would be entitled to payment in these circumstances. As set out in our written submissions, this entitlement is codified in the modern award that covers the ambulance and patient transport industry and it was also included in the pre-modern award which existed at the time this agreement was made. This isn't exclusive to the ambulance industry either; it's common across industries where employees work on a non-standard shift pattern that where a public holiday coincides with their rostered day off, they are entitled to some extra benefit, whether that's payment for that day or an additional day off.

PN289

Both parties in this case have relied on the Public Holidays Test Case from 1995, the decision of the Australian Industrial Relations Commission, because it goes directly to this point. In that matter, the Full Bench were very clear about what they were considering. They say they were talking about full-time employees who do not regularly work a five-day Monday to Friday week. I will just take you to the appropriate page, Commissioner. It is page 111 of the applicant's list of authorities.

PN290

THE COMMISSIONER: This is the decision where the list of the awards is longer than the decision itself.

PN291

MR GARDNER: That's correct, yes.

PN292

THE COMMISSIONER: Sorry, which page was that?

PN293

MR GARDNER: Page 111.

PN294

THE COMMISSIONER: Yes.

PN295

MR GARDNER: Under the heading 'Full-time Workers', the Full Bench said that they were considering full-time employees who do not regularly work a five-day Monday to Friday week. They gave some examples of what that could look like, but they are at pains to say that it was not intended to be exhaustive.

PN296

In regard to those employees, they said:

PN297

*It may happen that a prescribed holiday falls upon a day when the employee would not be working in any event, but fairness dictates that such workers should not be disadvantaged and that the appropriate compensation is an alternative day off, the addition of one day to annual leave or an additional day's wages.*

PN298

Then they said that they understand that such compensation is already provided in many awards, which was true, it was provided in the Ambulance and Patient Transport Award and to this day is in the modern award, although it must be said that it's an additional 1.5 days.

PN299

We say that this agreement was made with this award and these decisions as a backdrop and that clause 19.4(a) reflects the general principle that came out of this Full Bench decision that a full-time employee of the respondent can be required to work any day of the year and therefore they should not be disadvantaged when a public holiday falls on the rostered day off and, therefore, they should receive payment for that day.

PN300

Moving to how this applies to Mr Hope's specific situation, it's a fairly straightforward exercise. Mr Hope is a full-time employee, Easter Sunday was a public holiday, and it is agreed that he was not required to work. Therefore, we say he satisfies the criteria of 19.4(a). Having satisfied those criteria, he is entitled

to his ordinary rate of pay for the day, which we say is 9.5 hours at his ordinary rate of pay and, as we set out in our submission, that would be equal to \$273.13.

PN301

It follows from our preferred construction of the clause that we don't believe there is a need to consider whether Mark ordinarily works on a Sunday, but, for completeness, and should the Commission find that there is a requirement, we say that Mark does ordinarily work Sundays. Ordinarily or ordinary simply means something that is not unusual, unexceptional. It is not defined, for a start, in the agreement. It doesn't mean that it's a particular frequency, but it is simply something that is not special or unusual.

PN302

Taking into account the correction to Mr Hope's statement, he has worked in a period of 12 months on 17 Sundays and we would say that nine of these can be characterised as Sunday shifts because they either occurred wholly on a Sunday or started on a Sunday. The evidence of Mr Allen is that the respondent runs five shifts on a Sunday compared to 13 or 14 on Monday to Friday, so it's expected that any individual employee would work fewer shifts on a Sunday than any other day of the week.

PN303

It is also agreed that Mark has asked to work fewer Sundays, certainly Sunday day shifts, since 2021 as he would like to attend church, but, despite that and despite the fewer shifts run on a Sunday, he has still worked nine Sunday shifts in a year, so we indicate that Mark, Mr Hope, working on a Sunday or working a Sunday shift is not special or unusual; it's ordinary. It is immaterial that some or most of those shifts were night shifts because working a night shift doesn't disentitle you from receiving public holiday benefits, just as someone who works mostly night shifts from Monday to Tuesday is entitled to public holidays that arise on a Monday.

PN304

We would submit that Mr Hope can fairly be described as a full-time employee who ordinarily works Sundays, so if there is a requirement under 19.4(a) that a worker ordinarily work on Sundays, Mr Hope meets that criteria.

PN305

THE COMMISSIONER: The concept of 'shifts' - in inverted commas - in the agreement is not really defined. It seems to me that clause 10 provides a shift allowance for employees who are rostered to work between 6 pm and 6 am, so there's an amount for 6 pm to midnight and another amount from midnight to 6 am, and the method of arranging hours in clause 13 says that the hours of duty are worked in accordance with rosters, the rosters get posted and they show starting and finishing times. So, it's not as if the agreement itself says there's a specific Saturday arrangement or Sunday arrangement or Monday to Friday arrangement and what the respondent does is organise its workforce to meet, presumably, the demands or what it understands the demands to be over the coming month.

PN306

MR GARDNER: Yes.

PN307

THE COMMISSIONER: So this concept of a Sunday shift is not clear. I think there is an entitlement to Saturday and Sunday for rostered time of ordinary duty worked on a Saturday or Sunday - from midnight Friday to midnight Sunday is paid at the rate of time and a-half, so there's an additional entitlement for weekend work in the sense that we understand a weekend to be Saturday and Sunday.

PN308

MR GARDNER: Yes. I agree, Commissioner, that the agreement doesn't define a Sunday shift or a Saturday shift or anything like that. Should the respondent's argument be accepted that there is a requirement that an employee ordinarily work on a Sunday to be entitled to Easter Sunday public holiday pay, I think there is a need to work out what that means.

PN309

THE COMMISSIONER: Yes.

PN310

MR GARDNER: It is obviously not defined in the agreement and the respondent hasn't advanced a way to define that, but I think it could be one of two things: either someone who ordinarily works hours between midnight Saturday and midnight Sunday, or someone who ordinarily works Sunday shifts, as can be defined, and I think in either case, Mr Hope satisfies this requirement.

PN311

THE COMMISSIONER: Can I just ask, Mr Gardner, is there any issue with the payment for other public holidays? I appreciate there is no evidence before me on this, so it's just a curiosity question more than anything else.

PN312

MR GARDNER: Yes. My understanding, Commissioner, is that generally there hasn't been, perhaps with the possible exception of where Christmas Day falls on a weekend, and I believe this might have been changed since this agreement was made, that there is a public holiday on say the Sunday and also an additional day on the Tuesday. I think it may be disputed whether an employee is entitled to both days or is entitled to the payment on the Sunday.

PN313

THE COMMISSIONER: I guess I'm more interested in - when a public holiday falls on a Tuesday, is an employee who is not rostered to work on that Tuesday because it's not their rostered day on, are they being paid for that public holiday?

PN314

MR GARDNER: My understanding is they are.

PN315

THE COMMISSIONER: They are?

PN316



MR GARDNER: Yes.

PN317

THE COMMISSIONER: So this is only a problem with Sundays or with this Sunday?

PN318

MR GARDNER: Yes.

PN319

THE COMMISSIONER: Excuse me.

PN320

MR GARDNER: Thank you. If it is necessary to determine this question, we say the Commission should accept that Mr Hope does ordinarily work on a Sunday and therefore, under the respondent's construction, he would still be entitled to the payment.

PN321

I will just address two other issues which are raised in the respondent's submissions. The first is about the question of discrimination between part-time and full-time employees. The respondent has noted that an enterprise agreement cannot have a discriminatory term, although this is really confined, as defined in the Fair Work Act, to a term that would result in unlawful discrimination on a protected attribute, a protected ground such as race or sex or religion, and similarly under section 831 of the Workplace Relations Act, which was in force at the time, it was confined only to terms that would be unlawful under the Sex Discrimination Act.

PN322

Employment status in part-time versus full-time employment are not protected attributes under the Fair Work Act or any other legislation and we would say it is normal that an agreement discriminates between - they have different entitlements, just as different classifications or different work groups can have different entitlements. A casual employee receives a loading and doesn't receive leave entitlements; a part-time employee has fixed hours and days of work and a full-timer doesn't, so it is normal that there is a distinction made between these groups and there is no principle stating that the Commission must construe an agreement clause to ensure that there's equity between part-time and full-time employees. If the parties have agreed to an agreement that has such a distinction and it met the better off overall test and any other requirement under the Act, it's a legitimate clause and should be construed in accordance with the normal principles.

PN323

THE COMMISSIONER: Does the award contain the difference that exists in this agreement?

PN324

MR GARDNER: Yes. Well, the award - - -



PN325

THE COMMISSIONER: It could be easily fixed, of course, by giving the part-time employees the same entitlement.

PN326

MS PRESTON: There's a blanket entitlement across all employees, but it's different in (indistinct).

PN327

THE COMMISSIONER: Thank you.

PN328

MR GARDNER: The award is worded as follows:

PN329

*Where an employee works on a public holiday or where a public holiday occurs on the employee's rostered day off -*

PN330

and then it states they will receive the extra day and a-half pay or time off, and a rostered day off, taking into account the part-time and full-time arrangements, for a part-timer who has a fixed roster, fixed hours and days of work, a day which does not form part of that pattern cannot be described as a rostered day off, it's a non-working day, so under that clause, there would be a distinction in practice.

PN331

THE COMMISSIONER: Yes, okay, thank you.

PN332

MR GARDNER: I will also just address some of the other decisions that the respondent has cited in their written submission. At paragraph 50, they have noted a few different decisions. I won't go through them all. Several of these decisions deal expressly with the entitlement under the National Employment Standards. The applicant doesn't contend that the National Employment Standards entitle an employee to the day off if it occurs on a day that they are not required to work. That's the minimum entitlement that applies over all industries and all employees and all patterns of work. The applicant doesn't rely on that entitlement. We say that the entitlement in the agreement goes beyond that and does provide for a full-time employee to be paid for a public holiday that falls on their day off or on a day they don't work.

PN333

I also note specifically the Commission's decision in the Four-Yearly Review of the Registered and Licensed Clubs Award, which has been cited by the respondent. In that decision, the Commission was dealing with the Registered and Licensed Clubs Award and was considering a submission by the employer group, Clubs Australia, to delete clause 34.3 of the award, which, at the time, said:

PN334

*A full-time employee whose rostered day off falls on a public holiday must, subject to clause 29.3, be paid an extra day's pay, be provided with an alternative day off, or receive an additional day's annual leave.*

PN335

So this was very similar to what is in the Ambulance Award and is similar to what we say is the entitlement under the agreement.

PN336

In considering Clubs Australia's application, the Commission said at paragraph 30:

PN337

*Under the Clubs Award, the RDO is applied to ensure that full-time employees have two days off each week and may also operate as part of the roster arrangements to provide the averaged ordinary hours per week. Full-time employees work their ordinary hours according to a roster and the employer may require an employee to take their rostered day off on any day of that week. As a result, clause 34.3 is an important component to ensure that the integrity of the hours of work arrangements of this award is maintained. We note that such provisions are not uncommon in modern awards where RDO systems apply.*

PN338

On that basis, the Commission rejected Clubs Australia's proposal and clause 34 was not removed from the award. We would say that that decision supports the applicant's construction of this clause.

PN339

We say that the Commission has jurisdiction to arbitrate this dispute, that it would be inconsistent with the intent of the dispute settlement clause and with the nature of this jurisdiction to reject Mr Hope's application on the basis that he did not have a discussion about this matter with someone who did not have authority to deal with the dispute in circumstances where he was told by the relevant manager that the dispute was resolved and that he should go to Fair Work, and we say that the Commission should find that the meaning of 19.4(a) is that a full-time employee who is not rostered and does not work on a public holiday is entitled to payment for that day at 9.5 hours at their ordinary or base rate of pay and that, in the specific circumstances of Mr Hope, he did not work Easter Sunday, he was entitled to be paid for it and he should be paid 9.5 hours.

PN340

Those are my submissions, Commissioner, unless you have any further questions.

PN341

THE COMMISSIONER: Just out of curiosity, is this a zombie agreement?

PN342

MR GARDNER: It is.

PN343

THE COMMISSIONER: And I use that term as it's used to - - -

PN344

MR GARDNER: It's the technical term.

PN345

THE COMMISSIONER: The technical term, yes, thank you. So it's due to be  
- - -

PN346

MR GARDNER: It is.

PN347

THE COMMISSIONER: Due to expire?

PN348

MR GARDNER: That's correct.

PN349

THE COMMISSIONER: Thank you. Ms Preston.

PN350

MS PRESTON: Thank you, Commissioner. As my friend has indicated, there are three issues that fall to be determined in this proceeding. The first is jurisdiction. Obviously that's a preliminary issue. If the Commission is satisfied that there is no jurisdiction, that is where the determination ends.

PN351

THE COMMISSIONER: Yes.

PN352

MS PRESTON: The second issue concerns the circumstances in which public holiday pay should be paid under clause 19.4(a) of the enterprise agreement and specifically whether clause 19.4(a) should be treated as a blanket entitlement that applies to full-time employees regardless of the days on which they usually work by reason of the fact that the organisation operates a seven-day a week operation and that employees can be required to work on those seven days regardless of whether they actually do work on those seven days.

PN353

The third concerns the way in which pay should be calculated for the purposes of 19.4(a) and the meaning of ordinary time rate of pay for that purpose.

PN354

Turning first to the issue of jurisdiction, the law in this area is now settled: there must be compliance with the mandatory steps of the dispute resolution process prior to referring the dispute to the Commission for arbitration, and I don't hear that my friend is quibbling with that proposition. The questions therefore are, firstly, are the steps in clause 26.1 to be regarded as mandatory steps or is there some discretion that's at play and, secondly, if they are mandatory steps, were all mandatory steps taken prior to escalation and/or referral to the Commission and,

specifically, did the step in clause 26.1(a) occur, did the employee confer with his immediate supervisor?

PN355

Both of these matters appear to be in contention. It appears that what my friend is saying is that the steps are not mandatory in circumstances where Mr Allen did not have the power to finally resolve the position on behalf of the company and, secondly, I think it's being put that, if it was mandatory, then there was compliances.

PN356

Now the principles are set out in MC Labour and the Commission will be familiar with those. I just refer to paragraphs 38 and 39 of that decision. It's in the respondent's list of authorities at page 158. I think the actual reference to 38 is at page 166. I thank my instructor, who was at that faster than I was.

PN357

What those principles stand for is that if the proper meaning of a dispute resolution clause is disputed:

PN358

*the resolution of the disputed construction will begin with the ordinary meaning of the relevant words, considered in context, in accordance with the principles summarised in AMWU v Berri -*

PN359

and elsewhere, obviously. The legislative framework is part of that context:

PN360

*There may be cases where, properly construed, the clause allows the Commission to proceed to deal with a matter, despite certain steps not being satisfied. And of course, there may be clauses which expressly allow certain steps to be bypassed, or for the Commission to have a general discretion to deal with disputes.*

PN361

Importantly, the decision goes on to say:

PN362

*However, the parties to an enterprise agreement are free to impose limitations on the role afforded to the body that is to settle disputes about matters arising under the agreement. Where these limitations are not observed, the Commission ... has no discretion to deal with a dispute referred to it under the agreement, unless one is conferred on it under the terms of the agreement.*

PN363

Turning to the provision itself, which again is in the respondent's list of authorities - sorry, Commissioner, I've just lost my scrolling function somehow. As my instructor informs me, that dispute resolution process can be found on page 129 and that's clause 26:

PN364

*The procedures to be applied will be as follows:*

PN365

*The employee and immediate supervisor meeting and conferring on the matter. An employee may have a representative present, if desired.*

PN366

*If the matter is not resolved, it will be referred to senior management. An employee may have a representative present, if desired.*

PN367

*If not resolved, either party may refer the matter to the Australian Industrial Relations Commission.*

PN368

Obviously that's taken to be - - -

PN369

THE COMMISSIONER: Yes, I note that there is no reference in the clause to referring matters to the Fair Work Ombudsman.

PN370

MS PRESTON: No, there's not.

PN371

THE COMMISSIONER: There seems to be some confusion on a number of sides about the dispute settlement requirements. Mr Allen said, in answer to my question, that that's where they go, to the Fair Work Ombudsman, and that was the advice that was given to the applicant.

PN372

MS PRESTON: Yes. I don't think there's anything to be made of that for the purposes of the jurisdictional argument or otherwise. I think the position - - -

PN373

THE COMMISSIONER: Except that the matter was raised with Ms Dawson and Mr Allen said that she came and spoke to him about it, he went to the Fair Work Ombudsman and went back to Ms Dawson with the advice, which was it's done, it's finished, there is nothing more to be done. So Mr Allen, who is one of the supervisors - because there is actually no clarity in who - Mr Allen thought that the dispute settlement procedure had been dealt with. He - - -

PN374

MS PRESTON: I - - -

PN375

THE COMMISSIONER: Because he gave advice to Ms Dawson, who then provided the advice to Mr Hope that the next step was what Mr Allen understood the process to be, which was for Mr Hope to go to the Fair Work Ombudsman.

PN376

MS PRESTON: I think there's a few things wrapped up in that, Commissioner. The first point is what people thought is irrelevant to the determination of the issue of jurisdictional fact. The second point is that I'm not sure that that is an exact representation of the evidence in the sense that - - -

PN377

THE COMMISSIONER: Well, the evidence will show what it shows.

PN378

MS PRESTON: I think, yes, but I think the point is that if there's a dispute of entitlements, it's about checking whether the company position is right or not and who do they - you know - - -

PN379

THE COMMISSIONER: Well, that's not what - - -

PN380

MS PRESTON: - - - some people might go to a lawyer and they go to the Fair Work Ombudsman and they are encouraging him to do the same. I don't think that it's part of the dispute resolution process, and no one is saying that it was part of the dispute resolution process.

PN381

THE COMMISSIONER: Well, to the extent that that's what the company understood the dispute resolution process to be, then, yes, it was done. Now, the company may well be wrong, and obviously they are, there is no requirement to go to the Fair Work Ombudsman about matters.

PN382

MS PRESTON: Yes.

PN383

THE COMMISSIONER: But, from the company's perspective, it seems that they thought that Mr Hope had, at some point, been through the steps required prior to going to Fair Work because they told him that was the next step for him to take.

PN384

MS PRESTON: Well, I don't think there's any evidence that this was considered to be part of the dispute resolution process and that the company saw that as a dispute resolution process under the agreement. I think the position of the company has consistently been that there has been no compliance with that dispute resolution process because step 1 of the matter has not been complied with. So, although Mr Hope might escalate the matter to the CEO, there wasn't a basis - - -

PN385

THE COMMISSIONER: But he had been - step 1 doesn't matter? So what you are saying is that, technically, there has to be a technical compliance with each of the steps in the dispute settlement procedure and that if there's not technical compliance with the requirements of the step, then it doesn't matter where you go next, you have missed the boat?

PN386

MS PRESTON: Yes, well, I mean the position is clear under the authorities that  
- - -

PN387

THE COMMISSIONER: I understand the authorities, but - - -

PN388

MS PRESTON: Yes, and including the decision in Qantas

PN389

THE COMMISSIONER: - - - the dispute settlement procedure needs to be read in context as well, though, and it seems to me if the CEO has told Mr Hope, 'Don't come here', then there's not much point in Mr Hope going back to someone who is three steps below the CEO and asking the CEO to resolve it because that's not going to happen.

PN390

MS PRESTON: Yes, but this exactly the issue that was raised in the Qantas decision, and I will take you to that, Commissioner.

PN391

THE COMMISSIONER: Yes.

PN392

MS PRESTON: Because, at the end of the day, this is a private arbitration clause and the terms need to be met because they are the terms that were specified, and it doesn't really matter that you look backwards in some anteriorly-derived assessment of what is reasonable in the circumstances. That's exactly what the interpretation cases are saying you mustn't do in these clauses. What the interpretation cases say is - - -

PN393

THE COMMISSIONER: No, I'm not talking about an anteriorly-derived notion of what's fair.

PN394

MS PRESTON: In the sense of we go back and we say, 'In these circumstances, it's ridiculous that he should have to go through these steps' because Mr Allen was engaged, he was told to do a research task by Ms Dawson, so - - -

PN395

THE COMMISSIONER: Well, I don't know if he was told to, but he went and did it.

PN396

MS PRESTON: Well, that was his evidence. I understand that was his evidence.

PN397

THE COMMISSIONER: He went and did it.

PN398

MS PRESTON: He was essentially told to do a research task so he did the Fair Work Ombudsman.

PN399

THE COMMISSIONER: I don't know he mentioned research.

PN400

MS PRESTON: He didn't. He didn't mention research, no.

PN401

THE COMMISSIONER: No, thank you.

PN402

MS PRESTON: But, in my submission, that was the effect of his evidence, that the issue was raised with Ms Dawson, Ms Dawson asked Mr Allen to check with the Fair Work Ombudsman, presumably - - -

PN403

THE COMMISSIONER: I don't know that she asked him to check with anything. He went and did it and he gave that advice back to Ms Dawson.

PN404

MS PRESTON: Yes, but it was never raised with him by the employee. It was only raised by Ms Dawson and, in my submission, the transcript will reveal - of course it wasn't put in terms of a research task - a bit of lawyerly terminology - but that was essentially the capacity. There is no evidence of when he was asked to perform that task. It may well have been when the applicant first raised 'Is that correct?' before the dispute arose. It might have been that Ms Dawson - we don't know because there's no evidence about this - but it might be that Ms Dawson, before responding to the applicant, said, 'Can you just go and check with the Fair Work Ombudsman whether we have to pay that or not?' That's the most likely scenario.

PN405

THE COMMISSIONER: Well, we don't know, do we.

PN406

MS PRESTON: We don't know.

PN407

THE COMMISSIONER: No.

PN408

MS PRESTON: But you can't assume that it's otherwise.

PN409

THE COMMISSIONER: But we can't assume when it was because all we know is that, well, on Mr Allen's evidence, it was before the email was sent to Mr Hope.

PN410

MS PRESTON: It was before the email was sent to Mr Hope.



PN411

THE COMMISSIONER: Most likely.

PN412

MS PRESTON: Yes, which is before the dispute was raised, because the email response - - -

PN413

THE COMMISSIONER: It depends when the dispute is seen to have been raised, doesn't it?

PN414

MS PRESTON: Yes.

PN415

THE COMMISSIONER: Yes.

PN416

MS PRESTON: Well, the dispute doesn't arise - and, again, the authorities are clear - until there's the established contrary position where two parties have a different position and that's made known, and that's how you get the dispute. Until that point, there is no dispute because that's not - - -

PN417

THE COMMISSIONER: Well, that was before Ms Dawson sent the email to Mr Hope, because he had said, 'Yes, but what about the agreement?' and she said, 'No, no, no, you don't get that.' So the dispute had been raised in that respect.

PN418

MS PRESTON: Yes, so if we could go to - - -

PN419

THE COMMISSIONER: That's - - -

PN420

MS PRESTON: I mean we can go - the best we can do really is revisit the transcript, but, in my submission, it doesn't matter either way, the point is - - -

PN421

THE COMMISSIONER: Yes, I understand your submission.

PN422

MS PRESTON: Yes, but if we go to the chain of correspondence, we can see, at MH3 of the court book, so page 29 and onwards, we can see from 12 April - - -

PN423

THE COMMISSIONER: 12 April, he said, 'Can you check my pay?'

PN424

MS PRESTON: Yes.

PN425

THE COMMISSIONER: She came back and said, 'It's only considered a public holiday if you were to have worked that day.'

PN426

MS PRESTON: Yes.

PN427

THE COMMISSIONER: He said, 'Yes, but what about clause 19.4?' So the contrary positions had been established at that point.

PN428

MS PRESTON: Yes.

PN429

THE COMMISSIONER: Mm.

PN430

MS PRESTON: And what we don't know is when Mr Allen was told, 'Can you check what the Ombudsman says?' And if the Commission isn't prepared to draw an inference that the Ombudsman was contacted before this view on 13 April was formed, which, in my submission, is the most probable - we don't have evidence on that, but it's most probably that if that Fair Work Ombudsman is to be contacted, it would happen before the company formed a view, noting that the year earlier, he had actually been paid for those amounts, and so, in my submission, it was at that point and it was only informing that view that the Fair Work Ombudsman was contacted, and then the dispute arose based on the company's interpretation, as informed by what the Fair Work Ombudsman said. Now there wouldn't be much sense in the Fair Work Ombudsman being contacted before the company formed its view.

PN431

If the Fair Work Ombudsman has been contacted, as Mr Allen said, it was for the purpose of understanding what the rights and obligations were.

PN432

THE COMMISSIONER: Well, we don't know.

PN433

MS PRESTON: We don't know, but - - -

PN434

THE COMMISSIONER: One could also mount an argument that it was after Mr Hope said, 'But what about clause 19.4?' that the company went, 'Oh, maybe we'd better go and check with the Fair Work Ombudsman', and that's the point where they did.

PN435

MS PRESTON: Yes.

PN436

THE COMMISSIONER: Which was after they had formed the view that he wasn't entitled to the pay.

PN437

MS PRESTON: Yes, it could be argued, but we don't know because there's no evidence as to which.

PN438

But what does not emerge on the evidence is that this is necessarily part of the dispute resolution process because the position has been, and is maintained, that that process has not been followed, and not because Mr Hope didn't contact the Fair Work Ombudsman but because step 1 was never complied with.

PN439

Just going back to that issue about the anteriorly-derived, the question is what does the clause say and mean, and if the words in the clause have a plain meaning, that's the meaning that needs to be applied and, in my submission, the words do have a plain meaning. The 'immediate supervisor' is clear. Despite the fact that Mr Hope might make enquiries of other people, he reported to the immediate supervisors. Whether or not he has seen the organisational chart is not really to the point. The question is a question of fact, not whether it's fair and not whether there's some injustice that's emerged, but did step 1 happen?

PN440

Looking at the terms of that clause, the language clearly indicates that the step is mandatory. On the authorities, we can see the use of the term 'will' and - sorry, I am just going back to the provision:

PN441

*The procedures to be applied will be as follows.*

PN442

So that's the language of a mandatory requirement:

PN443

*The employee and immediate supervisor must meet and confer.*

PN444

Now, what we know is that that didn't happen. There was no meeting and conferring. There was no meeting and conferring at all really, but there certainly wasn't a meeting and conferring with the employee and the immediate supervisor. There might be a number of reasons why a dispute resolution clause is classed in these terms, and it's not necessarily that the immediate supervisor has the overarching decision-making capacity; in fact, it's unlikely that the most immediate manager, which is the lowest manager, would have that capacity, but that person does have a relationship with the employee in question and may be best, in a practical sense, to dispose of that dispute if it's just spoken about one way or another.

PN445

THE COMMISSIONER: On the applicant's evidence, he would go to the appropriate manager who he knew could resolve the dispute, or he understood could resolve the dispute, and he did that with different managers at different times about different matters.

PN446

MS PRESTON: Mm.

PN447

THE COMMISSIONER: So, on rostering, he would go to one, on workers compensation, he went to another one, on pay, he would go to Ms Dawson.

PN448

MS PRESTON: Yes, but the fact that someone might go and ask questions of particular people does not make that person an immediate supervisor. That terms has a very explicit meaning.

PN449

THE COMMISSIONER: Well, it seems it can be one of three people in this business.

PN450

MS PRESTON: The three general managers.

PN451

THE COMMISSIONER: Yes.

PN452

MS PRESTON: Yes.

PN453

THE COMMISSIONER: There are three immediate supervisors that he could have chosen any one of.

PN454

MS PRESTON: He could have chosen any one of those, but he didn't choose any of them.

PN455

THE COMMISSIONER: No.

PN456

MS PRESTON: And there wasn't a discussion with any of them, and it doesn't say 'and the immediate supervisor', it says 'and immediate supervisor', so one of the three is fine.

PN457

THE COMMISSIONER: Heaven help the employees.

PN458

MS PRESTON: Sorry?

PN459

THE COMMISSIONER: I think it's a lot easier if you only have one immediate supervisor, but anyway.

PN460

MS PRESTON: Well, it just depends how the work is structured. There's no evidence of - - -

PN461

THE COMMISSIONER: I know, I know. It was a comment, Ms Preston. You don't need to address me on the ins and outs of one or three immediate supervisors.

PN462

MS PRESTON: Yes, okay.

PN463

THE COMMISSIONER: I won't make a decision on it.

PN464

MS PRESTON: No. Then we can see, in step (b):

PN465

*If the matter is not resolved, it will be referred to senior management.*

PN466

It doesn't say the CEO, it says senior management.

PN467

THE COMMISSIONER: Well, that could be anyone.

PN468

MS PRESTON: It could be, it could be the CEO, it could be other levels of senior management.

PN469

THE COMMISSIONER: Yes.

PN470

MS PRESTON: Because it's not a defined term, obviously, but what we know is senior management is not going to be the lowest level of management, but that language of 'If the matter is not resolved' also shows the mandatory nature of each step of the provision, that there needs to be compliance, so, you know, it's only once you have done step (a) and, if it's not resolved through that step, then it might be referred to senior management, and that contradistinction also informs the meaning of immediate supervisor for the purposes of (a) because we can see the organisational structure.

PN471

Mr Hope's understanding might go to fairness considerations, but it doesn't go to the interpretation of the provision, if there's a clear meaning of those terms, and surrounding circumstances. In any event, it is not about a person's understanding of the provision, it goes to the circumstances as in when the Commission will take into account surrounding circumstances.

PN472

It's the factual matrix that existed at the time that the agreement was entered into, and there's no evidence before the Commission about that, including the organisational structure at that time. Really the term 'immediate supervisor' is a clear term and to be given its proper meaning, and there is nothing in the surrounding circumstances that would change that fact, and particularly not the relevant surrounding circumstances for the purposes of interpreting the agreement. Only then, if not resolved, may it be referred to now the Fair Work Commission.

PN473

We can see the position that has been adopted by Mr Hope, which you, Commissioner, also alluded to, is this circumstance of what if, you know, the immediate manager doesn't have the power to resolve that matter. On a proper reading of that clause, does that enable that step to be bypassed? Specifically this is addressed in the applicant's outline of submissions in reply where, at paragraph 5 - - -

PN474

THE COMMISSIONER: Is this the submissions or - - -

PN475

MS PRESTON: This is their submissions in reply. It says:

PN476

*A similar issue was considered by the Federal Court in Qantas Airways v Australian Licensed Aircraft Engineers Association.*

PN477

*The decision concerned an application for interlocutory relief and did not determine whether the Commission had jurisdiction to arbitrate the dispute.*

PN478

*The union's submission was that in the context of a dispute which could only be resolved by senior management and where discussions at the supervisory level would be futile, it was highly doubtful that, correctly interpreted, the dispute resolution clauses required consultation with supervisors. The court stated, at 68, that the submission had force.*

PN479

So, if you are taking a practical interpretation in Qantas whether or not the employees were going to be paid for the stand down - this was a massive, obviously, organisational issue at the time in relation to COVID and the stand down provisions - I think it was in relation to COVID - yes, in relation to COVID and the stand down provisions - there's no way that it could have been resolved, the payment for standby and the standby arrangements, by the immediate supervisor in those circumstances, and so the union there ran a similar argument to the position that is put here, and what is referred to in the submissions here is the interlocutory decision.

PN480

That interlocutory decision became the substantive decision, and that decision is in the court book, which is a decision of Flick J in the respondent's list of authorities.

PN481

THE COMMISSIONER: Is it at 285?

PN482

MS PRESTON: It's on 247.

PN483

THE COMMISSIONER: 247?

PN484

MS PRESTON: Yes, sorry, I have included the Full Court decision thereto, but it doesn't change anything. It's accepted - - -

PN485

THE COMMISSIONER: So you have not included the interlocutory?

PN486

MS PRESTON: Sorry? Do you not have the revised - - -

PN487

THE COMMISSIONER: I have got the revised one. Sorry, which page?

PN488

MS PRESTON: Page 247. Do you have that?

PN489

THE COMMISSIONER: Yes, I've got page 247. I'm just not - this is the decision [2020] FCA 951?

PN490

MS PRESTON: Yes. The dispute resolution procedure in the Qantas agreement is at page 252 of the decision.

PN491

THE COMMISSIONER: Yes.

PN492

MS PRESTON: There we can see really the same question raised, and this is immediate supervisor and supervisor are terms commonly found in these dispute resolution processes, the employee and the employee's supervisor meeting and conferring on the matter:

PN493

*If the matter is not resolved at this meeting, the parties to the dispute must arrange for further discussions between the employee and more senior levels of management, and if the matter cannot be resolved -*

PN494

So it's very similar in structure and what the court found was that the steps were mandatory, but what the court also found was that there had been compliance with each of those steps, so there had been a meeting with the immediate manager, which is a very strong contradistinction to what has happened here.

PN495

Now Flick J refers to the well-known decision of Madgwick J in Kucks - I never know how to pronounce that - but maybe we'll call it CSR Limited, which is an award interpretation case - and there we can see that:

PN496

*It is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*

PN497

And then:

PN498

*But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood*

PN499

*words are in general to be accorded their ordinary or usual meaning.*

PN500

In my submission, 'immediate supervisor' is an ordinary or well-understood word and it needs to be given its ordinary or usual meaning, and a person that manages payroll and sits in the executive manager role is not an employee that is an immediate supervisor. That would be a construction that, in my submission, is put in place by reference to the overall fairness and reasonableness of an outcome as opposed to looking at the clause on its face.

PN501

Then we can see that, at paragraph 38 of the decision, there is a reference to the discussions that took place with the GT maintenance manager and the employee in question and, at page 264, paragraph 43, you can see the cross-examination of the manager, and that's referenced in the decision. It says - and this is the cross-examination:

PN502



*It was - and you weren't - the matters he was proposing were totally outside of your authority, weren't they?---Yes, ah, yes, I spoke to - when I spoke to Mr Toovey, I told him that we - - -*

PN503

And then it goes down:

PN504

*But if he had, your response would have been the same, you would have referred him to senior management?---I would have asked Mr Toovey to send me an email in writing with the dispute.*

PN505

*Which you then would have referred to senior management?---Correct.*

PN506

*Yes, because you have absolutely no ability to resolve any dispute, big or small, about the stand downs at that point, do you?*

PN507

So that's the cross-examination of the immediate supervisor, and the point is the same as Mr Hope is making here, is that, 'There was no authority, all you would have done is refer it to that person.'

PN508

So let's take a practical approach on Kucks and the like and let's say that, you know, the parties' intention in that clause was not, in this circumstance, that you need to have a discussion with the immediate supervisor. That is not open, in my submission. At paragraph 55, Flick J said:

PN509

*Difficulty is expressed in reaching a conclusion that there need not be any compliance, be it strict or substantial compliance, with the relevant clauses of the agreement.*

PN510

And then goes on to say, halfway through the paragraph:

PN511

*Even so, any argument that there need not even be substantial compliance with those clauses where a large number of employees have been stood down for a common reason is not self-evidently correct. To attempt to construe those terms as meaning that a matter may be referred to the Commission if it cannot be resolved through the staged process expressly set forth or otherwise is, with respect, to, blatantly and impermissibly, give effect to some anteriorly-derived notion of what would be fair or just, regardless of what has been written into the award.*

PN512

It is concluded that:

PN513

*The relevant provisions impose pre-conditions which must be satisfied before a dispute or matter can be referred to the Commission. So much, it is respectfully concluded, follows simply from the manner in which each of the clauses is drafted. Each of the clauses presents a staged process of dispute resolution.*

PN514

His Honour goes on to analyse those provisions, and at paragraph 60:

PN515

*But such conclusions say nothing as to what would be sufficient or substantial compliance with each of the requirements imposed by those two clauses. Such conclusions say nothing as to the degree of precision there need be in the identification by an employee of a dispute and say nothing as to the degree of formality or informality with which this dispute may be raised at a meeting or discussed.*

PN516

What the focus of this decision is how much formality, you know, if it's raised on behalf of employees in the tea room and it doesn't specifically say it's a dispute resolution process, but it's still discussed and a meeting is held, would that be satisfied, and the court says, yes, like when you're looking at the general interpretation principles, you don't need a really strict level of formality, but you do need to comply with what it says, so you do need to have a meeting and it does need to be discussed.

PN517

The same goes here: the employee needed to have a meeting and it needed to be discussed, and that didn't happen, and really this Qantas decision is right on point on this issue.

PN518

At paragraph 69, his Honour says:

PN519

*The necessity for some degree of formality in the construction and application of the two clauses on the approach of Qantas and Jetstar necessarily followed, not only from the language employed in those two provisions, but also from the prospect that non-compliance with these provisions potentially exposed the airlines to the imposition of a pecuniary penalty.*

PN520

And at paragraph 70, it says, in the very last couple of sentences:

PN521

*To fall within clause 6 of the Qantas agreement, there needed to be the raising by an employee, or a group of employees, of an opposing view to that of their employer and that view had to be raised at a meeting, however flexibly that term is construed.*

PN522

So, no matter how flexibly you construe the term, those requirements are to be met. The same here: there needs to be a meeting with the employee, that employee may be accompanied by a union representative, and there needs to be conferring about the subject matter, and that needs to occur with the immediate supervisor. It didn't happen.

PN523

THE COMMISSIONER: Can that meeting have occurred by paper? Do you actually have to talk?

PN524

MS PRESTON: I don't think that needs to be resolved.

PN525

THE COMMISSIONER: Well, it's an interesting question.

PN526

MS PRESTON: It is an interesting question, and it might be that you need to have a meeting and conferring might not be - - -

PN527

THE COMMISSIONER: In which case, a party could frustrate the dispute settlement procedure by refusing to meet.

PN528

MS PRESTON: Well, that's a different - it's a different issue.

PN529

THE COMMISSIONER: No, well, the dispute settlement procedure wouldn't have been complied with.

PN530

MS PRESTON: Well, that can happen on any interpretation of the dispute resolution clause - I mean on any dispute resolution clause.

PN531

THE COMMISSIONER: Yes.

PN532

MS PRESTON: There are authorities of the Commission to say that the mere fact that you are being stonewalled is not - it's not about - the employee has taken those steps and it's been escalated in a proper way and it hasn't been resolved at that first stage, and that's how it should be interpreted. But, in this case, you don't need to go that far because - - -

PN533

THE COMMISSIONER: No, no, I understand.

PN534

MS PRESTON: But it is a relevant question and there might be reasons why it could be viewed that the parties did specifically say that you need to meet and confer. I mean, it is an old agreement, that's for sure, but there are benefits to

actually meeting in person rather than just sending and receiving emails out if you actually want to - - -

PN535

THE COMMISSIONER: No, I appreciate that.

PN536

MS PRESTON: Yes, so it might be the case and, in my submission, it would be the case that where it says 'meet and confer', the act of conferring and the act of meeting is not encompassed by an email and the words need to be given meaning and, again, those words have a plain meaning and it's not open to the Commission to form a different view, because that is really what's required, is you need to identify an ambiguity in order to have resort to other circumstances, although, in this case, there are no circumstances about the factual matrix at that time, as I have already said.

PN537

THE COMMISSIONER: I don't need to decide.

PN538

MS PRESTON: What's that, sorry?

PN539

THE COMMISSIONER: I don't need to decide, in any event.

PN540

MS PRESTON: You don't need to decide, correct. I understand it might be a distasteful outcome because, you know, there's a circumstance here and it may well be that the outcome would have been the same and it has a level of, you know, inefficiency and unreasonableness, but it's not a relevant consideration for the Commission, even though there's, you know, that underlying sense, or even if the Commission has that underlying sense that, you know, it's all ridiculous, that's just not - that is exactly what the court is cautioning against in Qantas.

PN541

That's about looking at it based - looking at the provision after the fact, rather than looking at the plain terms of the provision and the expectation of that and the use of that term and how common that term is used across awards and agreements, and to start messing with that meaning, in a sense, makes it very - has substantial prospects of inconsistency with the way that these matters have been interpreted and understood, and these are penalty provisions, and so it really does require a very strict technical legal approach, despite the usual bent of the Commission and the requirements they adopt in an informal and flexible approach.

PN542

However, of course, those powers of the Commission under the Act, in my submission in this case, that flexible and adaptive approach is not appropriate in this particular jurisdictional argument here.

PN543

THE COMMISSIONER: I think I have got the point.

PN544

MS PRESTON: You get the point. Yes, okay. I didn't want to leave you in any doubt.

PN545

THE COMMISSIONER: No, no doubt there.

PN546

MS PRESTON: Okay. In that case, we will leave the Qantas decision.

PN547

The question then is whether raising the issue with Ms Dawson, executive manager business and finance, was the applicant raising a dispute with his immediate manager. It wasn't. She was not his immediate manager, she was the executive manager, she had a different title to his manager, she had a different title to the person he was told he reports to under the position description, and she, as the organisational chart shows, held a senior management position.

PN548

THE COMMISSIONER: Well, which is only relevant to the extent the applicant never saw the organisational chart, which doesn't change her title - I'm not suggesting that.

PN549

MS PRESTON: It isn't - - -

PN550

THE COMMISSIONER: The applicant's evidence is he never saw the org chart, so he wouldn't - where someone sits in an org chart - - -

PN551

MS PRESTON: Well, it doesn't matter what he thought is the point.

PN552

THE COMMISSIONER: Well, if he didn't - - -

PN553

MS PRESTON: The question is what the clause means.

PN554

THE COMMISSIONER: Well, yes. Well, you raised it. I'm sorry, Ms Preston, you just said, 'Well, she sat higher up in the org chart.' That's irrelevant if the applicant never saw the organisational chart was what I said.

PN555

MS PRESTON: In my submission, that's not correct. In my submission - - -

PN556

THE COMMISSIONER: Well, you say that he did - you're not saying he did see the org chart?

PN557

MS PRESTON: No, no, of course not.

PN558

THE COMMISSIONER: No.

PN559

MS PRESTON: No, no, no, but what I'm saying is whether he saw the org chart is irrelevant to the question of whether she was his immediate supervisor.

PN560

THE COMMISSIONER: Yes.

PN561

MS PRESTON: Yes.

PN562

THE COMMISSIONER: I don't know that I'm disagreeing with you on that.

PN563

MS PRESTON: Okay, yes, absolutely, and so that evidence really is irrelevant because it doesn't matter whether he saw the org chart or not. It's an objective fact, not his view, that matters, and it's an objective jurisdictional fact, and the cases say time and again that it's for the parties to set those jurisdictional parameters as they see fit and they need to be strictly complied with.

PN564

In *CEPU v Sydney Trains* [2020] FWC 3991, Bull DP, at paragraph 84, said that - and this is a correct statement of proposition:

PN565

*While there is a dispute between the parties as to the meaning of the words in clause 83, disputation does not constitute or establish ambiguity. Disagreement between parties as to the meaning of the words of an industrial instrument is not uncommon but not determinative of ambiguity. As stated by the Full Bench in Bianco Walling Pty Ltd T/A Bianco Precast v Construction, Forestry, Maritime, Mining and Energy Union:*

PN566

*'As noted in Berri, regard may be had to evidence of surrounding circumstances to assist in determining whether ambiguity exists. However it does not follow that regard must be had to evidence of surrounding circumstances. Recourse to surrounding circumstances in determining whether ambiguity exists depends on the circumstances of each particular case. Here the ordinary meaning of the words in the 2016 Agreement are plainly clear and therefore the Deputy President's decision not to have recourse to evidence of surrounding circumstances, does not disclose error.'*

PN567

At paragraph 85:

PN568

*A Full Bench in Glen Cameron Nominees Pty Ltd (t/a Glen Cameron Trucking) v Transport Workers' Union of Australia made the following observations:*

PN569

*'In SDA v Woolworths [2013] FWCFB 2814, the Full Bench affirmed that in the process of interpretative analysis the 'task is to identify the common intention of the parties as they expressed it in the terms of their agreement'. Although the Full Bench recognised that '...it is permissible to take into account the industrial context and purpose of the agreement', the Full Bench held that there are two important limitations:*

PN570

*(a) first, as noted above, the process of interpretative analysis must focus, first and foremost, upon the language of the agreement itself; and,*

PN571

*(b) second, regard cannot be had to the respective subjective intentions and expectations of the parties as demonstrated by their 'statements and actions' in negotiating the agreement.'*

PN572

THE COMMISSIONER: I don't think anyone - has the applicant put that this is an ambiguity or uncertainty issue? I don't think they have.

PN573

MS PRESTON: No, but my submission is those words aren't - 'immediate supervisor' is not - - -

PN574

THE COMMISSIONER: Look, if the applicant is not saying they are ambiguous, then I'm not quite sure why you need to convince me they are not ambiguous.

PN575

MS PRESTON: Okay. In *Khiani v Australian Bureau of Statistics* [2010] FCA 1059, the Federal Court of Australia considered the meaning of line manager as distinct from supervisor at paragraphs 24 and 25 of that decision and specifically it drew a distinction between a line manager that could go all the way up the line as opposed to a supervisor, who was at the immediate level the direct supervisor of the employee. What the Federal Court said here is that line manager is not defined in the Act, the meaning of the expression is guided by the context of its use and ordinary meaning of the expression. Although the Macquarie Dictionary does not contain a definition of line manager, line is defined as something arranged along a line of - - -

PN576

THE COMMISSIONER: Ms Preston, fascinating, but I'm not quite sure there's an argument about line managers in this particular case.

PN577

MS PRESTON: No, there's not, but - - -

PN578

THE COMMISSIONER: So I'm not quite sure why I'm being given a dictionary definition, or lack thereof of one.

PN579

MS PRESTON: More about the contradistinction to the meaning of immediate supervisor, which also wasn't defined, and what the court said, that is, the line manager may be the immediate supervisor of an employee, but it is not necessarily the case. So it's well understood what the immediate supervisor of an employee is and whether a line manager is - - -

PN580

THE COMMISSIONER: Well, they are not the line manager, but there's no argument that there is a line manager in this workplace.

PN581

MS PRESTON: No.

PN582

THE COMMISSIONER: So I'm not sure - - -

PN583

MS PRESTON: Only going to the understood meaning of immediate manager and the contradistinction that's drawn between those two terms in that decision. That's all.

PN584

In Berri, at paragraphs 61 and 62, the court talks about the admissibility of evidence of surrounding circumstances and that that is limited to the evidence tending to establish objective background facts known to both parties and the subject matter of the contract, which is to be distinguished as evidence of subjective intent.

PN585

Clause 8.1 of the parent award also uses the same terminology - 'immediate supervisor' that is.

PN586

THE COMMISSIONER: The parent award being?

PN587

MS PRESTON: Being the award that's in the materials, so the 2002 - - -

PN588

THE COMMISSIONER: The award that was in force at the time the agreement was made or the modern award?

PN589

MS PRESTON: The award that was in force at the time the agreement was made.

PN590

THE COMMISSIONER: Yes.



PN591

MS PRESTON: So that clause 8.1 contains a dispute resolution procedure in that instrument. Obviously, the model dispute term that's currently in place is after the fact. It's not really relevant, but - - -

PN592

THE COMMISSIONER: I don't know that anyone's telling me I need to go and look at objective background facts, are they? I'm sorry, Mr Gardner did refer me to - no, he was talking about the clause, he was talking about clause 19.4(a) and not about the dispute settlement procedure, so I don't know that there's an argument about objective background facts.

PN593

MS PRESTON: There's not an argument about objective background facts. The question is really what is that evidence about, you know, 'I didn't know who my immediate' - - -

PN594

THE COMMISSIONER: Well, it's up to Mr Gardner to make submissions about it.

PN595

MS PRESTON: Yes.

PN596

THE COMMISSIONER: I understand your submission is that it's up to the applicant - sorry, that the dispute settlement procedure is clear on its face and the applicant didn't comply with it. I'm just not quite sure why I need to look at objective background facts. The managers may have been around in 2009 when this agreement was negotiated, but there's not much evidence that Mr Hope was around at the time, so he wouldn't know the objective background facts anyway.

PN597

MS PRESTON: Yes. But, at the end of the day, the evidence about Mr Hope's belief about who - - -

PN598

THE COMMISSIONER: It's not relevant.

PN599

MS PRESTON: Is irrelevant. That's all. That's the point really. That deals with the jurisdictional argument and, in my submission, there is no, obviously, jurisdiction.

PN600

The next issue that arises is the interpretation of clause 19.4(a). It's a complex issue.

PN601

THE COMMISSIONER: Well, some might say it's clear on its face.

PN602

MS PRESTON: Some might say it's clear on its face. However, that is the position, in fact, of Mr Hope. However, what is readily apparent is that it's not clear on its face when the provision as a whole is had regard to and the context in which the provision was made. I recall that my friend said (indistinct), you know, there's nothing that requires parties not to include non-discriminatory terms in provisions in enterprise agreements. Well, that's not the case. There are provisions in both Acts that address this issue and, moreover, in both the Workplace Relations Act and in the Fair Work Act, one of the objects is of non-discrimination, and so it's well established that in interpreting an enterprise agreement, regard should be had to the objects of the Act to understand the intention.

PN603

THE COMMISSIONER: It apparently wasn't a requirement at the time the agreement was made, either that or whoever it was who approved the agreement didn't properly consider those implications.

PN604

MS PRESTON: Well, no, what the respondent's submission is is that there isn't an intention to treat full-time and part-time employees differentially in the impact.

PN605

THE COMMISSIONER: In those circumstances, how should I read the clause?

PN606

MS PRESTON: Do you want that now or - - -

PN607

THE COMMISSIONER: No, if we're going to come to it, we'll come to it.

PN608

MS PRESTON: Yes, well, yes. My friend is just asking if we might have a quick break.

PN609

THE COMMISSIONER: Certainly. I will adjourn for five minutes.

**SHORT ADJOURNMENT**

**[12.03 PM]**

**RESUMED**

**[12.14 PM]**

PN610

THE COMMISSIONER: You've lost your instructors, Ms Preston.

PN611

MS PRESTON: They have disappeared on me. Might we just wait?

PN612

THE COMMISSIONER: Certainly. You might just want to stick your head out and let him know that we're all in here.

PN613

MS PRESTON: Is that all right?

PN614

THE COMMISSIONER: Yes.

PN615

MS PRESTON: Here we are. Sorry about that.

PN616

THE COMMISSIONER: I don't think we have started your submissions on clause 19.4.

PN617

MS PRESTON: No. Okay. As you said, Commissioner, it is - at first blush, the provision may look like it's clear, although my friend has already admitted that the term 'ordinary time rate of pay' has a level of complexity and obviously - - -

PN618

THE COMMISSIONER: Well, I think he said it wasn't mentioned. Sorry, in terms of what ordinary time rate of pay is, yes.

PN619

MS PRESTON: Yes, that it wasn't clear and, obviously, the whole of the clause needs to be read together, and so any lack of clarity in that aspect also feeds into the remainder of the clause, but, regardless, it is the respondent's position that the interpretation pressed by the applicant is not an interpretation that reflects the objective intention behind clause 19.4(a), and that's obviously a matter that needs to be considered in light of, in this case, the relevant circumstances that existed at the time the agreement was made, as well as the provision itself, as well as the agreement itself, as well as the parent award, being the 2002 interim award that was in force at the time the agreement was made. They are all relevant. They all inform the relevant context, as also is informed by the Workplace Relations Act and the provisions of that and the Public Holidays Act as was in force at the time and the provisions in relation to that. So that's a lot of things that are relevant to the context and to understanding this meaning of clause 19.4(a).

PN620

In my submission, the objective intention is to ensure that employees who are ordinarily rostered to work on particular days of the week - - -

PN621

THE COMMISSIONER: Well, it doesn't say that, it doesn't say 'ordinarily'.

PN622

MS PRESTON: It doesn't.

PN623

THE COMMISSIONER: No.

PN624

MS PRESTON: No, but we're looking for - - -

PN625

THE COMMISSIONER: So I need to import a word in?

PN626

MS PRESTON: We're looking for the intention, objective intention, of the framers.

PN627

THE COMMISSIONER: If the objective intention was ordinarily, then surely they would have said 'ordinarily'. They are quite conversant with the word.

PN628

MS PRESTON: Well, if you look at - - -

PN629

THE COMMISSIONER: They used it to define the rate of pay, the ordinary rate of pay. They knew what ordinary was.

PN630

MS PRESTON: Yes, and to that I say, firstly, the meaning of 'ordinary' assumes that there was an ordinary rate of pay for that day which can give meaning to the requirement to work. Secondly, what I would say is you don't just - - -

PN631

THE COMMISSIONER: Why does the meaning of ordinary rate of pay all of a sudden mean that you have to have worked?

PN632

MS PRESTON: Because it says the ordinary rate of pay for the day.

PN633

THE COMMISSIONER: The employee is entitled to be paid their ordinary rate of pay.

PN634

MS PRESTON: For the day.

PN635

THE COMMISSIONER: Rate of pay, not what they would have been - sorry, it says ordinary rate of pay for that day, yes.

PN636

MS PRESTON: For the day.

PN637

THE COMMISSIONER: Yes.

PN638

MS PRESTON: Yes. There is an argument, of course, if you look at that provision as a whole, that embedded in those words is a proposition that the ordinary rate of pay for the day is reflective of (a) that day being a day that the employee would ordinarily work and the hours that the employee would normally

work on that day. You could read 'ordinary rate of pay for the day' to be the payment for the day, or you can be reading it as the ordinary rate of pay for the day. Do you understand what I mean? So if the employee - - -

PN639

THE COMMISSIONER: I'm not quite sure it's going to come across on the transcript, but - - -

PN640

MS PRESTON: Okay, let me say it again.

PN641

THE COMMISSIONER: No, I understand what you mean. It depends where you put the comma.

PN642

MS PRESTON: Yes, yes, and, in my submission, you look at the employee's ordinary rate of pay for the day, as in what would their ordinary rate of pay be on that particular day.

PN643

THE COMMISSIONER: But it says they are not required to work.

PN644

MS PRESTON: No.

PN645

THE COMMISSIONER: So, clearly, on your construction, they are not entitled to any pay for the day because they are not required to work, so what's the point of the clause?

PN646

MS PRESTON: No, that's not the respondent's interpretation. In fact, if you look at the clause, what you are referring to is 19.1. So 19.1 is that an employee doesn't suffer - - -

PN647

THE COMMISSIONER: No, I wasn't actually looking at 19.1, but - - -

PN648

MS PRESTON: No, but I am referring you to 19.1, and an employee under 19.1 is entitled to be absent - a full-time employee and a part-time employee are entitled to be absent from work on a day that is a public holiday and are entitled to be absent from work without loss of pay. So that's what 19.1 is.

PN649

THE COMMISSIONER: Yes.

PN650

MS PRESTON: And on all the principles of interpretation, including in the Public Holiday Act, and we can see there's a bunch of decisions in the

respondent's cases that when you are looking at that provision, you are looking at was the employee actually rostered to work on that date.

PN651

THE COMMISSIONER: I don't know that 19.1 says they are entitled to be absent. They are entitled to the following holidays without loss of pay. It doesn't say they are entitled to be absent.

PN652

MS PRESTON: No.

PN653

THE COMMISSIONER: No. It's quite a different concept.

PN654

MS PRESTON: No. So they are entitled to the holidays without loss of pay, but what does that mean, and what does that mean in the context of a provision that says later on in the provision that an employee who is rostered has to work?

PN655

THE COMMISSIONER: Well, it depends whether I read 19.4 in the context of the rest of the clause or I read 19.1 in the context of 19.4. I am interpreting 19.4 not 19.1. 19.1 provides context for 19.4.

PN656

MS PRESTON: Exactly.

PN657

THE COMMISSIONER: Yes.

PN658

MS PRESTON: Correct, and so it needs to be viewed as a whole and to understand what the purpose of 19.4(a) is, consideration needs to be given, in my submission, to 19.1 and a whole raft of other matters which I am going to take the Commission to in understanding what does it mean.

PN659

THE COMMISSIONER: Let's go then.

PN660

MS PRESTON: And a number of different principles as well in the interpretation of instruments. As I was saying, in my submission, the objective intention is to ensure employees who are ordinarily rostered to work on particular days of the week are paid for the time not worked on those days at their base rate of pay for the hours they would ordinarily work on that day. Now there's no dispute between the parties. That's not the subject of a dispute whether it would be base rate of pay or otherwise. The parties agree that if he is entitled to pay, it would be at his base rate of pay. The question is how many hours and is there an entitlement?

PN661

THE COMMISSIONER: Mm-hm.

PN662

MS PRESTON: In my submission, the clause is not intended to provide a bonus to full-time employees, including relative to part-time employees, regardless of the actual days that they work, in the same way that part-time employees should be entitled to have their day off with pay to the extent it can be factored into the rostering provisions, or should be factored into the rostering provisions, and I think both parties refer to a distinction. The distinction that is drawn between a part-time and full-time employee is either the reality or an assumption that a part-time employee has set days of work, and so when a part-time employee has set days of work, if they are not rostered to work that day on their usual day of work, for example because public holiday manning requirements are lesser, then they will have the 19.1 entitlement, and so the 19.4 doesn't have any work to do.

PN663

With full-time employees, it's otherwise because full-time employees have more variability, so they might work across the week, they might work across the weekend. It is important to note, and I think, Commissioner, you did draw on this earlier, that in interpreting the agreement, firstly, we don't have any extraneous materials as to the organisation and it's make-up and structuring at the time the agreement was made, but we do have the terms of the agreement itself which impose no limitations in the sense of mandate the requirement that a full-time employee is required to work a seven-day rotating shift or that the company is required to have employees engaged in a rotating shift. It could equally be the case - - -

PN664

THE COMMISSIONER: It says here the position will be required to work as part of a rotating roster.

PN665

MS PRESTON: This position will be, yes. This is a position description in relation to a position that was entered in 2022. It's not relevant to understanding the circumstances that existed at the time and how the agreement is to be - - -

PN666

THE COMMISSIONER: We don't know that because we've got no one here who has given any evidence on it - - -

PN667

MS PRESTON: Yes.

PN668

THE COMMISSIONER: - - - in any event.

PN669

MS PRESTON: Correct. We don't know that, but that's the relevant information to understand - - -

PN670

THE COMMISSIONER: But I don't have that information.

PN671

MS PRESTON: No.

PN672

THE COMMISSIONER: And no one can give it to me.

PN673

MS PRESTON: No one can give it to you.

PN674

THE COMMISSIONER: No.

PN675

MS PRESTON: No one has given it to you.

PN676

THE COMMISSIONER: No.

PN677

MS PRESTON: So you need to make the best of the - - -

PN678

THE COMMISSIONER: Of the words.

PN679

MS PRESTON: - - - information you have, not only of the words - - -

PN680

THE COMMISSIONER: And the context.

PN681

MS PRESTON: And the context, et cetera, and we will get to all of that.

PN682

THE COMMISSIONER: If it's necessary.

PN683

MS PRESTON: Correct.

PN684

THE COMMISSIONER: Mm.

PN685

MS PRESTON: Correct. But, in looking at the agreement as a whole, there is no requirement of a rotating shift. Absolutely it operates on a seven day a week cycle, but there's nothing to prevent - even an employee who may be called on to work seven days a week, there's nothing to prevent the employer arranging fixed days of work for that full-time employee, and that could be either in the scope of just the usual work arrangements. Here the evidence is clear that rostering is facilitated according to employee preference wherever possible, but there's also the possibility, for example, you know, flexible work arrangements, accommodating parent's leave, carer's leave and the like, flexible work requests,



that an employee could potentially - a full-time employee could potentially be rostered to only work week days, despite the fact that the shifts are being rotated across the seven days, and that needs to be borne in mind that there isn't a limitation inbuilt in the agreement itself that would prevent that sort of arrangement arising, and that is what - - -

PN686

THE COMMISSIONER: Well, there might not be a limitation in the agreement that prevents it arising, but there's nothing in the agreement that deal with it either. What the agreement says is that:

PN687

*Hours of duty will be worked in accordance with rosters which will be posted at least 14 days in advance.*

PN688

MS PRESTON: Yes.

PN689

THE COMMISSIONER: There's nothing in the agreement about parental leave, or people with children, or people who want to go swimming on Wednesdays.

PN690

MS PRESTON: That's correct.

PN691

THE COMMISSIONER: Yes. So I'm not going to take into account what happens with people who want to go swimming on Wednesdays because there's nothing in the agreement about it that affects the words that are in the agreement.

PN692

MS PRESTON: Only in the sense that a purposive approach needs to be taken to the words of the agreement and the intention - - -

PN693

THE COMMISSIONER: But you are asking me to import in a whole range of things that I know nothing about and that no one knows anything about. You're asking me to make assumptions.

PN694

MS PRESTON: Well, two things can be said about that. The first thing that I would say about it is that the award, being the 2002 interim award that's in the materials, it does have provisions about these matters. It says, for example, that employees will be engaged on rotating shifts, it says that weekend work will be equitably distributed. As to - - -

PN695

THE COMMISSIONER: Does this agreement say it's read in conjunction with the award?

PN696

MS PRESTON: No.

PN697

THE COMMISSIONER: No.

PN698

MS PRESTON: But - - -

PN699

THE COMMISSIONER: No. You want me to import things that are in the award into this agreement when there's no requirement that the agreement be read in conjunction with the award.

PN700

MS PRESTON: On the contrary, Commissioner, my position is that those words have been omitted from this instrument as in the provision for weekend work to be equitably distributed, the provision for rotating - - -

PN701

THE COMMISSIONER: But it doesn't mean that people aren't rostered or can't be rostered to do it.

PN702

MS PRESTON: Absolutely it doesn't mean that.

PN703

THE COMMISSIONER: You want me to put in things and take out things on - I'm sorry, continue. I'll try not to interrupt you.

PN704

MS PRESTON: Oh, please do.

PN705

THE COMMISSIONER: No.

PN706

MS PRESTON: I welcome your - - -

PN707

THE COMMISSIONER: I have something at 2 o'clock.

PN708

MS PRESTON: What's that, sorry?

PN709

THE COMMISSIONER: I do have something on at 2 o'clock.

PN710

MS PRESTON: Okay. All right.

PN711

THE COMMISSIONER: I think you were referring to context.

PN712

MS PRESTON: Yes, and I would say that the terms of the award are relevant context in the sense that it is very prescriptive about the organisational structure, whereas there's less prescription in this agreement as to the way work and organisation is structured and more leeway to engage in different arrangements, and whether or not employees are actually engaged on, for example, a particular arrangement, being a rotating roster or a weekday roster, it is still a relevant distinction between the award and the agreement that may be taken into account.

PN713

The interpretation that Mr Hope urges on the Commission is also predicated - and I will come to this - on part-time employees being disadvantaged in a way that is not consistent with the parent award or the Public Holidays Test Case, and what I mean by that is part-time employees that have agreed hours of work that they work according to a schedule, they don't get to have public holiday benefits under 19.4(a) for days on which they are not usually rostered to work. The part-time provisions also enable part-time employees to be rostered to work on other days, but they are not - they don't have that extra benefit, as is clear from clause 19.4, and the distinction that's drawn between part-time and full-time employees.

PN714

Now, in my submission, that informs the interpretation that is to be given to 19.4(a) in the sense that the impact is not intended to be a differential impact to disadvantage part-time employees. It is intended to apply to them in the same way. So the intention behind 19.4(a) is also only to provide full-time employees with those entitlements that they would have under 19.4(a) for public holidays on which they would regularly work, which is, in effect, the same entitlement that is given to part-time employees, but the distinction in the nature of the engagement means that 19.4(a) doesn't need to specifically address the arrangements of part-time employees. Is that not clear?

PN715

THE COMMISSIONER: No, keep going.

PN716

MS PRESTON: Okay. Again I will come to the provision, but 19.4(a), in my submission, is intended to be an equity provision in light of the public holidays provision in 19.1, in light of the requirement to work on a day that you are rostered, which essentially deprives 19.1 of any application to full-time employees who are rostered to work irregular days because if that employee is rostered to work, there's no out for those rostered employees. They have to work that day, and they will get paid the loading, but there's not going to be a day under 19.1 that they are going to get paid for.

PN717

So the equity of the matter, which is to some extent drawing on the Public Holidays Test Case, is that these employees shouldn't miss out on the non-working days on which these public holidays fall, being their rostered days off, when they would usually work but, on that particular week, they happen not to be rostered for that day.

PN718

Although the Public Holidays Test Case is relevant, it also needs to be viewed within its context, which is the Public Holidays Test Case was in relation to the public holiday entitlements of employees on weekends who worked irregular rosters and usually worked some weekends, and the 1995 award that my friend referred to actually drew on those terms of ordinary hours, usually worked hours, as informing these provisions.

PN719

The Public Holidays Test Case was to inform the award. It wasn't a general proposition that is to inform every agreement; it was about the provisions that should be adopted in relation to the award review process in light of the irregular arrangements. That was the purpose of the case, and so the award that you see, being the 2002 interim award, is the award that's already had regard and has already been subject to that review process incorporating the Public Holidays Test Case, and in that award, we see that employees who are part time or full time are equitably treated, and we can also see an intention that - and I will take you to the exact provisions of the award - but it is by reference to the ordinary hours of work of employees.

PN720

Turning to clause 19 of the award - actually, we will first go to the interpretive principles. To that end, I am not going to take you through the whole lot, but I would refer to Project Blue Sky and Golden Cockerel. We have both those in the respondent's list of authorities. In terms of Project Blue Sky, I refer to paragraph 69, and the primary object of statutory construction being - and this is page 236 of the respondent's authorities:

PN721

*The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*

PN722

*A legislative instrument must be construed on a prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'.*

PN723

*Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision.*

PN724

At page 238, paragraph 78, the court says:

PN725

*The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.*

PN726

That is what I'm asking the Commission to do here, is to look at what was the real intention in providing this entitlement, and that comes first and foremost to any plain reading of the words that are used because it informs the meaning of those words, unless there is a fixed meaning and those circumstances cannot be viewed as creating any ambiguity and, in my submission, when you look at everything together, there is an ambiguity in the clause as a whole, not just the rate of pay but also in the circumstances that the pay will be required - - -

PN727

THE COMMISSIONER: I always thought that the starting point for an agreement, not legislation but an agreement, was the words on the paper, and the first matter the Commission needs to decide is whether the words have a plain meaning or whether there's ambiguity or uncertainty, and one person's claim of a particular construction doesn't create ambiguity.

PN728

MS PRESTON: Correct.

PN729

THE COMMISSIONER: Correct, yes.

PN730

MS PRESTON: However, the surrounding circumstances may mean that the clause which at first blush looks unambiguous is in fact unambiguous.

PN731

THE COMMISSIONER: Ambiguous, I think you mean.

PN732

MS PRESTON: Is ambiguous, yes, and - - -

PN733

THE COMMISSIONER: Well, regard may be had to the evidence of surrounding circumstances to assist in determining whether there's ambiguity.

PN734

MS PRESTON: Correct. And so you might look at the provision and say, 'Oh, that's pretty straightforward', but then all these other matters are introduced and you turn around and say, 'Oh, okay, well, it's not that straightforward actually.'

PN735

THE COMMISSIONER: Well, if we all agree that that's the approach - - -

PN736

MS PRESTON: Yes.

PN737

THE COMMISSIONER: - - - why don't we move to what those things are so you can tell me why they create ambiguity.

PN738

MS PRESTON: Yes, okay. I just note that Golden Cockerel deals with all this.

PN739

THE COMMISSIONER: Yes, as does Berri.

PN740

MS PRESTON: And Berri, yes. What Golden Cockerel also says - just one quick point - is the statutory interpretation principles apply to enterprise agreements and the interpretation of those terms, except issues around the consistency of those terms as used within the agreement because the bargaining process and amendment (indistinct) over time may lead to those inconsistencies, but, other than that, the general propositions are the same and you do look at the objects and purposes and you do have regard to the objects in the legislation as well, including in relation to non-discrimination.

PN741

THE COMMISSIONER: Yes.

PN742

MS PRESTON: Turning to the clause - well, first, also on that interpretation principle, I refer to *Gerald Dowsett v SouthLink* and page 202 of the authorities which talks about the plain meaning of the word 'ordinary' in the Macquarie Dictionary. I don't need to read it out to you, but it talks about things like commonly met, belonging to, immediate as contrasted with that which is delegated, customary, normal for all ordinary purposes, and the situation was also in relation to matters similar to considered here.

PN743

The relevant agreement term is at section 19, page 126 of the respondent's authorities, and at 19.1, we can see the entitlement to prescribed holidays and:

PN744

*A full-time or part-time employee shall be entitled to the following holidays without loss of pay.*

PN745

That needs to be read together with 19.3, which says:

PN746

*Employees rostered to work on a public holiday and failing to do so, will not be entitled to holiday pay for that holiday.*

PN747

And 19.4(a) needs to be read in conjunction with both of those provisions to understand what the purpose of that provision is, not only both those provisions, but also the other contextual. What that provides is:

PN748

*Where a full-time employee is not required to work on a public holiday, the employee is entitled to be paid their ordinary rate of pay for the day.*

PN749

The union says that 'not required' just means they don't have to work that day, and my submission is it's not as simple as that. If it's ordinarily not a working day for that employee, the intention is not that they get paid for that day.

PN750

Looking at the framework that existed at the time, we have the Public Holidays Act 1993. The version that I am looking at is not the one that's in the authorities, but it is incorporating amendments as at 24 September 2008, and what that - - -

PN751

THE COMMISSIONER: Sorry, you are looking at one that's not in the authorities?

PN752

MS PRESTON: Yes, it's the current version that's in the authorities. I'm sorry about that. I can have my instructor send you this.

PN753

MS PARSONS: We have sent it this morning.

PN754

MS PRESTON: You sent it this morning? Okay. Sorry, I wasn't aware of that.

PN755

THE COMMISSIONER: Yes, continue.

PN756

MS PRESTON: The holiday entitlements, at 10(1AA) we see there's a provision that says:

PN757

*This section is of no effect to the extent that it is inconsistent with the Workplace Relations Act -*

PN758

or an instrument giving effect to under that Act, which would, of course, the Gomed Agreement. So, if there's a more beneficial entitlement, that would prevail, but it still needs to be read with the general understanding that emerges from 10, which is that:

PN759

*Despite any provision to the contrary made by or under any other Act or by any contract of employment or other agreement or arrangement relating to*

*employment or by any employment, a person employed in Victoria is entitled to a public holiday or public half-holiday that applies to him or her without loss of pay, and who ordinarily works from Monday to Friday only is not entitled to any payment in respect of, or time off in lieu of, a public holiday or public half-holiday that falls on a Saturday or Sunday unless he or she works on that day.*

PN760

THE COMMISSIONER: Sorry, what clause number was that?

PN761

MS PRESTON: That's 10(1)(c).

PN762

THE COMMISSIONER: Thank you.

PN763

MS PRESTON: We see the use of the word 'ordinarily', also used in 19.4, being used here.

PN764

THE COMMISSIONER: No, 'ordinarily' is not used in 19.4.

PN765

MS PRESTON: Or 'ordinary'. Ultimately, we are searching for the meaning of 'ordinary' as used in that clause, so - - -

PN766

THE COMMISSIONER: I thought we understood the meaning of ordinary. You read it out to me before from another decision.

PN767

MS PRESTON: The - - -

PN768

THE COMMISSIONER: Sorry, we are still searching for the meaning of 'ordinary', are we?

PN769

MS PRESTON: We need to - - -

PN770

THE COMMISSIONER: I just want to know what it is we're - I thought that - continue, continue. I'll read the transcript. I'll work it out.

PN771

MS PRESTON: Let me just clarify. The clause in question, so the agreement clause, provides that:

PN772

*Where a full-time employee is not required to work on a public holiday, the employee is entitled to be paid their ordinary rate of pay for the day.*



PN773

THE COMMISSIONER: Yes.

PN774

MS PRESTON: So the ordinary rate of pay for the day, in the respondent's submission that pay rate is actually giving a broader meaning to the clause itself, that you're looking - - -

PN775

THE COMMISSIONER: You are saying that because they use 'ordinary rate of pay', I should read - are you saying I should read 'ordinarily required to work on a public holiday' in 19.4(a)?

PN776

MS PRESTON: Where the word is:

PN777

*Where a full-time employee is not required to work on a public holiday -*

PN778

that should - - -

PN779

THE COMMISSIONER: Not required, yes. You are saying I should put the word 'ordinarily' in there?

PN780

MS PRESTON: Where the employee is not required to work on a public holiday, it's talking about on a day they would usually work, and the use of 'ordinary' in this provision is about the prescription of payment.

PN781

THE COMMISSIONER: Well, 10(1)(c) in the Act is about ordinarily working on a day, not the ordinary rate of pay for the day.

PN782

MS PRESTON: I know, but what I'm saying to you is part of that context and the way that - including the Public Holidays Test Case and including this provision is showing an intention that if you don't work on a particular day ordinarily, you don't get whatever entitlements are provided for public holidays for non-work on that day.

PN783

THE COMMISSIONER: So, in effect, it is that I should read that as saying that the person is only entitled to the ordinary rate of pay if they would ordinarily be required to work? That's what you're saying?

PN784

MS PRESTON: Yes.

PN785

THE COMMISSIONER: Yes.

PN786

MS PRESTON: Well, where they're not required to work on a public holiday is also importing that proposition.

PN787

THE COMMISSIONER: We are doing a lot of digging to find the words we're importing.

PN788

MS PRESTON: Well, not when you look at the context. The question is why would a full-time employee be provided and why would it be the common intention of the parties to provide an entitlement to pay for 10 hours on a day when an employee would not normally work that day? Take Mr Hope's circumstances, for example. It is Mr Hope's evidence - well, it's the evidence in this proceeding that Mr Hope was generally not rostered to work on Sundays; in fact, organisationally, generally employees were not rostered to work on Sundays because there were only five shifts.

PN789

THE COMMISSIONER: I understand that is your submission, yes.

PN790

MS PRESTON: Yes. So ordinarily employees aren't rostered on a Sunday. In Mr Hope's case, he specifically was not rostered to work on Sundays, except where there was an absolute requirement.

PN791

THE COMMISSIONER: But I know - - -

PN792

MS PRESTON: It wasn't his usual - - -

PN793

THE COMMISSIONER: I understand Mr Hope's circumstances. I am just having trouble understanding where - sorry, you were explaining the Act to me. Let' go back to that. I understand Mr Hope's circumstances and I understand your submissions about what Mr Hope worked.

PN794

MS PRESTON: Yes.

PN795

THE COMMISSIONER: Yes, I understand you say that he wasn't ordinarily required to work on Sundays.

PN796

MS PRESTON: But if you're looking at the intention of the provision, you have to look at, well, what was the intention?

PN797

THE COMMISSIONER: Yes, well let's go back to what the intention was.

PN798

MS PRESTON: Yes, and that's what - yes, well, that's what I'm getting to.

PN799

THE COMMISSIONER: Yes, okay.

PN800

MS PRESTON: Is that if you're looking at the intention of the provision, is the intention to provide public holiday pay on a day that an employee wouldn't usually work? On what basis? On what basis would the agreement - - -

PN801

THE COMMISSIONER: Maybe the employer thought it was a nice thing to do when they did the agreement, Ms Preston. I don't know because I don't have anyone here who was involved in negotiating the agreement who can give me that information. What I have got is the words on paper.

PN802

MS PRESTON: Exactly, and you have both parties saying that it might be informed by the Public Holidays Test Case. You have a position where the respondent is saying you need to look at the award and the governing award and the provisions imported by that as to the intention; you need to look at the potential discrimination of part-time employees and whether that provision can be interpreted in a way that will not adversely impact part-time employees and whether there's a reasonable interpretation that would do that, and when you look at all of those things, you see that there are words that get imported and Project Blue Sky is a hundred per cent the authority from the High Court that you can import particular meaning into words and you can even - - -

PN803

THE COMMISSIONER: Okay. Yes, I understand the authority Project Blue Sky.

PN804

MS PRESTON: Yes.

PN805

THE COMMISSIONER: I understand the authority of Berri and of Golden Cockerel.

PN806

MS PRESTON: Yes. So when you have a Public Holidays Act which makes it clear that you're not going to get paid for a day that you don't normally work - that's the general proposition, is that you don't get paid for non-work on a day when you would not normally work. There are a number of Commission decisions, and they are in the bundle of authorities, that are very clear about that proposition. In fact, the note to the current Fair Work Act, which, in my submission, is just actually calling up the circumstances that existed before the Fair Work Act, including under the Public Holidays Act, is that you don't get an entitlement in respect of a day that you don't ordinarily work.

PN807

The award provision in 95 that my friend referred to earlier in this proceeding says the basis for these sorts of provisions was to compensate employees for the days they usually work. You have the Test Case provision, which is of similar import. All of them are about compensating an employee who is not rostered to work on a day they would ordinarily work, and that is the framework that this agreement was made. So the question is should this provision be interpreted consistently with that entire framework and which, on a reading of that provision, is entirely amenable? In my submission, it is ambiguous. It is ambiguous by reference to the circumstance. Why would this agreement of a small organisation, and we can see from the org chart it's not a big organisation, it's a small organisation, we have employees - the provision for public holiday pay provides - projecting forward, any other holidays that are prescribed or gazetted become additional public holidays. There's lots of public holidays potentially in the mix here.

PN808

THE COMMISSIONER: Well, there's 11 or 12.

PN809

MS PRESTON: Yes, but it's meaningful to understand what the organisation and the employees are taken to have agreed in that context. For an employee who doesn't regularly work on Sunday, is it going to be the common intention of the parties that he's going to be paid regardless for an employee who works a maximum 4.5 hours on a Sunday?

PN810

THE COMMISSIONER: Ms Preston, you keep going back to what the common intention was.

PN811

MS PRESTON: Yes.

PN812

THE COMMISSIONER: And I can't know the common intention because I don't know the circumstances. I don't know whether the employees, when they voted for this agreement, were given a copy of the Public Holiday Act and told, 'This is part of the context within which you should read this agreement.' You keep wanting to take me back to the context and to the common intention - sorry, the context, which is important, and the common intention of the parties, but I don't know whether the common intention was that this provision should be read in the context of the Public Holiday Act or whether it should be read despite the Public Holiday Act because I don't know what the employees were told.

PN813

MS PRESTON: You can't do more than what you have before you.

PN814

THE COMMISSIONER: No, that's right.

PN815

MS PRESTON: The relevant context - - -

PN816

THE COMMISSIONER: And you keep telling me to go a little bit further than what I've got before me.

PN817

MS PRESTON: Well, no, the relevant context is what I'm putting to you as the objective factual background and the evidence of the objective factual background that is before this Commission. You can't make assumptions beyond that. What you can do and what you are required to do in the fulfilment of your task is to have regard to the materials that are before you in order to understand the common intention, and that's your task: what is the objective intention of this clause?

PN818

THE COMMISSIONER: Yes, the objective intention.

PN819

MS PRESTON: Well, the objective intention is the common intention. It's the objective of the parties to the agreement determined objectively by reference to the background facts.

PN820

THE COMMISSIONER: Yes, okay.

PN821

MS PRESTON: All you can do is have regard to the facts that are before you.

PN822

THE COMMISSIONER: Yes.

PN823

MS PRESTON: And those are the facts that I'm pointing to - - -

PN824

THE COMMISSIONER: That's all I can do.

PN825

MS PRESTON: - - - as being in favour of the proposition and the interpretation which my client presses of that cause. The fact that there might be other evidence is not to the point.

PN826

THE COMMISSIONER: Well, that's not an issue - - -

PN827

MS PRESTON: No.

PN828

THE COMMISSIONER: I didn't raise that.

PN829

MS PRESTON: Okay. What I'm trying to get across, Commissioner, is that when you have a series of Full Bench decisions, when you have a particular statutory framework that provides the public holiday entitlement in particular circumstances in absence of other evidence, in my submission the interpretation of that clause - the objective intention of that clause - should be consistent with the terms of those instruments.

PN830

If those instruments - so the public holiday test case, the Public Holidays Act, the 1995 award decision, if all those decisions are pointing to payment on a day not worked only being payable on a usual day of work, then this provision should be interpreted accordingly.

PN831

THE COMMISSIONER: Yes, I understand. I understand that.

PN832

MS PRESTON: It is difficult because we're going back here to 2009.

PN833

THE COMMISSIONER: I remember 2009 well. It wasn't that far ago or that long ago. I understand it was 14 years ago, yes, and I understand that the legislation and the - I understand that the documents you refer to are of that age, of that time - - -

PN834

MS PRESTON: No, no, I mean in terms of evidence of what was going on organisationally at the time.

PN835

THE COMMISSIONER: Yes.

PN836

MS PRESTON: I mean, yes, the surrounding circumstances - - -

PN837

THE COMMISSIONER: Yes, I understand.

PN838

MS PRESTON: - - - occurring on the documents. In terms of getting evidence as to what was happening in the organisation at the time, it's a different story.

PN839

THE COMMISSIONER: Yes, yes.

PN840

MS PRESTON: If we looked at other provisions in the agreement, we can see that at paragraph 15 - so we saw in the annual leave clause, I think, that the reference was to ordinary pay.

PN841

THE COMMISSIONER: Yes.

PN842

MS PRESTON: In paragraph 15 we can see a reference to the ordinary rate of pay but obviously it's in a different context, it's in overtime, and it explains that the overtime ordinary rate of pay is the base rate of pay and how that is to be calculated. The question of what is the ordinary rate of pay for Mr Hope himself on a Sunday, his case is that he should be paid for the full 9.5 hours.

PN843

THE COMMISSIONER: Yes.

PN844

MS PRESTON: Even though if there is to be some ordinary shift in the sense of the usual shift, it's not a 9.5 hours of work time. So what he is saying is, say, for example, if he doesn't work the Saturday or the Sunday of Easter and normally he would have a shift - just take by way of example - that went from half a shift on the Saturday night, half a shift on the Monday night, and that is normally what he is engaged for which is to the extent there is a normal, that's the normal here, in those circumstances he should nevertheless be paid 9.5 hours for the Saturday and 9.5 hours for the Sunday if he isn't rostered to work those days.

PN845

In my submission, it's not consistent with the common intention or objective intention of the parties that this is going to provide a windfall benefit to full-time employees. If we turn to the award, we can see that the public holiday provision is the same in 32.1, so this is on page 82 of the respondent's authorities. We can see the entitlement for work without loss of pay and then we can see for absences when rostered on a public holiday it's the same provision as in the current agreement. Instead of the clause which is now under consideration, 19.4(a), we see that:

PN846

*Where an employee works on a public holiday or such holiday occurs on the employee's rostered day off, or if the employee would normally have been rostered for duty on a public holiday but was absent on sick leave and such employee has worked an extra shift in lieu, the employee is entitled -*

PN847

essentially to the loaded rate. That clause is after obviously the public holidays test case and what it's showing is an approach where it's a different entitlement to what we have seen here because what all employees are getting, are getting this loaded rate. It's understood that part-time employees wouldn't get it for all their time worked, so for the whole seven days. A part-time employee would only be entitled to that entitlement if it fell on a usual work day for the part-time employee and that is what the decision in relation to the interim award also says.

PN848

That is the matrix in which the agreement was negotiated, so although the entitlement is clearly different and we see a re-writing of the clause from that perspective, it shouldn't be presumed that suddenly the interests of part-time

employees are going to be less - or the entitlements of part-time employees are going to be any less than those of full-time employees.

PN849

It's the nature of the pay entitlement which results in the differential treatment, so a part-time employee who has six days of work, if they don't need to work those days they will get their entitlement under 19.1. They will be entitled to have payment for that day. So a part-time employee who is generally rostered to work four hours on Monday, Tuesday, Wednesday and the public holiday falls on Monday, that employee will be entitled to have presumably four hours' pay on the Monday that they're not rostered to work because of the public holiday and no greater entitlement. That's fair, because they weren't going to be rostered on any other day so why should they get the benefit of the Friday because that wasn't an initial workday for them.

PN850

In those circumstances where there are those specific days of work, there is no injustice or detrimental treatment of part-time employees because the days are set. In the case of a full-time employee there is less variation, so that employee might work 12-hour shifts. There might be an employee that works three to four 12-hour shifts a week, there might be a full-time employee that works only weekdays and Saturdays. Whatever the arrangements are, that employee should be paid for their usual days of work consistent with the part-time obligations and that's informed by the objects of the Workplace Relations Act, informed at the time.

PN851

You can also see in our authorities is section 831 of the Workplace Relations Act, which allows variations of workplace agreements on grounds of sex discrimination. Obviously that anticipates that some agreements can be made that discriminate on grounds of sex, but if that agreement can be interpreted in such a way that does not so discriminate, then the Commission should adopt that course.

PN852

In this case the way that those terms can be interpreted so as not to discriminate, consistent with the objects of the Workplace Relations Act that was in existence in that time, is to treat the 19.4(a) as only applying in relation to usual days of work, because otherwise full-time employees are getting an entitlement that (a) cannot be justified in the general matrix and (b) that is superior to part-time employees.

PN853

Now, in terms of the public holidays test case - the public holidays test case is at page 149 of the respondent's list of authorities. You can see on that page that the decision relates to an earlier decision, Print L4534, about safety net provisions for leave days which are loosely described as public holidays. That decision concentrated on the circumstance of people who were employed full-time on Monday to Friday and this decision is considering the circumstances of other employees. The submission to which the Commission was responding to was of Mr Bellchamber, who said that:

PN854



*To give practical effect to the minimum standards for all workers on a consistent basis, we see the Full Bench in its decision indicate that it remains open to the unions to pursue what may be called a savings clause or amendment variation to a savings clause to meet the circumstances of workers regularly rostered to work on weekends.*

PN855

So again we're seeing that notion of regular work on weekends. The entitlements that are emerging from this decision are about addressing the needs of those employees who regularly work on weekends. You shouldn't just say that they only get public holidays that occur on weekdays because if they're regularly rostered to work on weekends, as well, if a holiday falls on the weekend they should have the benefit of that, as well. That's really what this decision is about; addressing the needs of employees who are regularly working on weekends.

PN856

THE COMMISSIONER: Well, they may have been Mr Bellchamber's submissions. The reasoning is the reasoning.

PN857

MS PRESTON: Yes, so we'll go to the reasoning. In the reasoning we see under the heading 'Full-time workers', page 150, that:

PN858

*It may happen that a prescribed holiday falls on the day when the employee would not be working in any event. Fairness requires that the worker not be disadvantaged by that fact.*

PN859

So we see it's an equity provision. You might not be rostered to work on the weekend, but you shouldn't be disadvantaged by the fact of this rotating roster because, in the case of a Monday to Friday employee, there is no disadvantage because you're working the days Monday to Friday. If it falls on the weekend, it falls on the weekend, but what about an employee who works on the weekends, as well?

PN860

So it very much is tying to the usual pattern of work being on weekends, as well, because that's where the fairness consideration comes into play; that an employee who regularly works on a weekend should have made provision to have the benefit of those holidays that falls on weekends even if that employee is not rostered to work that particular weekend. We see that the Full Bench there is considering the different types of arrangements that come into play.

PN861

This comes to the fore when the Full Bench is addressing part-time workers at page 152. What the Full Bench says there is:

PN862

*It is generally accepted by the parties - and we agree - that where the normal roster of a part-time worker includes a day which is a holiday, the worker*

*should either enjoy the holiday on pay or receive the appropriate public holiday rate for working on it. Beyond this, there is little agreement.*

PN863

*The disagreements arise, to some extent, from focusing on alternative types of part-time work. For example, one person may work for four hours a day from Monday to Friday; another, for whole-of-day on Friday, Saturday and Sunday. In the former case, it might be quite practical to impose similar requirements, pro rata, to those affecting standard-week full-time workers.*

PN864

*The latter example, however, presents complicated issues about substitution. Given the diversity of circumstances, we do not think it practical to go beyond the general principle outlined at the beginning of this paragraph.*

PN865

So that general principle is that where a normal roster includes a day, you should have the benefits for that day and it really is the same principle that applies to full-time employees. They are being treated in the same way, it's just that the different nature of part-time employees makes it difficult for the Full Bench to have a provision governing that.

PN866

Similarly, you might have a situation as we see here with Gomed that you might have a variation in hours. So you might have a 12-hour or 10-hour shift being the ordinary hours of work. However you assess whether you pay at the 12-hour shift or at the 10-hour shift - so, for example, if every Easter Sunday or every public holiday an employee - and I'm not saying this is the case. There's obviously no evidence of this, but an employee is rostered to work 12-hour shifts for whatever reason, but usually they would work 10 hours on other days of the week, is it the intention of the agreement to say, 'Well, ordinarily you only work 10 so on this public holiday, you know, we'll also treat it as 10', or do you look at what the employee would ordinarily work on that particular day.

PN867

The same goes for a Sunday worker. It might be the case that for weekend work an employee would every weekend consistently work 12-hour shifts as opposed to the 10-hour, but ordinarily across the week would work 10-hour shifts. What is the intention behind the clause? Is the intention to give that employee pay that is equal to the hours that they would have worked on that particular holiday or is it just an ordinary rate of pay and what you would generally work across a shift? In my submission, you would look to see what the ordinary hours of work - being the usual hours of work - on that particular day were.

PN868

Then we see the conclusion at page 154 about 'commending the following principles' and this is the principles for the purposes of the award review process. That is that:

PN869

*Full-time workers who do not work on Monday to Friday of each week should be assured of the benefit of prescribed holidays. They should not forfeit that benefit because a prescribed holiday falls on a non-working day because they are not working.*

PN870

They shouldn't miss out on the benefit just because they're not working Monday to Friday when the public holiday entitlement, based on their former decision, would be triggered by work on those days and entitlement arising on Monday to Friday. They shouldn't be disadvantaged in that way.

PN871

*A full-time employee who works a non-standard week should not enjoy leave in respect of both an actual day and a substitute day, but should be assured of one of them.*

PN872

THE COMMISSIONER: I don't think there is a dispute about that.

PN873

MS PRESTON: No, but it's about the equity principle that infuses this provision.

PN874

*A full-time worker who ordinarily works on a Saturday or Sunday should be paid at the Saturday or Sunday rate for work performed on the actual day when substitution is prescribed.*

PN875

And that:

PN876

*A part-time non-casual worker whose normal roster includes a prescribed holiday should either be accorded the holiday on pay or receive the appropriate public holiday rate for work on the day.*

PN877

So again we can see that the principles are actually the same that apply to part-time and full-time employees. It's how they are going to be determined by the Full Bench - will have regard to the particular circumstances of organisations in the making of the award, then we see that that position is put at page 155:

PN878

*With this decision we see the Full Bench's task in constructing a safety net of prescribed holidays as completed save for variation of awards which are before us consequent on this and a previous decision. We expect the parties will bring to the hearing proposals which are consistent with our decisions and we welcome prior discussions between the parties -*

PN879

et cetera, et cetera.

PN880

*We expect the parties will bring to the hearing proposals which are consistent with our decisions and we welcome prior discussions between the parties -*

PN881

et cetera, et cetera. In my submission, it's correct to say that the public holiday test case is obviously a relevant context to the consideration of this provision. The way that it has trickled down through the award itself is a relevant context for this provision. The equitable principles as between part-time and full-time employees is a relevant consideration for this Commission and those are the contextual matters to which the Commission should have regard in assessing the objective intention of the parties in making a clause like that and agreeing to a clause like that.

PN882

The intention behind the clause is to compensate employees who would usually be rostered to work on a particular day, for that day, if they're not rostered and that is consistent with all the extraneous materials that are before the tribunal at the moment. It is also consistent with a common sense interpretation of that provision  
- - -

PN883

THE COMMISSIONER: I'm not quite sure common sense comes into the principles, but - - -

PN884

MS PRESTON: Well, in the sense of you're looking to see what the purpose of the provision is. The purpose of the provision is to compensate where you're working on particular days. Should an interpretation be preferred that provides a more beneficial entitlement - - -

PN885

THE COMMISSIONER: My comment was just that I don't think common sense is one of the principles of interpretation that's generally quoted, Ms Preston. It was not dismissive of the rest of your submissions about the principles surrounding interpretation.

PN886

MS PRESTON: I just refer the Commission to paragraph 22 of Golden Cockerel which cites French J in Wanneroo that:

PN887

The fact that the instrument being construed is an enterprise agreement is itself an important contextual consideration. As French J observed in Wanneroo:

PN888

*It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities ... There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned ... It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression*

*in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies.*

PN889

All that I am saying, Commissioner, is that in looking at the entitlement in 19.4(a) it is relevant to consider obviously the purpose of that provision and what it was intended to be compensated for from a commercial context and in light of those other decisions.

PN890

THE COMMISSIONER: Yes.

PN891

MS PRESTON: And if a particular interpretation makes sense, and even if it might not be the impression immediately gained from a strict interpretation of those words particularly in light of the objects of the Act and non-discrimination and the like, then that should be the interpretation chosen by the Commission.

PN892

The same is relevant to understanding what the ordinary time rate of pay for the day is and that's the last issue that the Commission needs to determine. Is the ordinary time rate of pay for the day simply the base rate of pay or does that import also a notion of the hours that are worked on that day or at least that are ordinarily or usually worked on that day? In my submission, it could not be said that the usual hours or the hours ordinarily worked on Sundays, if there is such a thing, were 9.5 hours.

PN893

THE COMMISSIONER: So how would I calculate it? How would I determine it? If I get this far, how do you say I determine what the ordinary rate of pay in Mr Hope's case should be?

PN894

MS PRESTON: So the evidence of the supplementary statement of - - -

PN895

THE COMMISSIONER: Mr Allen.

PN896

MS PRESTON: - - - Mr Allen - - -

PN897

THE COMMISSIONER: I understand all of that and I understand that you make submissions about whether he did ordinarily work, and so on and so forth. If I get to the point where I say, well, yes, I've got jurisdiction, yes, it means what has been put to me by Mr Hope - - -

PN898

MS PRESTON: Yes.

PN899

THE COMMISSIONER: - - - how do I then determine what his ordinary rate of pay is?

PN900

MS PRESTON: So paragraph 9(c) of the supplementary statement.

PN901

THE COMMISSIONER: So I should take that 4.5 to 5.5 as being generally what he has done?

PN902

MS PRESTON: Yes, well, he says that the usual Sunday night shift is 6.30 to 4.30, so it would be 6.30 until midnight.

PN903

THE COMMISSIONER: Yes.

PN904

MS PRESTON: I don't know when the break is taken, I haven't looked at the agreement.

PN905

THE COMMISSIONER: Yes, okay.

PN906

MS PRESTON: Presumably half an hour that would be a break, because it's the majority of hours that you have to look at the meal breaks in the agreement.

PN907

THE COMMISSIONER: Yes.

PN908

MS PRESTON: So that would be the submission. If there was a view that he should be paid in any event for his work on Sundays at ordinary time, the rate of pay would be the number of hours worked.

PN909

THE COMMISSIONER: Yes, I just want to make sure it's all covered off just in case I get there. So the agreement again is nice and silent on the matter, but let's assume that a meal break is required to be taken after five hours. The agreement just says you're entitled to a meal break at 30 minutes, it doesn't say when.

PN910

MS PRESTON: The agreement doesn't say - - -

PN911

THE COMMISSIONER: No. Clause 16 of the agreement, it doesn't specify that the meal break is required to be taken within the first five hours or after no more than five hours of - but let's just assume that the standard we have now was developed back then. The difficulty of course for people in even the non-emergency transport business is you don't just get to stop halfway through the trip to take your break.

PN912

MS PRESTON: Yes. I don't think you could say that it would be taken in - - -

PN913

THE COMMISSIONER: No.

PN914

MS PRESTON: On the basis of the agreement - and it doesn't say that the agreement should be interpreted in conjunction with the award or anything.

PN915

THE COMMISSIONER: No.

PN916

MS PRESTON: May it please the Commission.

PN917

THE COMMISSIONER: Thank you. Mr Gardner?

PN918

MR GARDNER: Thank you, Commissioner. I will just address a few points that were raised by my friend in her submission, starting with the jurisdictional issue. It's not contended that the dispute settlement procedure is not mandatory and we don't argue that the Commission has some residual discretion to hear a dispute.

PN919

The two key authorities which have been put forward I think are the Qantas case and the MC Labour case. It's correct that the Full Bench in the MC Labour case said that it is a mandatory process unless expressly said otherwise in the agreement in the particular dispute-settling clause. That, we submit, also needs to be read in conjunction with the Federal Court's conclusions in the Qantas matter; that they should be construed with a degree of flexibility consistent with the industrial context.

PN920

In Flick J's judgment in considering the dispute that arose with Qantas, he says in his concluding remarks that there were - this is at paragraph 117:

PN921

*There may not have been an individual -*

PN922

he uses the acronym 'LAME', I will just say 'engineer':

PN923

*There may not have been an individual engineer who formally reduced his personal concerns to writing and who may have formally asked his supervisor to refer his concerns to more senior levels of management. But that was what was occurring in substance. There was no prospect of the division of opinion as to whether there was or was not useful work to be performed by engineers*

*ever being able to be resolved on the hangar floor. Decisions affecting all engineers were being taken at a far more senior level of management.*

PN924

He also said at paragraph 64:

PN925

*Indeed, it would be a surprising construction of the 'dispute resolution procedures' if a general 'dispute' affecting a great number of employees could not be the subject of referral to the Commission in the absence of each individual employee 'meeting and conferring' with that employee's supervisor, and each individual dispute being thereafter the subject of 'further discussions' with 'more senior levels of management'.*

PN926

We say it's clear from the authority that while there is a requirement that a dispute is discussed at the workplace level and the steps are followed, the Commission should have regard to the context in construing each particular dispute resolution procedure and that may include the nature of the dispute that is brought forward.

PN927

In terms of the MC Labour case, I think it's also important to consider the facts in that matter. In that case the AWU lodged a dispute with the Commission having not followed any of the steps of the agreement's dispute settling procedure. The first the company knew of the dispute was when they received the F10. The Full Bench said it was critical that the employees or the union had not referred the dispute to the Victorian Building Industry Disputes Panel, which was the penultimate step, and therefore the VBIDP had not issued any decision that could be reviewed by the Commission.

PN928

That is markedly different to the situation in this matter where really the dispute has been discussed in the workplace with the person who Mr Hope believed was the relevant member of the management team. He has received a very clear response about the company's position. It has been escalated to a more senior level of management and it remained unresolved.

PN929

The issue has come up about when Mr Allen may have contacted the ombudsman and his extent in those discussions. The Commission may have some assistance from the respondent's form F1 that was filed, which they have stated:

PN930

*On 12 April 2023, the applicant emailed a pay query to Alyce Dawson. On 12 April 2023, Michael Allen, general manager, sought clarification around the applicant's pay query from the Fair Work Ombudsman.*

PN931

So Mr Allen was involved in that process and again it seems very unlikely that had been the matter been remitted to Mr Allen from there, that any outcome would have changed. In summary in terms of the jurisdiction, we say - - -



PN932

THE COMMISSIONER: Except that we don't know, because Mr Allen was never given the benefit of a discussion with Mr Hope or with Mr Hope's representatives on what might have been a reasonable outcome or a settlement to the dispute.

PN933

MR GARDNER: Yes.

PN934

THE COMMISSIONER: Because it was never taken to him. It may well have been that Mr Allen, with a practical eye to the circumstances, might have said, 'Well, in this case we'll do - you know, we think we can fix it. We'll do X, Y and Z', but he was never given that opportunity. We don't know. He may well just have said - just as easily his response might have been, 'Well, I've already spoken to Alyce about it. There's nothing else to see here.'

PN935

MR GARDNER: Yes, we accept that, but we say that Mr Hope has followed the dispute settlement procedure, he has engaged with, in the circumstances, the person who was an immediate supervisor for a query of this nature and that the Commission should read the dispute settlement procedure with the appropriate flexibility to enable a sound industrial outcome.

PN936

THE COMMISSIONER: Yes. The difficulty always arises where you set the boundaries. You know, whether - and I'm not suggesting you do this in this particular workplace, but whether, you know, a discussion at the pub after work on Friday night with your supervisor is enough to generate the dispute settlement procedure, for example, when you complain about your pay or something that has happened at work; whether that is enough in the circumstances.

PN937

There are always boundaries and the boundaries have to be found, and the respondent's submission is that the boundaries are clear in the words in the agreement.

PN938

MR GARDNER: Yes. Moving to the substantive dispute, to make clear our submission that the word 'ordinary' in 19.4(a) is simply qualifying the phrase 'rate of pay' to distinguish it from overtime rate of pay, to distinguish it from the entitlement in 19.4(b) which is a payment of double and a half time for an employee who works on a public holiday.

PN939

My friend has referred to section 831 of the Workplace Relations Act. I simply don't see how a section titled 'Variation of workplace agreements on grounds of sex discrimination' is relevant to this dispute. There is no question of it being a discriminatory term on the grounds of sex and even under the more expansive meaning of the 'discriminatory' term in the Fair Work Act there still needs to be a

protected class or attribute which is the basis for discrimination for the term to be unlawful.

PN940

Also in terms of the Public Holidays Act, again the Public Holidays Act as it has applied at the time - the reference to employees working Monday to Friday not being entitled to a public holiday that occurs on a weekend is not relevant to Mr Hope's case where there is no evidence and I don't think a submission that he is a Monday to Friday worker or that he ordinarily works only Monday to Friday.

PN941

THE COMMISSIONER: No, I don't take that to have been a submission. Ms Preston will correct me if I'm wrong, but, no, I don't - - -

PN942

MS PRESTON: We didn't really address Saturday, so it's not relevant in the scope. I haven't considered it, so - - -

PN943

THE COMMISSIONER: No, you're not saying that Mr Hope is a Monday to Friday worker.

PN944

MS PRESTON: His ordinary days of work were Monday to Friday - his ordinary days of work didn't include - it depends what you mean by Monday to Friday. I mean, he worked - - -

PN945

THE COMMISSIONER: Well, Monday to Friday; those five days that offices are open and banks are open. You're not suggesting Mr Hope was a Monday to Friday worker.

PN946

MS PRESTON: No, he could be rostered on - - -

PN947

THE COMMISSIONER: Yes.

PN948

MS PRESTON: Yes.

PN949

MR GARDNER: In relation to the public holidays test case, simply we believe this is clearly supportive of our submission. The Full Bench has been clear in distinguishing between the earlier decision which dealt with persons who were employed full-time on Monday to Friday of each week and then other full-time workers who do not regularly work a five-day Monday to Friday week, and the other employees of the respondent who can be rostered to work on four days of the week are clearly in the second category.

PN950

MS PRESTON: Sorry, Commissioner, if I may just interrupt. For the purposes of the Monday to Friday worker and the terminology of that agreement, whether he is regularly rostered to work on weekends, I would say he is not regularly rostered to work on Sunday. That's imported into the decision that my friend just referred to.

PN951

MR GARDNER: Yes.

PN952

THE COMMISSIONER: Thank you.

PN953

MS PRESTON: I just wanted to clarify that we are not held to - - -

PN954

MR GARDNER: Perhaps I misunderstand my friend's submission, but I'm not sure how the word 'regularly' is imported into this decision. It doesn't explicitly use the words 'regularly' or 'ordinarily' or 'frequently'. It simply refers to - sorry, I take that back. It refers to full-time workers who do not regularly work a five-day Monday to Friday week, which is not Mr Hope and - yes.

PN955

THE COMMISSIONER: Just to be clear, we all agree that Mr Hope could have been rostered any day of the week.

PN956

MS PRESTON: Could have been.

PN957

THE COMMISSIONER: Yes, yes.

PN958

MR GARDNER: Yes.

PN959

THE COMMISSIONER: And was at times - whether it was regular or not is a matter for consideration - rostered to work ordinary hours on Saturday and Sundays.

PN960

MS PRESTON: Correct.

PN961

THE COMMISSIONER: Yes.

PN962

MR GARDNER: We say the applicant's position is quite straightforward. In terms of working out whether an employee is entitled to this payment, the question is are they a full-time employee who is not required to work on a public holiday? There is no need to import words to look for an infusion of an equity principle. It can be construed on the plain meaning of those words.

PN963

To the extent that there is an ambiguity, we would say that relates to the question of what is a day in terms of calculating the entitlement itself, but certainly the qualification to the entitlement we believe can be resolved just looking at the plain meaning of the words and that there is no need to look outside of that to find an ambiguity. That was all my submissions.

PN964

THE COMMISSIONER: Thank you. Just before I let you go, Mr Gardner - no, that's all right. That's fine. Ms Preston, was there anything else from you in response to what Mr Gardner has said, not more broadly.

PN965

MS PRESTON: Only in the sense that a part-time employee can also be rostered to work - - -

PN966

THE COMMISSIONER: Yes, I understand. You have an equity submission. I think it's clear where your equity arguments come from. Part-time employees can be rostered to work Saturday and Sunday, yes.

PN967

MS PRESTON: And including, were there not, the original - usual agreed hours of work under the clause.

PN968

THE COMMISSIONER: Well, they would have to agree to change their hours, otherwise they would be entitled to overtime.

PN969

MS PRESTON: They could agree to vary them.

PN970

THE COMMISSIONER: Yes, that's what I said.

PN971

MS PRESTON: But overtime is in relation to hours that are different as opposed to times that are different.

PN972

THE COMMISSIONER: So you're suggesting to me that a part-time employee, where there is an agreement they work Monday, Tuesday and Wednesday, they are asked and they do work on Friday, they don't get overtime for it.

PN973

MS PRESTON: Under the agreement?

PN974

THE COMMISSIONER: Yes. We're not talking about overtime on the issue here, but, yes, I understand how part-timers can be rostered. Thank you. If there is nothing else, I'll reserve my decision. We are adjourned.

**ADJOURNED INDEFINITELY**

**[1.44 PM]**

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