

**TASMANIAN INDUSTRIAL COMMISSION**

**Industrial Relations Act 1984**

s29 application for hearing of an industrial dispute

**Police Association of Tasmania**

(T13799 of 2011)

and

**Commissioner of Police**

DEPUTY PRESIDENT TIM ABEY

HOBART, 26 September 2011

**Industrial dispute – Property Purchase Expenses – criteria not met – application for order declined**

**REASONS FOR DECISION**

**[1]** On 20 July 2011, the Police Association of Tasmania (PAT), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Commissioner of Police arising out of the alleged breach of the Police Award.

**[2]** A hearing commenced in Hobart on 9 August 2011 and continued on 31 August and 8 September 2011. Mrs A Smith and Mr M Kadziolka appeared for the union while Mr T Martin and Inspector S Burk appeared for the employer.

**[3]** This application, pursued by the PAT on behalf of member Constable M, relates to an unsuccessful application for the reimbursement of Property Purchase Expenses pursuant to clause 12.3 of the Police Award 2 of 2010 (the Award).

**[4]** The circumstances of Constable M can be summarised as follows:

- Constable M transferred from Smithton to the Radio Dispatch Service in Hobart on 12 July 2010. Constable M owned a home in Smithton which he resided in with his family. On becoming aware of his impending transfer he signed an agreement with a real estate agent to sell the residence.
- No police residences were available in the Hobart area and Constable M initially rented a property before purchasing a residence on 8 December 2010.
- On 21 February 2011 Constable M submitted a claim for the reimbursement of Property Purchase Expenses.<sup>1</sup> This claim was denied.<sup>2</sup>
- In June 2011 Constable M sought a review of this decision.<sup>3</sup> The substance of the review claim was that the housing market in Smithton was

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<sup>1</sup> Exhibit A3

<sup>2</sup> Exhibit A4

depressed and he had received advice that a selling price less than that which Constable M had paid for the property would be necessary to generate interest. The delay in effecting a sale was causing financial strain for the family. The property had been tenanted in the short term but Constable M remained committed to selling the property.

- In an e-mail response dated 28 June 2011, the application was again declined. The employer's position was that it was obliged to follow the Award, and that payment of Property Sale Expenses pursuant to clause 12.2 was a prerequisite to the payment of Property Purchase Expenses.

[5] Relevantly clause 12.3 Property Purchase Expenses states:

***"12.3 Property Purchase Expenses***

*12.3.1 A member who transfers to another locality and receives property sale expenses is entitled to property purchase expenses for the purchase of a property in the new locality, provided that:*

*(a) the expenses shall not exceed:*

*(i) \$12,650 for a purchase in a capital city and greater metropolitan area within the capital city, or*

*(ii) \$8,590 for a purchase in a non capital city;*

*(b) the amount paid shall be for reasonable expenses approved by the Controlling Authority incurred in the purchase of a property; and*

*(c) the members occupies the purchased property or intends to occupy the property upon completion of construction.*

*12.3.2 The Controlling Authority may approve payment of the property purchase expenses for the purchase of a property in the new locality, to a member who does not sell a property in connection with transferring to another locality, if the Controlling Authority is satisfied the transfer necessitated the member to purchase a property in the new locality.*

*12.3.3 In addition to paragraph 12.3.2, a member who was required to reside in Departmental accommodation at their old locality is entitled to claim property purchase expenses for the purchase of a property at their new locality, provided the member was entitled to and claimed property sale expenses when the member transferred to the old locality.*

*12.3.4 (a) A member is not entitled to claim property sale or property purchase expenses in respect of a sale or purchase of a property, which is effected more than two years after the date on which the members takes up duty in the new locality; or*

(b) *After the date on which the transfer appears in the Police Gazette as the member's transfer date back to the previous locality if less than two years.*

12.3.5 *The Controlling Authority may approve both property sale and property purchase expenses outside the two year time frame in special circumstances upon application by the member."*

[6] The focus of this application revolves around clause 12.3.2.

[7] This clause was the subject of a dispute before the Commission in T13581 of 2009.<sup>4</sup> That decision records that following consultations an agreement was reached which settled the outstanding claims and established an agreed set of guidelines for the future. These guidelines were subsequently published in the Gazette on 12 May 2005 and have been tendered in these proceedings.<sup>5</sup> The Guidelines read:

***"Property Purchase Reimbursement***

*Approval under clause 12.3.2*

*"For the Controlling Authority to be satisfied the transfer necessitated the member to purchase a property in the new locality" the following are taken into account: -*

*Reimbursement under this clause for costs associated with purchase where property sale reimbursement has not occurred may be approved in the following circumstances.*

- a) housing purchased in the new locality is the principal residence for member and family;*
- b) the member did not own a suitable house within reasonable proximity of the new locality prior to transfer;*
- c) the member does not retain ownership of a house retained in previous location, subject to (e);*
- d) the member rented a departmental residence or was involved in "the officer next door program" at the former location and/or can demonstrate a trend of renting departmental houses as a result of transfers;*
- e) in circumstances where the member retains a house in the former location. If the member returns to the former locality an undertaking is provided that the member will not claim reimbursement for sale or purchase at that locality associated with that transfer.*

*Unlikely to be approved (unless special circumstances are demonstrated by member):*

- suitable departmental houses are available in area to which the member transfers; or*

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<sup>4</sup> Abey DP 9 March 2010.

<sup>5</sup> Exhibit A2

- *the member previously rented in private market and moves to new location where there is a rental market (urban location), unless the member demonstrates unusual and special circumstances which maintain family and /or personal requirements; or*
- *not sufficient (of itself) to establish home ownership for first time; or*
- *not for venture capital purposes."*

**[8]** In T13581 The Commission, in relation to the Gazette notice, observed:

*"There can be no doubt that in 2005 the parties freely entered into an agreement which was subsequently reflected in the Gazette notice. To my knowledge the notice has not been rescinded and/or replaced. Accordingly it remains on foot and it is not open to either party to simply walk away from the terms of this agreement without proper consultation and appropriate notice."*

**[9]** Nothing has occurred since this decision to alter that position. Accordingly the Gazette notice remains on foot.

**[10]** Mrs Smith submitted that the circumstances of Constable M fell comfortably within clause 12.3.2 and the denial of the claim was unreasonable. Mrs Smith cited a number of previous examples which the PAT submitted were similar in nature to that of Constable M. They included:

Example 1<sup>6</sup>

**[11]** Officer transfers from St Helens to Devonport and resides in a Police residence at Port Sorell on a short term basis. He is subsequently required to vacate these premises and purchases a property at Shearwater. His property at St Helens was on the market but was not sold at the time the claim for Property Purchase Expenses was submitted. Mr Martin subsequently made an uncontested assertion that a contract for the sale of the St Helens property was signed one week after the settlement of the Devonport purchase, and prior to actual approval of the property purchase expenses claim. Notwithstanding, it would seem that the internal recommendation for payment was based on the requirement to vacate the police residence. The claim was granted.

Example 2<sup>7</sup>

**[12]** Officer was transferred from Launceston to Devonport in February 2003. He purchased a property in Devonport but chose not to sell his Launceston property. The officer undertook that, should he return to Launceston in the future, he would not claim property purchase expenses. The claim was granted.

Example 3<sup>8</sup>

**[13]** In January 2005 the officer transferred from St Helens to Hobart and purchased a residence. He chose not to sell the St Helens property for family reasons. The officer undertook not to claim for sale or purchase expenses should he return to the St Helens locality in the future. The application was granted.

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<sup>6</sup> Exhibits A7 and R2

<sup>7</sup> Exhibit A8

<sup>8</sup> Exhibit A9

Example 4<sup>9</sup>

**[14]** The officer transferred from Launceston to Devonport in November 2008. The officer purchased a residence in the new location but, for family reasons, chose not to sell the Launceston property. The application was granted.

Example 5<sup>10</sup>

**[15]** In August 2010 the officer transferred from Burnie to Glenorchy where a residence was purchased. The Somerset property was retained on the basis of an intention to return to the area in the future. He gave an undertaking consistent with subclause (e) of the Gazette notice not to pursue expense claims in the event that that occurred. Initially the claim was declined based on the existence of a rental market in the area. However following the provision of additional information, the application was granted.

Example 6<sup>11</sup>

**[16]** In 2010 the officer transferred from Burnie to Hobart and subsequently purchases a residence at Longley. He did not sell his Burnie property and gave an undertaking not to claim sale or purchase expenses should he transfer back to the Burnie area. The application was granted.

Example 7<sup>12</sup>

**[17]** In March 2009 the officer transferred from Ravenswood to Ulverstone and purchased a property in Devonport. She did not sell her former residence in Launceston. The application for property purchase expenses was initially declined on the basis of lack of evidence concerning the rental market. However following a subsequent review the application was granted.

**[18]** Mr Martin submitted that the Department had given full and proper consideration to Constable M's application. However it simply did not comply with the Award in that the payment of Property Sale Expenses was a prerequisite for a claim for purchase expenses.

**[19]** Mr Martin said that the only exception to this rule is found in clause 12.3.2, and Constable M did not meet the necessary criteria. All the examples cited by the PAT could be distinguished from the present application, Mr Martin contended.

**[20]** Mr Martin said that Constable M had consciously not made the purchase subject to the sale of the Smithton property. This of course was entirely open to Constable M, but it was not the responsibility of the employer to step in should the sale process take longer than expected. The Department had advised Constable M that the window to complete the sale would be extended from the two years available under the 2010 Award to three years as prescribed in the 2011 Award.

## Findings

**[21]** There is no dispute, that should the Smithton property sell, Constable M would have an immediate and absolute entitlement to both property sale and property purchase expenses.

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<sup>9</sup> Exhibit A10

<sup>10</sup> Exhibit A11

<sup>11</sup> Exhibit A12

<sup>12</sup> Exhibit A13

[22] There appears to be no dispute that the transfer of Constable M *"necessitated the purchase of a property in the new location."* Further it is clear that the property is the principal residence for Constable M and his family and is not for venture capital purposes.

[23] From the Gazette guidelines and indeed some of the PAT examples, there is no requirement to provide any particular reason/s for the retention of the property in the former location. The only consideration is whether the transfer necessitates the purchase of a property. It follows that should Constable M remove the Smithton property from the market an entitlement to purchase expenses would, in my view, almost certainly arise.

[24] Insofar as the undertaking under [e] of the Gazette Notice not to pursue sale or purchase expenses is concerned, I tend to agree with Mrs Smith's construction of this subclause. On the ordinary meaning of the words used, the undertaking is not required until the member actually transfers back to the previous locality. Whether this was the intention I am not sure.

[25] With the possible exception of example 1 above, none parallel the circumstances of Constable M. In each case the member has made a conscious decision to retain the property in the previous location, and the focus has solely been on whether the transfer necessitated the purchase of a property to reside in.

[26] In relation to example 1, there are subtle differences to that of Constable M. I refer to short term rental of the police residence in Port Sorell and the timing of the St Helens sale. These distinguishing points, whilst relatively small, are sufficient to remove the example from the category of binding precedent value in the case of Constable M.

[27] I am unable to accept that clause 12.3.2 is designed to cover the circumstances Constable M finds himself in. It is clear that Constable M does not wish to retain the Smithton property. It is actively for sale.

[28] Clause 12.3.1 makes it clear that the general rule is that purchase expenses only become available after sale expenses have been paid. A window of either two years (2010 Award) or three years (2011 Award) is allowed to effect the sale. This begs the question, if 12.3.2 was intended to apply when the sale process takes longer than expected, at what point does it cut in? After 6 months or 12 months or some other period? The award is of course silent on this question and strengthens my view that 12.3.2 simply does not apply in this case.

[29] I conclude that the decision to deny Constable M's application was not inconsistent with the Award, the Gazette guidelines or the previous examples provided.

[30] Accordingly I am not prepared to grant the order sought.

Tim Abey  
**DEPUTY PRESIDENT**

**Appearances**

Ms A Smith and Mr M Kadziolka for the applicant  
Mr T Martin and Mr S Burk for the respondent

**Date and place of hearing:**

August 9  
August 31  
September 8  
2011  
Hobart