

**TASMANIAN INDUSTRIAL COMMISSION**

**Industrial Relations Act 1984**

s70(1) appeal against decision

**Minister administering the *State Service Act 2000***

(T13176 of 2008)

and

**United Firefighters Union of Tasmania**

**FULL BENCH:**

PRESIDENT P L LEARY

DEPUTY PRESIDENT P C SHELLEY

COMMISSIONER J P McALPINE

HOBART, 7 April 2009

**Appeal against a decision handed down by Commissioner T J Abey arising out of T13022 of 2007 - Appeal Grounds 1, 2, 3, 5 and 6(b) rejected Grounds 4 and 6(a) upheld - decision revoked - T13022 of 2007 referred back to Commissioner Abey**

**REASONS FOR DECISION**

**[1]** In Matter T13022 of 2007 Commissioner Abey determined that the work of Community Fire Safety Officers (CFSOs) employed by the Tasmania Fire Service (TFS) should reflect a pay differential of 5% at each of the relevant award classifications.

**[2]** The Commissioner determined the following:

CFSO Level 1	95% of the Firefighter rate;
CFSO Level 2	104% of the Leading Firefighter rate;
CFSO Level 3	115% of the Station Officer rate;
CFSO Level 4	120% of the Senior Station Officer rate.

**[3]** He determined that the 5% differential represented the value of the requirement to hold and maintain a level of operational capacity.

**[4]** The Minister administering the *State Service Act 2000* (the Minister) has lodged an appeal against the Commissioner's decision.

**Background**

**[5]** In September 2007 the United Firefighters Union (UFU) made application to the Commission to vary the *Tasmanian Fire Fighting Industry Employees Award* (the Fire award). The application sought a work value assessment for a number of positions within the Community Fire Safety Division (CFS) of the TFS. The officers were generically classified as CFSOs.

[6] At the request of the parties the file was put aside pending further discussions and the outcome of the wider Public Sector Union Wages Agreement 2008.

[7] The matter remained unresolved and the Commissioner was requested to determine the claim.

#### **The evidence before the Commissioner**

[8] The Commissioner found that the work of career Firefighters had been properly assessed in a 1993 *special case* decision<sup>1</sup> of then Deputy President Robinson which embraced significant work value considerations across all classifications in the then applicable award.

[9] The Commissioner also noted that the 2004 and 2007 Enterprise Bargaining Agreements provided the following:

*“Work Value:*

*The parties agree that the salaries and conditions provided for in the Agreement and previous award and agreements reflect that employees have been fully compensated for all work that is currently being undertaken within their classifications and Statements of Duties...”*

[10] The Commissioner said however that any work value consideration could not have been taken into account in respect to the CFSO positions as the classification did not appear in the Fire award until May 2007.

[11] Accordingly it was his finding that all work value considerations had been taken into account for career Firefighters up until the new award was ratified in May 2007, but that the work of CFSOs had not been examined in respect to work value.

[12] One of the exercises undertaken by the Commissioner was a comparison of the work of CSFOs and the career Firefighters.

[13] The history of the CFSO classification, other than the Fire Safety Auditor role, reveals that traditionally the positions have been filled by career Firefighters from within the TFS. In some cases the incumbents have returned to operational duties whilst others have remained in the CFSO positions for long periods of time. Career Firefighters taking up positions as CFSOs have maintained their composite salary

[14] The five current incumbents including the Fire Safety Auditor, the subject of the Commissioner's decision, have been recruited from outside the TFS.

[15] The UFU argued that the role performed by the incumbents was identical to that of a career Firefighter other than the fact that there was no requirement for the CFSOs to return to operational duties. The Commissioner found that there was some requirement to maintain operational skills for career Firefighters. He noted however that it was not entirely clear as to how often career Firefighters, appointed as CSOs, were called upon to exercise those operational skills and under what circumstances.

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<sup>1</sup> Decision TA68 of 1990

[16] The sworn evidence of Damien John Killalea, Director of Community Fire Safety Division, seemed to support the claim by the UFU. He agreed that the CFSO, Instructors (Level 2) do *“essentially the same job”* as career Firefighters.<sup>2</sup>

[17] Likewise he agreed that the CFSO, Consultant Building Safety (Level 3) performed *“essentially the same work”* as the Station Officer Building Safety, a career Firefighting position.<sup>3</sup>

[18] The position of CFSO, Consultant TasFire Training (Level 4) was *“essentially identical”* to the work performed by TFS employees classified as Senior Station Officers.

[19] Having considered that unchallenged evidence the Commissioner was satisfied that the only difference between the two categories of recruitment (career Firefighters and external appointments) was the requirement to hold and maintain a level of operational capacity.<sup>4</sup>

[20] The Commissioner said that *“From the evidence it is clear that, save for the firefighting component, the work performed by the two categories is otherwise identical.”*<sup>5</sup>

[21] He then determined that maintenance of the firefighting component had some value and he considered that the relative position should have been recognised by a differential between the classification levels.

### **History of the CFSO classification**

[22] The parties were previously subject to the Commonwealth Act and at the time of approving new awards in the Tasmanian Industrial Commission (TIC), the UFU told the Commission that new classifications had been inserted into the new Fire Award as *“there have been difficulties in getting Firefighters to do these sorts of day-work jobs so the Fire Service employed people from outside. But we would say, from our point of view that it is traditional Firefighters work...”* And further *“...at some stage ...we will be asking the Commission to consider whether those rates of pay are in fact the ones that should apply...”*

[23] The Commissioner noted in his decision that:

*“With the exception of the Fire Safety Auditor, these positions have been traditionally filled by career fire-fighters who have transferred from shift work into one of the above positions. In some cases the incumbents have returned to shift work [operational duties] after a relatively short period. In other cases the career fire-fighters have remained in the positions for lengthy periods, even to the point of retirement. At the time of hearing there were approx. 17 career fire-fighters employed in the Community Fire Safety Division.*

*In or about 2003/04, the TFS began to experience difficulty in attracting career fire-fighters into these non operational positions. As a consequence, a decision was taken to recruit from outside the service. The five individuals subject to this application are in this category.*

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<sup>2</sup> Original decision para 23

<sup>3</sup> Supra para 31

<sup>4</sup> Supra para 39

<sup>5</sup> Supra para 109

*With the exception of the auditor, the UFU maintains that the duties and responsibilities of the four incumbents is identical to that being performed by career fire-fighters employed in the same roles, save that the career fire-fighters are required to undertake operational duties from time to time. It is the extent of this requirement and the level of competency maintenance which occupied much of the debate during the hearing.*

*Upon appointment the individuals were paid in accordance with various levels within the Administrative and Clerical Employees Award. It would seem that this arrangement was a matter of convenience and there was no suggestion that this represented an agreed work value assessment of the positions. The positions were not part of UFUA/TFS bargaining outcomes and salary adjustments were in accordance with various Public Sector Wage Agreements reached from time to time.”<sup>6</sup>*

**[24]** Career Firefighters who transferred to CSFO positions maintained their current composite rate of pay. This was confirmed in the sworn evidence of Mr Killalea who responded as follows to a question from the UFU representative Mr Warwick:

*Q The ones who have come off shift get paid at their current rate, don't they? ---*

*A Yes, yes.*

**[25]** The Commissioner said:

*“It would seem there are two identifiable categories of career fire-fighters employed in CFS.*

*In the first category career fire-fighters move from shift operations to non shift operations in CFS as part of a career path progression. This is usually for relatively short periods, generally up to a maximum of two years, following which they return to shift work operations. According to Mr Davidson this career development is “strongly advocated” by TFS.*

*In the second category are career fire-fighters, who presumably by choice have accepted a CFS appointment on a quasi permanent basis. A number have been employed for lengthy periods [10 years or more] and some have worked until retirement in a CFS role. In this second category it would seem the longer they were employed in CFS, the less likely the prospect of ever returning to an operational shift work position.”<sup>7</sup>*

**[26]** Mr Baker submitted that the issue for determination by the Commissioner was to establish relativities between career Firefighters and persons engaged to undertake duties that are of a similar nature to those of career Firefighters employed in what is known as the Community Fire Safety unit and classified as CFSOs.

**[27]** He submitted that *“...employees enter the community fire safety unit by way of a career development if they are a Firefighter. On the other hand you have persons who move from civilian life, if you like, into this area and undertake similar roles such as training, inspection of buildings, properties, fire damage and the like.”<sup>8</sup>*

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<sup>6</sup> Original decision paras 7 - 10

<sup>7</sup> Supra paras 44-47

<sup>8</sup> Transcript p. 2 line 33

### **History of wage arrangements for CFSO positions**

[28] As a matter of convenience the TFS and the UFU had agreed to pay the CFSOs in accordance with administrative classification levels found in the *Administrative and Clerical Employees Award* (the Clerical award). The Commissioner noted that when the Fire award was made in the TIC the UFU indicated that at some time it would be applying to the Commission to determine whether the rates then being paid to the CFSO positions were appropriate.

[29] That was the application before the Commissioner.

### **What was the Commissioner being asked to do?**

[30] The Commissioner was asked to determine the appropriate rates of pay for the CFSO positions, including the Fire Service Auditor, within the CFS division of the TFS. He was asked to undertake a work value assessment of the positions. The determination he would make would affect 5 current employees in those classifications.

### **What are the current wage fixing arrangements for employees covered by the Tasmanian Firefighting Industry Employees Award?**

[31] The Commissioner said:

*"Prior to the early nineties the salary structure for firefighters was based on the traditional concept of a base salary reflecting skills and responsibility, with additional loadings for shift work [15%], weekend penalty [7.5%], public holidays [3.75%], and a further 10% for working hours in excess of forty. At some point [which was not precisely identified], this concept was replaced with the composite salary whereby these additional allowances were rolled into the salary."<sup>9</sup>*

[32] It was therefore submitted that the wage rates for Firefighters and Officers and Communications officers are composite rates which include components for shift loadings, penalties, public holidays and extra duty hours. The career Firefighters work rostered shift work or non rostered shift work as provided by the relevant award.

[33] The CFSO rates, it was said, are not composite rates. In fact the rates for the CFSO classification are derived from the Clerical award and have no relationship with classifications or rates of pay for career Firefighters.

[34] It is noted that the composite wage rates for career Firefighters now also include, amongst other components, wage increases attained through enterprise bargaining. Accordingly the rates represent the negotiated outcomes of bargaining and are no longer able to be identified as being based on *work value*. The rates in the Clerical award are weekly rates and do not include any component for penalties of any kind but may or may not include increases achieved by enterprise bargaining negotiations.

[35] The wage fixing principles were amended following the 2007 State Wage case. At that time the Minister submitted that to allow the proposed comprehensive review of wage classification standards and structures to be undertaken and to develop a new contemporary model to replace the old it was necessary to vary the Commission's wage fixing principles.

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<sup>9</sup> Original decision para 66

[36] The proposed amendment would vary principle 13 in the following terms:

*"13.3 Consistent with this Principle and Principle 6.2 by extension, public sector awards may be varied from time to time to reflect salary rates and conditions of employment as may be agreed between the parties bound by relevant public sector awards."*

[37] The Full Bench determined that Principle 13.3 would be amended as proposed by the Minister and with the consent of all other parties. The Tasmanian Chamber of Commerce and Industry (TCCI) agreed to the amendment. However the Full Bench said that TCCI would need to be advised and consulted on any changes to awards which may affect private sector awards with similar classification scales and wage scales.

[38] Principle 13.3 was varied, by consent, to now provide:

*"Consistent with this Principle and Principle 6.2 by extension, public sector awards may be varied from time to time to reflect salary rates and conditions of employment as may be agreed between the parties bound by relevant public sector awards."*

[39] The Full Bench noted that:

*"The amendment to principle 13 will allow the incorporation of agreement rates of pay and conditions into public sector awards. Accordingly classification rates may not necessarily reflect true work value assessment."*

[40] The rates for the CFSO classification is an agreed weekly rate from an unrelated award with the ability to be paid penalty rates if and when the entitlement occurs, whereas the career Firefighter is remunerated by a composite salary which includes a component for penalty payments which is paid every week rather than when those penalties occur. It is noted that the composite does not include a component for overtime.

**Should the composite rates paid to career Firefighters be the appropriate rates from which to determine the rates for CFSOs?**

[41] The Commissioner said:

*"Prior to the early nineties the salary structure for firefighters was based on the traditional concept of a base salary reflecting skills and responsibility, with additional loadings for shift work [15%], weekend penalty [7.5%], public holidays [3.75%], and a further 10% for working hours in excess of forty. At some point [which was not precisely identified], this concept was replaced with the composite salary whereby these additional allowances were rolled into the salary."*

*Mr Baker submitted for a true work value comparison, these additional allowances should be stripped out, as the work patterns of those subject to this application, in the main, would not attract these additional payments. Mr Baker said if this was done, the existing salaries for Community Fire Safety Officers would compare more than favourably with their career fire-fighter colleagues working in Community Fire Safety Division."*

*There would be force in this contention if this latter group worked a pattern of hours which, prior to the composite salary, would have attracted such allowances.*

*The reality is, they do not. The composite salary is paid to all employees subject to the award, irrespective of whether they are on shift work or not. In Community Fire Safety Division, the Community Fire Safety Officers and their career fire-fighter counterparts work the same pattern of hours. In Building Safety, the work pattern is essentially Monday to Friday, business hours. In TasFire Training, some weekend and evening work may be involved.*

*The one remaining difference between the two categories is that career fire-fighters work an average of 40 hours per week compared with 38 for Community Fire Safety Officers. However this is compensated for by additional annual leave.*

*In the circumstances I am satisfied that no case has been made out to discount the career fire-fighter composite salary before a valid comparison can be made.<sup>10</sup>*

**[42]** It seems to us that it is not possible to compare the current rates of pay for career Firefighters with that of CFSOs as the career Firefighter is paid on the basis of a composite salary and the CFSO is paid by reference to a minimum rates award classification structure which may or may not now include increases from enterprise bargaining agreements. Nonetheless the current CFSO rate does not include any component for the penalties and additional amounts reflected in the composite rate paid to career Firefighters.

**[43]** Accordingly we disagree with the Commissioner's findings. Such finding would have perhaps been an appropriate one if the exercise had been one of comparative wage justice but is not appropriate for an assessment based on work value.

**[44]** To undertake a proper assessment of the two classifications would require an assessment of the CFSO role as prescribed by position descriptions, evidence and perhaps inspections. This was done by the Commissioner. The parties perhaps now need to consider whether there should be two categories of CFSO which take into account a career Firefighter background, which may or may not be an internal appointment, and those CFSOs who do not have a career Firefighter background. And if so what are the skills and qualifications of the non career Firefighter position and should the classification be an administrative classification rather than an operational classification.

**[45]** The evidence suggests that external appointees are in some cases administrative positions not necessarily requiring career Firefighter skills or qualifications but attracting other skills and qualifications. These perhaps should be benchmarked against similar public service positions, if in fact they exist. This was an exercise undertaken by the Commissioner but was still reliant to some degree on the relationship with the career Firefighter position as we understand the proceedings.

**[46]** We note also that there was a consideration of a number of public sector positions, which it was claimed had some similarities to the Auditor position.

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<sup>10</sup> Original decision paras 66-71

[47] Nonetheless the TFS submission and evidence seems to support the claim by the UFU that a CFSO role is identical, or at least very similar, to that of a career Firefighter absent the requirement to be available for operational shift work; that is there is no requirement to perform shift work although the Commissioner noted the evidence was not *absolutely* clear on that point.

[48] The TFS then needs to consider what additional payments, if any, are to be added to the *base rate* for the CFSO positions. Is there justification for any penalties to be included? It seems obvious that enterprise bargaining increases would form part of the total rate. Should there be any other components or loadings?

[49] Any work value changes in respect to the position of the career Firefighter have been addressed and the Commissioner in fact agreed with the submission of the Minister which said that there was no justification for any increase due to work value changes. The Minister argued that any change was evolutionary and as such no increase could be granted. There was no evidence led that the work of the career Firefighter had changed such to justify an increase under the work value principle nor was that a claim before the Commissioner.

[50] The Commissioner found that the decision of Robinson DP in December 1993 and the 2004 and 2007 Enterprise Bargaining Agreements (EBAs) had recognised all work value considerations for Firefighters up until 2007. Each of the EBAs had a similar clause which said:

***“WORK VALUE***

*The parties agree that the salaries and conditions provided for in the Agreement and previous awards and agreements reflect that employees have been fully compensated for all work that is currently being undertaken within their classifications and Statements of Duties. Employees are required to be trained in and use their competencies in this work and exercise their responsibilities for the work.”<sup>11</sup>*

[51] To correctly assess an appropriate rate of pay for CFSOs, if it is accepted that the career Firefighter should be the appropriate comparator, the rate of pay for the career Firefighter needs to be *‘unstacked’* and all extraneous or non work value components removed to assess a *base* career Firefighter rate of pay. We agree with the submission of Mr Baker for the Minister.

[52] The next step would be an evaluation of the work value of the role of the CFSO inasmuch as it is a supervisory role requiring, it was submitted, additional responsibilities not part of a career Firefighter role. Once that has been determined the only other consideration is what should be the differential, if indeed there should be one, for each of the levels of CFSO to that of a career Firefighter classification taking into account any aspects of a career Firefighter’s role not required of a CFSO and vice versa.

[53] A value judgement then would be made as to the worth of any differing or additional requirement. The Commissioner determined that a value of 5% could be justified for a differential in recognition of the requirement for the career Firefighter to hold and maintain a level of operational capacity.

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<sup>11</sup> Original decision para 103

[54] The evidence also shows that the work of a CFSO is *'almost identical'* to that of a career Firefighter other than the requirement for shift work however the CFSO position, it was submitted, requires additional skills which include educational, supervisory and management skills not required by operational career Firefighters. We note that the UFU argued that in respect to those additional skills that the Minister *"...is straying into areas that were never before the Commission (Commissioner Abey)."*<sup>12</sup>

[55] We note however the evidence of Mr Killalea where he testified as follows:

*Q And just to reiterate, the range of competencies that a non-operational employee would hold would be significantly different (to a career Firefighter).*

*A Yes.*

[56] The TFS has chosen to continue to remunerate career Firefighters appointed to CFSO positions at the same salary level they would have received had they continued in an operational capacity as it was considered 'unfair' to reduce their salary.

[57] Nonetheless it is not a valid process to use the career Firefighter composite rate of pay as the starting point of comparison as it is not comparing like with like and the composite rate now has little relationship to work value considerations.

[58] It would seem that the decision to pay CFSOs with a career Firefighter background the composite rate of pay was a decision made by the TFS to attract and maintain internal applicants. The TFS said that although it was not having difficulty attracting external applicants to CFSO positions once in the job they were disgruntled to find they were receiving a lesser salary than internal CFSO appointments. That is perhaps not surprising.

[59] Accordingly the rate being paid to CFSOs has nothing to do with wage fixation by work value considerations. Likewise the submission that a move to the CFSO position was part of a recognised career path has nothing to do with work value.

[60] The matter put before the Commissioner was conceptually incorrect at inception.

[61] The TFS needs to determine whether external applicants are required to have and maintain operational career Firefighter skills. If that is so then the starting place for assessment would be the career Firefighter classification but at the *base rate* absent any increases achieved by enterprise bargaining and any components included in the composite rate for penalty or other payments. The *base rate* would be the minimum rate which once appeared in the award.

[62] We note the following submission by the UFU in respect to datum points for work value considerations:

*"Well, in this case, I guess I'm being a bit exploratory, but what the Commission did when - with Commissioner Abey sitting alone, is set a data point and the data point is 2008 in terms of work value. Bargaining will proceed, and there is no practical guarantee that these people will receive the same bargaining outcomes as others under the award. In fact, the fire service has made it perfectly clear that they don't accept that there is any*

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<sup>12</sup> Transcript p. 23 line 43

*form of nexus and that they will seek to, from time to time, have different bargaining outcomes, so for different groups...<sup>13</sup>*

**[63]** That submission was unchallenged. Accordingly, and if correct, will create further difficulties and inequities between career Firefighter and CFSO classifications. It also calls into question the sworn evidence, submissions and findings in this matter which suggest that there is a nexus between the two classifications inasmuch as the work is considered either the same or similar.

**[64]** We have addressed the appeal grounds as they were addressed in the appellant's written submissions.

**[65] Appeal ground 1**

*"At para [69] the Commission is factually wrong in asserting that all employees covered by the award receive the composite salary."*

**[66] Para [69]** states:

*"The reality is, they do not. The composite salary is paid to all employees subject to the award, irrespective of whether they are on shift work or not. In Community Fire Safety Division, the Community Fire Safety Officers and their career fire-fighter counterparts work the same pattern of hours. In Building Safety, the work pattern is essentially Monday to Friday, business hours. In TasFire Training, some weekend and evening work may be involved."*

**[67]** The appellant submitted that the Award provided four classifications being: Firefighters and Officers (Career Firefighters); Communications Officers; Community Fire Safety Officers (CFSOs) and Fire Equipment Officers (FEOs). It was said that the rates of pay prescribed for Career Firefighters and Communications Officers are inclusive of shift loadings, penalties, public holiday payments and extra duty hours whereas the CFSOs and the FEOs are paid wages and overtime and penalties when and if incurred. Or, as noted by the UFU, any overtime is mostly taken as time in lieu (TOIL).

**[68]** Accordingly it was argued that the Commissioner had made a factual error.

**[69]** This appeal ground and the reasons submitted for it are misconceived. The decision of the Commissioner makes no change to the entitlements for FEOs, in fact FEO's were not a consideration in the matter before the Commissioner and whilst it may be that his comment could be seen to be a factual error it is not fatal to his decision and does not have the impact the appellant chooses to apply. The statement is just that, it is not a finding but little more than part of his commentary and is of no relevance to his final determination. Even if what is claimed is correct, and we do not accept that it is, a minor award variation would resolve the alleged confusion or concern if indeed such exists.

**[70]** We reject appeal ground 1 as being irrelevant.

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<sup>13</sup> Transcript p 46, line 33

**[71] Appeal ground 2**

*"At para [112] the Commission gave insufficient weight to the varied career paths provided by the employer to career Firefighters as part of their overall career as a Firefighter and, in particular, the evidence provided and referenced in para [48] which demonstrates that movement between fire brigades and Community Fire Safety Division and vice versa.*

**[72] Para [112] states:**

*"The extent to which the fire fighting qualification is used and competency maintained is entirely another matter, which is discussed earlier in this decision. Suffice to say that to suggest that the incumbents are required to maintain operational competency and respond on a regular basis to fire and other emergencies at short notice would be quite erroneous."*

**[73] Para [48] states:**

*" An analysis of career fire-fighters who have worked in TFS since 1994 reveals the following:*

- One is currently employed for a two year period*
- Seven have returned to operations within two years.*
- Three have returned to operations after more than two years.*
- Of the balance, thirteen employees have been employed for an average 6.3 years.*
- Three have retired whilst in a TFS position.*
- One has resigned whilst in a TFS position"*

**[74]** The appeal ground is misconceived. Career paths are not a work value consideration in the terms on which the appellant seeks to rely. The employer can decide its employment practices and the background employment history, experience and skills of potential employees it requires and in what way those skills and experience will be exercised. However to assess the value of the work the Commission looks at the actual work performed, the skills required and the environment in which the work is performed. Whether some employees move in and out of certain work situations subject to the requirements of the employer is irrelevant to the value of the work. In fact the evidence suggests that it is only the career Firefighters appointed from within the TFS to CFSO positions who, in the main, move between operational and non operational positions and then only in some cases.

**[75]** The claims in the appeal ground that the employer is being penalised are curious and misguided. The employer has the right to organise its work requirements as it sees fit, provided it meets the award provisions, how it does so has nothing to do with work value considerations or rates of pay.

**[76]** The opportunity for promotion and the various career paths available to an employee were not relevant to the task before the Commissioner.

**[77]** We detect no error by the Commissioner and reject appeal ground 2.

**[78] Appeal ground 3**

*"At para [117] the Commission erred in not providing any justification for his view that the work value differential between the career Firefighters and Community Fire Safety Officers is 5%."*

**[79]** Para [117] states:

*"In my view the relative work value worth of two categories would be represented by a differential of 5% in each case. According I determine that the appropriate relativities are as follows:*

*Community Fire Safety Officer Level 2 104%*

*Community Fire Safety Officer Level 3 115%*

*Community Fire Safety Officer Level 4 120%"*

**[80]** The exercise undertaken by the Commissioner determined a differential between the career Firefighter category and the levels of CFSO based on the different requirements between the two positions. The fact that the career Firefighter was paid a composite salary, which the TFS had elected to continue to pay when appointed to a CFSO position was not, in our view, relevant to the Commissioner's task.

**[81]** Mr Baker submitted that the difference between the career Firefighter and the non career Firefighter is *"educational, the theoretical knowledge that one is required to hold as opposed to the other employee."*<sup>14</sup> And further he submitted that *"...some of those skills, some of that knowledge is still required to be exercised because some of the units of training that are delivered by TFS cannot be delivered by somebody who does not have a firefighting background."*<sup>15</sup>

**[82]** That submission almost suggests an argument that maybe there should be two categories of CFSO. We note the Commissioner's comment that *"It would seem there are two identifiable categories of career fire-fighters employed in CFS."*<sup>16</sup>

**[83]** There are CFSOs with a career Firefighting background and those who *"wander in off the street"*. The submission indicates that only some of the career Firefighter skills are required for a CFSO position along with other *educational* and supervisory skills which the Commissioner noted were *desirable* rather than *essential*.

**[84]** The Fire award was varied to include a CFSO classification; the position has not been the subject of any work value exercise and the rate of pay is based on a *best fit* classification from another award. The UFU is therefore able to pursue a work value assessment of that work. The fact that a *best fit* classification by reference to another award was adopted is an irrelevance and was nothing more than a convenience to provide a salary arrangement.

**[85]** In any case the assessment of such a differential is a value judgement by the Commissioner and we are unaware of, and was not referred to, a decision of any industrial tribunal which breaks down such an assessment into minute parts and allocates a percentage point to a number of particular elements or components. The

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<sup>14</sup> Transcript p. 23, line 4

<sup>15</sup> Supra p. 23, line 32

<sup>16</sup> Original decision para 45

Commissioner considered all of the evidence and information provided and made a value judgement as would be expected of him. It should be remembered that this matter was heard over some 8 sitting days as well as inspections in Launceston and Hobart. The Commissioner therefore had a large amount of evidence, submissions and inspections on which to rely to make his assessment. He has considered it all and made his determination. We detect no error. The finding was open to him on the evidence before him.

**[86]** We reject appeal ground 3, the Commissioner has provided his reasons why he considered the differential he has determined was justified. He has determined that a differential was justified due to the requirement to maintain some operational capacity.

**[87] Appeal ground 4**

*"At para [91] the Commission is factually wrong in conclusions formed in respect of the operation of Principle 9 Work Value and Principle 11, First Award and Extension to Existing Award of the Wage Fixing Principles inasmuch as the employees had previously been assigned classifications in the Fire Service Award prior to their classifications being included in the Tasmania Fire Fighting Industry Employees Award."*

**[88] Para [91] states**

*"Hence the prima facie position referred to in Principle 11.1 has been complied with."*

**[89]** The Minister argued that the work of CFSOs was neither new work nor award free work and therefore could not attract Principle 11 – *First Awards and Extension to Existing Award*. The application was before the Commissioner as the work of the CFSO classification has never been valued by considering work value. Further it was submitted, and not challenged, that the CFSO position had been aligned to clerical and administrative classifications as a matter of convenience only.

**[90]** We have recorded the history of the change to the Wage Fixing principles at paragraphs 35 to 39 as the background is relevant to the exercise undertaken by the Commissioner as it involved a claim based on work value.

**[91]** It is arguable that as it is the intention of the Minister that public sector awards do, or will, contain rates of pay which include enterprise bargained increases and in some cases other components as well, that an application for a work value consideration may no longer be possible, or at least will be difficult. In this matter the difficulty which has caused error is a consideration of a composite salary for work value purposes.

**[92]** The rates of pay for career Firefighters are composite rates which are based on the previous award rate, which was a minimum rate presumably determined by work value considerations, those rates now include enterprise bargaining outcomes which are the result of the bargaining process and bear no relationship to work value, as well as a component which represents shift work, and other penalties, again which have no bearing on work value.

**[93]** The TFS has determined that the CFSOs would be paid according to clerical and administrative classification descriptors and submitted that those rates *"offered the greatest scope to enable all the relevant employees to be appointed to a single salary scale and with agreement of the relevant union"* until such time as the classification could be incorporated in the appropriate TFS award.

[94] Regardless of the provisions of Principle 11, *First Award and Extension to Existing Award*, and prima facie it may seem an appropriate principle under which to proceed, the final determination of the rates would still rely on a work value assessment.

[95] We uphold appeal ground 4.

[96] It is in the public interest that the Commission's Wage Fixing Principles are properly and consistently applied.

**[97] Appeal ground 5**

*"At para [118] the Commission has failed to apply rigour to the assessment of the value of work undertaken by the Fire Safety Auditor by performing a 'desktop' analysis of various statement of duties of other persons engaged in the State service without an examination of the work performed by those employees."*

**[98] Para [118] states**

*"In the absence of counterpart classification within the award, I accept Mr Warwick's submission that it is appropriate to have some regard for similar classifications in the wider public sector. Indeed this approach is specifically provided for in Principle 9.5."*

[99] The appeal ground criticises the Commissioner for not undertaking an inspection of the work of the Fire Safety Auditor position yet he was not invited to do so by either party. The work of the Fire Safety Auditor is an administrative role and is not easily *inspected*. The Commissioner examined the position descriptions, considered the evidence, including that of the incumbent, and made his determination, it is difficult to understand what else the Minister would have expected him to do when the role is largely administrative. The submissions reveal that the consultant used by the Minister also did a number of 'desktop' analysis of duty statements and positions descriptions which were acceptable to the Minister so we fail to see why the same exercise undertaken by the Commissioner was not acceptable. It is an exercise of discretion by the Commissioner having considered all of the evidence and submissions put to him.

[100] Appeal ground 5 is rejected as having no basis and we are satisfied that the Commissioner took into account all of the relevant factors and that an inspection would possibly have been unhelpful even if it had been suggested.

[101] The finding was open to the Commissioner on the evidence presented and we detect no error.

**[102] Appeal ground 6**

*"(a) At para [71] the Commission gave insufficient weight to the loadings included in the composite salary for career Firefighters for assessing the work value of the Community Fire Safety Officers who are engaged in the Community Fire Safety Division."*

**[103] Para [71] states**

*"In the circumstances I am satisfied that no case has been made out to discount the career fire-fighter composite salary before a valid comparison can be made."*

and

*"(b) At para [101] the Commission erred by concluding that it was a 'reasonable presumption' an assessment of the value of the work undertaken by career Firefighters in Community Fire Safety Division had been previously determined by Robinson DP in Matter T2594."*

**[104] Para [101] states**

*"On 10 December 1993 Robinson DP handed down the Firefighters 'special case' decision. This decision embraced significant work value considerations across all classifications in the Award. Whilst not specifically mentioned, it is a reasonable presumption that this included the work of career fire-fighters employed in CFS. The Deputy President identified certain changes which he considered to be evolutionary in nature, but went on to conclude:*

*'Over and above this there have been clearly dramatic changes of late which have constituted a significant net addition to work requirements, and, in my assessment, have not been fully compensated.' "*

**[105]** In appeal ground 6(a) the appellant claims that the Commissioner did not give sufficient weight to the loadings included in the composite salary for career Firefighters. We agree that the relevance of the components in the composite salary have not been considered. It is not possible to use composite salary rates for work value comparisons. As we have previously noted the proceedings were conceptually incorrect from inception resulting in the final outcome being flawed.

**[106]** The loadings included in the composite salary have nothing to do with work value and are irrelevant to any work value assessment. It was the decision of the TFS to maintain the composite salary for career Firefighters appointed as CFSOs. Such decision has no relationship with wage fixing principles and has resulted in the parties being misguided in their approach to this application.

**[107]** We uphold appeal ground 6(a) as the Commissioner has erred by using composite salaries for career Firefighters as the comparator for a work value assessment of the CFSO positions. In our view the error is sufficient to warrant the decision being revoked.

**[108]** Appeal ground 6(b) is somewhat confused in our view. It seems to support the submission of the Minister in the proceedings before the Commissioner and the Commissioner has agreed with that submission that there was no justification for any work value increase for Firefighters as all work value had been recognised up until at least the 2007 enterprise bargaining agreement. What the Commissioner said at paragraph 102 of the decision, in reference to the Robinson special case decision, is that:

*"Clearly this decision embraced all work value considerations up to that point in time. However it did not apply to Community Fire Service Officers as they were not in the award at the time."*

**[109]** The Commissioner did not make the finding seemingly credited to him by the Minister. What the Commissioner has said is that career Firefighters employed by CFS at the time of the Robinson decision were assessed on the basis of being career Firefighters not CFSOs as no classification existed in the award at that time.

**[110]** We detect no error and reject appeal ground 6(b).

**[111]** It is our view that the Commissioner's decision should be revoked, and we so find, and the matter be referred back to him for a proper assessment of the relevant CFSO positions.

**[112]** We take this course of action to allow the parties, with the assistance of the Commissioner, to commence the process again to achieve an outcome which addresses the needs of the TFS and is fair and equitable to those employees, be they internal or external appointees, who seek or hold CFSO positions.

**[113]** It is important and in the public interest that the Commission's Wage Fixing Principles retain their integrity and be consistently and appropriately applied.

**[114]** The wage fixing principles were created to provide a process for the variation of minimum rates awards and it was not envisaged that they would have any role to play in the assessment of rates of pay other than those prescribed in minimum rates awards.

**[115]** Principle 13.3 provides that the parties to an award may vary the rates of pay to reflect rates and conditions as may be agreed between them. That means that public sector awards may no longer reflect rates based on work value, as determined by the Commission, or conditions of employment determined by application of the Commission's wage fixing principles. In this matter the Commissioner will need to undertake the exercise as described in paras 51 and 52 if the claim by the UFU is to proceed as a work value assessment of the CFSO classifications.

**[116]** The decision of the Commissioner is revoked and the matter is referred back to him for further hearing or conference.

P L Leary  
**PRESIDENT**

**Appearances:**

Mr P Baker, Ms J Fitton, Ms R Pearce and Mr D Killalea for the Minister administering the State Service Act 2000

Mr R Warwick for the United Firefighters Union of Tasmania

**Date and place of hearing:**

2008

August 6

Hobart