

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Trading as Australian Manufacturing Workers' Union v Townsville City Council* [2021] QIRC 063

PARTIES: **Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Trading as Australian Manufacturing Workers' Union**
(Applicant)

v

Townsville City Council
(Respondent)

CASE NO: D/2020/75

PROCEEDING: Arbitration of an industrial dispute

DELIVERED ON: 24 February 2021

MEMBERS: Pidgeon IC

HEARD AT: On the papers

ORDERS: **The answer to the question for arbitration is that apprentices should be paid the full mechanical allowance as listed in Appendix D of the *Townsville City Council (Trade Employees) Certified Agreement 2019*.**

CATCHWORDS: INDUSTRIAL LAW – notice of industrial dispute - interpretation of industrial instrument - whether the full annualised allowance payable to apprentices - whether there is ambiguity in the certified agreement.

LEGISLATION: *Industrial Relations Act 2016* s 135

CASES: *AMWU v Berri Pty Ltd* [2017] FWCFB 3005

O'Connor v The Electroboard Administration Pty Ltd [2001] QIC 53; (2001) 168 QGIG 90

Reasons for Decision

Background

[1] On 10 July 2020, the Australian Manufacturing Workers' Union (the Union) filed a Notice of Industrial Dispute with the Industrial Registry against the Respondent Townsville City Council (the Council). The subject matter of the dispute was set out in the Overview of that notice:

Overview

1. The subject matter of the dispute between the parties is in relation to the payment of the annualised allowance in Appendix D of the *Townsville City Council (Trade Employees) Certified Agreement 2019* (the Agreement) to mechanical apprentices;
2. the issue to be determined is whether apprentices should be paid a percentage of the allowance or the full allowance;
3. since the introduction of the mechanical annualised allowances, apprentices in the mechanical trade have been paid the allowance proportionally, at a percentage commensurate with their rate of pay for their year level; and
4. The Union's position is that the allowance should be paid in full.

[2] The question for arbitration was agreed during a conference held 27 July 2020 and is as follows: Whether the annualised allowance under Appendix D of the *Townsville City Council (Trade Employees) Certified Agreement 2019* (the 2019 Agreement) for mechanical employees is payable to apprentices at the full rate or a proportionate rate?

[3] The part of the 2019 Agreement in contention is the annualised allowance for mechanical employees which is set out in appendix D to the agreement:

Annualised Allowances – mechanical

Annualisation means an additional component is added to the base hourly rate for each classification in lieu of allowances listed below and is an all purpose payment.

...

For the Mechanics and Diesel Fitters, Trades Assistants and Apprentices, the allowances annualised comprise:

- Confined Space Allowance
- Division and District Allowance On Site/Construction Allowance
- Repair of Unclean Vehicles Allowance
- Repair of Unclean Vehicles Allowance – Bitumen
- Sewerage Disability Allowance
- Special Substance Allowance – Battery

- Special Substance Allowance – Epoxy
- Special Substance Allowance – Fumes
- Wet Well Allowance
- Working in Rain Allowance
- Work Under Unpleasant Conditions Allowance

They do not include:

- Overtime
- Shift penalties
- Higher Duties

The annualised allowance will be:

\$3.05448 per hour

Legal framework

[4] The parties agree that the decision in *AMWU v Berri* [2017] FWCFB 3005 (*Berri*) sets out the relevant principles for construing an enterprise agreement. These principles have previously been applied by the Commission in the interpretation of an enterprise agreement:

[114] The principles relevant to the task of construing a single enterprise agreement may be summarised as follows:

1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:
 - (i) the text of the agreement viewed as a whole;
 - (ii) the disputed provision's place and arrangement in the agreement;
 - (iii) the legislative context under which the agreement was made and in which it operates.
2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the

parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.

4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.
5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.
6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901 (Cth)* applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.
7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.
8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.
9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.
10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.
11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such *objective* facts is to be distinguished from evidence of the *subjective* intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.
12. Evidence of objective background facts will include:
 - (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
 - (ii) notorious facts of which knowledge is to be presumed; and

- (iii) evidence of matters in common contemplation and constituting a common assumption.
13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.
 14. 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.
 15. 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 such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding.

[5] The relevant provision of the *Industrial Relations Act 2016* (IR Act) referred to by both the Union and the Council is:

135 Apprentice's and trainee's employment conditions

- (1) An apprentice or trainee is entitled to the same employment conditions as those fixed by the industrial instrument applicable to employees in the workplace where the apprentice or trainee is employed.
- (2) An apprentice or trainee is entitled to wages at—
 - (a) if an industrial instrument applying to employees in the workplace where the apprentice or trainee is employed or placed states a rate payable to apprentices or trainee—the rate stated in the instrument; or
 - (b) otherwise—the rate fixed by the commission, being a proportion of the wages payable for the relevant calling to employees in the workplace where the apprentice or trainee is employed or placed.

Examples —

- 1 an apprentice plumber is placed by a group training organisation in the workplace of a host employer where a federal award applies. The apprentice is entitled to the rate of wages stated in the federal award rather than a State award.
- 2 An apprentice carpenter is placed by a group training organisation in the workplace of a host employer where a certified agreement applies. The certified agreement does not state the rate of wages payable to an apprentice. The apprentice is entitled

to wages at the rate fixed by the commission, being a proportion of the wages payable to a qualified carpenter under the certified agreement.

- (3) If an industrial instrument provides for a tradesperson in a calling to be paid an allowance in addition to wages, an apprentice in the calling is entitled to be paid —
- (a) if, under the instrument, the allowance is taken to be part of the tradesperson's wages—the percentage of the allowance that the apprentice's wages bear to the tradesperson's wages; or
- (b) if, under the instrument, the allowance is not taken to be part of the tradesperson's wages—the full allowance.
- (4) If an industrial instrument provides for a tradespersons in a calling to be paid an allowance that is assessed as a percentage of the tradesperson's wages, an apprentice in the calling is entitled to be paid the percentage of the allowance that the apprentice's wages bear to the tradesperson's wages.
- (5) Subsection (4) applies whether or not under the instrument the allowance is taken to be part of the tradesperson's wages.
- (6) In this section—
Industrial instrument includes a federal industrial instrument.

Workplace, for an apprentice or trainee employed by a group training organisation, includes the workplace of the host employer with whom the apprentice or trainee is placed.

- [6] It was agreed between the parties at a mention held on 9 November 2020 that the matter be heard on the papers.

The Union's position

Background

- [7] Since the introduction of the mechanical annualised allowance in the 2019 Agreement, apprentices in the mechanical trade have been paid the allowance proportionally, at a percentage commensurate with their rate of pay for their year level. The Union's position is that the allowance should be paid in full.¹

Historical Payment of Allowances

- [8] The *Townsville City Council (Trade Employees) Certified Agreement 2017* (the 2017 Agreement) provided an annualised allowance for trades such as electricians, fitters and boilermakers but mechanical employees did not have an annualised allowance.

¹ Union submissions filed 17 September 2020 paras 4,5.

[9] Instead, individual allowances for mechanical employees were payable in accordance with both the 2017 Agreement and the *Queensland Local Government Industry (Stream C) Award* (the Award), Part 4.

[10] Under the 2017 Agreement and the Award, allowances were a flat rate paid at either a set amount or a percentage of the C10 rate of pay. Below is a list of allowances that were paid at a fixed flat rate:

- (i) Confined Space Allowance – set flat rate of \$0.90 per hour;
- (ii) Divisional and District Allowance – set flat rate (Northern Division, Eastern District) \$1.10 per week;
- (iii) Construction/Site Allowance – flat rate \$32.80 per week;
- (iv) Repair of Unclean Vehicle Allowance – additional hourly allowance of 25% of the C10 pay rate;
- (v) Repair of Unclean Vehicle Allowance (bitumen) – additional hourly allowance of 25% of the C10 pay rate;
- (vi) Sewerage Disability Allowance – additional hourly allowance of 25% of the C10 pay rate;
- (vii) Special Substance Allowance for battery, epoxy and fumes – three separate allowances paid at an additional hourly set flat rate of \$0.90 or \$0.75;
- (viii) Wet Well Allowance – additional hourly allowance of 25% of the C10 pay rate;
- (ix) Working in Rain Allowance – additional set flat rate of \$0.75 per hour' and
- (x) Work Under Unpleasant Conditions Allowance – hourly rate paid at time and one quarter.

[11] The Union says that the allowances under both the 2017 Agreement and the Award were separately claimed by mechanical employees. The allowances were paid in full to apprentices.²

The 2019 Agreement

[12] An annualised allowance for mechanical employees was incorporated into the 2019 Agreement. The annualised allowance for mechanical employees is set out in Appendix D (see [4] above).

Interpretation of Appendix D

[13] When considering the ordinary meaning of the relevant words in light of the *Berri* principles listed above, the Union submits that Appendix D is unambiguous and the words contained therein are not susceptible to more than one meaning. If the plain

² Affidavit of Peter Dalton filed 17 September 2020 at [9].

meaning of the words within Appendix D of the 2019 Agreement are considered, the effect of the provision is that an allowance is payable at the stated rate being \$3.05448 in lieu of certain allowances to 'Mechanics and Diesel Fitters, Trades Assistants and Apprentices' (Union's emphasis).

- [14] The Union says that Appendix D is detailed and identifies existing allowances that were annualised and specific allowances that are excluded. Further, there is no reference within this provision for this allowance to be paid proportionally to the apprentices.

Contextual Considerations

- [15] The Union restates the principle in *Berri* that where meaning is unclear then, resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. And further, that context may appear after considering the agreement as a whole and the legislative context under which the agreement was made. When considered as a whole, the text of the 2019 Agreement supports the view that the annualised allowance in Appendix D is to be paid in full to apprentices. It is constructed and worded differently to the provisions within the Agreement where apprentices are paid a certain percentage of an allowance.

- [16] The Union cites Appendix E of the 2019 Agreement and says that this clause clearly articulates how apprentices and trades assistants are paid a percentage of a particular allowance. Appendix E refers to the Engineering Trade Allowance and relevantly states: "The allowance shall be paid to apprentices at the percentage relevant to their standing in their apprenticeship". By contrast, Appendix D contains no such wording that apprentices are paid a percentage of the annualised allowance "relative to their standing in their apprenticeship". It is inappropriate to attempt to import such wording into Appendix D in an effort to rewrite the 2019 Agreement.

- [17] With regard to s 135 of the IR Act (reproduced at [5] above) which the Council has relied upon to justify not paying the annualised allowance in full, the Union's view is that the IR Act provides further context to support an interpretation that the annualised allowance is to be paid to apprentices in full.

- [18] The Union submits that s 135(3)(b) of the IR Act applies (and s 135(3)(a) does not) because:

- The language and plain meaning of the words in Appendix D of the 2019 Agreement are such that the annualised allowance is an '*additional*' stand-alone component '*added*' to the base hourly rate;
- At no stage within the instrument is it stated that the annualised allowance is included as part of a tradesperson's wages or base rate; and
- The instrument clearly states that the annualised allowance is to be paid to tradespeople, apprentices and trades assistants at a fixed rate.

Intention of the parties

[19] The Union submits that if the Commission is not satisfied that the words in the Agreement are clear, the Union relies on the evidence of Peter Dalton. Mr Dalton's evidence includes:

- Information about the negotiations for the 2019 Agreement;
- discussions regarding the creation of an annualised allowance for mechanical employees;
- the historical treatment of the allowances that were annualised and the intention of the parties; and
- that allowances which now form part of the annualised allowance within the 2019 Agreement were previously paid at a fixed rate and paid in full to apprentices and tradespeople, because they were disability allowances.

Mr Dalton's evidence

Historical payment of allowances/Previous Agreement and allowances

[20] It has been Mr Dalton's experience that disability allowances are paid at a flat rate and not paid on a percentage basis to apprentices.³

[21] Disability allowances provide additional remuneration to an employee because that employee has been displaced because of the work they are doing. The allowances have typically been paid at a flat rate because an apprentice or tradesperson working in the same confined space are equally displaced and impacted by the working conditions.⁴

[22] To Mr Dalton's knowledge, allowances payable under both the 2017 Agreement and the Award were individually claimed by mechanical employees, including apprentices, at a flat rate in full.⁵

Negotiations for the 2019 Agreement

[23] As part of negotiations for the 2019 Agreement, the Union included the introduction of an annualised allowance for mechanical employees as part of its log of claims. There were several points that needed to be negotiated before the annualised allowance for

³ Affidavit of Peter Dalton filed 17 September 2020 at [4].

⁴ Affidavit of Peter Dalton filed 17 September 2020 at [5].

⁵ Affidavit of Peter Dalton filed 17 September 2020 at [9].

mechanics could be agreed upon, including what existing allowances would be included in the annualised allowances and the value of the allowance.⁶

- [24] The Union's position during the negotiations was that it would be inappropriate to include certain allowances such as the on-call allowance or the engineering trades allowance.
- [25] The Union's concerns in relation to the inclusion of the trades allowance within an annualised allowance was that the identity and purpose of the allowance would be lost because it would be paid at a lower flat rate for all employees, whereas in the past it had been paid on a percentage basis to apprentices relative to the stage of their apprenticeship in recognition of the fact that they were not fully qualified tradespeople. To Mr Dalton's knowledge, this was the only allowance that was paid to apprentices as a percentage relative to their experience by the Townsville City Council.⁷
- [26] Mr Dalton describes the negotiations regarding what was to be included in the annualised allowance and what the eventual agreement was. He says that some allowances were excluded from the annualised allowance and were to remain claimable for mechanical employees. These were excluded on the basis that not all employees regularly claimed these allowances and in terms of the engineering trade allowance, Union members wanted to retain the purpose and identity of the allowance and avoid the value of the allowance being diluted by averaging the payment value of the allowance across both apprentices and tradespeople.⁸
- [27] During the negotiations, the Council provided the Union with various calculations and proposed rates for the annualised allowance. As part of the process, the Council reviewed the claimed amounts during the previous three years for each allowance that was to be included in the annualised allowance and averaged the claimed amounts out to arrive at the rate eventually agreed upon. Mr Dalton does not recall any point in the negotiations where there was a discussion about apprentices being paid a percentage of the annualised allowance under the 2019 Agreement.⁹
- [28] The Union did not consider the potential for apprentices to be paid a percentage of the mechanical annualised allowance under the 2019 Agreement. This was because the allowances that were included in the annualised allowances under the 2019 Agreement had previously been paid at a flat rate to apprentices and tradespersons in accordance with the Award. The Engineering Trades Allowance, which was to be paid to apprentices on a percentage basis, was deliberately excluded from annualisation.¹⁰

⁶ Affidavit of Peter Dalton filed 17 September 2020 at [10], [11].

⁷ Affidavit of Peter Dalton filed 17 September 2020 at [13].

⁸ Affidavit of Peter Dalton filed 17 September 2020 at [14]-[17].

⁹ Affidavit of Peter Dalton filed 17 September 2020 at [19],[20].

¹⁰ Affidavit of Peter Dalton filed 17 September 2020 at [21].

The Council's Position

[29] With regard to s 135(3) of the IR Act, the Council says that the fundamental issue is whether or not the mechanical allowance is part of the apprentice's 'wages'.

- (i) The definition of 'wages' in Schedule 5 of the IR Act and the ordinary meaning of 'wages' are consistent with the mechanical allowance being 'wages'. Case law distinguishes between allowances which relate to work performed or particular conditions of that work and allowances which are paid by way of reimbursement of expenses incidental to that work. The mechanical allowance is the former.
- (ii) Further, the 2019 CA specifically provides that '*Annualisation means an additional component is added to the base hourly rate for each classification in lieu of allowances listed below and is an all purpose payment*' – that is, the mechanical allowance is for all intents and purposes treated as wages for all entitlements, it is included in the calculation of overtime paid on sick leave, annual leave etc. It is part of wages. The payment of the allowance operates to increase the hourly rate for all purposes.¹¹

[30] Further that s 135(3) of the IR Act applies so that the allowance can be paid proportionately to apprentices. It is clear from the drafting and operation of s 135 that separately identified allowances can form part of wages. If that was not the case, s 135 would have no operative effect.¹²

[31] The Council does not agree with the Union's submission that the absence of a reference to proportional payment in Appendix D taken with references to proportional payments elsewhere means that the mechanical allowance must be paid in full to apprentices. The Council submits that irrespective of the text of the 2019 Agreement, the IR Act has the result that it must pay apprentices the mechanical allowance at a proportional rate, and while the Council could 'choose' to pay in full, it would be discretionary, not required by law.¹³

[32] The Council's position is that s 135 of the IR Act is also relevant to, and determinative of how the mechanical allowance is applied. Council point to the Explanatory Note to the *Industrial Relations Bill 2016* which provides as follows:

Clause 135 preserves the arrangements in section 136 of the IR Act and provides that an apprentice or trainee is entitled to the same conditions of employment as those fixed by the industrial instrument applicable to other employees in the same workplace. The clause provides a definition of 'workplace'.

This clause provides that an apprentice or trainee is entitled wages at either the rate stated in the instrument or a rate fixed by the QIRC. It further provides that an apprentice is entitled to receive any allowances provided for a tradesperson and prescribes how this is to be calculated. (Council emphasis)

¹¹ Respondent's submissions filed 19 October 2020 [2].

¹² Respondent's submissions filed 19 October 2020 [2].

¹³ Respondent's submissions filed 19 October 2020 [8],[9].

[33] Council says that there is no express provision in the 2019 Agreement which purports to exclude the operation of s 135 of the IR Act; or provide that the mechanical allowance is to be paid to apprentices in full irrespective of whether, under the 2019 Agreement, the allowance is taken as part of the tradesperson's wages. For these reasons, Council submits that:

- (a) section 135 of the IR Act is intended to "prescribe" (as per the explanatory note) how the entitlement of apprentices to allowances are to be calculated; and
- (b) accordingly, Appendix D of the 2019 Agreement must be read consistently with s 135(3) of the IR Act.¹⁴

[34] Further or in the alternative, in the event Appendix D of the 2019 Agreement is not subject to s 135(3) of the IR Act it is submitted that when taking into account:

- (a) the effect of s 135(3) and the silence of the 2019 Agreement on this provision;
- (b) that the Respondent has historically made payment to apprentices for annualised allowances consistently with subsection 135(3), including to apprentices who are covered by the AMWU; and
- (c) the express terms of Appendix D which specify the amount of the mechanical allowance as a rate per hour which is added to the base hourly rate;
- (d) the wording of Appendix D does not have a plain meaning in isolation of the IR Act. Accordingly, extrinsic material and interpretative aids, including the IR Act itself, may therefore be taken into account to resolve this ambiguity.¹⁵

[35] The Council says that as is provided in s 135(3) of the IR Act, the percentage of the mechanical allowance that is payable to apprentices is dependent on whether, under the 2019 Agreement, the allowance is taken to be part of an employee's wages.

The mechanical allowance is 'wages'

[36] The term 'wages' is not defined in the Agreement. 'Wages' is defined in Schedule 5 of the IR Act as follows:

wages means-

¹⁴ Respondent's submissions filed 19 October 2020 [12], [13].

¹⁵ Respondent's submissions filed 19 October 2020 [14].

- (a) an amount payable to an employee for-
 - (i) work performed, or to be performed, by the employee; or
 - (ii) a public holiday; or
 - (iii) leave the employee is entitled to; or
 - (iv) termination of employment; or
- (b) a salary; or
- (c) an amount payable from wages for the employee, with the employee's written consent.

[37] Council cites consideration of the identical definition of wages in the former IR Act¹⁶ by President Hall in *O'Connor v Electroboard Administration Pty Ltd (O'Connor)*.¹⁷

One may not, of course, safely assume that words used in a statute are used in their natural sense. Not uncommonly words are given an entirely unnatural meaning by express definition. On other occasions the context in which a word is used will require that it be construed in other than its natural sense...

...

Two observations may immediately be made. A definition such as the definition of wages at Schedule 5 is best regarded, not as giving wages a new meaning, but as an entirely mechanical device to allow the words at (a), (b), (c) and (d) to be supplied by a single word, viz "wages", whenever it is desired to legislate in the Act for anything which is included in that expression. In *Mutual Acceptance Co. Ltd v Federal Commissioner of Taxation (1944) CLR 389 at 398*. Rich J observed:-

"A definition of this kind is not an exercise in philology. It is a mechanical device to save repetition. Its purpose is not to endow the word 'wages' with a new meaning, but to enable the expression 'wages, salary, commission, bonuses or allowances to be paid or payable,' to be supplied by a single word whenever it is desired to legislate in this Act for anything which is included in that expression..."

The other observation to be made is that whilst in apparently peremptory terms the definition, like all statutory definitions, is subject to s.32A of the Acts Interpretation Act 1954 which provides:

"Definitions in or applicable to an act apply except so far as the context or subject matter otherwise indicates or requires."

[38] Council says that ultimately in *O'Connor*, President Hall determined that 'wages' in the context of s 72(1)(e) of the former IR Act should be given its natural meaning and not the statutory definition, on the basis that the requisite contrary intention was found with respect to that provision.¹⁸

¹⁶ *Industrial Relations Act 1999 (Qld)*

¹⁷ 2001 ICQ 051, page 90-91

¹⁸ Council submissions filed 19 October 2020 [19].

[39] Council submits that there is nothing in the IR Act or its explanatory materials which demonstrates an intention that 'wages' for the purposes of s 135(3) ought to be given a different meaning than the definition provided in sch 5.¹⁹

[40] Council submits that the mechanical allowance, both collectively and in respect of its individual components, represents 'an amount payable to an employee for work performed'. Therefore the mechanical allowance falls within the definition of 'wages' in sch 5 of the IR Act.²⁰

Ordinary meaning of wages and allowance

[41] Council says that if a payment of monies falls within the ordinary meaning of "wages", that payment ought to be classified as 'wages' for the purpose of s 135(3) of the IR Act.

[42] "Allowance" is not defined in the IR Act or the 2019 Agreement. It is submitted that this term should be defined using its ordinary meaning.

[43] Council referred me to some authorities which it says demonstrates the following:

- (a) 'wages' in its ordinary sense represents money paid periodically by reason of work performed by an employee;
- (b) allowances can also be classified as "wages"; and
- (c) an allowance is classified as "wages" if the relevant industrial instrument intended as such.²¹

[44] Council says that this is consistent with s 135(3) of the IR Act, which provides that the entitlement of an apprentice to an allowance is subject to whether, "under the instrument (Council emphasis) the allowance is (or is not) taken to be part of the tradesperson's wages".

Classification of allowances as wages

[45] Council says there is a distinction between allowances which relate to work performed or particular conditions of that work (which are treated as wages in the context of federal and state wage fixing principles) and allowances which are paid by way of reimbursement of expenses incidental to that work.

[46] With reference to the decision in *Mutual Acceptance* and the ordinary meaning of 'wages' cited in *O'Connor*, Council submits that the mechanical allowance, both collectively and with respect to each of its individual components, represents wages in the ordinary sense.

¹⁹ Council submissions filed 19 October 2020 [20].

²⁰ Council submissions filed 19 October 2020 [31].

²¹ Council submissions filed 19 October 2020 [18]-[21].

[47] The Council cites *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* where Latham CJ distinguishes between allowances which are:²²

- (a) "payments additional to ordinary wages made for the purpose of meeting certain requirements of a service;" and
- (b) "allowances as compensation for unusual conditions of service".

[48] Latham CJ further states that the class of allowances in (b) of the above paragraph "represents higher wages paid on account of special conditions and may fairly be described as part of wages in the ordinary sense".

[49] Clause 13 of *Queensland Local Government Industry (Stream C) Award – State 2017* provides allowances for disabilities and working conditions. It is submitted that each of the individual components of the mechanical allowance are referable to allowances provided in cl 13 of the Award and represent compensation for unusual conditions of work, discomfort or disability.

[50] Council submits that in the event any of the components of the mechanical allowance are not 'wages' in the ordinary sense, the nature of the mechanical allowance being an annualised allowance which is added to the base hourly rate, changes the character of those components that would otherwise be reimbursable into wages. Council says that although it is described as an allowance, it is not an allowance in the traditional sense and is simply an addition to the base rate.

How the 2019 Agreement classifies the mechanical allowance

[51] Council says that the wording of s 135(3) of the IR Act refers the reader to the treatment of the relevant allowance under the industrial instrument.

[52] Council submits that the drafting of the 2019 Agreement demonstrates an intention that the mechanical allowance is taken to be part of a tradesperson's 'wages', according to ordinary concepts and the definition of wages in the IR Act because:

- (a) the mechanical allowance is expressed and paid as a rate per hour worked rather than a fixed sum;
- (b) Appendix D provides that the mechanical allowance is "an additional component...added to the base hourly rate", which effectively makes it an extension of the base hourly rate of pay, which is wages and is payable to apprentices as a proportion of the full-time wages of a Level 1 Build Trades Person pursuant to Appendix C; and

²² (1994) 69 CLR 389.

- (c) A distinction is made in the 2019 Agreement between the annualised allowances in Appendix D and claimable allowances in Appendix E which are paid by way of compensation for expenditure which is incidental to the performance of work.

Response to the Union's submissions

- [53] Council says that the entitlement of apprentices to the mechanical allowance is subject to s 135(3) of the IR Act. Therefore an express provision in Appendix D itself as to how the allowance is to be paid is not necessary. The absence of express words in Appendix D that apprentices receive only a percentage of the mechanical allowance does not cause that allowance to be payable in full to apprentices.²³
- [54] Council says that the drafting of the mechanical allowance as an 'additional' component to the base hourly rate does not change its character to something which is not wages. It is an extension of the base hourly rate of pay, such that it is taken to be part of the tradesperson's wages.²⁴
- [55] The fact that Appendix D specifies a rate which is attributable to the mechanical allowance does not demonstrate that the rate is fixed for all employees. The rate forms part of the base hourly rate, which is paid proportionately to apprentices.²⁵
- [56] The case law and express words of subsection 135(3) of the IR Act demonstrate that the definition of 'wages' is broad enough to encompass allowances that are amounts payable for work performed by the employee which are in addition to base rates of pay.²⁶
- [57] Based on the wording of Appendix D of the 2019 Agreement, the mechanical allowance is payable in respect of work performed rather than by way of reimbursement of expenditure incurred which is incidental to the performance of the work, and the mechanical allowance therefore represents 'wages' according to ordinary concepts.²⁷
- [58] In the event that the Commission considers there to be an ambiguity in the wording of the 2019 Agreement as to whether the mechanical allowance is taken to be part of a tradesperson's wages, Council submits that extrinsic evidence of the payment of the mechanical allowance in practice is relevant to the interpretation of the Appendix D.²⁸

Historical payment of the allowance

²³ Council submissions filed 19 October 2020 at [41].

²⁴ Council submissions filed 19 October 2020 at [42].

²⁵ Council submissions filed 19 October 2020 at [42].

²⁶ Council submissions filed 19 October 2020 at [42].

²⁷ Council submissions filed 19 October 2020 at [43].

²⁸ Council submissions filed 19 October 2020 at [44].

[59] Council does not support the Union's submission that the intention of the parties supports its position.

[60] Council says that the mechanism of payment was not a live issue in negotiations. Mr Dalton's evidence articulates what the Applicant wanted done. There was very limited, if any, shared intention of the parties.

[61] Council says its position is more persuasive, based on how the allowances have historically been paid to apprentices. The affidavit of Stacey Coburn addresses the historical payment of the mechanical allowance.

[62] Council says that the following factors demonstrate that the mechanical allowance is treated in practice as a wage in accordance with ordinary concepts:

- the mechanical allowance is included in overtime payments to employees;²⁹
- the mechanical allowance is payable upon accepted claims for workers' compensation;³⁰
- the income on which superannuation contributions are calculated and paid by the Council on behalf of employees includes the mechanical allowance.³¹
- the mechanical allowance is included in leave payments, including annual leave and personal leave;³² and
- the above practice is consistent with the historical payment of annualised allowances in Appendix F of the previous iteration of the 2019 Agreement, being the *Townsville City Council (Trades Employees) Certified Agreement 2017*, which was also paid proportionately to apprentices in the same manner as the mechanical allowance is currently paid. It is also consistent with how the allowance has been paid from its introduction to certain groups from 2006.

Summary

[63] In summary, Council's position is that:

- (a) the 2019 Agreement must be read together with s 135(3) of the IR Act;

²⁹ Affidavit of Stacey Coburn executed 19 October 2020 [50]

³⁰ Ibid [52]

³¹ Ibid [49]

³² Ibid [51]

- (b) the mechanical allowance is paid periodically as compensation for work performed with respect to unusual conditions of that particular work and therefore represents 'wages' both under ordinary concepts (as applied at common law) and the definition of 'wages' in sch 5 of the IR Act;
- (c) the individual components of the mechanical allowance represent allowances paid to compensate employees for discomfort, disability or unusual conditions of work, and therefore fall within the ordinary meaning of 'wages';
- (d) the allowance operates to increase the hourly rate paid and is treated as wages for all purposes. It is included in the calculation of overtime paid on sick leave, annual leave etc.
- (e) the terms of Appendix D demonstrate an intention that under the 2019 Agreement, the mechanical allowance is taken to be part of the relevant tradesperson's wages; and
- (f) the historical practice of the Council in paying the mechanical allowance is consistent with the payment of wages according to ordinary concepts, in contrast to the payment of allowances by way of reimbursement of expenditure.

Affidavit of Stacey Coburn

[64] Ms Coburn says that annualised allowances were introduced for some trades in 2006 as part of a trial arrangement. Apprentices were part of these trials and they received a proportion of the allowance relative to the percentage of the tradesperson rate. The annualised allowance was added to the base rate, and all pay rises associated with the then certified agreement applied to the total value (base + allowance). The trial ended in 2009 when the arrangements were recorded in the *Townsville City Council Certified Agreement 2009*.³³

[65] Council's trade certified agreements have contained annualised allowances since at least 2009.³⁴

[66] The 2009, 2012 and 2017 Agreements contained annualised allowances for Electricians, Trades Assistants and Apprentices and Fitters/Boilermakers and Apprentices.³⁵

³³ Affidavit of Stacey Coburn filed 19 October 2020 [4]-[9].

³⁴ Affidavit of Stacey Coburn filed 19 October 2020 [10].

³⁵ Affidavit of Stacey Coburn filed 19 October 2020 [11].

- [67] The 2019 Agreement added annualised allowances for mechanics and diesel fitters, trades assistants and apprentices; and plumbers and apprentices.³⁶
- [68] The 2017 Agreement provided annualised allowances for electricians and fitters/boilermakers. Apprentices did not receive the full rate of these annualised allowances. Apprentices were paid proportionately, as compared to the base rate of pay for the Build Trade Level 1 classification.³⁷
- [69] Pursuant to Appendix F of the 2017 Agreement and historical practice following the introduction of trial annualised allowances, the annualised allowances were rolled into the applicable base rates of pay which indexed each year. The effect of this was that the amounts of the annualised allowances were indexed each year and varied at the same time and by the same percentage as the increases to base rates of pay.³⁸
- [70] Ms Coburn understands that the Union has coverage of boilermakers and therefore negotiated the annualised allowance as part of the trial arrangements and the 2012 and 2017 Agreements. Between 2006 and 2017, Council employed apprentice boilermakers and they were paid in accordance with the formula above.³⁹
- [71] Prior to the 2019 Agreement, mechanical employees were paid individual allowances in accordance with relevant provisions in the 2017 Agreement and the *Queensland Local Government Industry (Stream C) Award*.
- [72] With respect to the allowances which were absorbed into the mechanical allowance, Ms Coburn states that the following rules were applied regarding the percentage of the allowance payable to apprentices:
- a. the site allowance was paid to apprentices proportionately, as compared to the base rate for the 'Build Trade Level 1' classification in the 2017 Agreement;
 - b. the confined space allowance and special substance allowances were paid to apprentices at a flat rate per hour in accordance with the Award;
 - c. the repair of unclean vehicles allowances were paid at 25% of the C10 rate of pay in accordance with cl 43.2.5 of the 2017 Agreement;
 - d. the wet well and sewerage disability allowances, where payable, were paid at 25% of the apprentices' hourly rate of pay;
 - e. the working in rain allowance was paid at a flat rate based on the apprentices' hourly rate of pay; and
 - f. the other allowances listed in the Union's submissions were not applicable to apprentices and/or mechanical employees.

³⁶ Affidavit of Stacey Coburn filed 19 October 2020 [12].

³⁷ Affidavit of Stacey Coburn filed 19 October 2020 [14],[15].

³⁸ Affidavit of Stacey Coburn filed 19 October 2020 [16].

³⁹ Affidavit of Stacey Coburn filed 19 October 2020 [17].

Negotiations for the mechanical allowance

- [73] On 7 March 2019 as part of the negotiations for the 2019 Agreement, the Union included the introduction of an annualised allowance for the fleet workshop employees (mechanical allowance) in its log of claims.
- [74] The Council undertook an assessment of the individual allowances claimed and paid to the mechanical employees under the 2017 Agreement and the Award over the three prior financial years to determine which allowances were no longer claimed or were no longer applicable to the work performed by those employees.
- [75] Following negotiations, the Council and the Union agreed to include in the mechanical allowance those individual allowances listed in the email from Marni Taylor to Peter Dalton on 27 August 2019. The Council and the Union further agreed that the allowances currently contained in Appendix E of the 2019 Agreement were to be excluded from the mechanical allowance.⁴⁰

Calculation of the rate per hour of the mechanical allowance

- [76] For the purpose of determining the rate per hour for the mechanical allowance, the Council calculated the sum of all historical amounts of all or the majority of the individual components of the mechanical allowance which were claimed and paid to mechanical employees in the 2018-2019 financial year (not including apprentices) and obtained an average value of what employees received annually from these allowances. This process was also undertaken for other annualised allowances contained in Appendix D of the 2019 Agreement.⁴¹
- [77] During the course of the negotiations over the rate per hour of the mechanical allowance, the Council subsequently revised its calculations and included the value of the historical payments of relevant allowances to apprentices in the 2018-2019 financial year in its calculation. This resulted in a larger sum of money from which the average was calculated than the sum would have been had the payments to apprentices not been included in the calculation. Accordingly, the rate per hour calculated for the mechanical allowance increased.⁴²
- [78] Further negotiations were held and it was agreed to include additional components, including the site and district allowances, into the calculations of the rate per hour of the mechanical allowance.
- [79] During a discussion at Riverway in or around August 2019 prior to a negotiation meeting for the 2019 Agreement, Ms Coburn informed Mr Dalton that the historical

⁴⁰ Affidavit of Stacey Coburn filed 19 October 2020 [28],[29].

⁴¹ Affidavit of Stacey Coburn filed 19 October 2020 [31],[32].

⁴² Affidavit of Stacey Coburn filed 19 October 2020 [33],[34].

payments to apprentices were included in the calculations for the mechanical allowance to increase the pool of money and benefit employees. Ms Coburn says that Mr Dalton acknowledged that this was beneficial to employees who would receive the mechanical allowance.⁴³

- [80] Ms Coburn says that no specific discussions between the Council and the Union during the negotiations for the 2019 Agreement were held regarding whether apprentices would received the mechanical allowance in full or proportionately relevant to their standing.⁴⁴

Indexing of allowances

- [81] Following negotiations, it was agreed that the mechanical allowance would not index. Appendix D of the Agreement provides that the mechanical allowance "will be fixed for the life of the agreement".

Annual Leave Loading

- [82] The Council and the Union agreed for annual leave loading to be removed from the annualised allowances of the 2019 Agreement. Annual leave loading is not included in any of the annualised allowances in Appendix D of the 2019 Agreement.

Payment of the mechanical allowance under the 2019 Agreement

- [83] Appendix D for the mechanical allowance states: "Annualisation means an additional component is added to the based hourly rate for each classification in lieu of allowances listed below and is an all purpose payment." This wording is also used for each annualised allowance in the 2019 and the 2017 Agreement.
- [84] The value of the mechanical allowance is set at \$3.05448 per hour which is what a fully qualified tradesperson receives. This amount is added to the based hourly rate for each applicable employee classification in the 2019 Agreement.
- [85] Superannuation contributions were made by the Council on the amount of the mechanical allowance in Appendix D.
- [86] Overtime payments are inclusive of the mechanical allowance for employees who receive this allowance.
- [87] Employees receive the amount of the mechanical allowance as part of payments for paid leave, including annual leave and personal/carers leave.

⁴³ Affidavit of Stacey Coburn filed 19 October 2020 [36].

⁴⁴ Affidavit of Stacey Coburn filed 19 October 2020 [37].

- [88] The mechanical allowance is paid to employees as workers' compensation in the event of an accepted claim.
- [89] Employees do not receive superannuation, overtime or leave payments on the claimable allowances contained in Appendix E of the 2019 Agreement.

Request for further information

- [90] In a request for further information filed on 10 November 2020, the Union states that part of the affidavit of Stacey Coburn (see above [71]-[72]) is 'contradictory and inaccurate'. The Union said that the way individualised allowances were paid to mechanical apprentices prior to the operation of the 2019 Agreement is relevant to the intention of the parties who negotiated the annualisation of the mechanical allowance in the 2019 Agreement. The union requested further detail as to why the Council paid certain allowances in the way put forward by Ms Coburn. The union asserts that if the allowances were paid in the way Ms Coburn says they were, that these were not paid in accordance with the relevant Award or Agreement.
- [91] Ms Coburn responded to this request in an affidavit sworn and filed in the Industrial Registry 17 November 2020.
- [92] The Union's response to this information filed on 24 November 2020 continues to take issue with the approach to payment of allowances as set out by Ms Coburn. With regard to the matter subject of this dispute, the Union

notes that the Respondent has demonstrated a pattern of paying allowances to apprentices in a manner that is seemingly inconsistent with the relevant industrial instrument and the Award by relying on an ambiguous and untested interpretation and application of section 135(3)(a) of the *Industrial Relations Act 2016* (Qld) where the Council treats *some* allowances as wages.

- [93] I have not detailed the exchange here as it did not materially impact on my decision on the matter.

Consideration

Ordinary meaning of relevant words/Plain meaning

- [94] Following consideration of the submissions of the Union and the Council, I return to the principles set out in *Berri*. It is necessary to begin with the ordinary meaning of the relevant words.⁴⁵
- [95] Appendix D describes annualisation and says "Annualisation means an **additional component is added** to the base hourly rate for each classification in lieu of allowances listed below and is an all purpose payment".

⁴⁵ *Berri* at [114] sub paragraph 1.

[96] Appendix D goes on to say that "for Mechanics and Diesel Fitters, Trades Assistants **and Apprentices**, the allowances annualised comprise...".

[97] Following the list of allowances that comprise the annualised allowance and the items that do not, Appendix D says, 'The annualised allowance **will be**: \$3.05448 per hour'.

[98] There is nothing in Appendix D which stipulates that the annualised allowance is to be paid to apprentices as a percentage. The ordinary meaning of the words in Appendix D leads the reader to the understanding that:

1. The annualised allowance is an additional component which will be added to the base hourly rate;
2. The annualised allowance applies to Mechanics and Diesel Fitters, Trades Assistants and Apprentices; and
3. The annualised allowance is \$3.05448 per hour.

[99] The task before me involves determining whether an agreement has a plain meaning or if it is ambiguous or susceptible of more than one meaning.⁴⁶ A review of the mechanical allowance set out at Appendix D and set out above at [95]-[97] does not lead me to think that the information is ambiguous or susceptible of more than one meaning. It seems to me that the meaning is plain.

[100] One of the principles enunciated in *Berri* is that interpreting an agreement "does not involve rewriting the agreement to achieve what might be regarded as a fair and just outcome. The task is always one of interpreting the agreement produced by the parties".⁴⁷

[101] The submissions do not demonstrate that there were any specific negotiations held between the parties as to whether the annualised allowance would be paid at a percentage rate to apprentices or at the rate listed in Appendix D. In the absence of a shared position, I look to the agreement produced by the parties and certified in the Commission on 11 December 2019.

[102] Without commenting as to what might be a 'fair and just' outcome, to adopt a reading of the mechanical allowance at Appendix D consistent with the Council's position would be to 'read in' words that are not there.

[103] The third principle listed in *Berri* is that "the common intention of the parties is sought to identified objectively, that is by reference to that which a reasonable person would

⁴⁶ *Berri* [114] sub paragraph 7.

⁴⁷ *Berri* [114] sub paragraph 2.

understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties".

[104] It is my view that if a reasonable person were to look up the 2019 Agreement to find out about annualised allowances, that person would look to Appendix D. If that person were to be seeking out the annualised allowance for mechanical, they would look to page 62. To find out what the annualised allowance is for an apprentice, one would look for that word or category. On page 62, the word appears only once. It appears alongside trades assistants, mechanics and diesel fitters. There are no differentiated rates listed. A reasonable person looking at page 62 could sensibly come to the conclusion that all those mechanical employees listed will receive the annualised allowance of \$3.05448 per hour.

[105] Council suggests that Appendix D be interpreted alongside other contextual information and surrounding circumstances. This is not necessary as I have determined that no ambiguity exists.⁴⁸

[106] I have considered Council's position regarding the allowance being a part of wages and therefore being caught by s 135(3)(a) of the IR Act. There is nothing in Appendix D that indicates that the allowance is part of wages. The words used are 'additional component is added to the base hourly rate'. The plain meaning of these words does not lead me to the conclusion that the allowance becomes 'part of' the base hourly rate for the purposes of s 135(3)(a). The base hourly rate for apprentices is already established elsewhere. The allowance, clearly listed as '\$3.05448 per hour' is an 'additional component **added to**' the base hourly rate. While the base hourly rate will increase during the life of the 2019 Agreement (per Clause 31), the annualised allowance remains fixed.

[107] The principles in *Berri* make it clear that it is not the role of the Commission to rewrite the provision 'in order to give an externally derived conception of what the parties intention or purpose was'. The Union argues that in order to find the meaning the Council says aligns with its intention, the Commission would be effectively rewriting Appendix D to include the words underlined below:

...For the Mechanics and Diesel fitters, Trades Assistants and Apprentices (subject to section 135(3)(a) of the Industrial Relations Act 2016),

....

The annualised allowance will be:

\$3.05448 per hour, paid proportionally to apprentices in accordance with section 135(3)(a) of the Industrial Relations Act 2016.

[108] I agree with the Union's submission that the above would be the effect of adopting the Council's position.

⁴⁸ *Berri* [114] sub paragraphs 7-10.

[109] I also note the Council's submission that the IR Act has the effect that apprentices are paid the allowance at a proportional rate, and that while Council could elect to pay the allowance in full, it would be discretionary and not required by law.

[110] I understand that Council may have had a different intention regarding the annualised allowance for mechanical employees set out at Appendix D. However, the words used in Appendix D and certified by the Commission do not reflect that intention.

[111] The answer to the question for arbitration is that apprentices should be paid the full mechanical allowance as listed in Appendix D of the *Townsville City Council (Trade Employees) Certified Agreement 2019*.