TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

C2023/2135

s.739 - Application to deal with a dispute

Australian Workers' Union, The
and
Vinidex Pty Limited
(C2023/2135)

Vinidex Pty Limited Smithfield Site Enterprise Agreement 2021

Sydney

10.00 AM, THURSDAY, 3 AUGUST 2023

Continued from 03/08/2023

PN1393

THE DEPUTY PRESIDENT: Good morning.

PN1394

MS DOUMIT: Good morning.

PN1395

THE DEPUTY PRESIDENT: Ms Doumit?

PN1396

MS DOUMIT: Yes, thank you, Deputy President. Deputy President, my submissions are set out in a particular way in that I refer to paragraphs from the Berri decision and then state how they are analogous to the current proceedings. So perhaps if I could ask if you have a copy of the Berri decision?

PN1397

THE DEPUTY PRESIDENT: Yes, I do.

PN1398

MS DOUMIT: I suspect I will be referring you to that quite a bit. Thank you. And the reason why I say that this case is analogous to the case in Berri is for two reasons, predominantly, but other reasons that will become apparent as I go through the submissions. And, firstly, this decision related to the application of a laundry allowance which appeared in an enterprise agreement and the respondent in those proceedings specifically raised that there was an agreement reached 16 years prior to the formation of the enterprise agreement about those allowances not applying. And that was in the course of enterprise bargaining.

PN1399

So if I could start by taking you, Deputy President to paragraph 44 of Berri are '...all words in an enterprise agreement must prima facie be given some meaning and effect.'

PN1400

And to that end I refer to the clause in the enterprise agreement. Sorry, did you find that sentence?

PN1401

THE DEPUTY PRESIDENT: Yes.

PN1402

MS DOUMIT: Sorry, it's just after the comma in the first sentence. And the reason why I say that's relevant to this matter is there are certain terms in the clause which we seek to be interpreted in these proceedings which would have no effect if the respondent's case were to be accepted.

PN1403

So, in particular, the clause can be found at page 65 of the court book but the particular words that I say would have no effect are, firstly, in respect of the standard hours. The hours themselves. So if you look at the calculation of those hours. The standard hours equate to 87 hours and eight minutes.

PN1404

Then, in so far as the RDO – I am looking at clause A3.4.1.

PN1405

THE DEPUTY PRESIDENT: 4.1 – yes.

PN1406

MS DOUMIT: Yes, thank you. So where the clause, in the last sentence of subparagraph (a) says or second last sentence. Firstly, there is no rostered day off in this agreement. And then to offset this the RDO entitlement of two hours per week is paid at time and a half with double time for the last hour. But what I say is if the respondent's case is to be accepted that last sentence, to offset this, the RDO entitlement of two hours per week is paid at time and a half with double time for the last hour is of no effect.

PN1407

Essentially, the sentence shouldn't have been included if it's going to have no weight or no application. The second sentence which I say must be given effect is subparagraph (b). So on Monday or other days when overtime is worked there'll be no afternoon crib break. As a result work will cease at 6.04 pm but the pay period will cease at 6.20.

PN1408

Now, in actual fact, if the respondent's case is to be accepted the pay will cease at 2.30 on the Monday because they're only paid eight hours on the Monday, on the respondent's case. So those words would have no effect if they were only paid 76 hours per fortnight, as opposed to the hours they actually work, which is the standard hours as set out in that clause.

PN1409

The next paragraph that I wish to take you to, Deputy President, is paragraph 47 of Berri. So that paragraph says that –

PN1410

We acknowledge that the fact that the instrument being construed is an enterprise agreement is itself an important contextual consideration but it is also relevant that the instrument being interpreted in these proceedings is an enterprise agreement made pursuant to the Fair Work Act.

PN1411

And there is a quote from Justice White, and I wish to read that quote.

PN1412

The manner of making such agreements is subject to detailed prescription and their operation is contingent upon approval by the Fair Work Commission, the obtaining of which is itself a matter of detailed prescription. In my opinion, it is natural to suppose that parties engaging in this detailed process intend that the result should be a binding and enforceable agreement. To my mind, that is an important matter of context when approaching the construction of [the disputed clause in the agreement].

PN1413

So to this end, Deputy President, I draw your attention to the Form F17 which was filed in support of the 2021 agreement. That was found at page 1279 of the court book. I don't intend to take you to it unless you'd like me to.

PN1414

THE DEPUTY PRESIDENT: No, that's fine.

PN1415

MS DOUMIT: Yes. Essentially, that was at table 5 in support of the enterprise agreement. It expressly stated that the wages per hour with no penalties added were the same wages that appear in the enterprise agreement. This is the representation that was made to the Commission and understood by the employees. Essentially, that the hourly rates and enterprise agreement relate to each standard hour of work that they complete.

PN1416

That statement that I read out in Berri, which is the quote from Justice White, also applies in so far as this enterprise agreement was voted on by employees at the time at which it was made. And what I say is what they relied on during the time of that vote was the express words of the enterprise agreement. The respondent has not produced any documentation in relation to an explanation of that enterprise agreement which might have been relevant in these proceedings to demonstrate that it would apply in any way other than the words that are expressly listed there.

PN1417

The next paragraph of Berri, Deputy President, that I wish to take you to is paragraph 61. So if you were minded to find that the clause is ambiguous which, of course, is not my primary submission, but if you were so minded paragraph 61 becomes relevant. And what it says is –

PN1418

'Having identified ambiguity it is permissible to consider the evidence of surrounding circumstances as an aid to the task of interpreting the agreement.'

PN1419

And there is a reference there to the decision of Justice Nathan.

PN1420

... evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract where it has a plain meaning.

PN1421

And so, as I said, I only rely on that for the purposes of establishing that my primary submission is that the words are not ambiguous but to the extent that you disagree with me on that point Deputy President, then Berri further elucidates the steps to be undertaken in terms of interpretation.

PN1422

Paragraph 65 of Berri next.

PN1423

THE DEPUTY PRESIDENT: Yes.

PN1424

MS DOUMIT: So –

PN1425

Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties intention or purpose was.

PN1426

And the decision of Justice Madgwick is quoted in Kucks v CSR Limited.

PN1427

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.

PN1428

So, for example, ordinary or understood words are in general to be accorded their ordinary or usual meaning. So that, we say, is the first step in determining what the meaning is if there is ambiguity.

PN1429

The respondent in these proceedings presents a case that seeks that the terms of the enterprise agreement be derived from facts and circumstances which are anterior to the enterprise agreement, in my submission, and that are not agreed.

PN1430

So the respondent goes so far as to rely on conversations with the applicant's witnesses some 30 years after this agreement was supposedly reached in support of its case. And in essence the respondent's case points to, firstly, the historical manner in which employees have been paid in order to establish that there was an agreement reached with these employees 30 years ago.

PN1431

And, secondly, relies on calculations which purport to demonstrate that at the time the agreement was entered into there was a substantial increase in the wages of these employees.

PN1432

So, in respect of the first point which is essentially the historical manner in which these employees have been paid, we say that is not a relevant consideration. So, in Berri, the non-payment of a laundry allowance over 16 years was not

persuasive evidence despite the fact that Berri sought to rely on that historical circumstance.

PN1433

And in respect of the second point, that is the wages of these employees increased at the time when a supposed agreement was entered into in 1993. We make two observations. The first is that the respondent's case is at its very highest that this might indicate that there was some agreement reached in respect of the payment of wages and the way in which that would occur. Obviously we deny that. But it cannot be relied upon to explain the words of an agreement in 2021.

PN1434

If I could, in support of that, I wish to take you to paragraph 84.

PN1435

THE DEPUTY PRESIDENT: Yes.

PN1436

MS DOUMIT: So –

PN1437

The second flaw in the argument put is that – at its highest – it may explain the contextual background to the 1999 agreement and assist in construction of that agreement but it is of very little assistance in ascertaining the proper construction of the 2014 agreement. The parties to the 1999 agreement and 2014 agreement are quite different.

PN1438

I say a number of things in respect of that paragraph. So, in particular, the Full Bench in that paragraph, I should say, is considering the value of evidence of the parties as to their intentions at a historical point in time that being 16 years prior to the formation of the enterprise agreement.

PN1439

And, similarly, Deputy President in this case we say that the parties to any 1993 agreement which was reached between employees at that time and managers at that time or the respondent at that time are not - - -

PN1440

THE DEPUTY PRESIDENT: Or the NUW.

PN1441

MS DOUMIT: Or sorry – yes. Well, we were a party to the agreement but we weren't a party representing these members. Yes. We didn't have members that were fabricators at the time.

PN1442

THE DEPUTY PRESIDENT: But the NUW did.

PN1443

MS DOUMIT: But the NUW did. Yes.

PN1444

THE DEPUTY PRESIDENT: Yes.

PN1445

MS DOUMIT: But what I say is the parties to that agreement are not the same parties to the 2021 agreement and that's clear on a few grounds. I guess, most obviously, the fact that the respondent hasn't produced any evidence from managers who were present at the time when this agreement was reached. And also that, even on our own case, many of the employees – well, at least one of the employees that was a witness, was not around in 1993. But I suspect there would be others in the fabrication department who were not around in 1993 who this agreement applies to.

PN1446

So I just – I guess – highlight that Mr Driver is that employee that we say was not a fabrication department employee at the time.

PN1447

The second matter that I wish to raise in respect of reliance by the respondent on Mr Burton's calculations. So my primary submission in respect of those calculations is that they're irrelevant in so far as they attempt to relate to an agreement reached historically, which can have no effect in interpreting a current enterprise agreement.

PN1448

But I also say, as a secondary point, that those calculations are based on Exhibit R2 and R3, and they're highly speculatory in so far as they require assumptions to be made about documents by somebody who was not present at the time those documents were produced.

PN1449

This was demonstrated by Mr Burton's own answers in cross-examination. Mr Burton was not willing to make inferences in relation to the statement that appears in documents R3 which says eight hours O/T at 1.5. And when I questioned him about that Mr Burton said that he didn't write it so he couldn't comment as to whether that related to overtime. I am paraphrasing but, essentially, that was his answer. If not, the transcript will correct me, but that is the force of it in my submission.

PN1450

Contradictorally, he was willing to make assumptions in relation to the hourly rate and how that applied and how many hours that applied to. So to that effect I say those figures cannot be relied upon in so far as they speculate as to what particular numbers on a particular document not produced and not created by the person who is giving that evidence. So, sorry – I should say so far as they were relied upon by that person.

PN1451

Further, when I asked Mr Burton whether there were any time sheets that corresponded to Exhibit R3, he said he could not locate any and this puts further doubt in relation to what the figures actually relate to. So we don't know, for

example, how many hours the fabricators in that table worked in that particular week or fortnight. And so the assumptions that Mr Burton has made, may or may not be correct, but I say they should not be persuasive in so far as they are speculatory.

PN1452

I understand that the respondent seeks to rely on documents related to the manner in which bargaining progressed. Can I say that because there are number of historical enterprise agreements included in the evidence. And the respondent appears to rely on those historical enterprise agreements in order to establish that this issue was not raised in bargaining and could have been rectified in that forum.

PN1453

So to that end, I refer you to paragraph 88 of Berri. And I am just trying to find the relevant part so that I don't read the entire thing. So if I could just have a moment? So predominantly just in the first extract from Australian International Air Pilots Association v Qantas Airways Limited, the second sentence of that extract which says –

PN1454

The involvement of so many individuals in the formation of the agreement reemphasises the importance of approaching the construction of that document.

PN1455

That document being an enterprise agreement.

PN1456

In accordance with the principle of objectivity. It is important in doing so to be cautious and bear firmly in mind the fact that the agreement was formed by a diversity of persons who had sought to protect their differing interests by various formulations of work in it. Those disparate interests cannot be determinative of the proper construction to be given to the words chosen.

PN1457

And further, to that in the second extract, which is from the judgment of Justice Gray in Health Services Union v Ballarat Health Services, that second sentence –

PN1458

Whatever were the terms of such an agreement, and whatever was their meaning, those terms were imposed upon the employees who became bound by the award. In the current era, most industrial instruments are required to be put to a vote of the employees whose work will be covered by them, before they can be certified or approved so as to become enforceable by statute. The union and the employer who negotiated the terms might have had a common understanding of the meaning of them but that understanding might not have been shared by all or some of the employees who voted for the operation of the agreement. They may have been entirely ignorant of the common understanding. In those circumstances the occasions on which it can be said that a party to an agreement who entered into it on a common understanding

should not be allowed to resile from that understanding will be rarer than they have been in the past.

PN1459

And if I could also take you to paragraph 95 of Berri.

PN1460

THE DEPUTY PRESIDENT: Yes.

PN1461

MS DOUMIT: 'In circumstances where the parties to the 1999 and 2014 agreements are quite different and where the laundry allowance and its payment or non-payment was not discussed during the negotiation of the 2014 agreement. It is difficult to see how an earlier agreement to forego the laundry allowance, as part of the 1999 agreement, assuming there was such an agreement can reliably inform the interpretation of the 2014 agreement.'

PN1462

And this is potentially – possibly, I think – my highest submission in respect of – if you are against me on the ambiguity point. What I say is the applicability of the 1993 agreement.

PN1463

So, I make the same submission that essentially appears in that paragraph here. The evidence of the respondent in respect of enterprise bargaining can be found at paragraphs 26 to 45 of the witness statement of Mr O'Keefe and it can also be found at paragraphs 33 to 68 of the witness statement of Mr Burton.

PN1464

Neither Mr O'Keefe, nor Mr Burton provide any evidence to suggest the manner in which fabricators would be paid was a subject of enterprise bargaining. So they don't say that it ever came up in enterprise bargaining. And, in my submission, the Commission cannot rely on the terms of the 1993 agreement that were advanced by the respondent.

PN1465

And paragraph 99 of the Berri decision goes further in respect of that 1999 agreement. It says –

PN1466

First, the Deputy President erroneously relies on Mr Burton's evidence.

PN1467

I should say somewhat serendipitously that Mr Burton also appears in this judgment. But obviously not the same Mr Burton.

PN1468

But –

PN1469

First, the Deputy President erroneously relies on Mr Burton's evidence that the agreement reached in 1999 and, in particular, relies on Mr Burton's subjective opinion as to what was agreed.

PN1470

And what we say here is our Mr Burton also gave a subjective opinion as to the agreement that was reached in 1993.

PN1471

Such evidence does not go to establishing the objective framework of surrounding circumstances. Further, Mr Burton's evidence relates to what was agreed in the 1999 agreement and, as we have mentioned, the parties to the 1999 agreement and the 2014 agreement are quite different.

PN1472

And, of course, I make that same submission as I have already done that the 1993 agreement, in this circumstance, is very different to the 2021 agreement and the parties are different.

PN1473

THE DEPUTY PRESIDENT: What about the annexures dealing with each particular grouping? Doesn't that stand in contrast to Berri, in that you've got each discrete grouping?

PN1474

MS DOUMIT: So in what way? In what way, Deputy President, do you say that they are in contrast – sorry - - -

PN1475

THE DEPUTY PRESIDENT: It's just we're not considering an agreement where there was a broad scope of people voting on particular sections. One would imagine only the fabricators were turning their attention to what was in their particular schedule.

PN1476

MS DOUMIT: Yes. So what I say in respect of that is, firstly, the primary submission is that schedule applies in the way that it's in support of our case which is, essentially, there's an hourly rate in the enterprise agreement and there are standard working hours. And that hourly rate should apply to each of those standard working hours.

PN1477

So there is nothing in the enterprise agreement that would lend itself to the interpretation that the respondent advances, which is that hourly rate. It's only payable on 76 hours. So, in so far as, they could have looked at the discrete table related to their employment, I say it's supportive of our case in that the enterprise agreement says something different to what the respondent advances the 1993 agreement says.

PN1478

THE DEPUTY PRESIDENT: Yes.

PN1479

MS DOUMIT: Thank you. I submit that the evidence of both Mr Burton and Mr O'Keefe do not tend towards establishing the objective framework of surrounding circumstances and I say that for a few reasons. The first is that they were not parties to the 1993 agreement. The second is that no objective evidence of the terms of the 1993 agreement have been provided on the respondent's case.

PN1480

And I say that no documents which record any agreement have been provided. So to the extent that they say there was a 1993 agreement there have been no documents which produced that agreement that have been provided on the respondent's case. The respondent's evidence in respect of the agreement relies on reverse engineering documents in respect of pay. And I have already highlighted the difficulties with this as it attempts to construe what was agreed based on post-agreement conduct.

PN1481

In respect of post-agreement conduct Berri also helpfully provides aid and I take you to paragraph 106 and 107 and 108 of the decision. So 106 says –

PN1482

In the industrial context it has been accepted that in some circumstances subsequent conduct may be relevant to the interpretation of an industrial instrument. But, consistent with the view expressed by Justice Santow in Spunwill the post-contractual conduct must be such as to found a common understanding - a settled interpretation accepted by the parties.

PN1483

My submission, in respect of that paragraph, is that there is no settled interpretation accepted by the parties in this matter.

PN1484

We note that in Spunwill Justice Santow observed that in deciding on the weight to be given to extrinsic evidence of post-contractual conduct as part of the surrounding circumstances it is useful to refer to the following passage from Appeal Judge Lambert.

PN1485

'In the case of evidence of subsequent conduct the evidence is likely to be most cogent where the parties to the agreement are individuals. The acts considered are the acts of both parties. The acts can relate only to the agreement. The acts are intentional and the acts are consistent only with one of the alternative interpretations. Where the parties to the agreement are corporations and the acts are the act of employees of the corporations then evidence of subsequent conduct is much less likely to carry weight. In no case is it necessary that weight be given to the evidence of subsequent conduct.'

PN1486

And then paragraph 108 says in these circumstances, obviously this is an agreement between the corporation and the employee or employees and I say in our circumstances that that is the same. This is a company versus its employees,

but also that the post conduct that's relied upon by the respondent to the extent that they say for 30 years these employees did nothing is of no moment. And that is supported by that extract.

PN1487

That is predominantly the sections of Berri that I wish to rely upon. And just briefly, I wish to say a few other things about the respondent's case.

PN1488

So, the respondent attempts to argue that the rates of pay for fabricators are generally higher than other employees with the corresponding rate in other departments. And they use this evidence, I believe, to submit that these employees are already well paid and in the event that this judgment finds that they should be paid in accordance with our argument they will be paid even better.

PN1489

THE DEPUTY PRESIDENT: I think it's more relativity between trades.

PN1490

MS DOUMIT: Yes, and relativities between trades - - -

PN1491

THE DEPUTY PRESIDENT: And the like.

PN1492

MS DOUMIT: - - - as well. So that to end I draw your attention to page 1279 of the court book. So I took Mr Burton to this page because it is produced in his affidavit and this is the extract again from the F17 produced in support of the enterprise agreement.

PN1493

THE DEPUTY PRESIDENT: Yes.

PN1494

MS DOUMIT: And Mr Burton conceded, and rightfully so, in my submission, that the first – the second column relates to the award classification corresponding to the different employees and departments at Vinidex. So that third column is the enterprise agreement classifications which relate to the award classifications.

PN1495

Now what I say in respect of this – is provide a very neat analysis of the different classifications and the comparison of rates between fabricators and other employees of that department.

PN1496

So, if you have a look at that second row, you can see the fabrication rate is not the highest rate for that classification. And if you go down to every other row you will see that it is comparable, and definitely not an outlier as a rate, when compared to other rates for other departments at Vinidex.

PN1497

But I also make another submission in respect of those rates. So the rates that apply to fabricators – and when the fabricators in their cross-examination were taken to statements they'd made about the rate being loaded, and they conceded that it was, that concession goes to the fact that that standard hourly rate applies for all their standard hours. Right? That is our case.

PN1498

And what they were conceding, in my submission, is that they don't get additional overtime on that rate for the standard hours that they work, which are in effect, overtime hours. And that is because they're in excess of 38 per week.

PN1499

So they work a 42-hour week – call it 42 hours. And they don't get an overtime loading. But at the very least they get that rate for the full hours that they work. And so to the extent that that comparison is made, it doesn't factor in as well that there is already an overtime loading added into that rate for the standard hours.

PN1500

THE DEPUTY PRESIDENT: You note that the employees consented it is loaded?

PN1501

MS DOUMIT: Yes.

PN1502

THE DEPUTY PRESIDENT: You, yourself, describe it as loaded.

PN1503

MS DOUMIT: Yes.

PN1504

THE DEPUTY PRESIDENT: Which is another way of describing it as blended. Am I correct in that?

PN1505

MS DOUMIT: To be honest, I don't know. The extent that I say that it is loaded, what I say is that that applies, that hourly rate.

PN1506

THE DEPUTY PRESIDENT: No. No, just bear with me.

PN1507

MS DOUMIT: I'm sorry.

PN1508

THE DEPUTY PRESIDENT: Am I correct in understanding a blended rate is a loaded rate?

PN1509

MS DOUMIT: I can't comment on that. I can say that the - - -

PN1510

THE DEPUTY PRESIDENT: Well, I only ask because the question upon which the parties agreed for me to determine referred to a blended rate.

PN1511

MS DOUMIT: Okay.

PN1512

THE DEPUTY PRESIDENT: And which I had understood to be loaded rate and I'm just trying to confirm that with you.

PN1513

MS DOUMIT: Yes. Okay.

PN1514

THE DEPUTY PRESIDENT: So you agree with that proposition?

PN1515

MS DOUMIT: I agree with that. Yes.

PN1516

THE DEPUTY PRESIDENT: And being described as a loaded rate it must, therefore, have some loading in it.

PN1517

MS DOUMIT: Correct.

PN1518

THE DEPUTY PRESIDENT: If your interpretation is correct, what's loaded?

PN1519

MS DOUMIT: Yes. So what I say is loaded is the overtime allowance. So, in other words, what I say is the enterprise agreement provides that hours worked in excess of 38 for day shift workers attracts - or in excess of 40 - attracts an overtime loading of time and a half for the first hour. I'm sorry, time and a half for the first three hours and double time thereafter. So that loading has been factored into this rate, and the reason why I say that is because the agreement says, 'These are your standard working hours', and they're in excess of 38.

PN1520

So their standard working hours are - just by way of illustration - 42 hours per week. So what they are entitled to be paid for those standard working hours is their standard hourly rate. So rather than receiving overtime, an overtime loading on those additional hours, like every other day shift employee at Vinidex receives, they only receive their standard hourly rate for - - -

PN1521

THE DEPUTY PRESIDENT: Which is said to be loaded.

PN1522

MS DOUMIT: Which is loaded insofar as it includes the overtime loading component. So the reason why, again, the reason why I say that is because the

enterprise agreement says these are our standard working hours and what would one say should be paid for those standard working hours? Well, it must the standard hourly rate which is the rate in the appendix.

PN1523

THE DEPUTY PRESIDENT: Please continue.

PN1524

MS DOUMIT: Yes. Thank you, Deputy President. The respondent's case also relies on a 2002-2003 working hours review as somehow being indicative of the parties understanding the way in which they would be paid or the terms of the 1993 agreement. My submission is that is not the case. Firstly, this review occurred after 1993 so it was conduct by a third party who was not a party to the 1993 agreement, and as I have already highlighted in Berri, it is not persuasive insofar as it is post agreement conduct.

PN1525

Secondly, the purpose of the review was to look at and possibly change roster arrangements in the fabrication department. The review was not conducted in order to ascertain the terms of the 1993 agreement or to explain the terms of the 1993 agreement.

PN1526

Thirdly, each of the applicant's witnesses that were around at the time that the review was conducted do not remember the review. Mr Huemmer and Mr O'Keefe both admitted that participation in the review was voluntary and that questionnaires were submitted anonymously. Mr Huemmer also confirmed that he did not personally remember Mr Lowe, Mr Curmi or Mr Micallef participating.

PN1527

Fourthly, one of the applicant's witnesses, Mr Driver, was not employed at the time of the review. Nothing can be said in relation to his understanding of the 1993 agreement as a result of the review. This also supports my submission that the parties to the 1993 agreement are not the same parties as those to the 2021 agreement.

PN1528

The respondent's evidence also attempts to assert that fabricators will receive more than every other employee. They are paid the hourly rate for all of their standard hours of work. That is not the case. In order to truly compare rates of pay a similar analysis would need to - I'm sorry. I refer to - I'm sorry - in this regard page 1328 of the court book.

PN1529

You will recall, Deputy President, I did take Mr Burton to that page and I asked about the comparison of rates and the way in which it was completed, and Mr Burton conceded that he completed those calculations on the basis that every employee, other than the fabrication department employees, worked 80 hours per fortnight and that the fabricators worked the 88. I put to him that if he had worked out that every other department worked the same number of hours as

fabricators those rates would be higher and he agreed that it would be. So I say that that analysis is not to be relied upon on that basis.

PN1530

Then I would just like to briefly address the evidence of the respective witnesses. In my submission, the applicant's witnesses made reasonable concessions.

PN1531

So just to reiterate the loaded rate point. I say that in respect of overtime worked the department, the fabrication department employees, should have received - so I should say in respect of overtime worked as part of their standard hours, standard hours arrangement, the fabrication department employees should have received their standard hourly rate.

PN1532

So in respect of all of their hours, they should have received that standard hourly rate; that is, they are not entitled to an additional overtime allowance on top of their standard hourly rate for the standard overtime. I say that the concessions made by the witnesses in the witness stand relate to that interpretation and I rely on the fact that in re-examination I put to witnesses that had conceded that it was the loaded rate, that they still expected to receive that loaded rate for 88 hours or for their entire hours worked and they agreed with that, or they stated that was their understanding.

PN1533

Now, in respect of Mr Driver, I make a further submission; that is, that he was not a party to the 1993 agreement. He was not employed at the time that the agreement was entered into, nor was he employed at the time of the 2002-2003 review.

PN1534

To the extent that the respondent asserts that Mr Driver knew or ought to have known that he would only receive his hourly rate in respect of some of his standard hours, the respondent's documents do not point to any evidence in that regard. Nothing on the respondent's case sets out any plausible basis for that understanding.

PN1535

To the extent that the applicant's witnesses took time to respond to questions or appeared to have difficulty understanding questions, in my submission, Deputy President, that is simply reflective of the foreign environment in which they find themselves.

PN1536

In my submission, this courtroom is very different to the fabrication department where they ordinarily work. They don't have tertiary qualifications, even on the respondent's own evidence, and, therefore, they would have found the process overwhelming. So to the extent that they took their time or asked for questions to be repeated, I would submit that the inference that should be drawn is that they were nervous rather than that they were concealing anything.

PN1537

In respect to the respondent's witnesses, I make a few observations. So particularly in respect of Mr Burton, it's my submission that Mr Burton, at various occasions, was not willing to make, in my submission, reasonable concessions; in particular, I refer to exhibit R3, and Mr Burton's unwillingness to accept that the line 'about eight hours overtime' referred to overtime worked, and I have made that submission earlier. I have given that reference earlier.

PN1538

Mr Huemmer and Mr O'Keefe did make some concessions, particularly in respect of the voluntary nature of participation in the review. In my submission, however, in light of the findings in Berri, this review is of no moment. It is post-1993 conduct. It does not provide any force regarding an agreed position as to what would apply post-1993. Even if it did, the parties are not the same parties to the 2021 agreement.

PN1539

Just lastly, Deputy President, I wish to say that the respondent's case, in my understanding, is that the standard hourly rate in the enterprise agreement applies for 76 hours of work. That is their case - and Mr Rauf will correct me if I'm wrong - but my submission is there is nothing in the enterprise agreement which supports that interpretation, and so to the extent that I rely on Berri, I say there is nothing that you could consider that would reasonably lead you to conclude that what they should be paid is the standard hourly rate for 76 hours, as opposed to the standard hourly rate and the standard hours they actually work. Those are my submissions, unless there are any questions.

PN1540

THE DEPUTY PRESIDENT: All right. Thank you.

PN1541

MS DOUMIT: Thank you, Deputy President.

PN1542

THE DEPUTY PRESIDENT: Just at the outset, Mr Rauf - - -

PN1543

MR RAUF: I'm sorry, Deputy President.

PN1544

THE DEPUTY PRESIDENT: Just at the outset, I didn't note anywhere in your submissions whether you assert ambiguity or not. I note in the form F3 it is said to be ambiguous. What's the respondent's - just as a foundational position.

PN1545

MR RAUF: Of course.

PN1546

THE DEPUTY PRESIDENT: I need to know.

PN1547

MR RAUF: Of course. Well, in short, we say that there is an ambiguity and, Deputy President, you won't find words in the agreement to support, fortunately, the construction, if you like, in a literal sense, urged by other parties, even the union. The unions say all hours, but there's a gap there, and the union urges you to infer that the relevant rates apply to all standard hours - but that's not set anywhere - but we say that there is an ambiguity, but then you look at the context and the industrial circumstances and the history. That's how you arrive at the answer.

PN1548

Deputy President, there's no doubt that the focus in this matter hinges on the proper construction of clause A3.4.1, Hours of Work, in Appendix 3 of the agreement as it applies to fabricators employed by Vinidex, and we submit that on a proper interpretation the blended or loaded rate which is paid to employees in the fabrication department is in full satisfaction of all of the hours they work as a part of the standard hours under that clause. It accounts for four hours rostered overtime and also the rostered day off, so that is the two hours additional which takes it from 38 to 40.

PN1549

All of this arose no doubt in 1993 – and my friend kept going back to that – but there's more in between that I would like to address, and in between has been successively applied and picked up in instruments to which the AWU is a party or it was not involved and the concession given that it had nothing to do with fabricators in those instruments - that was a different union - but even when one looks at the construction urged by the AWU, it is, in my submission, shifting and inherently unclear.

PN1550

Can I indicate that by referring to the documents filed by the union, firstly at court book 7, which is the application, and there - so as I said, court book 7 at point 6 on that page:

PN1551

> *The applicant is of the view that the respondent is to pay fabrication workers two hours per week at time and a half and double time; therefore, the respondent should audit its records to back pay employees who have not been paid accordingly.*

PN1552

That appears to refer to RDO, but when you travel to page 11 it's slightly different. That's the email couched as, I accept, a resolution, but the second last dot point:

PN1553

> *Pay four hours of overtime, overtime for hours worked between 2.30 and 6.05.*

PN1554

or alternatively, stop working at 2.30. That's paraphrased, but that seems to focus then on the overtime component.

PN1555

When we travel to the submissions that were filed, so at court book page 82 - and this is a matter that was raised at the outset by the Deputy President yesterday - but in the responses provided there is an implicit acceptance of a built-in overtime component for work completed and other penalties. That's answered in the affirmative, but then (b), the hourly rates for that in Appendix A, Appendix 4, then is said to correspond to the appropriate employee classification for 84 hours of completed fortnightly. The further four hours of work completed paid by the rate of time and a half for two hours and double time for two hours thereafter.

PN1556

So if I pause there. The further four hours of work completed. Now, I think that extends, again, to the RDO component, suggesting that there be additional payment each week of 1.5, and then 2, double time, of the blended rate as I have just said, and that is said to now relate so that here, in its opening submission, the issue is said to relate to the RDO.

PN1557

Then - and I'm sorry to take you to the last volume - but in the closing submissions it, again, shifts, and at court book page 2002 – and this seems to now align with what the union is saying, albeit I will have something to say about that as well - at paragraph 11 it seems to, the union seems to now submit that, not that they should receive any loading for the overtime, but that the department employees should receive this further rate for all hours worked. So that's by the stage of the reply submissions.

PN1558

Deputy President, you asked the question today of my friend about, well, what does the loading account for, and it was said that that's for the penalties which may otherwise be applicable or the loading, and that which might otherwise be applicable if the employees worked overtime and there was an increased rate paid for the overtime.

PN1559

There was nothing said about the rostered day off so I'm a bit curious to hear whether it's accepted, that that's included or not, or there's, it seems to me, that there is still a claim sought in respect of the rostered overtime component, the two hours each week, which begs the question, well, what is the loading for?

PN1560

In part - and I will develop this further - but this uncertainty in the union's position arises precisely because this union had nothing to do with the fabrication, the appendix, or the fabricators or their terms.

PN1561

That goes back to the structure of this agreement which is important to the resolution, and indeed, during the evidence of the union's own witnesses, the newly established recruited members, it was apparent and clear that each employee accepted and understood that there was a loaded rate and that's what they had received, and that for those that had been there earlier than 1993 - in 1993 there was a fundamental shift such that they no longer, since that date,

received any rostered day off. They were required to work the standard hours which comprised of a mandatory four hours overtime, and then if they did work any additional overtime, that was a separate component for which they were paid at the overtime rates.

PN1562

The union confronts the history by simply speaking of 1993. Very little was said of in between, and that's 30 years. It confronts this by saying, 'Well, disregard that.' It's extrinsic. It's not objective evidence. Not common understanding and so forth - and I will deal with that - but in the arguments which it advances the union takes advantage of the very infelicities of expressions and uncertainties which are present in these types of documents when drafted by laypersons.

PN1563

It speaks of calculations and uncertainties, but all of this is a product of the history of the provision and repeated in successive numerous instruments which the union says, 'Don't worry.' In short, 'Don't worry about those', and that offends, in my submission, a very admonition urged by the superior courts in construing agreements; that is, to not interpret them in a vacuum divorced from the industrial realities.

PN1564

Instead an artificial, artificially literal approach is urged, and more than that, as I said at the very beginning, even on the union's case it says, 'Well, the company can't point to words that says you are only paid hours on the ordinary hours.' Neither can the union point to any words that say, that says, 'You pay that on all of the hours worked.' That's inferred, and so, which comes back to the foundational point, Deputy President, you quite properly asked at the outset. Yes, there is an ambiguity on both cases.

PN1565

There are various reasons why we submit that the Vinidex construction is the correct one. Firstly, there's the context in the provisions of the agreement, which I will come to. Secondly, the longstanding industrial history and the antecedent agreements which have applied to fabricators at the Smithfield site with the same arrangements. Thirdly, the circumstances of the blended or loaded rate and how it came into being, and the understanding expressed by all employees who gave evidence for the union's case.

PN1566

Fourthly, the acceptance that in 1993, even on the union's case – put to one side the work that Mr Burton did on his calculations and assessments and a review based on company records - even putting that to one side, the union employees accepted that there was a change, such that in 1993 they started receiving a higher rate than the previous ordinary or base rate which they received.

PN1567

There was a jump. They all accepted it. Well, the three that were there of the four accepted that, and the fourth accepted that there was a loading, a loaded rate which applied only to fabricators. It's an arrangement particular to fabricators and has been in place for 30 years.

PN1568

So they're the broad sort of grounds that I will develop, but before I do, can I also take you, Deputy President, to two decisions. I'm not sure whether you still have it, or whether you have been provided with a folder containing the respondent's authorities. There's only two cases that I want to go to.

PN1569

THE DEPUTY PRESIDENT: I haven't.

PN1570

MR RAUF: I see.

PN1571

THE DEPUTY PRESIDENT: But we have them online.

PN1572

MR RAUF: They're at tabs 11 and 12. So the Target decision of Banks-Smith J and then the Linfox decision of Tracey J which is at tab 12. I want to refer only to the Target case because it's a relatively recent decision which has a neat and convenient articulation of the principles, and I want to very quickly refer to some of those as collected here, but they commence at paragraph 20 of that decision, which is page 4, with reference to the Full Court's decision in Skene, WorkPac v Skene, and that was not the subject of any adverse comment on appeal. At 197:

PN1573

The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words.

PN1574

read as a whole and in context –

PN1575

The interpretation '... turns on the language of the particular agreement –

PN1576

and I underline this -

PN1577

understood in the light of its industrial context and purpose ...' The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament.

PN1578

To similar effect, it has been said that the framers of such documents were likely of a 'practical bent of mind' and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive

approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.

PN1579

Then in 22 there's reference to the King v Melbourne Vicentre Swimming Club decision where the first paragraph notes:

PN1580

The significance of history and context as an aid to the construction of awards –

PN1581

which was referred to in the often cited Short v Hercus decision, but then just travelling over to page 127:

PN1582

Practices in the relevant industry may provide material context. An illustration is Transport Workers' Union v Linfox Australia Pty Ltd [2014] FCA 829 –

PN1583

and I will come to that. I'm sorry, if I can just go back to that quote. So in the King decision at 127:

PN1584

The significance of history and context as an aid to the construction –

PN1585

but referring to the Burchett J decision –

PN1586

Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form, only a kind of wilful judicial blindness could lead the court to deny itself the light of that history, and to prefer to peer unaided at some obscurity in the language.

PN1587

THE DEPUTY PRESIDENT: There's a little bit of a difference in that case in that it was dealing with, well, it eventually seemed to be 99 per cent of the particular part of the transport industry as opposed to aid fabricator.

PN1588

MR RAUF: In respect to the Linfox?

PN1589

THE DEPUTY PRESIDENT: Yes.

PN1590

MR RAUF: Yes, and I will come to that, Deputy President; in fact, I will do that now. I accept the observation that, Deputy President, you made. I add to this, this comment, that in that case there was a broad acceptance by all parties that on a

literal interpretation the relevant workers would be classified as shift workers who had the benefit of a break. So that's on the literal wording of the agreement itself that was struck between the parties.

PN1591

Now, if the court had stopped there, that was the end of the matter, but there, despite that it was clear on the terms, nonetheless, Tracey J did not simply accept the literal construction and did look at the history of the provision, and then as it applied to the relevant day workers here, in answering the question whether they were shift workers or day workers, and in turn, entitled to a relevant break, crib time. Can I just go to paragraph 34 which we say is just as relevant here where his Honour said:

PN1592

Guidance as to the construction of industrial instruments may also be obtained by reference to principles which courts apply to the construction of commercial contracts. Commercial contracts should, as Kirby J held ... 'be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction.' An interpretation which accords with business common sense will be preferred to one which does not.

PN1593

and I will come back to that because we say that principle equally applies to the present case. At 42, at commencing, his Honour went through the history of various antecedent provisions.

PN1594

THE DEPUTY PRESIDENT: All right.

PN1595

MR RAUF: At 81, when it came to considering, his Honour noted that on a literal reading, when read with a particularly clause, each employee was a shift worker working a day shift and entitled to a crib time, a paid crib time of 20 minutes, and reference is made at 87 to the evidence establishing that the benefit of the crib break was, historically, made available to shift workers and not made available to those working within an ordinary span of hours provided for in earlier instruments, and at 88:

PN1596

There can be no doubt that, if a literal construction is applied, a consequence will be that workers in this category whose normal working days start about 5.30 am will be taken to be day shift workers. An examination of the history of the provision, however, suggests that it was never intended by the parties to have this effect.

PN1597

Then at 90 – and this is in the context of, again, the involvement of unions and the way in which subsequent agreements were negotiated:

PN1598

It might also have been expected that, immediately after the revised Award came into force, the respondent employers would have provided the workers, whose status had changed to shift workers, with the enhanced benefits which that status attracted. Had they failed to do so it would also reasonably be expected that the Union would have sought to enforce the performance of the obligations. Neither the employers nor the Union reacted in this way. It was not until March 2012 when the present demands were made that the Union, for the first time, advocated the construction for which it now contends. Not surprisingly the employers reacted with bemusement.

PN1599

Then over the page his Honour goes on to say why common inadvertence also is not a factor applicable here given subsequent events and what followed - and we say that that also is something that arises here - and at 93, finally, midway through:

PN1600

The fact that the parties had, at each stage, agreed on the terms of the relevant provision which had consistently been applied in the manner contended for by Linfox in the present proceeding, supports its argument that a common understanding existed. That common understanding should inform the construction of the relevant provisions of the 2004 Award.

PN1601

and on that basis his Honour was not prepared to accept the literal construction and found that it gave way to the common understanding. As I say there, there was no dispute that on a literal construction there was a particular outcome consistent with what the union was contending. In this case we're not even at that stage, where there is an ambiguity, but nonetheless, a literal construction with more is urged.

PN1602

Your Honour will know of the backgrounds generally, Deputy President, in that Vinidex has a number of employees at its Smithfield site, 130 presently in various departments, categories, including trade qualified. There are presently eight fabricators in the fabrication department and the evidence was - not challenged - that they don't require any formal training or technical qualification.

PN1603

Since 1993 fabricators have worked consistent standard hours which is comprised of 38 ordinary, two hours which pre-1993 went towards the rostered day off, and then four hours rostered overtime on the Monday, and since that time also fabricators have not received any entitlement or rostered day off, have not received any separate payment for the standard hours, including the rostered overtime, but they did receive separate payment for any additional overtime worked. When I put that to Mr Lowe he readily accepted that his payslips reflected where he worked additional overtime, and then that was calculated at a certain rate, and that was apparent or clear.

PN1604

Can I come to just start with the agreement itself. I'm working off a copy of the court book at 136, but it's at various places I think. My friend has worked off an earlier iteration. It doesn't matter. I will go by the court - - -

PN1605

THE DEPUTY PRESIDENT: Just go by clause numbers.

PN1606

MR RAUF: Yes, I think so. Can I just, in passing, note this - and I will come back to it - but Part 2. That's the commitments of Vinidex and its employees, and it highlights and emphasises the importance of a collaborative approach or partnership between the unions and the company, such that the document is very much a product of a collaborative approach. Then at 2.3, there's a committee also set up to, among other things, review the implementation and ongoing progress, and that's not anything new. That's also something which has been there for a very long time, and I will come to that.

PN1607

Then we travel to Part 5 and that sets out the hours of work. At 5.2 it refers to ordinary hours. It also says 'refer Appendix 3', and then it sets out that the ordinary hours must average 38 hours per week. Then at 5.4, it refers to the ordinary working hours and that these might be altered in certain circumstances as it applies to a section of day workers or individual day workers, at 5.4.2.

PN1608

At 5.14.2 is the definition of 'overtime' and that's hours in excess of ordinary hours or outside ordinary hours of work, and then the rates are prescribed, but then can I ask you, Deputy President, to come to Appendix 3, and that, of course, is the provision in contention.

PN1609

Firstly, clause 3.1. This is important as to the structure of this document - and no doubt this will be apparent and I don't expect that there's any dispute as to the import of this provision - but A3.1 makes clear that you have the body of the document which has the general conditions, and then there are these specific department conditions which are, effectively, negotiated with the separate departments and they vary, and the structure of this agreement is such that the last sentence:

PN1610

> *For the purposes of this Agreement, clauses contained in these Appendices override clauses contained in the body of the Agreement for the specified area.*

PN1611

So they are, in effect, standalone appendices for each department which overrides the general conditions and, in my submission, that, again, is consistent with the broader context of Part 2, which is the collaborative partnership approach. It's filtered down and applied at each department, such that each department is engaged to negotiate the specific conditions and terms.

PN1612

Then we, of course, come to the contentious provisions, A3.4.1. That is the only section that applies to fabricated products. Unlike the other appendices, there isn't the detail in terms of overtime or other differing conditions. (a) refers to the standard hours, and importantly, there is no rostered day off. To offset this, the RDO entitlement of two hours per week is paid at time and a half and double time for the last hour.

PN1613

There is nothing there about receiving payment for all of the hours worked - and that comes back to the question of standard hours and what's loaded - but if I can just step back for a moment in terms of the context in which that provision appears.

PN1614

So there's the structure of the agreement, the general body and the appendices. There's a distinction between ordinary hours and overtime hours. There are the separate appendices and, of course, the broader collaborative approach and committees, and it seems to be accepted that in terms of the parties, while the AWU is involved - and I will come to the historical aspect of it - it has not, at any time, engaged on behalf of the fabricators at all. The four employees that gave evidence in its case all clearly stated that they came onboard at the same time, about a year ago.

PN1615

Now, the history becomes important, precisely because of the ambiguity, and as I explained earlier, that's both cases. Even on the union's case, despite it's submission that there's a very plain and ordinary meaning, there isn't, with respect, because as I say, my friend won't be able to point to any words which say, 'Well, this is the rate that applied to all hours worked.' That hasn't been the case for 30 years, but there isn't any words which will support that, Deputy President. That's something that you will have to read in if that was to be found.

PN1616

Then there are the broader business and other implications - having regard to the structure and the relativities which I will come to as well - but can I come to the historical context, and I apologise that the material is as voluminous as it is. To try and help that what I have done is extracted from the agreements all of which are in evidence. There are the key provision relating to the hours of work and the standard hours, and if I can just hand that up, Deputy President. So I will just quickly turn that up.

PN1617

THE DEPUTY PRESIDENT: Thank you.

PN1618

MR RAUF: I don't need to go through it in any detail, but can I just highlight a few things. At the top page my friend is correct to note that we haven't been able to turn up the 94, or the agreement as it was made in 93 and titled 94. We found a name, but in trying to make inquiries, including the State Commission, we weren't able to turn up the actual document, but that's of no moment here, in my submission.

PN1619

We do come then to the instrument, the first instrument we could find, which is the 97 document, and the only union that was a party to that was the NUW. It represented all of the workers on its terms - and you will see the provision as to hours of work - but on the right-hand side, at that point in time, there was an annual base salary prescribed. So there wasn't hours. It wasn't in an hourly rate, but rather, a salary.

PN1620

Other unions come into the picture subsequently in relation to the 2000 agreement. So we have the NUW still with the ETU and the AWU New South Wales. There appears to be a slight change in the wording such that - to offset this - the RDO entitlement of two hours per week is paid at time and a half with double time for the last hour, and then from here on the provision carries through.

PN1621

So this is the stage at which there are a number of unions involved, but the rates of pay are no longer at Appendix 4 or they're not provided for curiously, but many of the other provisions which I went to, for instance, Part 2, the collaborative or partnership approach, they are all there.

PN1622

Similarly, in relation to the subsequent agreements, and then it's not until we - well, the 2004 agreement over the page, at page 3, is when there is the introduction of hourly rates for all employees, and with reference to grades. At that stage we still have as parties the NUW, the ETU and AWU NSW, and then things change in 2005 inasmuch as, by that stage, the AWU, the union as its presently comprised, comes into the picture and NUW. They're the only two unions involved, otherwise the relevant provisions are the same, and that remains so throughout.

PN1623

We can flick over all of the pages to page 5. It's the same when we come to the 2009 agreement. The provisions are still the same. The rates of pay expressed and hourly rates are still the same, but by that stage we move to the federal system, so it's then under the Fair Work Act at that point, and then that continues all the way through until the present, and each of those agreements is appended.

PN1624

They reveal much the same provision as has been carried forward, including with the involvement of a number of unions. We know and understand that the AWU didn't engage for or with the fabricators, but the NUW did. They were the union that represented. In that sense, the AWU, in relation to the fabricators is something of a new kid on the block, but what that historical context shows is that there have been the same provisions and practices in place since 1993.

PN1625

Subsequent agreements have picked up, and that's a pattern not only in relation to fabricators but a lot of other provisions in the agreement, they've picked up provisions with some change and the loaded rate, in respect to fabricators, has been applied consistently and they have consistently not had rostered day

off. They've consistently worked the four hour overtime component comprising a part of the standard hours.

PN1626

That comes back to the question of the loading. What is it? To answer that, one needs to step back and scrutinise the standard hours and understand what are the standard hours. When one looks at the provision of the agreements, the standard hours are these; they are, firstly, the 38 ordinary hours then there's two additional hours each week which, historically, led to the RDO entitlement but not since 1993, then the mandatory overtime of four hours. So that's what comprises the standard hours and since '93 the payment of the loaded rate has been paid in respect of the ordinary hours, but the loading has, in effect, picked up, firstly, the two hours additional worked each week, which went to the RDO entitlement, but then also the four additional hours rostered overtime. It hasn't picked up any further hours which the fabricators might do for which they get overtime, not at a lower base rate but at the loaded rate, so 1.5 times the loaded rate, or double time if it goes into a fourth hour.

PN1627

As I said earlier, while we do urge weight to be given in regard to be had to Mr Burton's analysis, which he has undertaking on a review of company records and the instruments that are there. Even on the union's evidence that there's an acceptance that there was a loaded rate with picked up overtime, and I specifically put that to the three employees who were there in 1993, their understanding that the loading rate picked up the overtime, and they agreed that it didn't. It was only the four hours, not even more. Similarly the RDO.

PN1628

Now, reference is made also to the working hours review and we accept that that doesn't have the force that industrial instruments have and some of the other evidence as to the practices of site and the way things have happened but, nonetheless, Mr Huemmer was challenged on that, and he was very clear as to his recollection, that a change in the spread of hours was expressly considered in 2003 and that's something that he did, firstly with the company then with the involvement of the union and we can take it, I think, that that was, in respect of the fabricators, the MUW, not the AWU, and then, on Mr Huemmer's evidence, while he maintained anonymity to encourage open feedback, he went to the pages in his report, which were provided by the company, showing that there were 13 fabricators at the time and he had responses from 13 fabricators at the time.

PN1629

That supports that there was some level of engagement with fabricators to consider the change in the spread of hours and to understand the impact on pay and what it meant for pay and that there was a continuation of the arrangement at the time.

PN1630

In terms of the written evidence, the witnesses who, or the three witnesses that were present at the time, three of them, prefaced it with they cannot recall. Now, I did challenge or go to that question to try and elicit something more, but in my

respectful submission, the denials of the witnesses or them having no recollection doesn't travel any higher than that. That is a recollection but they don't recall it.

PN1631

In contrast to that, there is the clear evidence of Mr Huemmer, which was not disturbed, as to his recollection and he was able to go to records, which were contemporaneous, and explain what they - the significance of some information.

PN1632

As an aspect of that, there was also evidence about an attempt to buy out RDO, in respect of another department, and an explanatory document being disseminated. That was in 2009, but that department rejected the proposal. There wasn't any challenge to that.

PN1633

There was evidence of communications being provided to the union, for instance, bulletins or updates, including in relation to the 2003 review and, at the time, in 2009 where an explanatory document was provided to another department to change or buy the RDO. There was nothing in reply to challenge that or say, 'No, we never got that'. That evidence remains unchallenged.

PN1634

Had the AWU not or if there was evidence to refute or challenge it, one expects it would have done so, but there's nothing there. We say all of these comfortably fit within the principles in the Berri decision and, importantly, the matters that I've taken you to, Deputy President, in the decisions of the superior courts that talk about the industrial context and history.

PN1635

Then can I come to the union construction and say a few things on that, before I finish? As I said, at the outset it is inherently unclear, in Shipton(?). It was explained this morning, with reference to getting paid the loaded rate for all of the standard hours. What wasn't addressed was the RDO issue and what was then loaded, in respect of the RDO, if what is said that there's still a payment at the higher rate for the additional two hours which were supposed to be picked up.

PN1636

Secondly, the approach urged by the union ignores 30 years of successive instruments applying the same arrangements, with the involvement of another union, no doubt, and it upsets the balance, in terms of the relativities and the rates of pay which have been set, and the fabricators are the only one who have a loaded rate which picks up overtime and, on our case, the RDO.

PN1637

In terms of the reference that was made to the analysis undertaken by Mr Burton, in the table, that needs to be understood in context and that is that that analysis was done in respect of the rates applicable for ordinary hours and having regard to the structure and context of the agreement.

PN1638

On the union's case, if the employees are paid for the standard hours, that is 44 a week at the loaded rate, there is a residual impact that the rates for the ordinary hours, comparatively, do significantly increase, so it has that flow on effect as well.

PN1639

It also disregards the advantages that have been enjoyed by the fabricators, that is that they've had the benefit of this loaded rate which all union witnesses readily accepted, that leave entitlements have been paid on these loaded rates, unlike for other employees. So there are vast advantages in terms of pay.

PN1640

Now, if I pick up, for a moment, the response of the union, that the loading only picks up the 1.5 and double time at presumably a lower rate, so that's, conceptually, and I don't descend into numbers and calculations but conceptually, we are there talking about, in my submission, four hours a week and it's only the small component. So if the base rate was lower, there's a small component which is then picked up and it's said, on the union's case, that that should be applied, in effect, across the whole working week. Rhetorically, one would - well, it would be a surprising result for the company to accept that, in contrast to simply working the lower base hours, paying at the lower base rate for all ordinary hours and then simply paying the four weeks at the lower base rate and all leave entitlements at the lower base rate.

PN1641

It's quite a significant jump, in terms of, on the union construction, as to the minimal amount that's picked up and said to be picked up in the loading but nothing more, and that's applied to all of the hours. By extension, if the employees work additional overtime that then is also paid at the much higher elevated rate.

PN1642

THE DEPUTY PRESIDENT: When you talk of a loaded rate and a base rate - - -

PN1643

MR RAUF: Sorry, Deputy President?

PN1644

THE DEPUTY PRESIDENT: You talked of a loaded rate and a lower base rate?

PN1645

MR RAUF: Yes, and that's going back to the evidence of the union witnesses and their acceptance that prior to this arrangement coming into play they received a lower base rate and that was then boosted in 1993, when a loading was applied.

PN1646

THE DEPUTY PRESIDENT: Sorry, I just had to understand. Sorry.

PN1647

MR RAUF: Sorry. On one view of it, the company would have been far better off maintaining a lower base rate and paying everything on it, as opposed to

giving the employees the benefit of a higher loaded rate, applying that to all of the ordinary hours and then also the leave entitlements, over 30 years.

PN1648

THE DEPUTY PRESIDENT: And overtime.

PN1649

MR RAUF: And overtime, indeed. Indeed.

PN1650

So we say, respectfully, I couch this respectfully, the union's construction should be seen for what it is. It is an opportunistic claim which seeks to pursue an overly literal interpretation in a vacuum, in circumstances where it's representing now it's newly recruited fabricators. It seeks to take advantage of infelicities in the drafting, which have existed over 30 years and the product of 30 years of instruments, yet the union urges this Commission to ignore all of that.

PN1651

It, in effect, also asks the Commission to ignore the context this agreement, again that context being applicable over 30 years which evidences a collaborative and partnership approach which builds in the role of the unions, in terms of engaging different departments.

PN1652

This is where, Deputy President, coming back to a question - quite a proper distinction, Deputy President, you made, as to the Linfox decision that related to a lot of industry. But here, given the structure of this agreement and the very different departments and the appendices applying to departments which have a historical context, here we are talking about one department. We are talking about an arrangement that has existed in relation to that department and not any other.

PN1653

All of the employees accepted that this only applied to fabricators, no one else. There's a significant distinction there that has existed for a very long time applying to all fabricators that have ever been employed since 1993.

PN1654

Having regard to all of that, we say that the proper construction is that the loading or loaded rate, which was paid, is paid to employees under the agreement, on the ordinary hours, picks up the additional hours, which they do as part of a standard hours and that's the very purpose and benefit of a higher rate paid on the ordinary hours, that it picks it up and then all leave is also paid on it, all overtime is also paid on it, and that's not being challenged in over two decades.

PN1655

They were the submissions, Deputy President, unless you had any questions?

PN1656

THE DEPUTY PRESIDENT: No, I don't, thank you.

PN1657

MR RAUF: Thank you.

PN1658

THE DEPUTY PRESIDENT: Anything in reply?

PN1659

MS DOUMIT: Yes, thank you, Deputy President.

PN1660

Just initially, in respect of the way that this application has progressed, I do accept that there has been a change in the way that this case was originally filed and the way that it's now pleaded. What I say, in that regard, particularly in respect of our F10 that was initially filed; there was an error in that F10 and at the earliest opportunity, when that was identified, it was brought to your attention, Deputy President, in conference. It was at that point where those questions were developed and we did seek to file an amended application at that point. You may recall that the respondent's solicitors confirmed that they didn't require us to, insofar as the question. They were willing to accept that those questions that were put to you were the questions for determination.

PN1661

Now, in respect of the submissions, I also accept there is some clunkiness in the way that we initially stated how these employees should be paid. So, in other words, the way that we answered those questions. In hindsight I would answer them differently but I still rely on those submissions as being indicative of our position from the very start. So even those opening submissions and my submission today still indicate our case in the same way that has been pleaded.

PN1662

THE DEPUTY PRESIDENT: Yes, I was just trying to, particularly with my questions, clarify the blended rate as loaded rate.

PN1663

MS DOUMIT: Absolutely. Yes, I accept that.

PN1664

THE DEPUTY PRESIDENT: Thank you, yes.

PN1665

MS DOUMIT: But just to be very clear on that, in light of Mr Rauf's submissions, I would like to take you to our opening submissions and, in particular, to page 82.

PN1666

THE DEPUTY PRESIDENT: Yes.

PN1667

MS DOUMIT: If you see there, our response to those questions that were asked? The first one asks whether, under the terms of the agreement, employees are entitled to a blended rate in full satisfaction. So, in hindsight, that should have been answered, 'No', because of the words, 'in full satisfaction'. But - - -

PN1668

THE DEPUTY PRESIDENT: I've got it circled.

PN1669

MS DOUMIT: Thank you. Thank you. But what I say is the explanation of that answer is the same as the case as it is pleaded. So where it says:

PN1670

Yes, so far as the hourly rate set out in Appendix A 4.5.6 is intended to compensate employees for the inbuilt overtime component of work completed and other penalties, except for the rostered day off entitlement.

PN1671

And notably that's further expounded in the second response, subparagraph (b):

PN1672

The hourly rate set out in the appendix corresponding to the appropriate employee classification for 84 hours of work completed fortnightly.

PN1673

That is what we say they should be paid, that's what we argued in this case they should be paid, plus four hours as an RDO component, with the RDO loading.

PN1674

So why we say its built in or loaded or blended and, again, in hindsight, I would change the way that was worded, but I still believe it represents the same case we've pleaded and are closing on, why we say it's loaded is because the standard hours include overtime hours and they get the hourly rate for all those hours worked, rather than the overtime loading which exists in the agreement.

PN1675

Now, to go to, again, the construction of the terms of the agreement, Mr Rauf handed up the historical changes table and when he was referring to that document he referred to the rates from 2004 onwards as hourly rates. So just from page 3 of that document that he handed up, that is where you first see those hourly rates.

PN1676

Now, what I say is, there is an acceptance that these are hourly rates and that acceptance appears in the F17, filed in support of the enterprise agreement and in the fact that when I took witnesses, including Mr Burton, to the rates in the enterprise agreement and I said, 'Is that an hourly rate for every department, including fabrication', he said, 'Yes'.

PN1677

Now, why we say the agreement clause can only be constructed in the way that we say is that there are standard hours at an hourly rate in that enterprise agreement. So to not conclude that that hourly rate applies for at least all of the standard hours that are worked is to be inconsistent with the words in that enterprise agreement.

PN1678

I also submit that Mr Rauf did not address, in any detail, the point that I took you to, in respect of the words having to have effect in an enterprise agreement. The crib break is - the paid crib break is clearly articulated in that clause. There is no way, in my submission, that the respondent's case addresses what work those words have to do, if any. On their case those words shouldn't be there.

PN1679

Sorry, to be clear, the words that I'm referring to are subparagraph (b), the entire subparagraph (b) of Appendix A 3.4.1. The other words that I say must be given effect and which the respondent's case does not respond to, are the last sentence of subparagraph (a), in respect of the RDO.

PN1680

Now, Mr Rauf also said that the case that we plead calls for a literal interpretation in a vacuum. What I say that the case we plead actually calls for is a literal interpretation. The context, we say, is irrelevant, but the literal interpretation of this clause is what we do seek and we seek that on the basis that as conceded, and as the evidence demonstrates, there is an hourly rate in the enterprise agreement and a standard hours arrangement. The only conclusion, I say, the only interpretation available is that that hourly rate must apply for the hours worked.

PN1681

That's all I wish to say in reply, Deputy President.

PN1682

THE DEPUTY PRESIDENT: Can you just tell me exactly how many hours would be paid in an ordinary fortnight?

PN1683

MS DOUMIT: Yes. So what we say is that there are 86 - sorry, 87 hours and 40 minutes that would be paid in an ordinary fortnight. If you'd like me to explain that, I can do so.

PN1684

THE DEPUTY PRESIDENT: So 87?

PN1685

MS DOUMIT: Eighty-seven hours and 40 minutes that are paid - - -

PN1686

THE DEPUTY PRESIDENT: I know you've done this previously.

PN1687

MS DOUMIT: That's okay. I know it's very confusing and that makes me nervous that I haven't communicated it properly, so I would prefer - - -

PN1688

THE DEPUTY PRESIDENT: I'm not saying that, I just want to be - - -

PN1689

MS DOUMIT: I know. But I'd like the opportunity to do it again, if that's where this is headed. So what I say is the hours that they are entitled to be paid for are

87 hours and 40 minutes. The reason why I say that is because their standard working arrangements require them to work, so they actually work, they're physically present for work for 87 hours and eight minutes per fortnight. So that is because they actually finish work at 6.04 pm on the Monday, so that's where that extra eight minutes comes from, and they get half an hour unpaid meal break on that Monday.

PN1690

But why I say it's 87 hours and 40 minutes, rather than 87 hours and eight minutes is because of that subparagraph (b).

PN1691

THE DEPUTY PRESIDENT: Sixteen minutes every week.

PN1692

MS DOUMIT: That's right. Now, the rate that I say should apply to that 87 hours and 40 minutes is, and I just want to get this right, I say that they get 84 hours - no sorry, that's not right. Eighty-three hours and 40 minutes at the standard hourly rate and they get RDO component on the additional four hours that fortnight.

PN1693

So they get their standard hourly rate times time and a half for the first two hours in that fortnight, or for one hour each week, and double time for that second hour each week, on the loaded rate, on the rate in the enterprise agreement, which has been expressed as an hourly rate and accepted as an hourly rate.

PN1694

THE DEPUTY PRESIDENT: So Monday they get paid for the 12 hours four minutes, less 30 minute break?

PN1695

MS DOUMIT: That's right, 11 hours and 34 minutes.

PN1696

THE DEPUTY PRESIDENT: Eleven hours 34. Tuesday to Friday is the same, which is?

PN1697

MS DOUMIT: Eight hours.

PN1698

THE DEPUTY PRESIDENT: Flat?

PN1699

MS DOUMIT: That's right, yes.

PN1700

THE DEPUTY PRESIDENT: Plus there's a payment for RDO, you say?

PN1701

MS DOUMIT: Plus the clause expressly provides that they're entitled to an RDO entitlement of time and a half for one hour each week and double time for one hour each week.

PN1702

THE DEPUTY PRESIDENT: So how do you express that? So you've got 11 hours 34 minutes then four times eight, so 32?

PN1703

MS DOUMIT: Yes. So what I say is two hours in that week, in the same way that an RDO accumulates towards a day off, any two hours in that week, because they're working in excess of 38, attracts that RDO penalty. So it could be the last two hours they work that week which attracts time and a half for the first hour and double time for the last hour.

PN1704

THE DEPUTY PRESIDENT: So in a week?

PN1705

MS DOUMIT: Yes. So in a week, I might get my calculator to make sure I'm doing this exactly right.

PN1706

THE DEPUTY PRESIDENT: Three and a half hours.

PN1707

MS DOUMIT: Yes, three and a half hours per week for the RDO. Yes, sorry.

PN1708

THE DEPUTY PRESIDENT: Okay, thank you.

PN1709

MS DOUMIT: Thank you, Deputy President.

PN1710

THE DEPUTY PRESIDENT: Well, I intend to reserve my decision. I thank the parties for their considered approach to the matter and you will receive the decision when it's made. Thank you.

ADJOURNED INDEFINITELY **[11.41 AM]**