DECISION

Fair Work Act 2009
s.604—Appeal of decision

Health Services Union
v
DPG Services Pty Ltd
(C2022/8478)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL

MELBOURNE, 2 MAY 2023

Appeal against decision [2022] FWC 3061 of Commissioner McKinnon at Sydney on 2 December 2022 in matter number C2022/1649.

[1] The Health Services Union (HSU) has applied pursuant to s 604 of the *Fair Work Act 2009* (Cth) (Act) for permission to appeal and if granted, appeals a decision of Commissioner McKinnon dated 2 December 2022.

[2] The decision determined an application by the HSU pursuant to s 739 of the Act for the Commission to deal with a dispute in accordance with the dispute resolution clause of the *Opal Aged Care (NSW) Enterprise Agreement 2016* (Agreement).[1]

[3] The respondent, DPG Services Pty Ltd trading as Opal Aged Care (Opal) is an aged care services provider. It operates 43 facilities in New South Wales, the state in which the Agreement operates. The dispute concerned the meaning of "shiftworker" for the purposes of ascertaining which of Opal's employees are entitled to an additional week of annual leave and related loadings.

[4] The Commissioner relevantly concluded that an employee is a "shiftworker" for the purposes of clause 34.1(b) of the Agreement if at least one of their regularly rostered shifts each roster cycle is wholly between the hours of 6:00 pm to 6:00 am Monday to Friday or between the hours of 6:00 pm Friday and 6:00 am Monday.[2] Put another way, for the purposes of clause 34.1(b) a shiftworker is an employee who works at least one rostered shift per roster cycle where the hours worked on that shift are wholly outside the span of hours in clause 23(a).The HSU contends that the Commissioner incorrectly interpreted the terms of the Agreement and thereby erred. For the following reasons, we agree.

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[1] AE420692; Agreement, clause 9

[2] *Health Services Union v DPG Services Pty Ltd T/A Opal Aged Care* [2022] FWC 3061 at [40]

The appeal ground

[5] The HSU brings the appeal on the sole ground that the Commissioner incorrectly interpreted "clause 9(b)" of the Agreement.[3] There is no clause 9(b) in the Agreement. Having regard to the Decision, and to the written and oral submissions it is obvious the appeal ground contains a typographical error, and we proceed on the basis that the ground of appeal contends error interpreting clause 34.1(b). To the extent it is necessary, we allow an amendment to clause 2.1 of the notice of appeal accordingly.

The decision under appeal

[6] As earlier stated, the dispute before the Commissioner concerned the interpretation of provisions of the Agreement which provide for an additional week of annual leave and related loadings for an employee who is a "shiftworker" as defined or described in clause 34.1(b) of the Agreement. In the absence of agreement between the parties as to the question for arbitration, the Commissioner decided the question for determination would be as follows:[4]

> "When is an employee a 'shiftworker' for the purposes of the entitlement to an additional week's annual leave in clause 34.1(b) of the Agreement?"

[7] Before the Commissioner, the HSU contended, *inter alia*, that a shiftworker for the purpose identified in the above question is an employee who is rostered to work any of their ordinary hours of work outside the ordinary hours of a day worker (defined by the Commissioner in the decision as "the day worker span"), as defined in clause 23(a) of the Agreement.

[8] In short, the position taken by Opal was that there is a threshold proportion of hours that must be worked outside of the day worker span before a shiftworker becomes entitled to the additional week of annual leave in clause 34.1(a) of the Agreement.

[9] The Commissioner declined to adopt either of the parties' contentions. Rather, the Commissioner concluded that:

> "An employee is a 'shiftworker' for the purposes of the entitlement to an additional week's annual leave in clause 34.1(b) of the Agreement if at least one of their rostered shifts each roster cycle is wholly between the hours of 6.00pm and 6.00am, Monday to Friday and/or between the hours of 6.00pm Friday and 6.00am, Monday."[5]

[10] The Commissioner's reasoning can be summarised as follows:

> (a) A shiftworker in clause 23(b) of the Agreement is an employee who is regularly rostered to work their ordinary hours of work outside the hours of a day worker as defined in clause 23(a). When the cross-reference into clause 23(b) is replaced with its full meaning, a shiftworker is an employee who is regularly rostered to work their

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[3] Notice of appeal dated 23 December 2022, 2.1 at [1]

[4] *Health Services Union v DPG Services Pty Ltd T/A Opal Aged Care* [2022] FWC 3061 at [2]

[5] Ibid at [40]

ordinary hours of work outside the hours of 6:00 am and 6:00 pm, Monday to Friday.[6]

(b) This definition of shiftworker applies generally for the purposes of the Agreement, except in relation to clause 34.1(b).[7]

(c) The definition of shiftworker in clause 34.1(b) of the Agreement has the separate and limited purpose of seeking to meet the statutory condition for approval of enterprise agreements in s 196(2) of the Act.[8] That definition is plainly intended to operate separately from the definition of shiftworker in clause 23(b) of the Agreement. There would be no need otherwise for two definitions of the same word.[9]

(d) While clause 23(b) covers the same ground as the first category of employees in clause 28.2(a)(i) of the *Aged Care Award 2010* (Award), it makes no reference to the second category of employees in clause 28.2(a)(ii) of the Award. This creates a potential approval difficulty if only the definition in clause 23(b) of the Agreement is relied upon in connection with s 196. For these reasons, clause 34.1(b) should not be read down as being intended to replicate the definition in clause 23(b) of the Agreement.[10]

(e) In describing a shiftworker as an employee who is “not a day worker” for the purposes of the additional week of annual leave, what is intended is to refer to an employee whose ordinary hours of work are not between 6:00 am and 6:00 pm, Monday to Friday.[11]

(f) Because an employee cannot simultaneously be regarded as someone whose ordinary hours are “between” and “not between” the day worker span, only an employee whose rostered ordinary hours include shifts that start and finish wholly between the hours of 6:00 pm and 6:00 am, Monday to Friday and/or between 6:00 pm Friday and 6:00 am Monday, can be a shiftworker for the purposes of clause 34.1(b). This is so even if they are also rostered to work ordinary shifts within, or overlapping with, the day worker span.[12]

(g) An employee whose rostered ordinary hours always fall partially within the day worker span cannot be a shiftworker for the purpose of clause 34.1(b) of the Agreement.[13]

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[6] Ibid at [23]

[7] Ibid at [24]

[8] Ibid at [25]

[9] Ibid at [26]

[10] Ibid at [27]

[11] Ibid at [29]

[12] Ibid at [30]

[13] Ibid

[11] The Commissioner reasoned that her preferred construction operated harmoniously with the purpose of the entitlement - to compensate for the inconvenience of working unsociable hours on nights and weekends and avoids the entitlement bearing almost no connection to that inconvenience.[14] The Commissioner said it was unlikely that the parties intended to cast the net so wide that any employee working outside the day worker span obtained the benefit.[15] It also avoided, in the Commissioner's view, an approval difficulty occasioned by the application of s 196 of the Act.[16]

Consideration

[12] The dispute determined by the Commissioner involved a question of construction of the Agreement. The correctness standard therefore applies to this appeal.[17] Accordingly, we must determine whether the Commissioner's answer to the question for arbitration was correct.

[13] The principles of interpretation of enterprise agreements are well established.[18] The task of construing an industrial instrument begins with a consideration of the ordinary meaning of the words, read in context, and taking into account the evident purpose of the provisions or expressions being construed. Relevant context will include other provisions of the industrial instrument, read as a whole, and the disputed provision's place and arrangement in the instrument. The statutory framework under which the industrial instrument is made, or in which it operates may also provide relevant context, as might an antecedent instrument or instruments from which a particular provision has been derived. Regard may be had to relevant context and surrounding circumstances to determine whether there is any ambiguity in a provision of an industrial instrument. The language of an industrial instrument is to be understood in the light of its industrial context and purpose, not in a vacuum or divorced from industrial realities. Context is not itself an end, and a consideration of the language contained in the text of the relevant parts of the instrument remains the starting point and the end point in the task of construction. Nevertheless, a purposive approach to interpretation, not a narrow or pedantic approach, is appropriate.

[14] Clause 34 of the Agreement concerns annual leave. It states that annual leave is provided for in the National Employment Standards (NES) and addresses the quantum of annual leave at clause 34.1 as follows:

> "34.1 Quantum of annual leave
>
> (a) Annual leave on full pay is to be granted in accordance with the NES as follows:
>
> (i) Full time employees – four weeks annual leave
> (ii) Full time shift workers – five weeks annual leave

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[14] Ibid at [31]

[15] Ibid at [33]

[16] Ibid at [32]

[17] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 at [46]-[49] per Gageler J; *Rail Commissioner v Rogers* [2021] FWCFB 371 at [61]

[18] See for example *James Cook University v Ridd* [2020] FCAFC 123, 298 IR 50 at [65] and the authorities referred to therein; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 264 FCR 536 at [197]; *Australian Workers' Union v Orica Australia Pty Ltd* [2022] FWCFB 90 at [18] and the authorities referred to therein

(iii) Part time employees – four weeks annual leave on a pro rata basis
(iii) Part time shift workers – five weeks annual leave on a pro rata basis

(b) For the purposes of this clause, a shiftworker is an employee who is not a day worker as defined in clause 23 (a) Span of Hours."

[15] Clause 34.5 of the Agreement deals with annual leave loading. By clause 34.5(b) shiftworkers will be paid, when taking annual leave, in addition to their ordinary pay the greater of a 17.5% loading calculated on their ordinary pay or the shift penalties they would otherwise have received had they not been on annual leave.

[16] Clause 23 deals with the span of hours under the Agreement and provides the following:

"**Span of hours**

(a) The ordinary hours of work for a day worker will be between 6.00 am and 6.00 pm Monday to Friday.

(b) A shiftworker is an employee who is regularly rostered to work their ordinary hours of work outside the ordinary hours of work of a day worker as defined in clause 23(a)."

[17] Clause 34.1(b) of the Agreement makes clear that the definition of shiftworker with which it deals is for the purposes of "this clause," being clause 34 of the Agreement. It is a provision, as the Commissioner correctly identified, that seeks to comply with the enterprise agreement approval requirements in ss 187(4) and 196(2) of the Act when, by reason of clause 28.2 of the Award and the terms of the Agreement, s 196(1) is engaged. Section 196(2) aims to ensure that the NES entitlement to an additional week of annual leave is not lost for a shiftworker defined for that purpose under a modern award in the transition from such an award to an enterprise agreement.

[18] Opal contends that clause 23(a) to which clause 34.1(b) refers, does not include an express definition of "day worker." Rather, Opal points to clause 23(b) which defines a shiftworker being an employee who is "regularly rostered" to work ordinary hours of work outside the ordinary hours of a day worker.

[19] Opal contends that it is impossible in these circumstances to assign meaning to clause 34.1(b) of the Agreement simply by reference to its words. Opal submits that it is necessary to glean the parties' intended meaning from the text of the Agreement as a whole and in context. On this basis, Opal submits that clause 23 is to be read as a coherent whole, with its effect being that:

(a) employees who are "regularly rostered" to work ordinary hours outside the day worker span are shift workers; and

(b) employees who do not meet that definition are day workers.

[20] Opal's position is that it is therefore necessary to discern when an employee is "regularly rostered" to work their ordinary hours of work outside the hours of 6:00 am to 6:00 pm Monday to Friday. In short, Opal contends that an employee is "regularly rostered" to work outside the day worker span if at least two-thirds of ordinary hours worked, as a proportion of the total ordinary hours potentially worked, are outside the day worker span. Opal relies upon that which it terms to be the "conventional approach" established in decisions of the Commission considering the regular performance of work by an employee on Sundays and public holidays.[19]

[21] In support of its position, Opal draws upon the industrial history relevant to the identification of continuous seven-day shiftworkers in the context of the metal trades industry.[20] We do not accept that the clauses in question are to be properly construed by adopting a particular metal trades industry standard in the context of a fundamentally different clause within the aged care industry, where such a standard has not previously applied. In this respect, we concur with the Commissioner's view[21] that the decisions in *Elizabeth O'Neill v Roy Hill Holdings Pty Ltd*[22] and *RTBIU v One Rail Australia Pty Ltd,*[23] while relevant to the entitlement for seven-day shiftworkers who regularly work on Sundays and public holidays, are not a useful guide to understanding the equivalent entitlement in the aged care industry, and given the significant differences between the shiftworker terms in the relevant awards. Opal's contention in this respect is therefore rejected.

[22] In any event, on a proper construction of the Agreement, clause 23(b) and the concept of "regular rostering" upon which Opal relies is not a relevant consideration in the determination of the dispute. The clauses requiring construction in the application relevantly read as follows:

> Cl. 34.1(b) "a shiftworker is an employee who is not a day worker as defined in clause 23(a) Span of Hours"
>
> Cl. 23(a) "the ordinary hours of work for a day worker will be between 6.00am and 6.00pm Monday to Friday"

[23] Clause 34 notes that annual leave is provided for in the NES. Clause 34.1(b) describes an employee who is entitled to the quantum of annual leave for a shiftworker for which the NES provides and which clauses 34(a)(ii) and (iv) of the Agreement set out.

[24] Clause 23(a) serves two purposes. First, to fix the span of hours within which a "day worker" will work ordinary hours. Second, to describe an employee as a "day worker" by reference to the pattern of their ordinary hours of work. In this respect clause 23(a) has only one possible meaning - an employee is a day worker if the ordinary hours worked fall entirely within the span of 6:00 am to 6:00 pm Monday to Friday. This reflects the use of the language that ordinary hours "will be between" the period specified in the clause. It sensibly follows that

[19] See *RTBIU v One Rail Australia Pty Ltd* [2021] FWC 3097; *AMWU v Genesee & Wyoming Australia Pty Ltd* [2019] FWC 2502 and *Elizabeth O'Neill v Roy Hill Holdings Pty Ltd* [2015] FWC 2461

[20] *Re Shift Workers Case 1972* [1972] AR (NSW) 633; (1972) 14 AILR 700 at 659; cf *Manufacturing and Associated Industries and Occupations Award 2020* at cl. 34.2

[21] Appeal Book 9 at [35]

[22] [2015] FWC 2461

[23] [2021] FWC 3097

a shiftworker for the purposes of the annual leave entitlements described in clause 34 is an employee who does not meet the description of a day worker in clause 23 (a), to which clause 34.1(b) refers. There is no requirement for regularity as found in the definition of shiftworker in clause 23(b), because clause 34.1(b) operates to describe a shiftworker for the purposes of the NES in an exclusionary way – an employee who is not a day worker; a day worker being an employee who works all ordinary hours between the span of 6:00 am to 6:00 pm Monday to Friday. There is also no requirement for a minimum shift pattern as the Commissioner found. Neither the text nor context support such a conclusion.

[25] Plainly, and as we earlier noted, clause 34.1(b) of the Agreement is intended to meet enterprise agreement approval requirements in ss 187(4) and 196(2) of the Act. On our construction, clause 34.1(b) plainly does, as it captures both species of shiftworker described in clauses 28.2(a)(i) or (ii) of the Award. That it also captures other employees is beside the point. Had the status quo been intended, clauses 28.2(a)(i) or (ii) of the Award could have simply been reproduced as the description of a shiftworker for the purposes of the NES. They were not. Instead, another description is adopted – one that is broader. And so, in substance, a shiftworker for the purposes of the NES described in the Agreement is an employee who is not a day worker.

[26] The construction we favour – and one which does not require the strictures the Commissioner would impose - is consistent with clause 32 of the Agreement which concerns "Shiftwork." It provides as follows:

"**32 Shiftwork**

32.1 Employees working afternoon or night shift shall be paid the following percentages in addition to their ordinary rate, for such shift. Provided that employees who work less than 38 hours per week will only be entitled to the additional rates where their shifts commence prior to 6.00am or finish subsequent to 6.00pm.

(a) 10% for afternoon shift commencing after 10:00 a.m. and before 1:00 p.m.

(b) 12.5% for afternoon shift commencing at or after 1:00 p.m. and before 4:00p.m.

(c) 15% for night shift commencing at or after 4:00p.m. and before 4:00a.m.

(d) 10% for night shift commencing at or after 4:00a.m. and before 6:00a.m.

(i) The shift penalties prescribed in this clause will not apply to shiftwork performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 29 -Saturday and Sunday work and clause 35- Public holidays applies.

(ii) The provisions of this clause will not apply to Registered Nurse levels 4 and 5."

[27] As is apparent from clause 32.1, an employee (with the exception of Registered Nurses levels 4 and 5 in particular circumstances) who performs shifts which commence or cease outside the span of 6:00 am to 6:00 pm is working either an afternoon shift or night shift. Employees are compensated for such shifts by way of the shift loadings prescribed by clause 32.1. Such shifts are not compatible with the definition of a day worker in clause 23(a) of the Agreement, which requires the exclusive performance of ordinary hours between 6:00 am and 6:00 pm Monday to Friday.

[28] Consistent with this construction, overtime penalties in clause 31 of the Agreement are only engaged when hours are worked in excess of the ordinary hours of "any day or shift prescribed in clause 22" of the Agreement. Clause 22 of the Agreement relevantly provides as follows:

> "**22 Ordinary Hours of Work**
>
> (a) The ordinary hours of work will be 38 hours per week, or an average of 38 hours per week worked over 76 hours per fortnight or 152 hours per 4 week period, and will be worked either:
>
> (i) in a period of 28 calendar days of not more than 20 work days in a roster cycle;
>
> (ii) in a period of 28 calendar days of not more than 19 work days in a roster cycle, with the twentieth day taken as an accrued paid day off (ADO); or
>
> (iii) The shift length or ordinary hours of work per day will be a maximum of 10 hours exclusive of meal breaks…"

[29] The effect of clause 31, read with clause 22, is to limit the payment of overtime penalties to hours worked in excess of 38 per week (or an average of 38 hours per week in the manner prescribed by clause 22(a)) or in excess of 10 hours per day exclusive of meal breaks. Relevantly, the overtime provision does not deal with the circumstance where a day worker performs work outside the span of hours in clause 23(a). This is because a day worker may only work ordinary hours within the prescribed span and such ordinary hours when worked outside of the span may only be worked by a shiftworker.

[30] It follows that under the Agreement properly construed:

(a) a day worker is an employee whose ordinary hours fall entirely within the day work span; and

(b) an employee whose ordinary hours (some or all) are outside the span of hours of a day worker is a shiftworker for the purposes of clause 34 of the Agreement, pursuant to clause 34.1(b), because such an employee is not a day worker.

[31] The inquiry for the purposes of determining which employee is a shiftworker entitled to the additional annual leave described in clause 34 of the Agreement is confined to the application of clause 23(a) and does not derive any of its meaning from clause 23(b). As much

is clear from the use of the words "as defined in clause 23(a)" in clause 34.1(b), which denote the definitional significance of the subclause.

[32] It follows that Opal's contention that it is impossible to assign meaning to clause 34.1(b) of the Agreement simply by reference to its words, because clause 23(a) is not a complete definition of "day worker," is rejected. The Agreement defines or describes a day worker by reference to the span within which ordinary hours may be worked and it clearly defines a shiftworker in clause 34.1(b) by reference to an employee who is "not a day worker" having regard to the span of ordinary hours of a day worker in clause 23(a).

[33] To this end, the HSU contends that periods of day work and shift work can be delineated by reference to the rostering arrangements in clause 27 of the Agreement.[24] While we accept that it is open to Opal to roster its employees in the manner contended by the HSU pursuant to the rostering provisions in clause 27, in our view the delineation between periods of day work and shift work is squarely addressed by the ordinary hours of work provision at clause 22 read with clause 23(a).

[34] The term "ordinary hours of work" as used in clause 23(a) of the Agreement is given further meaning by clause 22, which we earlier extracted. In general terms, clause 22 provides that ordinary hours of work will be 38 per week (or an average) and provides for periods in which those hours can be calculated.

[35] In effect, where any of an employee's "ordinary hours" are worked outside the span of 6:00 am and 6:00 pm within a 38-hour week, or an average of 38 hours per week worked over 76 hours per fortnight or 152 hours per four-week period, then that employee is not a day worker for the purposes of clause 23(a). The employee will then meet the definition of shiftworker in clause 34.1(b) for the relevant averaging period and because an employee's annual leave entitlement accrues progressively during a year of service according to an employee's ordinary hours of work,[25] the employee accrues a portion of the additional week of annual leave for a shiftworker in that period. The concept of "ordinary hours" in the Agreement is thereby temporally confined to one, two or four-week periods of 38 hours or an average thereof. Understood in this way, an employee can transition from being a day worker, and not a day worker, and progressively accrue different annual leave entitlements as a result, between these averaging periods.

[36] It follows that the days and times when an employee works "ordinary hours" effectively delineates the periods during which an employee:

(a) is a shiftworker for the purpose of clause 34.1(b) of the Agreement; and

(b) is a day worker.

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[24] Transcript of proceedings dated 23 February 2023 at [76]-[82]

[25] *Fair Work Act 2009*, s 87(2)

[37] Having regard to this construction, we turn briefly to address the work left to be done[26] by clause 23(b) of the Agreement.

[38] It is uncontroversial that the definition of shiftworker in clause 34.1(b) applies only to clause 34. The definition of shiftworker in clause 23(b) of the Agreement has application for the balance of the Agreement provisions outside clause 34. We accept that the consequence of our construction is that the definition in clause 23(b) has relevance as a definition of shiftworker in only one instance - the operation of clause 18.2, which concerns the circumstances in which a meal allowance will be paid. But that provides no justification, absent some textual or contextual mandate, to read into clause 34.1(b) the strictures of regularly rostered found in clause 23(b).

[39] Having regard to the above analysis, we consider the Commissioner's conclusion that an employee is a "shiftworker" for the purposes of the additional week of annual leave in clause 34.1(b) of the Agreement if their weekly or fortnightly roster regularly provides for them to work one or more shifts that fall *exclusively* outside the span of hours of 6.00 am to 6.00 pm, Monday to Friday is incorrect.

[40] As is apparent from clause 32 of the Agreement, which defines the pattern of work constituting afternoon shift or night shift, the three shifts contemplated by clause 32.1(a)-(c) involve a shift commencement time within the day work span. Such employees would not, on the Commissioner's construction, be shiftworkers and entitled to the additional week of annual leave and related entitlements. However, such an employee regularly so rostered would be a shiftworker as described in clauses 28.2(a)(i) of the Award. Although the Commissioner's construction "can cover an employee who is regularly rostered to work their ordinary hours of work outside the day worker span (clause 28.2(a)(i) of the Award) and an employee who works more than four hours on 10 or more weekends in a year (clause 28.2(a)(ii) of the Award)", as is evident it will not always do so.

[41] Similarly, the night shift to which clause 32.1(d) refers commences between 4.00 am and 5.59 am and necessarily involves a significant proportion of the shift during the day work span. On the Commissioner's construction, an employee rostered only to perform work pursuant to this shift pattern would not meet the definition of a shiftworker for the purposes of clause 34 of the Agreement but would be a shiftworker as described in clauses 28.2(a)(i) of the Award. And if such shifts included more than four ordinary hours on 10 or more weekends, the employee would also be a shiftworker as described in clause 28.2(a)(ii) of the Award.

[42] There is no apparent textual basis for the conclusion that the Commissioner reached that a shiftworker for the purposes of clause 34 of the Agreement is an employee who works wholly outside the day worker span. Moreover, the Commissioner's construction would exclude some employees who would be shiftworkers for the purposes of the NES as described in the Award. The Commissioner's decision is inconsistent with the Agreement and thereby offends the prohibition in s 739(5) of the Act. For this reason, we grant permission to appeal.

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[26] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-82 (McHugh, Gummow, Kirby and Hayne JJ); *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (MV Portland Case) (No 2)* [2020] FCA 1138 at [33]

[43] It follows that the HSU's ground of appeal has been made out. The appeal should be upheld and the decision quashed.

[44] On a rehearing of the application, for the reasons stated, we answer the question formulated by the Commissioner in the following way:

Question: When is an employee a "shiftworker" for the purposes of the entitlement to an additional week's annual leave in clause 34.1(b) of the Agreement?

Answer: An employee is a shiftworker within the meaning of clause 34.1(b) of the Agreement if their ordinary roster requires any part of their ordinary hours of work outside the day work span of hours in clause 23(a). An employee's annual leave entitlement accrues progressively during a year of service according to the employee's ordinary hours of work.

Order and disposition

[45] We order as follows:

1. Permission to appeal is granted.

2. The appeal is upheld.

3. The decision in *Health Services Union v DPG Services Pty Ltd T/A Opal Aged Care* [2022] FWC 3061 is quashed.

4. The dispute in matter C2022/1649 is determined in accordance with the answer given at [44] above and the application dismissed.

DEPUTY PRESIDENT

Appearances:

Mr L. Saunders of Counsel, for the appellant.
Mr O. Fagir of Counsel, for the respondent.

Hearing details:

2023
Melbourne
23 February by video link

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