TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT KOVACIC
COMMISSIONER JOHNS

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2015/6)
Educational Services Award

Melbourne

2.08 PM, THURSDAY, 21 JULY 2016

Continued from 18/07/2016

PN141

VICE PRESIDENT CATANZARITI: I know there are some new appearances, so we will just - - -

PN142

MS L GALE: Your Honour, Linda Gale, with Mr K McAlpine, for the NTEU.

PN143

VICE PRESIDENT CATANZARITI: Thank you, Ms Gale. Mr Pill, you're still here, Ms Pugwell and we have Mr Izzo.

PN144

MR L IZZO: Yes, your Honour, seeking permission to appear on behalf of the New South Wales Business Chamber and Australian Business Industrial.

PN145

VICE PRESIDENT CATANZARITI: Thank you, Mr Izzo. Permission to appear is granted as it has been granted to other legal representatives. Thank you, Ms Gale.

PN146

MS GALE: Thank you, your Honour. I should briefly pass on a message from the Community and Public Sector Union. I spoke to Mr Mark Perica of the CPSU, who asked me to convey his apologies to the Commission for not being present today. He has flown to Perth to deal with a matter involving prison officers in Western Australia. He asked us to report that the CPSU supports the NTEU's applications in this matter and opposes the employer applications. Mr Perica expects that he will address the Commission at a later time.

PN147

VICE PRESIDENT CATANZARITI: Thank you, Ms Gale.

PN148

MS GALE: We have not got a necessary order of appearance due to the fact that all parties are here with applications before you, but we have agreed that the NTEU will go first and, with the consent of the Commission, that is the approach we will take. The NTEU is pursuing a number of variations to the Higher Education - Academic - Award; the Higher Education - General Staff - Award; and the Educational Services (Post-Secondary Education) Award. These variations are both consistent with the modern awards objective and we say necessary for the provision of a fair and relevant minimum safety net of terms and conditions.

PN149

I refer to and rely upon the three variation applications lodged by the NTEU on 15 October 2015; the outline of submissions and materials lodged by the NTEU on 11 March 2016; the submissions and materials in reply lodged on 3 June 2016; and the two further submissions in reply lodged on 11 July 2016.

PN150

VICE PRESIDENT CATANZARITI: Do you want all those materials marked officially? Shall we mark them for the record?

PN151

MS GALE: I think that would be of assistance, your Honour.

PN152

VICE PRESIDENT CATANZARITI: All right. The three variation applications, we'll make that exhibit A.

EXHIBIT #A THREE VARIATION APPLICATIONS

PN153

VICE PRESIDENT CATANZARITI: I think the next one was the outline of submissions of 11 March 2016. That will be exhibit B.

EXHIBIT #B OUTLINE OF SUBMISSIONS OF 11/03/2016

PN154

VICE PRESIDENT CATANZARITI: 3 June 2016, exhibit C.

EXHIBIT #C OUTLINE OF SUBMISSIONS OF 03/06/2017

PN155

VICE PRESIDENT CATANZARITI: 11 July 2016, exhibit D.

EXHIBIT #D OUTLINE OF SUBMISSIONS OF 11/07/2016

PN156

MS GALE: Thank you, your Honour. Turning to the outline of submissions which is now exhibit B, I wish to clarify that in October last year in the award variations that we lodged, exhibit A, in relation to academic hours of work, we lodged a proposed new clause 22. I wish to make it clear that that has been replaced by the revised proposed clause 22 which is found at paragraph 9 of exhibit B.

PN157

VICE PRESIDENT CATANZARITI: Just let me make sure we have got that. That's on page 5? Is that what you're referring to?

PN158

MS GALE: Yes, your Honour.

PN159

VICE PRESIDENT CATANZARITI: Yes, I have that.

PN160

MS GALE: I will also note that in our submission on 11 July, exhibit D - in paragraph 39 of that exhibit, we flagged the possibility of a further amendment to that draft clause, although we haven't proposed any specific words in relation to that.

PN161

VICE PRESIDENT CATANZARITI: What do I take from that? By the end of the case you will be making some changes?

PN162

MS GALE: Indeed, your Honour.

PN163

VICE PRESIDENT CATANZARITI: Yes.

PN164

MS GALE: The NTEU is pursuing substantially similar variation applications with respect to the Academic Award and the Post-Secondary Award, in relation to the matters that are raised in part D of our outline of submissions, exhibit B, with the exception of that part of the matter that is the matters relating to the way in which casual academic rates are described.

PN165

All the proposed variations before you go only to the two higher education awards. That is the only part of the matter that goes to the post-secondary Award. In relation to that part, there is substantial overlap between the two - the Higher Education and Post-Secondary Awards - in relation to the casual academic rates of pay.

PN166

Part F of our submissions has been substantially narrowed between the parties during the exposure draft process. I will come back to that in more detail, but - - -

PN167

VICE PRESIDENT CATANZARITI: Is this all in one consolidated document?

PN168

MS GALE: I'm sorry, the main document is the outline of submissions on 11 March.

PN169

VICE PRESIDENT CATANZARITI: This is what I've got in front of me at the moment, yes.

PN170

MS GALE: Yes. That is organised according to parts A through to M, I think.

PN171

VICE PRESIDENT CATANZARITI: When you say you're narrowing stuff, are you changing the stuff in front of us when you're narrowing it or are we relying on what is in front of us?

PN172

MS GALE: When I am narrowing things, I am narrowing things from the state they were in on 11 March, yes.

PN173

VICE PRESIDENT CATANZARITI: So we don't have a document post-11 March which is narrowed?

PN174

MS GALE: The exposure draft reflects the narrowing on many of these things. If you can bear with me a minute, I think I will come back to these in a way which will satisfy you.

PN175

VICE PRESIDENT CATANZARITI: Thank you.

PN176

MS GALE: Noting that the university employers parties have each expressed the view that the general staff classifications do not require updating as part of the award review process, the NTEU does not press the variations set out in part G of our outline of submissions. We no longer press part G. The matters raised at part I of our submission have been resolved by consent through the exposure draft process, so the NTEU does not press for any changes relating to that part of our outline.

PN177

The NTEU's proposed award variations fall into three groups. The first group are changes to wording proposed to correct historical errors and omissions which have crept into the awards. The variations proposed in parts D, F, I and K fall into this group. That is, at part D the variations relating to the way that casual academic rates of pay are described and delineated; at part F, the words used to link general staff rates of pay to the classification levels; at part I, the new wording in the types of employment section which have now been resolved in the exposure draft process; and at part K, the content or context question.

PN178

The second group of variations are proposed to mend problems with the operation or potential operation of award provisions in the absence of general capacity to raise disputes about the operation of awards. The variations proposed in parts A, C and E fall into this group. That is part A, dealing with the better regulation of required academic hours of work; part C, providing words to protect the right of academic staff to be paid at the correct work value level; and part E, an obligation on employers to take positive steps to prevent the working of uncompensated overtime by general staff.

PN179

The third group of variations are proposed to establish new entitlements which we say should be added to the award in order to ensure a fair and relevant safety net. The variations proposed in parts B, H and J, and that flagged at M, fall into this group. That is at part B, new payments for some casual academics for work done in the course of policy familiarisation and professional and discipline currency work; at part H, extending the restrictions on inappropriate use of fixed term contracts to Bond University, which is - - -

PN180

VICE PRESIDENT CATANZARITI: I note that Bond University are coming into this matter later on in the cycle.

PN181

MS GALE: It does indeed, yes. It is an application from the Bond University Academic Staff Association and we are supporting that application. At part J, a new allowance compensating for the cost of information and communication technology, personal connections used for work; at part M, a provision for the conversion of some casual academic work. That claim is subject to the outcome of the casuals common claim. We indicated several times that the precise form and nature of such a claim would depend on the outcome in the common claim, but that due to the specific nature of academic work, we would not be seeking the same provisions as might emerge from a common claim.

PN182

In addition and standing alone is the proposed variation relating to research institutes at part L, and that is listed for later in these proceedings. The AHEIA and group of eight universities are also pursuing changes to the awards. They seek to radically expand the scope for using fixed term contracts of employment rather than providing staff with ongoing jobs. For those employed on fixed term contracts, they seek to reduce entitlements which currently arise for some staff if a contract is not renewed. They seek to remove provisions relating to payments when academic staff are declared redundant.

PN183

There is also one outstanding issue from the exposure draft process related to the substitution of public holidays, which does not arise as an application from any party. The NTEU has been expansive in our written outline of submission and subsequent reply documents. This reflects the fact that there are several distinct issues raised in the applications and that the particular characteristics of the industry necessitate a more nuanced approach in regulation than might apply in other industries.

PN184

We're aware that every industry comes to the tribunal with a special pleading, that every industry relies on its own special and unique characteristics. We can't comment on the extent to which they might be true of other industries, but we do say that it's apparent even from the current award provisions that the Commission and its predecessors have made allowance for the particular character of higher education employment in a number of important respects and that you should continue to do so.

PN185

The higher education industry is founded upon notions of institutional independence and academic freedom. The university is a community of scholars, staff and students working together in pursuit of knowledge, free from interference from the state or private interests. This ideal of the university may now be hidden under regulations, funding criteria, accreditation processes, international marketing imperatives, domestic student demands, government policy frameworks and numerous other external pressures, including industrial awards.

PN186

It is also internally compromised through a growing concern for risk management, codes of conduct and performance measurement. Nevertheless, it is this institutional concept of a university as a place where there is freedom to pursue knowledge that motivates most university employees as much as for more than salary or other traditional industrial factors.

PN187

You might expect this to be true of academic staff and by and large it is. However, it's important to understand that it's also true of very many general staff. Even in occupational groups you might not immediately associate with idealists, faculty administrative officers or computer technicians, maintenance staff, you will find people who work for universities even though they could demand higher wages in the private sector, because they value the chance to be part of that community of scholars, that pursuit of knowledge.

PN188

The NTEU makes this point both to acknowledge that there is intrinsic value to university employment which is not reflected in the wages - except perhaps in the fact they remain relatively modest for several occupational groups - and to explain why the regulation we are seeking takes a light touch approach to interference in the things that motivate university staff.

PN189

There is a contradiction in the organisation of work in higher education. It is, by and large, located in very large employers. Universities are huge enterprises, employing thousands of staff and administering massive revenue. They have large human resource departments, internal legal units and high level expertise to draw on in relation to almost any field of endeavour, but at the same time much university work is done in relative isolation. Alone in an office, in a small team in a laboratory, at home with a stack of marking, away at a conference. There are plenty of exceptions, of course, but much university work is unobserved.

PN190

There is no foreman or overseer watching the production line. Each lecture and tutorial is delivered by a single academic in a closed room. Lectures may be recorded, but no supervisor has time to watch them all and, even if they did, may not have the specialist knowledge required to really critique them.

PN191

COMMISSIONER JOHNS: Sorry, Ms Gale, to interrupt. We just might see if we can get the noise turned off in the other rooms, because it reverberates. If there is no one there, maybe we can just disconnect them. Thank you, Ms Gale.

PN192

MS GALE: Preparation, thinking, research, writing, these are usually activities best suited to solitary reflection and for very good reasons. Universities trust their staff to get done what needs to be done without close supervision. Associated with this is considerable flexibility in when and where some duties are done, particularly for academics. If an academic needs to collect their kids from school

at 3.30, but will put in three hours' reading after the kids are in bed, the university is generally not going to quibble.

PN193

So long as classes, student consultation times and university meetings are covered and all the work gets done, it suits both employers and employees to allow flexibility in how and where other duties fit into the working week. For academic work, it can be difficult to put fences around when work will be done. If someone is engaged in a long-term project of analysis and discovery, they may well have their breakthrough idea sitting on the beach during holidays, while walking the dog on the weekend or, like Archimedes, in the bath.

PN194

The work of many academics coincides with their personal enthusiasms, whether that is enthusiasm for a field of knowledge or enthusiasm for helping others master that field of knowledge, or both. So there are unusual levels of flexibility in this workforce and high levels of intrinsic reward. Neither of those things is a reason not to ensure fair and enforceable regulation of hours of work, but they are reasons to look for regulation that does not unreasonably restrict that flexibility or diminish those intrinsic rewards.

PN195

To provide a fair and relevant minimum safety net of terms and conditions when taken together with the NES, the awards must provide a set of terms and conditions that are clear and ascertainable. The awards must provide for rates of pay that are properly fixed with regard to work value, relativities and the equal remuneration principle. Conditions must be appropriate to the industry and to the circumstances in which the work is performed. Without these things, we say the award cannot provide a fair and relevant safety net.

PN196

The award safety net must also be considered in its own terms; what are fair terms and conditions for a person employed on the award and not by reference to higher prevailing wages in the agreement stream. Even before considering the evidence, we say it will be apparent from first principles that the higher education awards do not currently meet this test.

PN197

Considering the claims in relation to working hours alone, this is evident. Without any meaningful relationship between the wages and the hours worked, it is simply not possible to ascertain what the actual rate of pay is for higher education academics in order to ensure the wages are properly fixed on work value grounds, nor is it possible to properly apply equal remuneration principles.

PN198

If an employer may effectively reduce the hourly rate of pay by increasing the hours without increasing total remuneration, then there is no enforceable rate of pay and there cannot be a fair safety net. It's clear on a simple reading of the Academic Award that this is so. The current award does not meet the modern awards objective. We say that this is apparent from first principles and does not depend on the evidence about current practices in relation to hours worked.

PN199

For general staff, the award contains a traditional array of provisions in relation to hours of work, with compensation for additional hours worked either in the form of paid overtime or as time off in lieu. However, the General Staff Award suffers from one simple flaw that undermines the effectiveness of these provisions. It speaks of overtime and TOIL being available in the case of authorised work.

PN200

If the work is not authorised, but is nevertheless worked, the employee has no claim to payment for the time worked, let alone to overtime payment at penalty rates. Through this loophole, many thousands of hours of work go uncompensated across the higher education system. In fact academic and general staff are currently the greatest philanthropic donors to university funding in Australia through the in-kind donation of unpaid work.

PN201

The NTEU has no objection to university staff choosing to donate to their employers where that is a genuine and informed choice, but the current awards enable employers to extract the value of unpaid work without staff having any real choice about that transaction. We say, therefore, that on first principles without even beginning to look at the evidence, the need for amendment to the awards is clear.

PN202

In fact the evidence will demonstrate beyond any doubt that current employer practices, whether through ill intent or simply conveniently turning a blind eye - or perhaps a little of both - the current employer practices have resulted in widespread or significant imposition of long hours of work for both academic and general staff without appropriate compensation for the additional hours worked. It is manifest, we say, that there is a problem that needs fixing.

PN203

We say it's clear from the words of the awards themselves and will be even clearer when the evidence has been heard. The evidence goes both to demonstrating the gaps in current regulation and to illustrating those characteristics of the work and the industry which make the remedies proposed by the NTEU appropriate. The NTEU has proposed words which we say will fix the problems while being appropriate to the industry and promoting flexible modern work practices.

PN204

It does surprise us that the employer representatives do not like the words we have put forward. We have, from the outset, tried to engage with them about possible solutions. However, it is remarkable that they persist in the face of the evidence in denying that there are even problems to be fixed.

PN205

COMMISSIONER JOHNS: Ms Gale, how in a practical sense would the NTEU proposal to have maximum ordinary hours as an average of 38 work? How would it actually work?

PN206

MS GALE: Looking at the academic hours of work clause? If I can take the Commission to the actual words of our claim, which start at page 5 of exhibit B. The clause is long and it's long of necessity, we say, in order to properly reflect the nature of the work, but, in essence, it's simple. We're not proposing to introduce any notion of a span of hours or of ordinary days of work. We are talking about averaging hours across a year, so to start with we're acknowledging that there are great fluctuations in the work cycle in academic work and we are acknowledging that there will be times and places where that work is quite intensive.

PN207

We are proposing, in simple terms, that rather than trying to keep time sheets or Bundy clocks or in some other way track the actual time worked by academics which, due to the nature of the work, would be impractical and would result in unintended consequences which I suspect no one in the industry would be happy with, the proposal instead is to regulate the hours of work that are required by the employer by regulating the volume of work that is required by the employer.

PN208

The regulation of work volume is the way in which academic working hours have been managed in every Australian university and we say it is an appropriate tool for the Commission to use to regulate academic working hours. We are proposing a very light touch regulation, in this sense: that the university be required to make an estimate - a reasonable and fair estimate - of how much time it ought to take an academic at that classification level in that discipline area or group of discipline areas to carry out this bundle of work.

PN209

If that bundle of work can be done within an average of 38 hours a week across a year, then that is, if you like a full workload. If the university seeks to impose a higher workload than that, then it ought to incur overtime payments in relation to that higher workload. We're not proposing that the university has to track individual hours of work, we're not proposing that anyone has to keep a time sheet and we're not proposing that the university has to know exactly how long that piece of work actually took that academic to do.

PN210

We are proposing that the university has to have a system which ascertains a reasonable expectation of how long that work ought to take and if I can take you to - - -

PN211

COMMISSIONER JOHNS: Sorry, just as a practical measure, how would it work? If I'm an academic today and the award provides that the ordinary hours of work under the award are 38 per week, but I'm working 55 hours a week because I've got my teaching, my research, my admin, I'm trying to keep myself current, how would what you're proposing make my life different?

PN212

MS GALE: Okay. At the moment all those hours over 38 that you do, you do. You may in fact contractually be required to do them because of the reasonable

instructions from your employer that you generate research, do this teaching, et cetera. The difficulty in the current system is that the employer can require more and more and more work of an academic member of staff. There's no point at which the award says that's too much. There's no point at which the NES in relation to reasonable additional hours comes into play, because the work is not allocated as hours of work. It's simply - - -

PN213

VICE PRESIDENT CATANZARITI: Yes, but I'm struggling, if you read the proposed clause - I know we've still got the opening submissions and the evidence will unfold, but as with Commissioner John's question, I'm struggling to understand how the clause operationally would work as drafted, because you're not keeping records. It's not that sort of environment and it's more or less a view that the person who is currently an academic thrives in an environment where there is flexibility.

PN214

MS GALE: Yes.

PN215

VICE PRESIDENT CATANZARITI: And this clause might in fact be going against the flexibility that works both ways, but there are no records of - so what does the person do, in fact? They say, "Well, I'm forming the view that I'm overworked." How do you measure that?

PN216

MS GALE: Yes.

PN217

VICE PRESIDENT CATANZARITI: Against that is the point you just made, that there seems to be a view on your side at least that more and more is being asked of an academic.

PN218

MS GALE: Yes.

PN219

VICE PRESIDENT CATANZARITI: How do you compensate for that?

PN220

MS GALE: Well, our view is that more and more is being asked of academics and in fact what you have in terms of academic working hours is a bit of a Mary Poppins bag - more and more and more gets put in - but the perspective of what that constitutes as one workload doesn't change. What we have distinguished between in this clause is - and a key concept here is the concept of required work. This clause is intended to capture the work that the employer requires of an academic.

PN221

It doesn't limit what an academic may seek to do or choose to do on top of what is strictly required of them by their employer, but it's actually trying to limit what

the employer requires, such that there is actually the freedom and the flexibility in an academic working life for those things that academics value. If I can take you through the clause, the relevant period of account I think is fairly simple. It simply says that it's a year unless there are other particular reasons for it to be a different period of account.

PN222

Required work is made up of the specific duties and work that are allocated to an employee, such as you have these classes to teach, you must sit on this committee. It may include some research work, as well. You may be required to assist Prof Bloggs with his slime mould research. To the extent that things are not already covered by those specific and allocated duties, it's also required work if it's work that's necessary to meet performance standards expected of the employee.

PN223

This particularly comes into play in relation to research work, where the evidence will show that most universities have performance standards such as, "You will generate three publications and $500,000 worth of research income each year on average when measured over a three-year period."

PN224

VICE PRESIDENT CATANZARITI: And how do you deal with that - I'm quite familiar with that second point you just raised.

PN225

MS GALE: Yes.

PN226

VICE PRESIDENT CATANZARITI: How do you deal with that where some academics will be very efficient in their productivity research and they will take less hours to generate the research or the discipline will then generate a financial outcome, and another academic will struggle? We've had in my time at the Commission disputes over this very issue, where an academic feels they're being managed in terms of their research outcomes and they can't deliver their KPIs on research. How do you link that back to an hours clause that you propose?

PN227

MS GALE: We do that through the concept of the ordinary hours workload, which is the next subclause. If I can just read it and then come back to explain it.

PN228

An ordinary hours workload for an employee is the amount of required work such that employees at the relevant academic level and discipline could, with confidence, be expected to perform that work in a competent and professional manner within an average 38 hours a week.

PN229

Now, that means we are proposing that the employer be able to effectively average out those two academics you described. To say that the workload the employer can require of - let us assume they're both at the same classification

level. They're both senior lecturers. The workload that the university can require of those two senior lecturers should be such that they could expect a senior lecturer at the level (c) in that discipline area at a professional standard to perform it within a 38-hour week, which will mean that some people will work more than 38 hours and others may work less or more likely work less on that required work and still do other work.

PN230

It means that the employer is restricted from being able to set a workload level that will take one academic 38 hours - will take the most efficient academic 38 hours and everyone else 50 hours, knowing that they're imposing osr hours50 hours' work on everyone by, rather than a reasonable expectation, taking an extreme expectation. It also prevents them from imposing in all those staff, including the most efficient, workload requirements that require them all to work in excess of 38 hours.

PN231

VICE PRESIDENT CATANZARITI: Why isn't that achieved by identifying the teaching percentage? You can't teach more than that amount of hours so you are freed up the other way in terms of the research requirements that are pending, because it seems to me that there is more and more teaching being added which affects the mix, which is an easier way of measuring it on one view than your hours clause. I've seen that, as well, being debated, so I'm just trying to work out how - - -

PN232

MS GALE: Indeed. If you look at the workload regulations in a lot of enterprise agreements, they do take that approach of starting with teaching hours and trying to put some cap on those.

PN233

VICE PRESIDENT CATANZARITI: Well, they're just easier to measure, because teaching hours are easier to measure.

PN234

MS GALE: They are self-evidently easier to measure in one sense. There is still of course the imponderable that taking someone who is experienced and proficient to prepare a lecture may take them five hours, whereas someone who is preparing their first lecture ever may take five weeks. The sort of presumptions that are built into measurements of teaching hours are also, if you like, piecework assumptions about how much time various tasks take on average and what is a reasonable time to allow for that within those models.

PN235

VICE PRESIDENT CATANZARITI: Just following on from that, at the moment, as I understand it, in enterprise agreements a lot of universities have academic workload models and then they have committees that talk about the model, all right?

PN236

MS GALE: Yes.

PN237

VICE PRESIDENT CATANZARITI: So that every year it's continuously reviewed, right, to make sure that there is no disparity. This hours of work clause is going to sit underneath that, is it? Is that the way it's going to work?

PN238

MS GALE: Well, this of course is intended for the award safety net.

PN239

VICE PRESIDENT CATANZARITI: Yes. You say this will work in that environment because once - - -

PN240

MS GALE: Well, we say this provides a measuring stick against which those models - I mean, at the moment if an agreement comes to this tribunal with such a clause in it, in terms of the BOOT test, I don't know what the tribunal is looking at to see whether that clause needs a BOOT test. In terms of its impact on hours of work, there is nothing there.

PN241

VICE PRESIDENT CATANZARITI: So you describe this hours of work clause as your so-called safety net?

PN242

MS GALE: Yes.

PN243

DEPUTY PRESIDENT KOVACIC: Perhaps can I just ask a question, Ms Gale.

PN244

MS GALE: Yes.

PN245

DEPUTY PRESIDENT KOVACIC: How would you see the BOOT test operating on the context of this particular provision given subclause (c) of 22.1? It strikes me as being, one, arguably an area of potential disputation in the absence of anything quite specific and quite nebulous as a concept.

PN246

MS GALE: There are a number of nebulous concepts in industrial regulation. This one is actually, we think, capable of being tested. We think that a university would need to be able to establish that it had some system for ascertaining what a fair estimate of working time required by various duties was and those were realistic estimates.

PN247

It would not have to demonstrate down to the second every estimate made was correct. It would have to demonstrate that it had an appropriate system for doing that and that it had made some effort to work out how much time it is imposing overall on its workforce.

PN248

COMMISSIONER JOHNS: So does that mean that each year, at the beginning of the year, an academic would get a letter from the university that says, "Okay, your maximum ordinary hours of work are 38. Eight of them are teaching, two of them are preparation, 10 of them are research, three of them are admin, four of them are keeping current, six of them are - is that what's going to happen?

PN249

MS GALE: No.

PN250

COMMISSIONER JOHNS: I just want to know what's happening as a practical measure. How does this help as a practical measure?

PN251

MS GALE: Well, how a university would go about - we're not proposing that the award should determine and direct in that sense that a university has to place a cap on teaching hours. We're not proposing that the award should direct that a university has to break the workload down in a particular way. What we're proposing is that the university has to be able to make a realistic estimate that the workload it is - sorry, not "that", whether the workload it is requiring of people can be reasonably performed within a 38-hour week. If not, by how much does it exceed that level.

PN252

COMMISSIONER JOHNS: How would they do it?

PN253

MS GALE: Well, it's complex. They do it at the moment in a range of different ways and a range of different processes. We will provide evidence of various things that have been done at different universities to go about that exercise. It is complex, but it's not beyond the wit of man and it's certainly not beyond the wit of multi-million-dollar enterprises like universities.

PN254

The problem with not having some better regulation is that at the moment an enterprise agreement could require that all academic staff work a minimum of 50 hours a week and be paid the award rate of pay, and I suggest that that would pass the BOOT test because there is nothing in the award at the moment that provides for any additional payment if an employee is required to work more than 38 hours.

PN255

The current situation is that the door is open to extreme working hours exploitation of academic staff and we say the evidence will show that university practice has walked through that door, and gone a very long way into very long hours of work.

PN256

In any practical sense in terms of bringing agreements to this tribunal to consider the BOOT test, there is no BOOT test on hours of work. There is no standard in the award against which they can be measured. The provision saying for the

purposes of the NES, ordinary hours are 38, does not achieve that. It's not accompanied by any penalty to the employer if ordinary hours exceed 38.

PN257

VICE PRESIDENT CATANZARITI: Well, at the moment what is happening in the university sector is if there is a dispute over academic workloads, after exhausting the internal enterprise agreement, it comes up as a dispute on an individual basis where an academic asserts they are working excessive hours. That's how they do it at the moment.

PN258

MS GALE: Yes.

PN259

VICE PRESIDENT CATANZARITI: The question is, is this clause as a safety net going to achieve clarity with the proposed clause or is it going to make it more complex?

PN260

MS GALE: Well, I certainly understand the question. It's not a simple "hours will be 38 and then there will be overtime with penalty rates after 38" kind of clause. Because of the nature of the work, the reason that we have gone for a more complicated clause is to try to reflect the nature of academic work and the nature of the industry, and provide greater protections for the employers because much of this work is unobserved. Much of this work is done inside someone's head.

PN261

If we had an hours system that reflected, for example, timekeeping, then the employers would be at great risk of someone coming in and saying, "I worked 200 hours last week", and how is that evidenced and how is that tested?

PN262

DEPUTY PRESIDENT KOVACIC: That's a bit hard, given there are 167 in a week.

PN263

MS GALE: There is also the problem in regulatory terms - the great benefit for the higher education system and for the country - that academic staff tend to pursue ideas and do extra work, and go out of their way to look after students and go above and beyond what is required of them. We do not want to see a system put in place that puts the employer in breach of an award if academic staff go above and beyond what's required of them.

PN264

We say the employer should be accountable for what they require of the employee, but the current system allows the employer to require an unreasonable amount. We say there is no protection either in the NES or in the award against being required to perform an unreasonable amount of workload, which has the effect of being required to work unreasonable hours.

PN265

COMMISSIONER JOHNS: It might come out once we've seen the evidence and the like, but just speaking for myself at this point in time, I'm still struggling to understand how the proposed clause would make my life any different. If I was an academic working 55 hours a week and aggrieved by that, how this clause could alleviate that mischief.

PN266

MS GALE: If you were employed under the award and you were working 55 hours a week as a result of work required of you by the employer, then this clause would enable the question to be asked of whether the employer had a reasonable system of ascertaining how much work was allocated to you and how much work was allocated to your colleagues in such a way as to make it a reasonably achievable task. The fact that you individually had worked 55 hours might not be conclusive as to whether the answer to that was yes or no.

PN267

You might be an excessive workaholic. You might be someone who has done 40 hours of required work and another 15 hours of pursuing a line of inquiry that just occurred to you, and has nothing to do with what the employer has required of you. Presuming it's all required work, then there would be a very strong question raised by that circumstance that the measurement of an ordinary hours workload by your employer was not fair and reasonable, and that would be able to be tested.

PN268

If the ordinary hours workload was able to be demonstrated to be a fair and reasonable estimate, then someone who worked 55 hours might have no remedy if there was some explanation for why they as an individual have taken so much longer to do what could reasonably be expected to be done in 38 hours; but the more likely outcome would be to find that in fact that ordinary hours workload was not a reasonable estimate and therefore had to be ratcheted down.

PN269

COMMISSIONER JOHNS: Okay.

PN270

VICE PRESIDENT CATANZARITI: So, Ms Gale, do you propose to lead evidence in terms of problems with the operation of the provision relating to hours of work as it currently exists?

PN271

MS GALE: Yes. The clause doesn't require that an employer go down this path. It allows an employer to choose. If it wishes to, it can simply measure hours worked and pay hours worked, but it does presume that most university employers would prefer a model which allows an estimate of reasonable hours required; an ordinary hours workload. 22.4 does allow an employer to set and record hours of work, and there may be some subsets of staff for whom it decides that is appropriate, for example, but 22.5 deals with what we expect would be the more common circumstance, which is where the actual hours are not set and recorded by the employer.

PN272

If the required work exceeds an ordinary hours workload, then we say that the award should provide for an overtime loading and that overtime loading is calculated in such a way as to acknowledge that there may be some arguments at the edges about an ordinary hours workload. Although it's a 38-hour week, we're proposing that overtime payment does not kick in until the workload of an academic meets a 40 hours estimate and then it goes up in two-hour increments. That is measured against the annual workload, not on a week by week basis. It's capped at the rate of pay applicable to the top of level C and it's only paid at ordinary time up to an average of 43 hours across the year, and above that it provides for a penalty loading.

PN273

22.6 establishes that an error made in good faith by an employer in ascertaining the number of hours per week required under 22.5(a) wouldn't constitute a breach in the award, provided that there is a fair and rigorous system for ascertaining those hours. 22.7 provides - - -

PN274

VICE PRESIDENT CATANZARITI: Have you got any precedent in any other industry where a clause like 22.6 exists?

PN275

MS GALE: No.

PN276

VICE PRESIDENT CATANZARITI: Because it's very unusual having in a modern award a clause which says if you do this, it's not a breach. I'm not sure how one can actually write such a clause, but we'll have a look at it.

PN277

MS GALE: We are not proposing that the employee not be entitled to the overtime. We are proposing that if the mistake is made in good faith - - -

PN278

VICE PRESIDENT CATANZARITI: No, I understand that, but you're saying to another body, not the Fair Work Commission - - -

PN279

MS GALE: Yes.

PN280

VICE PRESIDENT CATANZARITI: - - - that this clause cannot amount to a breach.

PN281

MS GALE: If the error is made in good faith and the employer has a fair and rigorous system for ascertaining hours in place, yes. 22.7 deals with machinery provisions, advice to the employee before the period of account or within 14 days of commencement if they're a new employee; whether the workload is such that an overtime loading is payable and, if so, the basis and amount of the loading. So,

an employee has advance notice if their workload is such that it's expected it's going to take longer than 38 hours. That doesn't bind the employer to continuing to pay an overtime loading if the volume of work reduces.

PN282

22.8 is another protection for the employer. There has been an issue raised in some of the employer evidence about the practicability of the first sentence of 22.8 and we say it's simply there as a recital of a pedestrian fact. It could go, but the essence of 22.8 is to avoid doubt with respect to employees whose actual hours of work are not set by the employer:

PN283

No employer shall be held to be in breach of this clause merely by virtue of the fact that an employee is actually working any particular number of hours.

PN284

That is, if you have been given a reasonable workload and you choose to work 55 hours instead of 38 or if some external factor causes you to take 55 hours to do that work which could reasonably have been expected by the employer to be done within 38, then the employer is not in breach of the clause simply because academics will go and keep working.

PN285

Nor shall an employee be discriminated against or disadvantaged in their employment simply because they only work the required workload and don't go and do that other above and beyond work. It's a two-way street in award terms. An employee can be required to do a full workload. They shouldn't be required to do more and, if they are required to do more, they should be paid penalty rates. If they only do the work that's required of them, then they can't be disadvantaged in their employment by comparison to other workers who do more.

PN286

The clause, in terms of workload and working hours regulation, does not apply to casual employees except to say that if a casual academic employee is engaged more than 76 hours in any two-week period, then the payment for hours worked in excess of 76 should be at 150 per cent of the rate otherwise payable. It is complicated, but we say the complications are necessary to reflect the complexity of the work and to protect the employers and the employees from the current lack of regulation.

PN287

VICE PRESIDENT CATANZARITI: Just for clarification, what is the current position in terms of overtime for academics? Do academics actually get overtime in any agreement?

PN288

MS GALE: No.

PN289

VICE PRESIDENT CATANZARITI: So in fact this is really an overtime clause saying that as a concept in an industry that hasn't had overtime, by regulating

hours this way, we're moving away from annual salary, if you like, which contemplates you do your job as you're best fit. Say, "We're looking at the hours and going to awards overtime in certain circumstances."

PN290

MS GALE: In terms of the award regulation, yes, that's the case.

PN291

VICE PRESIDENT CATANZARITI: Going forward, if you're then measuring the BOOT for a current agreement in relation to this clause - - -

PN292

MS GALE: Yes.

PN293

VICE PRESIDENT CATANZARITI: And that's why I asked the question, because I haven't seen any agreement that had that time in it for academics.

PN294

MS GALE: No.

PN295

VICE PRESIDENT CATANZARITI: It would be very difficult to work out how the BOOT would then be passed on that clause.

PN296

MS GALE: Well, there is some material in the evidence and in our submissions, I believe, that goes to that comparison, but the starting point I suppose for that discussion is that the salary rates in all the agreements are in the order of 30 per cent above the award; so there is a lot of room for the rates of pay to incorporate a lot of overtime before the question of not passing the BOOT test would arise.

PN297

However, if I can take you to the table at page 19 of the NTEU outline. This table sets out the award rates of pay in the first column up to the top of level C and then considers them rather than as salaries, as hourly rates of pay when compared to C.10 and the graduate engineer's rate. You can see that the first step of level A at $23.86 comes in at 119 per cent at C10 or just about 100 per cent, 101, of the graduate engineer's rate. If that same salary is spread across a 45-hour week, the hourly rate of pay drops to $20.15. As a percentage of C10, the entry point for a level A academic is 100 per cent at C10 rather than 100 per cent of the graduate engineer and only 85 per cent of the graduate engineer.

PN298

The subsequent columns examine what happens to that rate of pay if you incorporate an assumption that overtime at 150 per cent is calculated for the hours beyond 38. If that were the case, a 47,000-dollar salary spread over 45 hours, the actual hourly rate is only $18.69 and then 150 per cent of that after 38 hours. The next column, disregarding overtime, looks at what happens to that annual salary if it's spread over a 50-hour week and you can see that then it is dropped to

90 per cent of the C10 rate and 77 per cent of the actual comparative for that level, which is the graduate engineer.

PN299

Again, if you consider how that hourly rate looks if you build in a presumption about 150 per cent overtime penalty after 38 hours, the actual hourly rate is dropping to $16.19. If someone, to use Commissioner John's example, was working 55 hours and had an entitlement to 150 per cent overtime, then the rate of pay comes out at $14.28 an hour for an academic. Now, we say that that is a problem. That is a problem that the Commission really needs to address.

PN300

If the current system with no capacity for balancing hours of work against the salary enables that level of distortion in relativities and that level of actual hourly rate of pay, then this is not a properly fixed safety net.

PN301

DEPUTY PRESIDENT KOVACIC: Can I just ask a question, Ms Gale, and it flows on from the Vice President's question before. Historically have rates of pay in the Academics Award incorporated or reflected an expectation that academics will work some additional time beyond 38, the hours per week?

PN302

MS GALE: We say there is no historical assumption either one way or the other.

PN303

DEPUTY PRESIDENT KOVACIC: Then why isn't there an overtime provision in the Academics Award?

PN304

MS GALE: There has never been any arrangement for overtime payment for academic staff.

PN305

DEPUTY PRESIDENT KOVACIC: I accept that.

PN306

MS GALE: Yes.

PN307

VICE PRESIDENT CATANZARITI: But I'm asking the question why that is the case.

PN308

MS GALE: Why that is the case. I think because all the industrial parties would have seen it as unnecessary and as introducing an expectation of measurement of hours of work. We're not seeking measurement of hours of work. We're seeking measurement of a workload and consequent likely hours of work, if that makes sense.

PN309

VICE PRESIDENT CATANZARITI: Is any party going to lead evidence about the history of the underpinning award, because it now becomes quite fundamental in this case as to what is an academic, it seems, the way you're developing your argument. Mr Pill, are the employers leading evidence of that nature?

PN310

MR PILL: It's largely uncontested, but there is some evidence from Mr Picouleau which identifies - going back to the 1987, I think, Salaries Tribunal - about that. It identifies picking up some comments. It identifies that these staff have always been paid an annual salary for their engagement as academics. There has never been any provision or indeed claim for overtime caps of hours - suggestions that they are going to be allocated particular hours.

PN311

The short answer is there is some evidence, but it's largely not contested and it's also not contested that this is, for the first time, an attempt to introduce those concepts for academic employees.

PN312

VICE PRESIDENT CATANZARITI: Thank you, Mr Pill.

PN313

MS GALE: I think the other thing we would say about that question is that historically of course if there were problems with excessive hours of work, there was the capacity to seek arbitration of disputes, which is no longer available in relation to that. Effectively, the NTEU and our members are put in a position of having to negotiate for a safety net rather than negotiating from a safety net in relation to hours of work.

PN314

DEPUTY PRESIDENT KOVACIC: How many academics are actually reliant on the award, can I ask, Ms Gale?

PN315

MS GALE: In the Australian public education system there is wall-to-wall agreement coverage for academic staff, with a very few exceptions of senior academic posts which in some places are excluded from the agreement. I suspect that very few of those are on award wages.

PN316

DEPUTY PRESIDENT KOVACIC: Does that suggest, to use your words, that there are very few difficulties in terms of academics negotiating for a safety net, as you put it?

PN317

MS GALE: Well, what we say is that the academics negotiate for a safety net through enterprise bargaining and once every three to four years every academic in the country is reliant on the award, in that they rely on it for the purposes of the BOOT test.

PN318

DEPUTY PRESIDENT KOVACIC: But wasn't your point a few moments ago that where you have got a difference or a premium in terms of agreements of about 30 per cent over the award, that one inference I could draw from the remark that you made was that from a monetary perspective, perhaps little difficulty in meeting the BOOT test under the current arrangement.

PN319

MS GALE: For most employees, your Honour, but there are categories of employees both in terms of classification level and in terms of hours worked where the BOOT test would not be met.

PN320

DEPUTY PRESIDENT KOVACIC: So have those category of employees been subject to disputation around workload?

PN321

MS GALE: There is some disputation around workload. Most of it is within the constraints of enterprise agreement clauses which are based on the absence of a safety net in relation to hours. It's difficult to answer the question - - -

PN322

VICE PRESIDENT CATANZARITI: Well, Ms Gale, speaking for myself, having done a number of the academic workload disputes involving the NTEU, the majority of those are based on an individual situation. Where they are collective, it's based how the academic workload institution actually works and tweaking the academic workload for the cohort, but do we have people that are going to lead evidence about - that the award itself is problematic as it currently stands? Is there anybody being paid the award that would be dis-affected if we didn't have the safety net as you seek?

PN323

MS GALE: We are bringing no evidence from anybody who is being paid the award.

PN324

VICE PRESIDENT CATANZARITI: Is that because there is nobody who is being paid the award in this industry?

PN325

MS GALE: There is certainly no NTEU member who is being paid the award. Just to put a few questions beyond doubt, the NTEU clause does not require anyone to record hours actually worked. It does not require employers to make estimates of how long individual academics might be expected to take to perform their required work. It does not prescribe what work an employer must or may require from academic staff, nor the balance within that work as to whether the employer must require more or less teaching, more or less research, more or less administration.

PN326

It does not limit the hours any academic can work on a weekly, annual or other basis. Therefore, much of the employer witness evidence is simply beside the point. It is opposition to a claim that's not being made.

PN327

VICE PRESIDENT CATANZARITI: Sorry, can I just - that last bit.

PN328

MS GALE: Yes.

PN329

VICE PRESIDENT CATANZARITI: You say that the evidence we're going to hear from the employer is against a claim that is not being made. Is that the point you just made?

PN330

MS GALE: Much of the employer witness evidence appears to go to the cultural unacceptability of asking people to record hours. It appears to go to the difficulty of trying to track individual hours of work and so forth. As those are not required in any way by the clause proposed by the NTEU, we would say that much of that evidence is misdirected.

PN331

If I can turn to part (b) of the NTEU claim, which goes to casual academic employment. This is a claim for the payment of casual academic staff, or some of them, for work that they do in the course of familiarising themselves with university policies and maintaining their professional and discipline currency. A large proportion of the workforce are casual academic staff. The exact numbers are uncertain, but there is a variety of evidence which will be before you looking at the way that that portion of the workforce is counted and the different composition of that group.

PN332

There are indeed some people paid a casual rate of pay who come in for a guest lecture. They are genuinely, in that sense, casual and go away again, but the people we are talking about are people who have a connection with the institution which goes beyond that very casual form of employment and relates to people who are employed for a course of teaching. We're not talking about non-teaching casual academics. There are a small number of people employed, for example, as research assistants. We're talking about people who are employed to do tutoring and lecturing, and who are employed for a series of classes.

PN333

The current rates for casual academic staff reflect a mix of piecework rates and rates for the hours worked. When I speak of piecework rates, I'm thinking, for example, of the rates for lecturing or tutoring which are based on the contact hours, so a payment for an hour of tutoring assumes one hour of contact time with the students and another two hours of preparation, student consultation and work associated with that tutorial. Similarly, for lecturing. There are a couple of rates available for lecturing, depending on whether it's a complex lecture or a more simple one.

PN334

I don't know how often your Honours have been invited to give a lecture, but you may agree with me that there is no such thing as a simple lecture. Nevertheless, there is different rates for lecturing assuming different amounts of preparation time associated with them. Basically they're paid as piecework rates and it's an example that if an academic spends 10 hours preparing a lecture, they will still be paid for one lecture.

PN335

They don't get paid the three hours associated with the lecture plus an extra seven hours' pay. They get paid for one lecture and that assumes an hour of contact and two hours of preparation. That's what I'm taking about when I say there are piecework rates already built into the casual academic rates of pay. There is also, at the end of the rates clause, a provision for other academic duties which is simply paid for the time worked.

PN336

VICE PRESIDENT CATANZARITI: Just explain. The clause we're talking about is 13.3(iii), the new clause you propose. How does that actually work?

PN337

MS GALE: No, it's all of 13.3.

PN338

VICE PRESIDENT CATANZARITI: Not just the issue that involves - "There has been no payment previously for policy familiarisation and professional and discipline currency."

PN339

MS GALE: That's correct.

PN340

VICE PRESIDENT CATANZARITI: Okay.

PN341

MS GALE: The words at 13.3 and over the page, that is an amendment to the version lodged with our application. I'm sorry, I should have highlighted that earlier. It's an updating of our claim.

PN342

VICE PRESIDENT CATANZARITI: So if I go to University X once and I go back a second time, I don't get paid the second time on this? It's only the first time for the policy?

PN343

MS GALE: Yes, unless there is more than a 12-month gap between the two. It's fairly straightforward. There will be evidence before you as to the volume of university policies. There will be evidence before you as to the contractual and policy requirements for all staff and for casual staff to comply with university policies. and to be familiar with university policies. There will be evidence before you of the practical expectations in relation to large slabs of university policy.

PN344

While an employee signs a contract saying they are familiar with all university policies, it may be reasonable to expect that they're no more familiar with, for example, the procurements policy than to know that it exists, but a member of academic staff, be they casual or not, does have a huge range of policies that they do have to know and comply with; policies to do with students, policies to do with academic matters and policies to do with their own obligations and entitlements as an employee.

PN345

VICE PRESIDENT CATANZARITI: Why was the number 6 chosen? Are we going to have evidence as to why that is the right figure, in the sense that that may end up being somebody only turns up to a university to do six one-hour lectures or six one-hour tutes.

PN346

MS GALE: Yes. The number was chosen with a view to - I'm sorry, I'm just looking for where it occurs in the clause - "A series of six or more related lectures or tutorials." That is where someone is employed as a sessional; they are employed for a session of classes. They do have a connection that goes on for a substantial volume of work. It is an arbitrary figure. We say it's a reasonably fair one.

PN347

VICE PRESIDENT CATANZARITI: What would be wrong with the clause, for example, if it said for a semester rather than a series of six? Wouldn't somebody then have got a closer connection with the university and might need to understand all the policies, et cetera?

PN348

MS GALE: Well, we say that someone who is employed for one hour is actually required - is given a contract requiring them to sign off on this. There are a wide variety of ways in which courses are structured. Someone may deliver a course over a period of a semester. They may deliver exactly as much work over the period of a week in an intensive short course, for example.

PN349

The elements that we put forward are that it has to be more than a little bit. That is, six or more. They have to be related and they have to be in a unit of study, which is, I suppose, partly implied by them being related. We think it's a fair cut-off point. There will be evidence as to the volume of work involved in simply complying with that contractual obligation and also a professional obligation to students and colleagues to do the work properly and according to policies.

PN350

The policies are different from university to university and they are revised and reviewed quite regularly by university administrations, and we have put forward a fairly minimalist proposition which is a one-off payment which compensates for, I suppose, the boot-strapping work that people need to do towards the commencement of their employment and/or as each issue arises for the first time in the course of their employment. We have also provided, of course, that where

the university does have a paid induction program, that that can be contra'd against this payment.

PN351

The second aspect of what we're pursuing under part (b) is a payment in relation to discipline and professional currency. All academic staff are required to keep up-to-date with their discipline. An academic teaching industrial law would be expected to read case reports, expert commentaries and academic articles to keep up-to-date with changes in legislation and understand the current controversies. Some academics in professional fields are also required to maintain their professional registration and in order to do that must attend a certain number of hours or days of professional development.

PN352

Academics are also expected to consider and incorporate into their teaching developments in pedagogy, including ways of making best use of technologies. These requirements are as true of casual academics as of their continuing colleagues. The main difference is that ongoing or continuing staff and fixed term staff are paid for this work as part of their ongoing duties. Casuals are not paid for this work unless and to the limited extent that it might be caught by preparation for a particular class they are delivering.

PN353

It's absurd to suggest, as some of the employer witnesses seem to, that while a casual academic is required to be up to date on appointment, they're not expected to maintain that currency in their discipline or profession during the course of their engagement. In any discipline, developments occur on a year-round basis. There are journals and conference papers to read, discoveries to understand and controversies to follow. It's a characteristic of university education that staff are expected to be able to incorporate their knowledge of such developments into their teaching work.

PN354

In a university, teaching is expected to be informed by research and academics are expected to be experts in their field. This goes well beyond the reading and revision needed to prepare the content of a particular class and it encompasses an overall knowledge of the discipline. I talked a minute ago about the piecework nature of the academic rates and within the rate of pay for a lecturer or a tutorial, there is built in an allowance for some preparation time. We say that does not address this broader issues of professional and discipline currency. That is about the work done specific to that hour of delivery, specific to preparation of that lecture or that tutorial.

PN355

The recognition that discipline and professional currency work is done in the course of university employment is even more apparent when one considers the significant number of casual academics who are what Associate Professor Anne Junor characterises as career casuals who work semester after semester. The university is their employer year in, year out and there is no other time or place in their career where they go to, to brush up their disciplinary currency in between engagements. They do it in the course of their ongoing work with universities.

PN356

The current piecework nature of the academic rates obscures the existence of this work. It's apparent from the contracts which will be before you that this work is not separately contemplated or paid for by the employers. The NTEU proposes a payment proportional to the volume of teaching work the academic is employed to do. We say that these two new payments for casual academic staff are necessary to establish a fair and relevant minimum safety net. Many academic staff, despite the relatively high hourly rate of pay, are low paid workers because their total income is built on a very small number of hours of pay. The award currently does not contemplate these areas of work, yet it is evident that the work is expected by employers and is done by casual academics. The award should provide for the work to be paid.

PN357

Part (c) of our application goes to the relationship between academic salaries and the minimum standards for academic levels which are found at the back of the Academic Award. The claim in relation to this is set out at page 43 of exhibit B. Clause 18 currently reads as set out down to the commencement of the bold text near the bottom of the page. Importantly, if I can take your Honours to the beginning of that last paragraph, the current text of the award says:

PN358

The minimum standards for academic levels will not be used as a basis for claims for reclassification by an employee.

PN359

Now, what we have in the award are rates of pay for five academic levels and minimum standards for those academic levels that describe in broad terms the difference in work value between those different academic levels, but they are not classification standards in the sense usually understood in an award because they're not available for reclassification.

PN360

The five academic levels in the award are called (a) to (e). In the industry, while local usage varies slightly, these are generally assistant lecturers; lecturers A; research assistants or research officers at level A; lecturers or research fellows at level B; senior lecturers or senior research fellows at level C; associate professors or principal research fellows at level D; and professors at level E.

PN361

Movement between those academic levels and those academic titles is by and large via internal promotion systems, although it is also possible to seek competitive appointment at a higher classification level than one has previously attained through promotion. The two ways to move through the structure are by applying for a job at that level and winning it or through academic promotion.

PN362

Therefore, what your rate of pay is under the award is contingent on what level you have been appointed or promoted to, unlike other areas of work where, for example, an employee appointed as a cleaner can enforce payment at a higher rate of pay if the work is actually not cleaning but electrical repairs. The award

prevents an academic from making a claim for reclassification if they're working at a different level than that which is contemplated by their title and rate of pay.

PN363

This, in our submission, is the correct model for academic career progression in circumstances where universities maintain robust systems for promotion based on academic merit, because that is a way of measuring work value. It is the established way in this industry of measuring work value of academic work. There is a promotion system where academic peers judge someone against the minimum standards and determine whether or not they merit promotion to a higher title and a higher classification level.

PN364

DEPUTY PRESIDENT KOVACIC: Ms Gale, do any universities not operate academic promotion systems?

PN365

MS GALE: At the moment, to our knowledge, every university does operate an academic promotion system. They are not all universally available to all academic staff. Some people are excluded from access to those systems.

PN366

DEPUTY PRESIDENT KOVACIC: Is that the lower classification in terms of the award?

PN367

MS GALE: It's generally on the basis of the duration of their current employment. If they're on a fixed term contract, they may be excluded. In some categories staff - for example, at some places people employed in research whose employment is funded by a research grant don't have access to promotion if the grant doesn't allow for it. Grants don't generally come with extra money in the pocket in case someone gets promoted.

PN368

We also say that it was a satisfactory model in a system where the parties had ready access to arbitration if problems arose. For example, if a university decided to put a freeze on all promotions for five years, we used to be able to come along to this tribunal and have that addressed. That is no longer an avenue that is available.

PN369

We say the award needs to provide a fair safety net. In the absence of any reference to academic promotion, it simply has some rates of pay and some academic standards. These govern appointment levels, but provide no basis for career progression after appointment. We value the importance of high integrity promotion systems and we don't propose that the detail of those systems should be the subject of award regulation. They are properly left to the academic profession to regulate.

PN370

However, if academic employees were not to have access to such systems, then the integrity of the award as a fair safety net for those employees requires some other method of ensuring people are paid at the appropriate classification level and the obvious method, we say, is reclassification. The presence of the proviso that we are proposing in the award will prevent any new or existing employer in the sector from choosing the path of under-classifying and therefore underpaying academic staff, but it will also encourage the retention of what we value, which is robust academic promotion systems based on academic merit.

PN371

We say that the employers should have nothing to worry about from this proposal. If they say their academic promotion systems are robust and extensive, then they would have no problem. To the extent that their academic promotion systems exclude people, then we say they have a case to answer as to why those academic staff can be said to have a fair safety net.

PN372

If I can turn to part (d) of our application, this goes to the academic rates of pay and the proposals that the NTEU has put forward fall into two groups. One is the proper representation of what we have called the PhD point. The PhD point is the historic reference point and work value level established in the academic rates when they were first introduced into the award as the minimum rate of pay payable to a person who holds a PhD or who performs full subject coordination duties.

PN373

That is fixed at step 6 of level A. You'll see that one of the higher of the tutoring, marking, et cetera, rates of pay is drawn from step 6 of level A, while the lower rate is drawn from step 2 of level A. At clause 18.1, it states:

PN374

Any level A academic required to carry out full subject coordination duties as part of his or her normal duties or who upon appointment holds or during appointment gains a relevant doctoral qualification, will be paid a salary no lower than the salary point.

PN375

That appears as an asterisked note to the full-time or the non-casual rates of pay. That is reflected through the casual rates of pay. We say that in the translation into the modern award, the simplification perhaps of the words of the rates of pay led to that detail being lost at all points, except in relation to other academic duties. We're seeking its re-insertion throughout the rates of pay to make it clear that that distinction for full subject coordination duty applies in relation to all casual rates and not simply the other academic duties rates of pay.

PN376

The other change that we're proposing is the reintroduction of words that better define what is meant by a lecture or a tutorial or repeat lecture or a repeat tutorial and the musical accompanying rates of pay, and the undergraduate clinical nurse education rates of pay. We note in the employer submissions that they think we have got some of the - in terms of translating the exact words from the old award,

that we have made a few minor transcription errors. It's unclear whether they support that change being made with those transcription errors corrected or whether they oppose the change.

PN377

We say the change adds to the clarity and sense of the award. It adds certainty as to what the different rates of pay apply to. It reintroduces some protections for employees that were lost when those definitions were removed. For example, that the repeat rate applied if the tutorial were repeated within seven days of the previous delivery and not, for example, if it were repeated in the subsequent semester. In our submission, these changes reflect the basis on which the rates were struck and should be included.

PN378

Part (e) goes to general staff working hours. The modern awards have various and differently worded clauses about the circumstances in which overtime payment is required. Some awards refer to all time worked in excess of 38 hours as being payable as overtime, while others talk about overtime being payable when work is directed. Whether these differences arise from actual differences in practice or just historical drafting accidents, is not clear to us. However, the current award safety net in clause 26.1 of the General Staff Award says that:

PN379

An employee will be paid overtime or provided with time off instead of overtime payment for all authorised work performed outside of or in excess of the ordinary or rostered hours. That is all authorised work.

PN380

What we say this means and what occurs in practice in the industry is that "authorised" applies both to the work - that is the work that's performed must be work that's authorised to be performed - and to the hours in which it is performed. That is, the fact that I'm going to do it on Sunday instead of Friday has been authorised so that the authorisation applies both to the work and to the fact that is it performed outside or in excess of the ordinary hours. An employee may be authorised to prepare a report; that if she does it on Sunday instead of during her ordinary span of hours, she is not entitled to turn around and claim that for overtime unless the fact that she did it on Sunday was authorised. We say that's commonsense.

PN381

As for academics, much work of higher education general staff is performed in a lone office or at a lone work station by an individual employee and is not directly overseen or closely supervised. Unlike, say, a call centre or a shop, the employer can't close the business at 8 pm. Many employees have the ready capacity to work late and unseen in their offices, laboratories or work stations without direct supervision. Moreover, with changes in technology, employers have facilitated employees' capacity to work from home, out of hours and on weekends.

PN382

In these circumstances, we think it's a reasonable expectation that the employer needs to have authorised the performance of that work at those times for the

employee to be entitled to additional compensation or TOIL. Whether that authorisation is given before or after the performance of the work is a matter the award can properly leave to the employer. However, for the award safety net to be fair and effective and for the award provision of that overtime to operate in a practical way, it's necessary that the employer take reasonable steps to ensure that employees are not working uncompensated overtime. Otherwise, the employer can trade on the ambiguity or uncertainty in the sense of the obligation held by some employees to obtain the benefit of additional hours without the employee receiving any benefit.

PN383

One regulatory approach might be to simply provide that all time worked will be paid for, regardless of prior to ex post facto authorisation by the employer. The question is simply were the hours worked? If so, they should be paid. If an employee is working too much overtime, then they can be instructed not to. The approach preferred by some employer witnesses appears to be that it's up to the employee to claim for the additional time they work and, if they fail to make a claim, that is their lookout.

PN384

The clause the NTEU has proposed, we say, is a reasonable compromise. In this industry the regime should be that only authorised overtime is paid and other additional time worked attracts no entitlement, nor is the employer in breach of the award if an employee works beyond her ordinary hours without authority, but the employer in exchange should make it clear that unless the work is authorised, it shouldn't be being done. We say that's a reasonable quid pro quo.

PN385

If I can take you to the actual words of the claim that we're seeking. They're found at page 58 of exhibit B. A new subclause:

PN386

The employer must take reasonable steps to ensure that employees are not performing work in excess of the ordinary hours of work or outside the ordinary spread of hours as specified in clauses 21 and 27, except where such work has been authorised and compensated in accordance with clauses 23, 24 or 26.

PN387

That is overtime and TOIL. At 23.3:

PN388

An employee at level 6 or above who responds to or uses email or phone messages beyond or outside the ordinary hours of work for brief periods and only occasionally to meet the needs of the employer, will not be deemed to be performing work beyond or outside the ordinary hours of work provided that the sending or responding to such emails at that time is not part of their assigned duties, contract or conditions of employment, has not been directed and is in all other senses voluntary.

PN389

That is, we're saying an employer should not be held to pay an overtime payment because I happen to check my email on my phone at dinner and respond quickly to something that I see has come in there or, even if I'm asked to do so, unless it's actually a term of my conditions of employment that I will be required to do so. We say that's fairly simple and straightforward. It is not an onerous obligation on the employer to take reasonable steps. It doesn't require them to take all reasonable steps.

PN390

It simply requires them to take reasonable steps and in an industry where there will be ample evidence before you that there is a culture of workload pressures and cultural expectations that people will put in extra hours and not make claims, we say that it is an appropriate measure to impose a simple obligation on the employer to tell people to go home or to claim overtime; to tell people not to do additional work if that additional work is not being properly compensated.

PN391

This is not an attempt to stop overtime or additional hours being worked. Some of the employer evidence goes to the necessity of people working overtime and we concede that. There are many times and places in university employment where it's absolutely appropriate for general staff to work long hours. We don't see any time or place where it's appropriate for that to occur without that overtime being authorised or TOIL being authorised.

PN392

VICE PRESIDENT CATANZARITI: That might be a convenient time for today, Ms Gale. Will we be given tomorrow the scheduled witnesses for next week?

PN393

MS GALE: We should be able to provide that tomorrow, yes.

PN394

VICE PRESIDENT CATANZARITI: Thank you. The Commission will adjourn until 10 o'clock tomorrow.

ADJOURNED UNTIL FRIDAY, 22 JULY 2016 [3.55 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs