



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER JOHNS**

**C2023/3904**

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

**Australian Municipal, Administrative, Clerical and Services Union  
and  
MacKillop Family Services Limited T/A MacKillop Family Services  
(C2023/3904)**

**Melbourne**

**11.10 AM, TUESDAY, 26 SEPTEMBER 2023**

**Continued from 14/07/2023**

PN1

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

PN2

MS D PREDIC: If the Commission pleases, my name is Predic, initial D, and I appear on behalf of the applicant.

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THE COMMISSIONER: Thank you, Ms Predic.

PN4

MR N HARRINGTON: Good morning, Commissioner, my name is Harrington, initial N, and I believe permission has been granted for me to appear for the respondent today.

PN5

THE COMMISSIONER: Yes, it has. Thank you, Mr Harrington. Just some preliminary matters. A digital Tribunal book has been prepared, and I understand distributed to the parties. And then in addition to that there were two new (indistinct) this morning, the new form F10 which is dated 25 September, and then a witness statement from Ms Predic also dated 25 September. Is there anything missing from the digital Tribunal book from your perspective, Ms Predic?

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MS PREDIC: No, Commissioner, but I do note that the respondent sent through two new items last night.

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THE COMMISSIONER: Mr Harrington, what were they?

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MR HARRINGTON: I don't think we need to rely upon them. It was the SCHADS Award dating back to 2016, and it was the position description for Mr McAliffe. But I don't need to take you to those. I thought I might need to, but I don't think I need to now. So, that's not a problem. The Tribunal book I'm working from was the revised Tribunal book of 162 pages that we received last week on Friday, which I'm completely comfortable with and I've got those two extra documents from yesterday from the union, in front of me.

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THE COMMISSIONER: All right. Then what I propose to do is mark as exhibits in the proceedings each of the documents as they correspond with the tab in the digital tribunal book. So, for example, the form F10 will be exhibit 10, the applicant's outline of submissions in reply is exhibit 8, and as I've indicated, the new form F10 dated 25 September is exhibit 10, and the witness statement dated 25 September 23 of Deena Predic is exhibit 10.1.

**EXHIBIT #8 APPLICANT'S OUTLINE OF SUBMISSIONS**

**EXHIBIT #10 NEW FORM F10 DATED 25/09/2023**

**EXHIBIT #10.1 WITNESS STATEMENT OF DEEANA PREDIC  
DATED 25/09/2023**

PN10

Mr Harrington, I understand none of the witnesses are required for cross-examination, is that correct?

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MR HARRINGTON: That's correct, Commissioner.

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THE COMMISSIONER: Yes. Thank you. And then that's also the case from you, Ms Predic?

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MS PREDIC: Yes, Commissioner.

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THE COMMISSIONER: All right, good. And are there any other preliminary matters I need to deal with? Mr Predic?

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MS PREDIC: No, Commissioner.

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THE COMMISSIONER: Mr Harrington?

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MR HARRINGTON: One of clarification, but as is probably apparent to you, Commissioner, given these two lists of documents that are now marked exhibit 10 and 10.1, the respondent does not further prosecute any jurisdictional issue in that there has been compliance with the dispute settlement procedure/clause, and so roughly jurisdictional.

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THE COMMISSIONER: Mr Harrington, I'm indebted to you for confirming that.

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MR HARRINGTON: Thank you.

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THE COMMISSIONER: Right. Well, I guess that then just takes us to some closing submissions. Is that where we're at?

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MR HARRINGTON: I probably should raise one issue I raised with my learned friend beforehand, and you will have read this in the submissions, that we're not sure the question – the question, and I'll go to exhibit 10 - - -

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THE COMMISSIONER: Yes. Yes, go on.

PN23

MR HARRINGTON: Exhibit 10 is the further amended form F10 but this is the one we need to focus on. The question hasn't changed over three iterations of the form F10. The question remains the same. And you might recall in reading our submissions, at paragraph 23 of court book or Tribunal book 115, and we're not trying to be difficult about this but we – well, I, I should say, articulated a different question which we thought puts everything neatly in issue but it's always important, of course, for the Commission to know what question are you being asked, or what question captures the dispute and what question must you answer, and it really is, I guess, for the applicant who brings the dispute to pose their question, and I accept that and so - - -

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THE COMMISSIONER: Can I say in relation to this issue about the question - - -

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MR HARRINGTON: Yes.

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THE COMMISSIONER: Ms Predic, and I do want to hear from you on it because it just seemed to me that there was a neatness or simplicity about the question that was proposed by the respondent at paragraph 23 on page 115 of the digital Tribunal book, and I guess I want to understand what difficulty you have with that question. It just seemed a bit neater than, with respect, what had been proposed by the union.

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MS PREDIC: Thank you, Commissioner. I will note that we did amend the question to say, 'Does the application in clause 11.2,' rather than '11.2(a),' in question 1, to kind of meet the respondent half way.

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THE COMMISSIONER: So, where do I find that amendment?

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MS PREDIC: In our reply submissions which are at exhibit 8 - - -

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THE COMMISSIONER: Yes.

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MS PREDIC: On page 128, paragraph 18.

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THE COMMISSIONER: Yes.

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MS PREDIC: Because we submit that 11.2(a) is relevant to the framing of the application of overtime in the matter. 11.2(b) needs to be with 11.2(a).

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THE COMMISSIONER: What if the – if we look at paragraph 23 on page 115 of the digital Tribunal book, if that question just said where it currently says, '11.2(b),' it just says, '11.2,' does that work?

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MS PREDIC: Yes, that does work.

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THE COMMISSIONER: Mr Harrington, are you happy for me to strike out the small (b)?

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MR HARRINGTON: Yes, and that's a nice segue of something else I want to address you on, Commissioner, but yes, I'm comfortable with that.

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THE COMMISSIONER: All right. Then subject to that amendment the question I will answer is that amended version of the files, the question at paragraph 23 on page 115 of the digital tribunal book, thank you, excellent. All right, Mr Harrington, you said that lays something else for you?

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MR HARRINGTON: Yes, just that it segues into this which is I think a lot more straight forward, and that is that when we made our submissions we took another exception or objection to the way the matter was being, at least articulated in the submissions and that is that we've said this dispute pertains only to a fulltime employee, Mr McAliffe.

PN40

It doesn't involve any part-time employees and that's our submissions at Tribunal book 114 at 18, quote, 'finding there is no dispute arising on the facts in respect to the payment of any overtime allowance to a part-time employee.' That's not a matter before the Commission. And I was going to say it's a bit technical in a way but it's actually substantive because we're here to have an argument about fulltime employees and that engages 11.2(b).

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11.2(c) is concerned with the right or entitlement of part-time employees and there's no evidence before you about a part-time employee making a complaint.

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THE COMMISSIONER: I'm really just here to deal with

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Mr McAliffe, aren't I?

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MR HARRINGTON: Yes, and he's a fulltime employee, which really focuses you on 11.2(a) and 11.2(b). That's how we'll be running our case.

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THE COMMISSIONER: Yes. Are you content with that Ms Predic?

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MS PREDIC: Yes, and the question refers to a fulltime shift worker, so I don't think there's any concern to the applicant.

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THE COMMISSIONER: Yes. All right.

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MR HARRINGTON: Thank you for that, Commissioner.

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THE COMMISSIONER: Any other preliminary matters, Ms Predic?

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MS PREDIC: No, Commissioner.

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THE COMMISSIONER: Thank you. Mr Harrington?

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MR HARRINGTON: No. No, Commissioner, thank you.

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THE COMMISSIONER: Then thank you. I'll hear from you,

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Ms Predic.

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MS PREDIC: Thank you, Commissioner. This is an application by the ASU under section 739 of the Fair Work Act and in accordance with clause 32 of dispute settlement procedures and MacKillop Family Services Enterprise Agreement 2016. We are here because the respondent insists in calculating overtime in a way that had disadvantaged residential care shift workers who are regularly rostered on the second Sunday of their pay period.

PN56

In the case example we're using ASU Kevin McAliffe who has been disadvantaged by the respondent's approach and has not been paid overtime penalties on three additional hours he worked on Wednesday 22 March 2023. We are asking the Commission to exercise its powers under clause 32 of the agreement by arbitrating this matter and answering the following question.

PN57

'Where a full-time shift worker employee covered by the 2016 agreement works in excess of 76 hours in a fortnight, for the purposes of clause 11.2 of the 2016 agreement and the calculation of any overtime payment are the hours in excess of 76 hours in the fortnight to be calculated upon (a), the date on which the employee worked in excess of any rostered hours, or (b), the day upon which the employee is calculated to work any time in excess of the 76 hours in the roster period?'

PN58

The ASU submits that the answer to (a) is yes, and (b) is no. The dispute in the simplest terms is the respondent believes the timing of when overtime is worked in a pay period is relevant, whereas the ASU submits it is not, that overtime is overtime wherever it falls within a fortnight pay period, and that this is the only interpretation open on the relevant terms of the agreement.

PN59

Our evidence demonstrates that for the pay period in question Mr McAliffe wasn't rostered on to work a regular shift on Wednesday 22 March. However, he worked an additional three hours on this date. These additional hours brought him to 79 hours worked in the fortnight.

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Mr McAliffe's roster was provided with his witness statement, exhibit 3.1, dated July 2023, attachment KM3 on page 58 of the digital court book.

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This clearly labels his shift on 22 March as an extra shift. When Mr McAliffe was paid for that period his payslip, which is at page 59 of the court book, shows that the respondent paid the overtime on his pre-rostered ordinary hours of Sunday, 2 April. As he would already be paid 200 per cent of the base rate on his pre-rostered hours on Sunday, as per clause 12.4 of the agreement he did not receive the benefit of penalty rates for the overtime hours that he had worked.

PN62

The ASU approached the respondent regarding what we submit is an underpayment for the pay period in question, as the Wednesday hours should have attracted an overtime penalty payment. The respondent contended that there was no underpayment and that overtime was correctly applied to the Sunday hours. The matter was unable to be resolved following the disputes procedure in clause 32 of the agreement and thus the ASU has escalated this matter to the Commission.

PN63

Broadly, it is understood that when an employee works overtime hours they get paid for the actual overtime hours they have worked on the days they have worked them, not on the date at the end of the pay period that the employer has artificially imposed. But we must consider the relevant clauses of the agreement to determine how to apply overtime in the circumstances.

PN64

Mr McAliffe is a full-time shift worker. As per clause 6, the definitions clause of the agreement the shift worker definition states that employees are regularly rostered to work their shifts. Clause 6 provides that the ordinary hours for a full-time shift worker at 76 hours per fortnight. Clause 6 also states that ordinary hours are advised at the commencement of employment or when there is a change to a shift work pattern.

PN65

Thus the agreement is explicit that ordinary hours do not change week to week depending upon when the respondent requires employees to work excess

hours. The ordinary hours of work clause 9.1(a) of the 2016 agreement also states that the ordinary hours of work for a full-time employee shall be 38 hours per week, or an average of 38 hours per week in a four week period subject to no more than 76 hours being worked in any two consecutive weeks.

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The span of hours clause 9.2(c) provides that shift workers work on a fortnightly roster which must be provided to them at least 14 days in advance. Mr McAliffe's pre-scheduled shifts amounted to 76 hours per fortnight. These are the hours that meet the definition in clause 6 of ordinary hours. Thus as they come to 76 hours total for a two week period, they are also the relevant ordinary hours according to clause 9.1(a).

PN67

Mr McAliffe's Sunday shift on 2 April was included in these ordinary hours and the additional hours he worked on Wednesday 22 March were not. Clause 11 of the agreement covers the rates and accrual of overtime. Clause 11.2 specifically relates to overtime rates. Clause 11.2(a) outlines what must be considered when calculating overtime.

PN68

A plain reading of this clause is that overtime is considered for excess hours worked:- (1) on a shift by shift basis; (2) for anything over 76 hours per fortnight regardless of where the overtime falls; and (3), that overtime is not payable for ordinary hours worked on Saturdays or Sundays.

PN69

The ASU submits that as prearranged hours on Sunday, 2 April form part of Mr McAliffe's ordinary hours, it is not possible under this clause for overtime to be paid on this shift unless the shift went beyond his rostered ordinary hours. For example, if he worked an additional three hours on that day.

PN70

The respondent's submissions seem to be that ordinary hours are just the number of hours an employee works in a fortnightly pay period, up until they work 76 hours. However, this interpretation cannot be supported on the words of the agreement as ordinary hours are pre-advised and pre-rostered as per clause 6 and 9.2(c) of the agreement.

PN71

And clause 11.2(a)(iii) states that overtime is not payable for ordinary hours worked on a Saturday or Sunday. And notably, the words in clause 11.2(a)(ii) stated that 'overtime is paid on any hours over 76 hours in a fortnightly period, regardless of where they fall.' These words cannot be read in any other way than that overtime is paid on the actual excess hours where they fall, not just once the 76 hours have been worked in the period in question.

PN72

The respondent has repeatedly relied upon the concept of the roster period even though there is no mention of this in the relevant provisions. Directly in conflict



with their submissions is the wording of clause 9.1(a) which states that ordinary hours of work are up to 76 hours being worked in any two consecutive weeks.

PN73

The respondent's interpretation completely ignores the relationships, the relationship for two weeks included in the fortnight pay period have with the weeks worked either side of this period which clause 9.1(a) requires must be considered. Even if the respondent was correct in overtime was merely calculated on the hours an employee worked cumulatively in the 76 weeks over a two week period they would still have underpaid Mr McAliffe.

PN74

Because if we take the two weeks from 13 to 26 March 2023, overtime hours would fall on Friday, 24 March. Regardless, the ASU still submits that the hours that the overtime should be calculated on are the hours worked in excess outside of an employee's regular rostered ordinary hours.

PN75

For the payment of overtime we looked at clause 11.2(b) of the agreement which states that a full-time employee will be paid overtime for all work which exceeds ten ordinary hours per shift, and anything over 76 hours per fortnight that hasn't already had overtime applied to it and isn't a Saturday or Sunday ordinary shift.

PN76

The shift on 2 April 2023 was a Sunday ordinary shift and the hours worked outside of Mr McAliffe's 76 hours per fortnight were those three hours worked on Wednesday, 22 March. Thus they must be paid in accordance with clause 11.2(b)(ii). These hours should have been paid at time and a half.

PN77

Not only is the respondent's application of overtime provisions not able to be supported by a proper construction of the provisions in the agreement, the actual impact of their application demonstrates how illogical it is. Our evidence demonstrates that Mr McAliffe, as he has a regularly rostered Sunday shift on the second Sunday of the respondent's pay period, is unwilling to pick up overtime shifts because it isn't worth it to him as he will not receive penalty rates on those hours.

PN78

Yes, if his Sunday shift was in the middle of the pay period instead, he would be willing to pick up extra shifts as he would be paid at overtime rates on extra hours worked. This cannot be the intention of the provisions. The respondent has decided to count ordinary hours in a way that suits them and their bank account but hurt their dedicated employees and their ability to staff their operations and serve vulnerable members of the community.

PN79

It is only open to the Commission to answer question A in the affirmative, and question B in the negative and the ASU seeks that if the Commission determines that if the answer to question A should be answered in the affirmative that it makes a declaration that the respondent's application of overtime penalties is in

breach of the MacKillop Family Services Agreement 2016. Thank you, Commissioner.

PN80

THE COMMISSIONER: Ms Predic, can I just take you up on that issue about the declaration. In regard to the dispute resolution clause, wouldn't I be saying something about how the agreement operates prospectively, as opposed to making some declaration about past rights?

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MS PREDIC: Yes, Commissioner. I guess to frame the declaration as a – the overtime provisions should be applied in line with, I guess, to be paid – overtime should be paid on the day in which employees work in excess of rostered hours, going forward.

PN82

THE COMMISSIONER: Because I don't know that I have the power to fix what you claim to be an underpayment. Surely that's a matter that you can - - -

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MS PREDIC: Yes, I understand.

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THE COMMISSIONER: Yes, that's fine. All right, I won't be making a declaration about past rights but certainly I'll make a statement about how I think the agreement should apply moving forward.

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MS PREDIC: Thank you, Commissioner.

PN86

THE COMMISSIONER: Mr Harrington, do you agree that that's all I can do? Sorry, you're on mute so - - -

PN87

MR HARRINGTON: You're absolutely correct, Commissioner, and we address that in one sentence at paragraph 30 of our reply submissions at Tribunal book 119 and at have cited the relevant authority, which is – as you've articulated you don't have jurisdiction or power, if there's a distinction between those two things, to grant declaratory relief but you can answer a question in an attempt to resolve the dispute that is before you. And that's, I'm sure, what you will ultimately do one way or the other.

PN88

THE COMMISSIONER: Yes. Yes, thank you for clarifying that. Ms Predic, so did you finish your submissions?

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MS PREDIC: Yes, Commissioner.

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THE COMMISSIONER: Yes, thank you. Mr Harrington?

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MR HARRINGTON: Thank you. Commissioner - - -

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THE COMMISSIONER: Mr Harrington, I've obviously had the benefit of reading the submissions which have been filed by the parties. I guess what, from my perspective presently, the respondent doesn't engage with is if we look at 11.2(a)(i), for convenience on page 88 of the digital Tribunal book - - -

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MR HARRINGTON: Yes.

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THE COMMISSIONER: 'When calculating overtime consideration is given to excess hours worked on a shift basis.'

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MR HARRINGTON: Yes.

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THE COMMISSIONER: It seems that MacKillop Family Services ignores that and I'm trying to figure out, if it's in the agreement it's got some work to do – what work does it have to do?

PN97

MR HARRINGTON: Well, that's perhaps a nice invitation, Commissioner, for me to address that very briefly and now I'll take you to some of the facts, but just on that question, as a matter of construction 11.2(a) is what I would call a machinery provision, and I think I used that language in the submissions, in that it directs the parties to give consideration to certain matters when calculating overtime.

PN98

Because it's 11.2(b) and 11.2(c) that actually contain the obligation and there have been hours worked by Mr McAliffe that were excess to something and we say, well, they were excess to the roster that he was given. I don't see that as particularly controversial but my learned friend, I think, does say that we've taken some distorting or perverse pathway in the way we argue the case.

PN99

But there were more than 76 hours, and these are 76 ordinary hours worked in the fortnight, and I think we both agree in that. That's just not in dispute. So, we don't ignore (a)(i) that consideration must be given to the excess hours worked on a shift basis, and we don't ignore Roman (ii) that there is a question about, or a consideration, to use the language of 11.2(a)(ii) that there must be consideration as to where the overtime falls.

PN100

Now, it might be said against me that, hang on, the language of 11.2(a)(ii) says, 'regardless of where the overtime falls.' And that is literally the language and I

accept that phrase and that proposition, and it's probably the strongest part of my learned friend's case and I accept that too.

PN101

But two points I might make about that is that that's a consideration but that must be read subject to a further consideration which follows it, Roman numeral (iii), that the overtime is not payable for ordinary hours worked on Saturday or Sunday.

PN102

So, what is the difference between us in the way I approach the interpretive task or the construction task is, the union appears to contend that it doesn't matter where it falls, if you exceed 76 you get it, so to speak, and that's articulating pretty simply. Ms Predic is nodding, so I'm sure she's happy to hear that and it's lucky we're not in a jury trial because that would be helping her case.

PN103

But what we say about that is, well, yes, it's literally said those things but as a matter of construction, before you get to 11.2(b), 11.2(a) you've got to have regard to all relevant considerations and (3) must be read against (2). It confines it, it narrows it. That's how we put our case for when you get to 11.2(b).

PN104

The interesting thing about 11.2(b), Commissioner, is that it applies expressly to full-time employees and it doesn't use the same language necessarily at 11.2(a). I mean, to read it literally, 'A full-time employee will be paid the following payments for all work which exceeds ten ordinary hours per shift.' That's not us.

PN105

That's not this case because the Wednesday that Mr McAliffe came into work, he only worked three hours and in fact the three hour shift, I think can be fairly described as a training shift. It was a CPR training exercise that he had to undertake and he came in expressly for that purpose and did three hours on the Wednesday.

PN106

And in that sense he didn't exceed the ten ordinary hours, so that doesn't apply. But then to return to 11.2(b), 'and anything over 76 hours per fortnight that hasn't already had overtime apply to it, and isn't(?) Saturday or Sunday ordinary shift.' So, the actual obligation itself is contained in 11.2(b) but you have regard to the considerations in 11.2(a), but 11.2(a) directs you to a consideration of this. Where did the overtime fall?

PN107

And in fact the first question posed by the union, and when I say the first question, in the form F10 as first filed, but let's just go form F10 as filed yesterday which is now exhibit 10, the union squarely places in issue at its question number 1, that language of regardless of where they fall, meaning the ordinary hours and the excess hours.

PN108

They put in issue, the union, the idea of where the hours fall.

PN109

Now by reason of what's gone on this morning the question that I think we have agreed that we're proceeding upon which is at 23 of the submissions, is this. 'Where a full-time shift worker employee covered by the '16 agreement works in excess of 76 hours in a fortnight, for the purposes of clause 11.2,' that's the concession we made of the 2016 agreement, 'and the calculation of any overtime (indistinct) are the hours in excess of 76 hours in the fortnight to be calculated upon the day on which the employee worked in excess of any rostered hours on the day in which the employee is calculated to work.'

PN110

Now Ms Predic in her submissions earlier today, I think she was working off her earlier script where she was addressing question 1 and 2. It's not a criticism but I think by agreement we are addressing this question, question 23 – sorry, paragraph 23, response submissions and it's got Part A and Part B in it. If I can address that question, Commissioner, and say that what's at the heart of the question that you must answer, that we've agreed that you must answer, is this idea of where the hours fall.

PN111

Because you must ascertain where the hours fall in order to then apply the considerations in 11.2(a) and then, if I can call it, the formula of payment of entitlement under 11.2(b). If you come to the task that way, Commissioner, having regard to the 11.2(a) considerations, the 77th, 78th and 79th hour beyond ordinary time hours, and I want to address you on that in a minute, they fall on the Sunday.

PN112

They fall on the Sunday. And one of the relevant considerations that is both in 11.2(a) at (iii), but also in 11.2(b) in the chapeau and the end there, and isn't a Saturday or Sunday ordinary shift. So, it does matter where they fall. It does matter because the times when they reached this agreement made it very plain that you don't get the overtime if the hours fall for consideration on the Saturday or the Sunday shift.

PN113

And that's the tension, in a way, Commissioner. It's the tension between a consideration at 11.2(a)(ii), quote, 'regardless of where the overtime falls.' With 11.2(a)(iii) overtime is not payable for ordinary hours worked on Saturday and Sundays, which is reinforced at 11.2(b) in the chapeau where it says, 'and anything over

PN114

76 hours per fortnight that hasn't already had overtime applied to it (audio malfunction) ordinary shift.

PN115

THE COMMISSIONER: But Mr Harrington, doesn't – the inclusion of 'that hasn't already had overtime applied to it,' sort of suggest that you could have overtime paid on a shift by shift basis? It sort of links in with 11.2(a)(i). Because otherwise it doesn't need to be there, at all.

PN116

MR HARRINGTON: I think that needs to be properly understood in respect of what I'll call two species of possible overtime – 'exceeds ten ordinary hours per shift and anything over' (audio malfunction) is the ten ordinary hours per shift. Can I answer this by a slightly longer way home, which is to take you to some of the facts and the first element of the factual aspect I'd like to take you to, Commissioner, is in answer to this question. Well, what are ordinary hours in the scheme of things?

PN117

It starts with, in my submission, the contract at clause

PN118

18 and if you go to the Tribunal book at 52 you will see that's Mr McAliffe's first disagreement, obviously. And what he was provided with is a letter dated 3 July 2018, and at 52, right at the bottom of the page and this is KM1 to the witness statement, 'You are required to work 76 hours per fortnight as per the roster.'

PN119

Now the reason, with respect, that's relevant is because my learned friend did take you to this. If we go then to the 2016 agreement at clause 6, and I take you to Tribunal book 83, the 'ordinary hours' definition – 'ordinary hours means the number of hours worked in a day which average 76 hours per fortnight, or less than 76 hours per fortnight for part-time employees. Ordinary hours are advised on the commencement of employment or when there is a change to shift work patterns.'

PN120

The reason I have taken you to that more succinct definition of 'ordinary hours' is because the contract that was provided to Mr McAliffe, KM1, did advise him of, in my submission, his ordinary hours which was 76 hours per fortnight. So, that is part of the factual puzzle and it's not in contest between us, as I understand it. That expression being or 'ordinary hours,' and again my learned friend took you into this, does some work at clause 9.1 on Tribunal book page 85.

PN121

'The ordinary hours of work for a full-time employee shall be 38 hours per week, or on average.' And then the last line there on, again, 9.1 of Tribunal book page 85, 'By agreement the ordinary hours may be worked up to ten hours per shift.' So, what happened when Mr McAliffe attended his three hour shift was that he worked ordinary hours, in my submission. He was working ordinary hours.

PN122

And as I have said already, this Wednesday, March 2 shift, it was a training module, as it were, for CPR. So, right at that point in time if you stopped everything and said, well, what's he doing? Is he working overtime or excess hours right now, our submission is he is not. He's working ordinary hours because he's not working beyond ten hours in the shift. That's not the complete answer but that's just to take a snapshot of what is happening on that day.

PN123

But it is consistent with the submission that we make that the focus, we say, is those last three hours on the Sunday, 77, 78, 79. Because if it falls for consideration those, so called extra hours at that point, it runs into the problem in our submission, and this is where we're apart, basically, Commissioner, and I think you know this. It runs into the problem at that point of the consideration in 11.2(a), or putting it slightly differently, the prohibition in 11.2(a)(iii) and 11.2(b) that you don't get it in a Saturday or Sunday ordinary shift.

PN124

The construction principles upon which we rely, Commissioner, are set out in our submissions at 49 to 59 and that's the Tribunal book at page 120 to 121, and Amcor is quite helpful in this particular setting that we find ourselves in. I don't need to go through the facts at Amcor but it dealt with a restructure between companies within a broader framework of the Amcor companies and no employees lost their job and every employee kept their terms and conditions.

PN125

But there was an argument advanced by the union before a single Judge and three Judges of the Federal Court, saying we've been made redundant and we're entitled to severance pay because we've changed employers and our old job has come to an end and we've got a new job. We've got a new job, doing the same work at a different company within the structure. And ultimately the High Court said that's not right in the particular circumstances of that case but it required the High Court to look very closely at the relevant principles.

PN126

And you will see in paragraph 50 of the respondent's submissions on Tribunal book at 120, page 120, that we've set out what Gobbo, Hayne and Hayden JJ had to say there. But also, and you're well aware of this, Commissioner, and Kirby J in Amcor which is the sort of thing that was said in the Federal Court case in Kutz(?), that when you look and you are scrutinising for (indistinct) of an agreement, quite often it bears all the common hallmarks of colloquial language and a measure of imprecision.

PN127

And that has something to do with the background of the drafters and the like. In order to tackle the construction question - - -

PN128

THE COMMISSIONER: Yes, it always strikes me that these things are drafted with imprecision, and I wasn't there drafting it but I have to decide what it means.

PN129

MR HARRINGTON: Yes, 'imprecision' is a very polite term. Some would perhaps use the term, 'wriggle room.' Sometimes it can be drafted by the parties with wriggle room, so - - -

PN130

THE COMMISSIONER: Deliberately, so that it means everyone gets a win.

PN131

MR HARRINGTON: Everyone has a win. The agreement gets made and then suddenly you hit the rocks later on, and we have to go to the Commission saying, 'Well, it's very clear, just read the words,' and it's like the parties may or may not have intentionally used a whole lot of words that mean a whole lot of different things, and it's ambiguous and it's unclear. B

PN132

But it doesn't mean it's unenforceable because that's the job of the Commission to make sense of it. But what's interesting about this construction task, and I'm sure you'll grapple with it, Commissioner, is that 11.2(a) is an unusual clause because it doesn't impose an obligation other than have regard to considerations. It's not actually imposing an overtime obligation, 11.2(a).

PN133

And I think I can say that quite forcefully. It's there as, sort of, hardly interpretive machinery for perhaps anticipating a dispute later on to say that the parties, indirectly to the Commission, when you are calculating overtime you've got to give consideration to three primary issues or primary factors, and both myself and my learned friend no doubt agree on this. They are quite literally what they – they are what they say, except 11.a(ii) is more of a mouthful and it contains a number of different ideas.

PN134

See, (1) just says, 'excess hours worked on a shift basis,' and we say that box is ticked here and I think we're in agreement on that; (3) says, 'overtime is not payable for ordinary hours worked on Saturday or Sunday.' I think we're both in agreement in a broad sense that that is literally what it means, and you can't get an overtime payment for Saturday or Sunday work.

PN135

It's (ii) in 11.2 that throws up for considerations some difficult questions, because to reiterate without repeating myself what I said before, that notwithstanding the verbiage of regardless of where the overtime falls, which is important in my submission, it does have (indistinct 11.52.09) but the reason it matters, Commissioner, where it falls is because if it falls within the catchment contained in 11.2(a)(iii), Saturday or Sunday, it's not payable.

PN136

So, you have to read 11.2(a)(ii) subject to the consideration in 11.2(a)(iii), and as I've already submitted, this is important because the parties have reiterated 11.2(a)(iii), again in the language of 11.2(b), making it very clear. Clearly in the negotiation and I wasn't there of course, but clearly what's happened is, all right, you can earn overtime but because we're paying a higher rate on Saturdays and Sundays in any event, you can't come along and get 400 per cent of ordinary time on a Saturday and Sunday. You're already getting 200 per cent for working, particularly the Sunday.

PN137

And what really appears to be at the heart of the discombobulation by the union here, putting to one side whether they've got the arguable case in the construction,



is that when a pay period ends on a Sunday, as it does here and as it always has, when it ends on a Sunday, quite often in my submission – I should withdraw that, it doesn't matter about other circumstances, but in this case the 77th to 79th hours are worked on that Sunday.

PN138

They're not worked, in my respectful submission then on the Wednesday because it's still ordinary time back on the Wednesday, the three hours of CPR training. And that's where we're fundamentally apart. To really reduce it to its essence, where do they fall? And your answer might be, and I won't be happy about this but you might say it doesn't matter where they fall because it says, 'regardless of where the overtime falls.' That might be your answer, Commissioner, and I'll have to confront that, I accept that.

PN139

But we do confront that by saying that that has to be read very carefully because of the other consideration at 11.2(a) and the fact that it's repeated as a consideration at 11.2(b). So, where it falls does matter, in my submission. And I think if you come to the crux of the construction question, if you were to say to us, can you articulate the question in a sentence, it's like it would be the dispute is, well, where does the overtime fall for the purposes of 11.2(a) and/or (b), particularly (b). That's what it's going to come down to.

PN140

So, Commissioner, I don't want to repeat myself ad nauseam. I think I've addressed you on that critical question of where the overtime falls and that it does matter, and I've addressed you on the idea of the 77 to 79th hour on a Sunday which can't attract the overtime because implicit in that is that the three hours were ordinary time hours when they were worked.

PN141

And can I just deal with an important matter, too. 11.2(b) refers to the first species of overtime which is for all works which exceeds ten ordinary hours per shift. That's not us and I've already made that submission, and I think we all agree on that. And then it goes on, 'and anything over 76 hours per fortnight.' Now, that phrase must refer to 76 ordinary hours per fortnight.

PN142

So that the word, 'ordinary' is not there but preceding that is the reference to 'ten ordinary hours.' But given that this is shift work, given that Mr McAliffe's contract says, 'your ordinary hours are 76 hours per fortnight and given the definition in clause 6, it's my submission that at 11.2(b) you read '76 hours per fortnight' as '76 ordinary hours per fortnight.'

PN143

Dealing with the last element of the verbiage there, quote, 'that hasn't already had overtime applied to it and isn't a Saturday or Sunday ordinary shift,' the problem the union runs into there is they might be able to shift the boxes saying, well, the three hours on the Wednesday 22 March didn't have overtime applied to it because you haven't paid it like that, and that's correct because we've viewed it in a particular way. But the word, 'and' then appears that we say because of where

the hours fall, they are at the end of that Saturday or Sunday ordinary shift and therefore you do not get it under 11.2(b).

PN144

So, in summary, Commissioner, the consideration in clause 11.2(a)(ii) defrays regardless of where the overtime falls, must be read as subject to that very clear prohibition at 11.2(a)(iii) and then into 11.2(b). Commissioner, is there any other matter – I'll just check with my instructor's file but is there any other matter that I can address you on that would assist you?

PN145

THE COMMISSIONER: No, thank you, Mr Harrington, but if you want to consult with your instructor.

PN146

MR HARRINGTON: Thank you, just one second. Yes, the only final submission but I think it emerges from what I've put before you, is the work done or the time worked by

PN147

Mr McAliffe could not have exceeded 76 ordinary hours before and until the Sunday, but I've made the submission it's a numerical or calculation exercise, I think, is one way to describe that. Commissioner, unless I can assist you any further those are the submissions.

PN148

THE COMMISSIONER: Thank you, Mr Harrington. Ms Predic, if we're looking at 11.2, and what Mr Harrington says is that 11.2(a) imposes no obligation, he then I think correctly points out that 11.2(a)(ii) and (iii) are picked up in 11.2(b), and it is only in 11.2(b) that the obligation arises where it says, 'will be paid.' Where is the obligation to pay when I work more hours than I was rostered on a particular day? Where do I find the obligation to pay?

PN149

Because it might be said that those extra three hours on the Wednesday were overtime but no overtime rate applies to them. Where do I find the obligation pay overtime rates for those three hours?

PN150

MS PREDIC: 11.2(b) must be read with 11.2(a) in calculating the obligation, in calculation the amount that the obligation is, and it does say anything over 76 – it says, 'ten ordinary hours and anything over 76 hours,' which the respondent has agreed is 76 ordinary hours. We submit the ordinary hours were not worked on that Wednesday, they were overtime hours.

PN151

They can't be ordinary hours as they don't meet the definition of 'ordinary hours' in clause (6) which needs to be informed - - -

PN152

THE COMMISSIONER: Ms Predic, I'm sort of, in part, agreeing with you.

PN153

MS PREDIC: Yes.

PN154

THE COMMISSIONER: I don't think those three hours are ordinary hours.

PN155

MS PREDIC: Yes.

PN156

THE COMMISSIONER: But where does the obligation to pay overtime rates arise in respect of those three hours? Because if I read 11.2(b), that's what imposes the obligation and the only one that can be relevant is anything over 76 hours per fortnight in the current factual circumstance.

PN157

MS PREDIC: Yes but I submit that anything over 76 hours per fortnight, it doesn't matter where they fall. So, there's nothing in 11.2(b) that confines the obligation to where the hours fall, whereas 11.2(b) must be read with 11.2(a) which tells you how to calculate the - - -

PN158

THE COMMISSIONER: But until I get to the Sunday I haven't worked in excess of 76 hours. I mean, if I didn't work my shift on the Sunday I wouldn't get the overtime, would I?

PN159

MS PREDIC: No, you would not, but then you wouldn't have worked your 76 ordinary hours.

PN160

THE COMMISSIONER: So, you say that the obligation arises in 11.2(b)?

PN161

MS PREDIC: Yes, read in conjunction with 11.2(a). 11.2(a) has to have work to do.

PN162

THE COMMISSIONER: Yes.

PN163

MS PREDIC: What is the purposes of the considerations if it doesn't impact the payment?

PN164

THE COMMISSIONER: You say if 11.2(a) doesn't have some work to do to help in the construction of 11.2(b), why is it there at all?

PN165

MS PREDIC: Exactly.

PN166

THE COMMISSIONER: Yes, I see. Anything further?

PN167

MS PREDIC: Just to reiterate, my friend did continually state that the hours worked on the Wednesday were ordinary hours which, again I just submit these cannot be considered ordinary hours under clause 6. And if you look at the roster itself, the respondent themselves has identified it as an extra shift which indicates that they're aware that those are not ordinary hours for the purposes of the agreement. Thank you, Commissioner.

PN168

THE COMMISSIONER: Just give me one minute. Mr Predic and Mr Harrington, I have been greatly assisted by the submissions and I thank you for the careful way in which you've taken me through the provisions. It is necessary for me to reserve my decision and I do so. We are adjourned.

PN169

MR HARRINGTON: Thank you.

PN170

MS PREDIC: Thank you.

**ADJOURNED INDEFINITELY**

**[12.04 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #8 APPLICANT'S OUTLINE OF SUBMISSIONS ..... PN9**

**EXHIBIT #10 NEW FORM F10 DATED 25/09/2023 ..... PN9**

**EXHIBIT #10.1 WITNESS STATEMENT OF DEEANA PREDIC DATED  
25/09/2023 ..... PN9**