TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1) application for hearing of an industrial dispute

Community and Public Service Union (Tasmanian Branch)
(T14532 of 2017)

and

Minister administering the State Service Act 2000
(Department of Primary Industry, Parks Water and Environment)

PRESIDENT D BARCLAY HOBART, 4 JULY 2018

Industrial dispute- entitlement to travel allowance- camping allowance- Award interpretation- overnight accommodation allowance – requires an expense for accommodation to be incurred before payable – camping allowance not payable

Introduction

[1] This Application relates to the manner in which the Respondent is permitted to arrange accommodation for its employees and the proper Travel Allowance[1] it is required to pay where employees are required to undertake work related travel and required, as part of that travel, to stay away overnight.

[2] The Applicant asserts that the Respondent breached the State Service Award by failing to offer the employees affected the opportunity to first arrange commercial accommodation before having them stay in employer owned or arranged non-commercial accommodation. Alternatively the Applicant asserts that there was a breach of the award if accommodation allowance was not payable because camping allowance was payable and has not been paid.

Background

[3] On 4 and 5 April 2017 (in so far as it is relevant to this application) Mr Phillip Wicks and Mr Craig Reynolds were required to work on Bruny Island and to stay overnight on the island.

[4] The Respondent arranged overnight accommodation for them in accommodation that was owned by Respondent (I was not provided with evidence of which entity in fact owned the accommodation but it was assumed the Respondent department owned it).

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[1] Travel Allowance is dealt with in Part IV of the *State Service Award* and in particular clause 3 of that Part.

[5] The Respondent paid (or offered to pay) the incidentals component of the Travel Allowance. The Applicant has claimed on behalf of Messrs Wicks and Reynolds the Overnight Accommodation Rate.

[6] In the alternative the Applicant claims Camping Allowance.

The Contentions

The Applicant

[7] The Applicant contends that, where there is available commercial accommodation and alternative accommodation in respect of which the employer can provide that accommodation to its employees free of charge, the employer is not permitted to direct its employees to stay in the free employer arranged accommodation but must first give employees a choice whether to stay in the employer provided accommodation or in commercial accommodation.

[8] If the employee chooses to stay in the commercial accommodation then the employer is obliged to pay Travel Allowance including the Overnight Accommodation Rate.

[9] It is noted that the Respondent provided meals. As such the Applicant makes no claim for Meal Allowance.

[10] In the alternative the Applicant submits that the standard of accommodation provided on Bruny Island at the relevant time was such that it was equivalent to a "*tent, hut or similar type of accommodation*"[2] and accordingly the employees are entitled to be paid Camping Allowance for the overnight stay.

The Respondent

[11] The respondent contends that, having regard to the words of the Travel Allowance clause that as a matter of construction the Respondent is not obliged to pay the Overnight Accommodation Rate. Further it contends that it can choose between commercial accommodation and non-commercial accommodation which it can provide free of charge.

[12] In respect to the alternative claim for Camping Allowance the Respondent contends that the accommodation was better than a tent, hit or similar and therefore the camping allowance is not payable.

The Facts – Accommodation Allowance Rate

[13] During the relevant time fuel reduction burns were being conducted in Bruny Island. Approximately 20 employees were engaged to conduct the burn. About 8 of the employees were covered by the *State Service Award* (**the Award**). Commercial accommodation was available for 10 employees and employer owned accommodation was provided for approximately 14 employees. There were also cabins at the caravan park but they were only available the night before the burn.

[14] The lack of availability of commercial accommodation was because of the tourist season.

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[2] This phrase is from clause 3(b)(i) of Part IV of the award.

[15] Mr Philip Duggan, who was the Fire Operations Officer in charge of the operation made a statement and gave evidence. He arranged the accommodation. He decided to house the Fire Crew in the commercial accommodation because they were staying longer than the employees relevant to this application. Meals were provided.

[16] Attending the fuel reduction burns was voluntary. An email[3] was circulated to regional staff asking for expressions of interest to conduct the fuel reduction burn. Expressions of interest were made and employees were advised by email who would be attending and where they would be staying.

[17] Commercial accommodation options had been exhausted. It seems they were exhausted before employees were allocated to the employer owned accommodation.[4] Accordingly there was no commercial accommodation available at which the affected employees could stay.

The Travel Allowance Clause

[18] The clause provides as follows:

"3. TRAVEL ALLOWANCES

(a) Travelling

The object of this clause is to ensure that an employee who is required to undertake work related travel and who is required to remain away from home overnight is to be provided with accommodation, meals and incidental expenses without incurring out of pocket expenses.

(i) Travel Allowance Expense for Overnight Accommodation, Meal Allowances and Incidental Expenses

(1) An employee who is required to undertake work related travel requiring overnight accommodation is to be paid a travel allowance for expenses incurred calculated in accordance with the following tables:

Overnight Accommodation

Accommodation Venue	Overnight Accommodation Rate
Adelaide	$157.00
Brisbane	$205.00
Canberra	$168.00
Darwin	$216.00
Melbourne	$173.00
Perth	$203.00
Sydney	$185.00
Tasmania	$132.00

[3] Exhibit R5
[4] Transcript p 25 line 7-8

Meal Allowances
(Preceding or following an overnight absence)

Breakfast	Applicable 7.00am – 8.30am	$26.45
Lunch	Applicable 12.30 – 2.00pm	$29.75
Dinner	Applicable 6.00pm – 7.30pm	$50.70

Incidental Expenses

Payable per overnight stay:	$19.05

(2) The rates contained in the tables above are derived from the Australian Taxation Office Taxation (ATO) Determination TD2016/13, Table 1. These rates are to be adjusted from 1 July each year in accordance with the appropriate ATO determination. The accommodation component of the allowance is derived from the capital city rate for each State within that Determination.

(ii) Pre-Booking and Payment of Accommodation

(1) The employer may enter into an arrangement with a commercial provider (hotel, motel or serviced apartment) for the provision and payment of accommodation on behalf of an employee.

(2) In such cases the accommodation component of the Travel Allowance Expense will not be paid.

(iii) Payment of Actual Travel Expense

(1) The employer and an employee may enter in an arrangement whereby it is agreed that the actual cost of accommodation and/or expenditure on meals incurred in the course of business are to be paid upon the verification of such receipts as may be tendered in support of the claim.

(2) In such cases the accommodation and/or meal allowances prescribed in paragraph (a)(i) of this clause are not to be paid but the actual accommodation and/or meal expenses incurred in the course of business travel are to be reimbursed to the employee.

(3) An employee who has entered into an arrangement in accordance with subclause 3(a)(iii)(1) above is to be paid the Incidental Expenses Allowance as prescribed in subclause 3(a)(i))(1).

(4) The employer may provide alternative methods of payment of travel expenses, such as through use of a corporate credit card.

(iv) Payment for Employee Choice

(1) An employee may choose not to stay in accommodation for which the employer has a commercial arrangement in which case the employee is to be paid the rates prescribed in paragraph (a)(i) of this clause.

(2) The employer may require the employee to provide evidence by way of receipt that a commercial accommodation (hotel, motel or serviced apartment) expense was incurred.

(3) An employee may choose not to stay overnight in commercial accommodation (hotel, motel or serviced apartment) in which case the accommodation component of the travel allowance is not payable to the employee.

[19] I agree with the Respondent that the question of what is payable by way of Travel Allowance turns on the proper construction of the clause.

Submissions – Overnight Accommodation Rate

The Applicant

[20] The Applicants written Outline of Submissions are as follows:

"8. The Applicant submits that under the Award, the right of the employer to organise accommodation on behalf of an employee is limited to arrangements with commercial providers. Within Part IV- Expense and other allowances of the Award, the right of an employer to make accommodation arrangements arises at (3)(a)(2)(ii).

'The employer may enter into an arrangement with a commercial provider (hotel, motel or serviced apartment) for the provision and payment of accommodation on behalf of an employee.'

9. The Applicant submits that there is no provision in the Award or relevant Agreement that outlines a right of the Respondent to enter into accommodation arrangements on an employee's behalf with non-commercial providers.

10. The Applicant submits that the Award impacts many state service employees and the nature of the employees, being Parks and Wildlife employees, should not allow for accommodation standards implied under the Award to be disregarded.

11. The Applicant submits the Award should not be interpreted in such a way that may discourage transparency and accountability so as to allow an employer to direct and employee to stay in employer-owned accommodation, without giving choice to an employee, and where a commercial alternative is available. In light of this, the Applicant respectfully suggests the Award be interpreted in light of the State Service Principles, in particular per State Service Act 2000 s15(d) that:

'...the State Service is accountable for its actions and performance, within the framework of Ministerial responsibility, to the Government, the Parliament and the community.'

12. The Applicant submits that employees required to remain away from home overnight, who in the normal course of their duties are required to travel to different locations are entitled per Part IV- Expenses and other allowances 3. Travel Allowances to receive either an accommodation or a camping allowance."

[21] In oral submissions the Applicant amplified the submission by submitting that the award effectively provided an employee with a choice between commercial accommodation

and accommodation provided by the employer (where employer provided accommodation is available). Where the Respondent went wrong in this case, it was submitted, was that it failed to give the employees a choice of arranging commercial accommodation before directing them to stay at the employer provided accommodation, even though there was no commercial accommodation available. This submission is of course different from the written submission which suggested that the choice would be available where commercial accommodation was available (paragraph 11 of the Applicants submissions set out above).

[22] Because the choice was not first given there was a breach of the award. It was submitted that it did not matter that no commercial accommodation was available. It was also submitted that it did not matter that, accordingly, the employee would not incur an expense for overnight accommodation.

[23] The submission was that, as the award was silent as to arranging private accommodation the Respondent could only organise commercial accommodation. The Applicant relies on clause 3(a)(ii) which, as noted above, allows for the employer to enter into commercial arrangements for a provider to provider commercial accommodation. It submits that outside these arrangements the employer can do nothing and the employee is entitled to arrange accommodation.

[24] The Applicant submitted that there were implied accommodation standards[5] and that those standards were maintained by their construction put on the scheme of travelling allowance. It was however never made clear how standards of accommodation were implied into that part of the Award. It may well be that standards of accommodation are relevant to camping allowance, but it is not clear to me how standards of accommodation are implied into the accommodation allowance part of the clause.[6] Whilst not relevant to this decision I note that an employee who is arranging commercial accommodation could choose to stay in backpacker style accommodation but still be entitled to the accommodation allowance rate, and in this way make a net gain on the accommodation rate. As such it is difficult to see how there is an implied standard of accommodation. If there were, either an employee would be required to stay in accommodation which costs about the same as the accommodation rate, or would only be paid the actual expense incurred for the overnight accommodation.

[25] The Applicant also submitted that choice of accommodation ensured transparency and accountability. It was never made clear to me how that would work. However tellingly the Applicant submitted that choice would promote those ends "*where a commercial alternative is available*". No such alternative was available. I give no weight to this submission. If the standard of accommodation is akin to a tent, hut or similar accommodation the employees are paid a camping allowance. If it is contended that transparency and accountability is, in the circumstances of this case, to ensure employees are not housed in inadequate accommodation, they are protected by the award itself in that they will be paid the camping allowance.

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[5] Applicant's submissions paragraph 10.

[6] Whilst not relevant to this decision I note that an employee who is arranging commercial accommodation could choose to stay in backpacker style accommodation but still be entitled to the accommodation allowance rate, and in this way make a net gain on the accommodation rate. As such

The Respondent

[26] The Respondent submits that the issues raised as to accommodation allowance rate are a matter of construction of the relevant clauses of the Award and then applying the clause as construed to the facts of the case.

[27] I agree that it is a matter of construction.

[28] The Respondent submits that it is a precondition to an entitlement to Accommodation Allowance (not including Camping Allowance) that an employee must incur an expense before travel allowance is paid.

[29] The Respondent further submits that there is no limitation in the Award which prevents an employer from providing non-commercial accommodation.

[30] Finally on this issue it is submitted that there is no general choice for an employee to choose accommodation. It is submitted that choice is specifically dealt with and is limited to cases where the employer has a commercial arrangement with an accommodation provider.

[31] The Respondent also points out that neither of the affected employees sought to exercise a choice. There is certainly no evidence that they did.

The Law

[32] In *Polan v Goulburn Valley Health*[7] Mortimer J said this of construction of agreements (omitting citations):

> "Like other instruments creating normative rules, such as statutes and regulations, industrial instruments are to be construed in accordance with their language (or text), taking into account their context in the wider scheme or structure of the instrument, and the purpose of the provisions, again as seen in the wider scheme or structure of the instrument: Certain Lloyd's Underwriters v Cross [2012] HCA 56; 293 ALR 412 at [24]–[25]. In the latter case, French CJ and Hayne J said at [25]:
>
> > Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials.
>
> Having made that statement, their Honours then reaffirmed that, ultimately, the purpose of a statute "resides in its text and structure". Subsequent decisions have confirmed this emphasis, while making it clear that extrinsic materials may also be consulted.
>
> In relation to industrial instruments, considerations of context include the wider industrial circumstances in which a particular agreement has been negotiated and concluded, taking particular account of the "practical frame of mind" that might often be brought to its drafting and of the "industrial realities" in which such

[7] [2016] FCA 440

instruments are drafted. Examination of the history of industrial instruments is as justified as examination of legislative history. It is critical that construction of industrial instruments should contribute to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the industrial instrument. Although it has been held that ss 15AA and 46 of the Acts Interpretation Act 1901 (Cth) do not impose obligations to construe the instrument in a way which would best achieve the objective of the instrument (those provisions having been held to be inapplicable to enterprise agreements, it is nevertheless clear from the authorities to which I have referred that a purposive approach to the construction of the terms of an industrial instrument is required just as much as it is required in construing a statute."

[33] More recently the Full Bench of the Fair Work Commission drew together the authorities for the construction of enterprise agreements under the *Fair Work Act 2009.*[8] So far as is relevant for this matter the Full bench said:

"2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.

3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:

(a) 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;

(b) notorious facts of which knowledge is to be presumed;

(c) evidence of matters in common contemplation and constituting a common assumption.

7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.

8. Context might appear from:

(a) the text of the agreement viewed as a whole;

(b) the disputed provision's place and arrangement in the agreement;

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[8] AMWU v Berri Pty Ltd [2017] FWCFB 3005.

(c) the legislative context under which the agreement was made and in which it operates.

9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is 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.

10. 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."[9]

Consideration

[34] It was not submitted that the language of the agreement was ambiguous. Rather it was submitted that the construction advanced by the Applicant was consistent with a standard of accommodation which was to be implied into the agreement, and that the award required a choice to be given to employees.

[35] As noted the Respondent relied on the words of the clause to establish that there was a precondition to an entitlement to accommodation allowance, namely that the employee incurred an expense in respect to accommodation.

[36] I agree that the accommodation allowance requires an employee to incur an expense in respect to accommodation before the accommodation allowance is payable. The clauses themselves indicate that this is so.

[37] Firstly the object of the clause is *to ensure that an employee who is required to undertake work related travel and who is required to remain away from home overnight is to be provided with accommodation, meals and incidental expenses* ***without incurring out of pocket expenses.***

[38] Secondly the clause provides that *an employee who is required to undertake work related travel requiring overnight accommodation is to be paid a travel allowance* ***for expenses incurred.***

[39] Thirdly, clause 3(a)(ii) provides that if an employee stays in accommodation for which the employer has a commercial arrangement no accommodation allowance is payable. That is because the employee is not incurring any expenses for accommodation.

[40] If the employee stays in commercial accommodation for which the employer does not have a commercial arrangement, then the employer may require the employee to show that an expense was in fact incurred for commercial accommodation before the allowance is paid.[10] Further if the employee does not stay in commercial accommodation then travel allowance is not payable.[11]

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[9] Supra at paragraph 38
[10] Clause 3(iv)(2)
[11] Clause 3(iv)(3)

[41] It is clear from the text of the award that an expense must be incurred before travel allowance is payable. The award is not ambiguous. The construction which I have concluded is correct is consistent with the objects of the clause.

[42] Because no expense was incurred for overnight accommodation the overnight accommodation component of the allowance is not payable.

[43] I should however say something about the contention that the employer is only entitled to arrange commercial accommodation. The Applicant contends that such a conclusion is mandated by the fact that there is provision for the employer to enter into commercial arrangements but there is no similar clause permitting the employer to arrange non-commercial accommodation.

[44] In essence the Applicant submits that clause 3(a)(ii) permits the employer to arrange commercial accommodation and because the clause is otherwise silent, there is an implied prohibition on the arrangement of non-commercial accommodation.

[45] There are a number of problems with that. Firstly the contention does not grapple with the situation where there is no commercial accommodation. This may particularly be the case for DPIPWE employees. The Applicant says that does not matter. Because there is a choice, where the employee cannot stay in commercial accommodation the employee is paid overnight allowance. That presupposes that there is a choice where there is no commercial accommodation (which I will deal with below) and it presupposes that every employee will "choose" to stay in commercial accommodation and thereby become entitled to the overnight allowance.

[46] In my view there is no right to choose where there is no commercial accommodation available. Where there is no commercial accommodation available there is in fact no choice for the employee to make. The "choice" where there is no commercial accommodation available is not between staying in the non-commercial accommodation and some other accommodation but is in reality deciding whether to accept the accommodation or not to accept it other than if the overnight allowance is paid. That is not a choice between two types of accommodation but is a decision whether to require the employer to pay overnight allowance or not. If the employee chooses to stay in the employer provided accommodation, then no accommodation allowance would be payable. If the employee chose not to stay on the accommodation it is not the case he or she would not stay at the accommodation, but rather the consequence of the "choice" not to stay there is that an allowance becomes payable. There would only be a real choice (albeit not between two types of accommodation) if the decision not to stay in the accommodation provided by the employer meant that the employee would not do the work. Even then no accommodation allowance would be payable because the employee would not be travelling.

[47] The second difficulty with the contention that the employer has no power to arrange non-commercial accommodation (as I apprehend the submission) in any circumstances is that the language of clause 3(a)(ii) is permissive. That is the employer has a discretion (may) enter into such arrangements. That is not consistent with there being an implied prohibition on arranging non-commercial accommodation. There may be substance to the approach to construction contended by the Applicant if the obligation to arrange commercial accommodation was mandatory. That is, "you must arrange commercial

accommodation". It is more likely that there may be an implied prohibition to arrange non-commercial accommodation because the clause requires a certain type of accommodation to be arranged. However that clause is not mandatory but discretionary.

[48] Further just because the employer is permitted to do one thing in respect to overnight accommodation does not mean that it covers the field for all such arrangements.

[49] In *ASU v Commonwealth of Australia (acting through and represented by the Australian Tax Office)*[12] (the Hot Desking Case) the Full Bench of the Fair Work Commission was dealing with the following clause:

> "87.1 The ATO is committed to providing high quality office accommodation that meets the professional needs of employees and the nature of the employees' work.
>
> 87.2 The ATO will continue to make more effective use of space, greater use of flexible work arrangements and rationalise accommodation holdings.
>
> 87.3 Where a decision has been made to have new accommodation or modify existing accommodation, affected employees and where they choose, their representatives will be consulted.
>
> 87.4 Without reducing the general requirements concerning quality and consultation, employees regularly engaged in field work may be required to use shared accommodation. The sharing arrangements and ratio of workpoints to employees will have full and proper regard to the nature of the employee's work."

[50] The shared accommodation referred to in clause 87.4 was hot desking. The union submitted that because clause 87 specified in subclauses 4 that employees engaged in field work may be required to hot desk, then no other employees could be so required.

[51] The Full Bench disagreed. It held that the clause did not, in its terms, operate as a negative injunction to prohibit the ATO from imposing hot desking on employees other than field workers.[13]

[52] In my opinion clause 3(a)(ii) also does not operate as a negative injunction prohibiting the employer from making alternative arrangements of a non-commercial nature. Indeed, in the case where no commercial accommodation was available, if there was a prohibition on arranging non-commercial accommodation, then its work may never be carried out, unless it paid the overnight allowance, regardless of the quality of the non-commercial accommodation offered. In my view that conclusion is not to be preferred. If the accommodation is of the quality of a tent or hut a camping allowance is payable. If it is not, then no allowance is payable because no expense has been incurred.

Conclusion – overnight accommodation rate

[53] As an employee must incur an expense for overnight accommodation and the employees in this case did not, no overnight allowance is payable.

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[12] [2018] FWCFB 1170
[13] Ibid at paragraph 31

[54] Further there is nothing prohibiting the employer from arranging non-commercial accommodation where commercial accommodation is not available. I understand however that where commercial accommodation is available that accommodation will usually be made available. However nothing I have decided should be seen as determining anything other than where there is no commercial accommodation available the employer is at liberty to make arrangement for non-commercial accommodation. I reserve for another day the question whether, where commercial accommodation is available the employer can nevertheless determine that employees will stay in non-commercial accommodation. The question of construction is different from that of the present case and I have had no submission regarding those circumstances.

Camping allowance

[55] There remains the question whether, in light of my findings regarding overnight allowance, a camping allowance was nevertheless payable.

[56] The relevant clause provides as follows:

Camping Allowance

(i) An employee who is required to camp overnight in a tent, hut or similar type of accommodation in performing their duties is to be paid a camping allowance of $42.75 for each overnight stay.

(ii) This allowance is compensation for all working conditions such as travelling over rough terrain and for work undertaken in severe climatic conditions.

(iii) However an employee who is required to carry a tent and equipment, including consumables, to a work site in order to undertake duties is to be paid a camping allowance of $61.80 for each overnight stay.

(iv) The employer is to provide all meals and consumables of a reasonable standard by direct payment to a supplier.

(v) Where the employer chooses not to provide meals and consumables the employee is entitled to purchase food and consumables up to the value of $53.45 for each overnight stay, or is entitled to be paid an allowance of $53.45 for meals and consumables for each overnight stay.

(vi) The allowances specified in this clause are drawn from Clause 2(d) Meal Allowances of this Part and are adjusted in sub-clause (v) with that rate being the aggregate of the meal rates of Clause 2(d); and sub-clause(i) being 80% of the rate of sub-clause (v); and sub-clause (iii) being the rate of sub-clause (i) plus the Incidentals rate of the same ATO Determination that provides these meal rates.

[57] The question is simple, was the accommodation provided by the employer a tent, hut or similar type of accommodation.

[58] The evidence is relatively narrow on the point. Mr Wicks gave evidence. His witness statement was tendered. The extent of his witness statement was:

- "On the 4th and 5th of April 2017 I was directed to stay in the accommodation supplied by the Parks and Wildlife Service while conducting fuel reduction burns on Bruny Island.

- I was required to bring bedding and would describe the accommodation as a hut type, similar to what is available on the three capes walk.

- To clarify it has bunk house type beds, shared rooms with outside sanitary facilities (toilet outside, no hand basin).

- To wash after use, you need to go back into the main living quarters through the three doorways to a shared bathroom, one shower over old bath and one small hand basin and wait in line if already in use, similar to hut style accommodation.

- I was provided with meals and given the opportunity to claim incidental allowance but denied camping allowance, citing I was not camping.

- I believe the conditions, we the six staff were asked to share would be deemed camping or hut type accommodation as listed in the State Service Act and that would attract a camping allowance of 38.35? (sic)"

[59] His evidence in chief was as follows:

> "MS JONES: So perhaps you could take us through the similarities between that accommodation and the accommodation that you stayed at on Bruny Island?"
>
> "MR WICKS: The similarities would be that you're supplied with some sort of area to sleep in. Bruny Island, it was a mattress on a bed. Out on Three Capes you could be in one of the huts which is a bunk type bed, or you might need to put a mattress down on the floor in the workshop, in the kitchen area, or sleep in what has been classed as a makeshift sleeping area out of a water tank, which is used down on Macquarie Island, so they brought them back from Macquarie Island and some have been deployed out there for maintenance staff. So normally we wouldn't be allowed to sleep in the accommodation huts that our visitors are paying for. They like to keep us separate from that accommodation type, so you – it would be on the floor. But Bruny Island was similar, that it just had some bare beds in some rooms and you were sharing those rooms and you had to supply your own bedding, whether it be sleeping bags, sheets and pillows and things like that."
>
> "MS JONES: Yes. I'll just take you to the third paragraph where you do mention those shared rooms. Can you just speak a little of the sleeping arrangements, to start off?"
>
> "MR WICKS: It was sharing – I class it as bunk house type accommodation, just a couple of beds, obviously on the floor. We were sharing a room. The conditions in the house, or accommodation if you want to call it, were one shower over a bath, one hand basin, and the toilet facilities were external. There was no handwashing

basin in the toilet area so you had to go back through three doors, in effect, to get to a sink to be able to clean up after you'd used those facilities and once again, that is in line with the Three Capes hut where the toilet facilities are some distance away and outside. And there's only one sink, and cold water. So I just thought the sanitary conditions are a little bit camp type."[14]

[60] I also have the benefit of a number of photographs and a video. I have considered them.

[61] However first I must construe the relevant clause. Was the accommodation a tent, hut or similar accommodation? This begs the question what is a tent or a hut. I must then consider whether the accommodation provided was a tent or a hut and if it was not precisely those things was the accommodation similar to those things.

Submissions

The Applicant

[62] The Applicant in its written submissions simply states that the accommodation falls within the scope of "tent, hut or similar type of accommodation" due to the nature of the basic shared facilities and requirement to provide their own bedding.

[63] The Applicant in oral submission said:

> "MS JONES: Yes, and on that we would submit that access to basic shared facilities, an outdoor toilet with no hand basin accompanying it, an expectation that there is communal living, it's like just the general experience of discomfort. Even features as were in the respondent's photos a sign on the door "As you leave, please take your rubbish with you". I mean these are all things that you experience when you're camping in these kinds of arrangements. It's a very different standard to what you would get in commercial accommodation and - - -
>
> THE PRESIDENT: And say I've got some – sympathy; you've got to take your own sleeping stuff as well.
>
> MS JONES: Yes, so I guess it turns on whether this section of the award is designed to compensate in a way employees for these kinds of conditions. Those conditions we would say and we would submit are present and were present on this occasion with the Bruny Island accommodation."[15]

[64] The Applicant did not really grapple with the meaning of the clause. Rather it relied on the fact the accommodation was basic, with shared facilities and that the facilities were the sort of facilities for which the camping allowance was designed to compensate the employees.

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[14] Transcript p 4 lines 14 – 44
[15] Transcript P 44-45 lines 41-12

[65] In contrast, the Respondent relies on the construction of clause to identify what a tent was, what a hut was, and to extrapolate from that what similar accommodation was. At paragraphs 54 to 59 in written submissions the Respondent said this:

> "54. By including a separate Camping Allowance to cover situations where employees are required to camp, it is implied that camping does not meet the purpose of the Travel Allowance. This is consistent with the realities of camping.
>
> 55. When camping overnight, employees are generally isolated and unable to readily access other accommodation options, restaurants, cafes, shops and therefore do not incur the expenses of the Travel Allowance.
>
> 56. Employees who are camping are generally required to purchase in bulk and bring food and personal supplies to the camp, with limited cooking and refrigeration facilities.
>
> 57. The Camp Allowance provides for the reimbursement of these expenses, in addition to the allowance component.
>
> 58. Having regard to the ordinary language, origins and context of the clause the Respondent submits that purpose of the allowance component of the Camp Allowance is to compensate employees for:
>
> a) The disabilities of camping in a tent, hut, cubicle or similar type of accommodation (eg discomfort, lack of modern amenities, isolation, additional work);
>
> b) All working conditions associated with camping such as travelling over rough terrain, work performed in severe climatic conditions; and
>
> c) To compensate employees for incidental expenses related to camping.
>
> 59. To understand what *special conditions* and *disabilities* are involved with camping, it is necessary to consider what distinguishes camping for work purposes from staying at a house or commercial accommodation. In this regard, it is submitted that camping involves special conditions or disabilities such as
>
> - Sleeping in potential uncomfortable conditions;
> - Not being able to escaple the elements;
> - Not having modern conveniences such as hot showers, fridge, flushing toilet, oven etc;
> - Additional work involved in having to cook own food in a camp;
> - Additional work involved in having to maintain a camp;
> - Having to work communally; and/or
> - Being isolated and unable to readily leave."

[66] The Respondent also noted the Macquarie Dictionary definitions of hut, camp, camping and tent at paragraph 41 of its submissions as follows:

> "The Dictionary definitions of the terms camp, camping, tent are hut are as follows: (sic)
>
> a) The term 'hut' is relevantly defined in the Macquarie Dictionary, Seventh Edition (p 744) as "a simple, small house such as a beach hut or bushwalker's hut."
>
> b) The term 'camp' is relevantly defined in the Macquarie Dictionary, Seventh Edition (p 224) as "to find temporary or makeshift accommodation" and camp out, to live temporarily in a tent or similar shelter."
>
> c) The term 'camping' is relevantly defined in the Macquarie Dictionary, Seventh Edition (p 225) as "the activity of living temporarily in a tent or similar accommodation, especially as a form of recreation or holiday-making."
>
> d) The term 'tent' is relevantly defined in the Macquarie Dictionary, Seventh Edition (p 1545) as a "portable shelter made of strong material, formally usually canvass, supported by one or more poles or a collapsible frame, and usually anchored by ropes fastened to pegs in the ground."

[67] I accept these submissions. Accordingly the question is, is the house which was provided by the employer a hut or similar type of accommodation? It is certainly not a tent.[16] Is it a hut or similar.

[68] While I accept there is an outside toilet with no sink, and to an extent communal living and that the employees took their own bedding, the communal living was essentially limited to sleeping. Breakfast and dinner was supplied at the local hotel. Lunch was also provided. Having considered the written and oral evidence, the photographs and the video I conclude that the accommodation is of a higher standard than a hut. Whilst it is relatively basic it is better than hut or similar type of accommodation.

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[16] I note in passing that the Respondents submissions were to the effect that the camping allowance would be payable in circumstances where an employee was staying in the type of tent often associated with "glamping" because it would fall within the meaning of tent event though it would be of a very high quality.

Conclusion camping allowance

[69] I find that camping allowance is not payable. The experience of the employees was not similar to camping. The facilities provided, although basic were much better than a beach hut, bushwalkers hut or similar.

Conclusion

[70] For the reasons set out above I dismiss the application.

David Barclay
President

Appearances:
Mr N Jones for the Applicant
Ms C Collins for the Respondent

Date and place of hearing:
2017
4 October
Hobart