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**AUSCRIPT**

**TRANSCRIPT OF PROCEEDINGS**

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O/N 62455

**TASMANIAN INDUSTRIAL COMMISSION**

**PRESIDENT P.L. LEARY**

**T No 13004 of 2007**

**TASMANIAN FIRE FIGHTING  
INDUSTRY EMPLOYEES AWARD**

**Application pursuant to the provisions of  
section 43(2)(a) of the Industrial Relations Act 1984  
by the United Firefighters Union of Tasmania for an  
interpretation of the above award re operation of  
Clause 3 - Scope relative to the operation of  
Clause 4(i) - Lateral entry by experienced firefighters**

**HOBART**

**2.00 PM, THURSDAY, 23 AUGUST 2007**

**HEARING COMMENCED**

**[2.01pm]**

PN1

THE PRESIDENT: Thank you. Could I take appearances please?

PN2

MR R. WARWICK: I appear for the United Firefighters Union of Tasmania.

PN3

THE PRESIDENT: Thank you.

PN4

MS J. FITTON: I appear on behalf of the Minister Administering the State Service Act and with me today is MR P. BAKER and MR A. NEWELL.

PN5

THE PRESIDENT: Thank you. Mr Warwick?

PN6

MR WARWICK: Thank you. Commissioner, might I say what a delightful winter's day in Hobart. Who would, in their right mind, want to live elsewhere?

PN7

THE PRESIDENT: Yes, and who would want to spend a beautiful afternoon in here?

PN8

MR BAKER: Listening to you.

PN9

THE PRESIDENT: Yes, all of you. Nevertheless we are here now so we will do what we came to do.

PN10

MR WARWICK: If the Commission pleases, I would like to start by making a statement about the real-world circumstances that have led to this application. Those circumstances relate to two members of the UFU. One of them, however, is currently a member of a different branch of the union. This application is nothing to do with the relative merits or qualities of these individuals, rather this application is about what we thought was an honourable consent agreement between the Tasmanian Fire Service and the union but which now the fire service is seeking to repudiate.

PN11

In other words, the argument is between the union and the fire service and it has nothing to do with the union and its relationship with any of its members including members of other branches. This application comes about because a member of the Tasmanian branch of the union recently lodged an application to the State Service Commissioner for a review of the employer's decision to appoint a person from outside to a station officer position. That application for review was not based on merit but was based on a clause in the award that

relates to how persons from outside the Tasmanian Fire Service are to be employed.

PN12

After consultation with the Office of the State Service Commissioner and the Tasmania Fire Service, the parties have agreed that the proper way for this matter to be resolved is through the interpretation powers given to the Tasmanian Industrial Commission through the Act. There are a number of background points regarding this application that are important. When I started with the UFU in 1996 there was an unwritten law in the fire service that related to the resignation of firefighters and officers.

PN13

That rule was once you leave you can't come back. This unwritten law probably had its basis in the military character upon which fire services were historically established. In 1996 however, this unwritten law was unsustainable within the context of the State Service Act and modern civilian employment practices. When approached by management in 1997 to allow lateral entry of firefighters because of staff shortages at the time the union leadership agreed. This led to some significant anger and resentment in sections of the membership.

PN14

Some of this animosity probably still exists. Having said that the union went on to negotiate award clause 4 career paths subclause (i) lateral entry by experienced firefighters as follows, and I have copies of the relevant sections that I would like to talk about, if I could hand those up.

PN15

THE PRESIDENT: Thank you. I won't mark them, they are extracts from the award.

PN16

MR WARWICK: They are. The third page of the document at about a third of the way down indicates subclause (i) lateral entry by experienced firefighters which says:

PN17

*The employer may initially appoint a person who is currently competent and who has appropriate periods of practical firefighting employment experience in a recognised career firefighting agency. The appointment and advancement of these persons, up to and including the level of leading firefighter, classification 3E, is to occur depending on the level of competency and experience in each individual case. In all cases the Tasmania Fire Service must consult its employees regarding its intention to appoint firefighters in accordance with this clause.*

PN18

For the sake of brevity, Commissioner, I would seek to refer to that clause as the lateral entry clause.

PN19

THE PRESIDENT: Does it mean that a firefighter with the New South Wales Fire Brigade is the sort of person you are looking at for a lateral entry?

PN20

MR WARWICK: Those sorts of persons and also people from the aviation industry.

PN21

THE PRESIDENT: With the specific firefighting skills?

PN22

MR WARWICK: And also in some cases persons from the defence force but who have worked in that capacity as a firefighter.

PN23

THE PRESIDENT: And maybe forestry-type people because they also have firefighting people, don't they?

PN24

MR WARWICK: Well, probably not. Those people have absolutely no experience with structural firefighting, hazardous materials, air appliances and I think they would probably have to start from scratch.

PN25

THE PRESIDENT: Yes, but it could be limited to trees, yes.

PN26

MR WARWICK: Yes.

PN27

THE PRESIDENT: Yes.

PN28

MR WARWICK: And the list goes on as well.

PN29

THE PRESIDENT: Yes, okay, but in general terms what you are looking at are experienced firefighters in another State?

PN30

MR WARWICK: Yes, yes. There are a number of reasons why this clause appears as it does in the award but again, there are some points of background that are important. There are only three substantial pay levels in the award. They are senior firefighter, station officer and district officer. All of the levels are achieved through advancement as opposed to promotion. This is equally true of senior station officers in practice, although the award says otherwise.

PN31

In respect to leading firefighters the TFS is on record as having said that they would like every senior firefighter - which is the rank below leading firefighter - every senior firefighter in the system to progress to the rank of leading firefighter. The reasons for this can be found in award clause 3, classification descriptions and standards, subclause (e)(ii) which reads as follows, and that

appears on the second page of the document that I have handed to the Commission, and at the top of that page it has a classification standard and description for leading firefighter and in (ii) it says:

PN32

*Under limited supervision expected to undertake all firefighting tasks and operate all equipment to advanced skill level. Required to employ an independent approach and initiative in relation to training, testing, evacuation, prevention activities and overseeing work of firefighters. Is qualified to act as a station officer and to apply for permanent appointment to a station officer level position. May be required to take charge of minor fires and fuel reduction burns while undertaking field duties.*

PN33

The key words in this description, and I quote again:

PN34

*Is qualified to act as a station officer and to apply for permanent appointment to a station officer level position.*

PN35

Commissioner, leading firefighters offer the fire service a level of flexibility that most other employees can only dream about. They can act up or down on a day-to-day basis. That is to say if a station officer is absent due to illness a leading firefighter can act in that officer's position and perform all of the operational and administrative responsibilities associated with that rank and in turn act down as a firefighter the next day.

PN36

This applies not only to sickness but to all other circumstances where a station officer might be absent, including all forms of leave. Leading firefighters can be transferred to all sorts of day work jobs at station officer level and often are. This is happening today and it happens all over the State every day. Leading firefighters in the Tasmania Fire Service save the employer millions of dollars in overtime every year. Hence you can understand why the TFS would like very senior firefighter to progress to the leading firefighter level.

PN37

Having said all of that, opportunities for leading firefighters to be promoted to station officer level are rare. They are inextricably linked to the rate of station officer resignations or even rarer promotions above station officer level, and so we negotiated the lateral entry clause in good faith with the employer for very good reasons. The thrust of the lateral entry clause is as follows. Under this clause the employer is entitled to employ experienced firefighters from outside the TFS at all levels up to and including pay point 7, and that is leading firefighter, pay point 7, but not above.

PN38

A critic of this clause may say that it is unfair because a person from outside may have all the qualifications and experience necessary to be directly employed as a station officer and that person may be disadvantaged by only

being able to enter at the leading firefighter level. The union says that this is not so and the reason for this lies in the classification description of leading firefighters. They are qualified in all respects at station officer level just as an outside applicant may be.

PN39

In many cases they may have spent an accumulated period of years acting in station officer positions. We say that in that regard they are no different from qualified station officers from outside. The award, in fact itself, Commissioner, says they are qualified officers and the only thing standing between them and an appointment as an officer is a vacant position and merit. We say that leading firefighters from within the TFS system and qualified officers from outside the TFS system should have to seek promotion to station officer level on an equal basis of merit.

PN40

Our view is that in employing persons from directly outside into station officer positions disadvantages existing leading firefighters from within the system. We say the qualified station officers from outside should come into the job at leading firefighter level and compete with all the other qualified station officers, that is leading firefighters, who are awaiting promotion to a vacant station officer position on merit.

PN41

THE PRESIDENT: So they come in as a leading firefighter and then they apply for appointment along with internal candidates if it is a merit-based selection after that; is that what you were saying how it should be done?

PN42

MR WARWICK: That would - yes.

PN43

THE PRESIDENT: It was intended to be done?

PN44

MR WARWICK: Yes. Although I should clarify that in fact very few have come in and gone straight to leading firefighter. In fact, I would say probably none. Some have had to go back and do a recruit course or do certain elements of it before they can then seek accelerated progression. In some cases it has taken people a couple of years before they actually get to the level of pay point 7 and that is essentially because of their - the firefighters in the Tasmania Fire Service are, generally speaking, significantly more multi-skilled than in many other jurisdictions.

PN45

There is another element to this issue which is worth noting at this point. The union has long since accepted that the TFS has the right to appoint outsiders directly into station officer positions when there are no internal applicants. That is when no leading firefighters apply. The Commission might find it difficult to understand why this might happen. The causes lie in the fact that promotions from leading firefighter to station officer have often required

employees to undertake extended periods of what we might call, in the interests of simplicity, day work positions.

PN46

That is promotions have nearly always been to day work positions rather than direct promotions in an operational shift work setting. It is a sad legacy that the fire service must bear that in a certain part of the State day work has historically been used as a form of punishment. Hence there have on occasions been no applicants from within the system. In such circumstances we have had to accept the direct appointment of outsiders to station officer positions.

PN47

It is only in the immediate circumstances that the TFS has chosen to employ an outsider into a station officer position over an internal leading firefighter who also applied. It is because of this very recent circumstance that this matter has come to a head. That is the TFS has honoured the lateral entry clause up until now. If the Commission pleases, we say that there will be very serious consequences if the employer's interpretation in this matter is successful.

PN48

The consequences will be in relation to the attitudes of senior firefighters and leading firefighters into the future. In the case of senior firefighters, waste of time, particularly for the paltry 4 per cent salary increment. That is, they will look at the enormous amount of work that is required to become a leading firefighter, and will decide that it is simply not worth it. They will decide that their prospects of ever becoming a station officer are marginal at best.

PN49

Existing leading firefighters will deduce that their prospects of becoming a station officer have been seriously reduced. This will in turn affect their willingness to seek acting-up opportunities of all sorts. In this regard, I speak of day-work areas, such as volunteer training, commercial fire training, district operations and many others. In other words, in pursuing this course of action, the Tasmania Fire Service is foolishly soiling its own nest. These consequences are real and not imagined.

PN50

Many members of the union have contacted both myself and members of the branch committee of management to express the view that the fire service will no longer enjoy their enthusiasm in seeking to pursue career advancement. The actions of the Tasmania Fire Service in this regard will become a self-fulfilling prophecy. By employing one person from outside directly into a station officer position, the TFS will have to employ more. Excuse me. This will be because internal applications will dwindle, as the morale-dampening implications of the employer's decision flows through the system.

PN51

As more are employed from outside, there will be an accumulating negative effect on morale. On that note, the union requests that the Commission consider the public interest implications of the employer's actions and of the

outcome of this application. It is very much not in the interests of the Tasmanian community for there to be a general dampening of the enthusiasm of career firefighters and officers to acquire advanced skills to do their job well and to seek advancement.

PN52

Commissioner, the Government's submission will no doubt rely on a key item: that is, they say they have advice from the solicitor-general about this matter, and as indicated in the application, the advice goes to the operation of the scope clause in the award. That is, they say that the award only applies to people in the job, and not to people seeking to become employed. The first thing we would say about that - - -

PN53

THE PRESIDENT: It goes without saying, doesn't it? It can't apply to people seeking to be employed.

PN54

MR WARWICK: Well, that is the basis of their argument.

PN55

THE PRESIDENT: Yes.

PN56

MR WARWICK: The first thing we would say about that is that while the Government may be bound by advice from the solicitor-general, the Tasmanian Industrial Commission is not so bound.

PN57

THE PRESIDENT: Would you just repeat that for me please? I would like to see that on the record again. It is an internal debate we are having.

PN58

MR WARWICK: The first thing we would say about that is that while the Government may be bound by advice from the solicitor-general, the Tasmanian Industrial Commission is not so bound.

PN59

THE PRESIDENT: I agree.

PN60

MR WARWICK: You are free to decide whether that advice is right or wrong. The second thing that we would say is that the solicitor-general's advice is a mere technicality, and our submission is that under section 20 of the Act, which requires the Commission to act according to good conscience - to equity and good conscience, you have the power to find that the solicitor-general's advice is wrong. We specifically submit that under section 20(1)(a), you have the power to disregard technicalities or legal form.

PN61

We say that the argument of the solicitor-general is a technicality. Commissioner, the lateral entry clause constitutes an honourable agreement reached between the Tasmanian Fire Service, the employees covered by the

award and the union. The advice of the solicitor-general is an artifice to sign simple - circumvent this agreement. In that regard, we say the employer is now acting in a dishonourable fashion. The lateral entry clause as it stands constitutes a very significant set of concessions on the part of the union.

PN62

The clause was negotiated to give the employer the flexibility they are entitled to, while at the same time treating all applicants for positions, whether they be internal or external, on an equal basis. I am sure that many who work in the field of labour relations will agree with me when I say that the act of one party or other in dishonouring a fair and well-made agreement is one of the most likely sources of increased disputation in the workplace rather than less. All of the members of the union agree with me that this is a sad and sorry circumstances, and indeed the fire service should take a good, hard look at itself in respect to this matter. If the Commission pleases.

PN63

THE PRESIDENT: Isn't the problem the words "within the board", because if you look at the definition of leading firefighter, as I read it, if you are appointed as a leading firefighter - - -

PN64

MR WARWICK: Progress, I would suggest.

PN65

THE PRESIDENT: If you are employed as a leading firefighter, however you get there, it seems to be inherent in the qualification that you hold that you are qualified to act as a station officer, but if what you say is correct, and that is that Tasmanian firefighters are more skilled in as much as they have a larger or a wider range of skills, that may not necessarily apply to somebody coming in laterally. Would they be the same sort of skills and qualifications - - -

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MR WARWICK: It is - - -

PN67

THE PRESIDENT: - - - the wide-ranging - - -

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MR WARWICK: It is impossible to say - - -

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THE PRESIDENT: Yes.

PN70

MR WARWICK: - - - and it would depend on merit, I imagine.

PN71

THE PRESIDENT: Yes, because, I mean, what the award says is that once you get to leading firefighter, it is automatic that you are qualified to act as a station officer.

PN72

MR WARWICK: Exactly.

PN73

THE PRESIDENT: What you are saying is that, yes, that is fine for internal applicants, but for external it should be limited just to the leading firefighter classification, and then they can progress on merit, that it is not an automatic thing - - -

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MR WARWICK: Be promoted - no.

PN75

THE PRESIDENT: - - - can come in externally - - -

PN76

MR WARWICK: Well, no one going from leading firefighter to station officer is automatic.

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THE PRESIDENT: No.

PN78

MR WARWICK: It is a promotion.

PN79

THE PRESIDENT: That is for an appointment.

PN80

MR WARWICK: Yes.

PN81

THE PRESIDENT: But when you act up and down, if I can use that expression - - -

PN82

MR WARWICK: Yes.

PN83

THE PRESIDENT: - - - it is almost automatic that if you get the leading firefighter classification, you have got the required skills - - -

PN84

MR WARWICK: Yes.

PN85

THE PRESIDENT: - - - to act as a station officer.

PN86

MR WARWICK: Yes.

PN87

THE PRESIDENT: You are saying that that should - your understanding is that the intention was that that was restricted to internal applicants, that external applicants could be employed as leading firefighters, but not to come in with that right to act up as a station - - -

PN88

MR WARWICK: No, no, not at all.

PN89

THE PRESIDENT: - - - officer automatically.

PN90

MR WARWICK: If they have the competencies, they may - well, in almost every case, they would have to do some units of competency bush firefighting, because very few urban fire services actually, you know, the people possess those competencies. So generally speaking, a very well-qualified person from anywhere ought to be able to come in, spend perhaps a month perhaps as senior firefighter, spend the month getting bush firefighting skills, and then go straight to leading firefighter and be able to act up.

PN91

THE PRESIDENT: So if they came in and spent, say, a month doing the extra skills, what is your position then if there is a station officer position?

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MR WARWICK: They are equal - - -

PN93

THE PRESIDENT: They would be then able to apply equally?

PN94

MR WARWICK: Yes.

PN95

THE PRESIDENT: What you are saying is that they shouldn't be able to come in externally straight into that station officer position.

PN96

MR WARWICK: That is exactly right.

PN97

THE PRESIDENT: Okay.

PN98

MR WARWICK: And the consequences of them being able to do that, or that happening, as I would stress again, are going to be dire.

PN99

THE PRESIDENT: Yes, I understand that part of it, yes. I just wanted to understand exactly how you saw the provision working.

PN100

MR WARWICK: Yes.

PN101

THE PRESIDENT: All right, thank you.

PN102

MR WARWICK: Thank you.

PN103

MS FITTON: Thank you. I guess I will start of by just concurring with some parts of the history that we have already been given, and the reasons why this application has come before you today. Our submissions today are on the basis that: (1) the award cannot be interpreted to prevent a station officer or above from being appointed from outside the service, as the words in the clause are clear and unambiguous and silent on levels above leading firefighter; and (2), even if such an interpretation were found, that the clause prevented appointments from outside the service, appointments are not an industrial matter and any clause purporting to regulate appointments in the State service does not have any validity.

PN104

I might just start by just going through a bit of history, and try not to repeat what has already been said. Just as a note, that it is prior to May 2007 the TFS was actually - or Tasmania Fire Service was actually part of the federal jurisdiction and operated under the federal award. It is conceded that prior to 1999 it was the understanding of the Tasmanian Fire Service that they could not appoint persons outside of the service, I guess the so-called what we have heard unwritten law. And on this basis, in 1998 both the UFU and the Tasmanian Fire Service put some issues to the AIRC for the inclusion of the current lateral entry clause.

PN105

And it is agreed that this was included to enable the appointment of experienced firefighters to the Tasmanian Fire Service above the recruit level, subject to agreement between the parties. In June 1999, after receiving an appeal from a person from outside the fire service who wanted to be considered for a station officer, it is also true that legal opinion was obtained. It should be noted that at this time that this advice was received, the lateral entry clause did not exist.

PN106

At the time of the advice, the current clause for entitled career paths existed, but in the federal award, and at that time it was known as clause 8, promotion and advancement. The advice at that time was that there was nothing to - the reasons being that the scope of the award did not apply to a person not employed in the firefighting industry operated by the TFS. Therefore the provisions of clause 8 could also not apply to a person not then employed in the firefighting industry who is applying for appointment.

PN107

THE PRESIDENT: It is no different to anybody applying for a position and satisfying the classification description, so I don't know why we are getting hung up on that.

PN108

MS FITTON: Well, even if the alternative - even if the scope of the award did apply, clause 8 could not, as it was dealing with promotion advancement and the situation in question wasn't appointment - and did not read those provisions of clause 8 to include appointments. Hence the old provision

entitled promotion advancement denoted the promotion advancement pass to move through the fire service and did not relate to people outside the service.

PN109

So since that time, the TFS has operated on the basis that all persons could apply for positions advertised on merit, but it is true that it has rarely happened or occurred. I do understand that in about 2002 or 2003 a station officer was appointed from outside the service, and the union were consulted but did not have an issue, as there were no other applicants in this particular circumstance, but they did not have an issue with the principle of appointment from outside the TFS. So at all times - - -

PN110

THE PRESIDENT: As opposed to if there were no internal applicants.

PN111

MS FITTON: Yes, but there was nothing - no issue with the principle, and I guess we would submit that everybody is having the equal opportunity to apply for all of these jobs on merit.

PN112

THE PRESIDENT: But doesn't it go back to what was the intent of what you agreed?

PN113

MS FITTON: I guess there was that intention, but we took on that advice and that was our position.

PN114

THE PRESIDENT: Well, there is a different between what you intended and what the legal advice is. An agreement is about intention.

PN115

MS FITTON: I guess that intention was done and that advice was received afterwards, before that clause was actually put into the award.

PN116

THE PRESIDENT: Maybe what you should have done then was sought to vary the terms of the clause - - -

PN117

MS FITTON: That is correct.

PN118

THE PRESIDENT: - - - to reflect what you did agree.

PN119

MS FITTON: That is probably correct, yes.

PN120

THE PRESIDENT: Yes.

PN121

MS FITTON: The issue has now arisen that the new clause 4(i) prevents entry into the Tasmanian Fire Service above the leading firefighter level, and we submit that this is wrong and any interpretation as such would have no effect. We submit that the words "of the clause" are clear and not ambiguous, and state that a person who is currently competent and possesses the appropriate periods of practical firefighting employment experience in a recognised career firefighting agency can initially be appointed up to and including the level of leading firefighter, depending on their level of competency required.

PN122

Progression to all levels up to and including the leading firefighter level in the award is where progression is made on attainment of competencies rather than any selection on merit process. We submit the award clause is silent in clause 4(i), positions above the leading firefighter level, and it is argued that as the next levels require a merit process, the lateral entry clause has no relationship to these levels, and therefore there is no barrier to appointment of station officers and above from outside the TFS.

PN123

The only reference to station officer is in clause 4(e), as we have heard today. The previous - and the whole clause 4 is entitled Career Paths, and we submit that is exactly what it is: it is about a career path for firefighters once you are inside the service and do not relate to people being appointed from outside.

PN124

THE PRESIDENT: Sorry, just pass that by me again.

PN125

MS FITTON: So clause 4 is entitled Career Paths, and we submit that that is all about showing your progression and your career and where you can go once you are inside the service.

PN126

THE PRESIDENT: But when we are talking about lateral entry, it talks about appointing them to a level.

PN127

MS FITTON: Up to and including leading firefighters.

PN128

THE PRESIDENT: Yes, up to and including the level of leading firefighter. And then as I understand it, you are relying on the specific definition of leading firefighter, that says that they can be qualified to act as a station officer.

PN129

MS FITTON: Or we are looking at the definition - like, saying that the only - where station officer is referred to in that clause, (f) - - -

PN130

THE PRESIDENT: Yes.

PN131

MS FITTON: - - - that has no bearing on somebody from outside; it is really relating to the progression through the ranks from once you are inside the service.

PN132

THE PRESIDENT: Yes, but what I am saying is, as I understand what you are putting, is that the lateral entry clause allows you to bring people in laterally up to and including the level of leading firefighter, and then you are relying on the definition of leading firefighter, where it says that they will be qualified to act as a station officer. That allows you then to put them in as a station - to bring them in as a station officer, and that is where the disagreement is.

PN133

MS FITTON: Yes, I guess we don't see that you need to have to come in at leading firefighter, then have the ability to act up, and then apply; you should just be able to apply on merit. Everyone would be still on an equal - if you have got - then apply.

PN134

THE PRESIDENT: But if you wanted to bring them in as station officers, why can't they - why wouldn't they apply for a station officer's position?

PN135

MR WARWICK: Exactly, yes.

PN136

THE PRESIDENT: But that is not what has happened, is it?

PN137

MS FITTON: They did apply for the station officer position.

PN138

THE PRESIDENT: Did they?

PN139

MS FITTON: Yes.

PN140

THE PRESIDENT: So what was the intent of the lateral entry clause then?

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MS FITTON: I guess the intent was based on a previous understanding that there was this custom and practice that you couldn't actually bring anybody in from outside, it was a career service, it was a so-called closed shop. So that was the initial intent - what we would now think of as a misunderstanding or interpretation.

PN142

THE PRESIDENT: But the lateral entry provision only allows you to bring a lateral applicant in up to the level of leading firefighter.

PN143

MS FITTON: Yes.

PN144

THE PRESIDENT: And that is what you have done; is that - - -

PN145

MS FITTON: Nothing has happened with this actual person in question, as I understand.

PN146

THE PRESIDENT: Right.

PN147

MS FITTON: Our intention was to bring them in at a station officer - because they have applied for a job on merit.

PN148

THE PRESIDENT: Yes, I mean, I have some difficulty with a number of aspects of this. If I am a firefighter who wants a job, and I have got the qualifications, can I just apply for any position?

PN149

MS FITTON: We would say yes.

PN150

THE PRESIDENT: So why did you put in the lateral entry provision? There has got to be a reason. This is what I am trying to get to - - -

PN151

MS FITTON: Yes, yes.

PN152

THE PRESIDENT: - - - the actual intent. The words may say things, and they are a bit confusing, but it is an agreement, so there must be some reason why there was a restriction on bringing people in - - -

PN153

MS FITTON: I guess it just came back to the custom and practice that existed at the time.

PN154

THE PRESIDENT: Yes.

PN155

MR WARWICK: If I might, President, I can answer that question in one word: volunteers.

PN156

THE PRESIDENT: Because if what you are saying is right, that John Brown, who sees the light and moves down to Tasmania and is a highly qualified ex-New South Wales firefighter, say, and wants to apply for a job as a station officer, he can do that, there is no problem with that. If he has got the qualifications he is like anybody else, so why do you need a lateral entry provision? That is what I am trying to get to. There must be a reason.

PN157

MS FITTON: That is exactly right. I just think it came down to that was that understanding of this custom and practice.

PN158

THE PRESIDENT: And the understanding was that they were limited to coming in - - -

PN159

MS FITTON: They couldn't even come in at a leading firefighter level; they had to come right back to recruit. So if you had a station officer in Queensland, highly qualified, had all the competencies that they required, they would have to come back and start from the bottom again and work their way up.

PN160

THE PRESIDENT: This is just one of the case studies we do at the police lectures I do at the police college; that is why it is interesting, using - just changing the names. But when you have obviously reached agreement, and the agreement was that there was going to be allowed lateral applicants - - -

PN161

MS FITTON: To go from base to here, yes.

PN162

THE PRESIDENT: - - - but it was limited to the level of leading firefighter.

PN163

MS FITTON: Yes. And that was another - - -

PN164

THE PRESIDENT: An understanding, yes.

PN165

MS FITTON: Yes, or again based on the culture of the time. That was seen as a huge change, and so it was limited to that level, not that I am I am saying we did that right or we - - -

PN166

THE PRESIDENT: I understand, yes.

PN167

MS FITTON: - - - shouldn't have varied it by now.

PN168

THE PRESIDENT: I am not questioning the morality of what you have done.

PN169

MS FITTON: No.

PN170

THE PRESIDENT: I know why it has happened because I am familiar with these sorts of service industries where these things happen.

PN171

MS FITTON: Yes.

PN172

THE PRESIDENT: The difficulty that I am having is if that is what you agreed, that he or she could only come into the maximum level of a leading firefighter, why are you saying that they can come in as a leading firefighter and then it has almost by default become a station officer, because that is what I think is being argued you are going to try and do.

PN173

MR WARWICK: If I can, if you don't mind, President, it was actually advertised - sorry. Thank you. It was advertised as a station officer position.

PN174

THE PRESIDENT: Yes.

PN175

MR WARWICK: So therefore anybody looking for it that had the station officer qualifications and experience - - -

PN176

THE PRESIDENT: So it is not a lateral entry issue.

PN177

MS FITTON: No.

PN178

THE PRESIDENT: All right. Well, that is a particular issue.

PN179

MS FITTON: My understanding is that the UFU are relying on the lateral entry clause to say, "Nobody can come in; you apply, but you can't come in because you can only come in to the top - the maximum you can come in at is a leading firefighter."

PN180

THE PRESIDENT: What I understand they are saying is that you can come in, but that the level that you come in at is the leading firefighter. It doesn't automatically then make you a station officer. But there needs to be some - - -

PN181

MS FITTON: And you have to be in to apply for station officer.

PN182

THE PRESIDENT: And that is not your position.

PN183

MS FITTON: Yes.

PN184

THE PRESIDENT: You are saying that you can come in at any level.

PN185

MS FITTON: Yes, and apply on merit the same as everybody else.

PN186

THE PRESIDENT: Okay.

PN187

MS FITTON: I guess in the alternative, even if the words were interpreted to prevent anyone from outside the TFS being appointed to a station officer, we submit that that interpretation couldn't succeed as it is not a matter that can be included in an award. Section 32 of the Industrial Relations Act states:

PN188

*That an award under the Act may contain provisions with respect to any industrial matter.*

PN189

Industrial matter being defined in section 3 of the Act and specifically excluding a matter relating to appointments or promotions other than in respect of the qualifications required for advancement. This definition regulates and meets the matters that can be included in the award. Section 19 of the Act states:

PN190

*That the Commission has jurisdiction to hear and determine any matter relating to an industrial matter -*

PN191

and therefore in this matter it is submitted there is no jurisdictional matters of appointment or promotion, only the qualification aspect. Section - I just might now refer to the State Service Act, which I have a copy of here if you would like.

PN192

THE PRESIDENT: Only if I have to.

PN193

MR BAKER: Another copy. Oh, thanks.

PN194

MS FITTON: Section 3(5) of the State Service Act states:

PN195

*That where there is inconsistency between an award and the Act the award prevails. However this is only to the extent that the award has the power to make such a provision, therefore any provision purporting to deal with appointments and promotions other than in respect of qualification for advancement is void and the power of the minister is not affected. The power to actually appoint a person to the State Service is vested in the minister and contained in section 37 of the State Service Act. the award therefore can only constrain the power of the minister to appoint in relation to qualifications -*

PN196

and this would be the case -

PN197

*the minister is obliged by the award to follow those qualification provisions.*

PN198

Clause 4(i) of the award deals with lateral entry, in other words, appointment to the TFS by experienced firefighters. They are submitted the award can only be valid in this respect in the context of providing qualifications for such appointments. The clause itself does provide for qualifications for appointment to positions up to and including leading firefighter, ie, the competency and appropriate practical firefighting experience, and therefore the minister must adhere to these requirements when making appointments to these positions.

PN199

The clause is silent on qualifications for station officer and above and so it cannot limit the discretion of the minister in relation to appointments in any respect. It is noted that the provisions in clause 3 dealing with station officers only address advancement. It is therefore submitted that clause 4(i) in the context of appointments other than qualifications part is void and has no effect. As the award currently stands the minister has the power to validly appoint persons from outside the fire service to positions above leading firefighter.

PN200

We would therefore request the Commission to issue directions to the parties to amend the award provision by removing any invalid content and redrafting the clause to be consistent with the operation of the Industrial Relations and State Service Act and that concludes our submissions.

PN201

THE PRESIDENT: What about the last line of clause 4(i), the TFS must consult with employees about application of that provision. Does that happen?

PN202

MS FITTON: It's not my understanding, that - and it is my understanding that has happened in places up - - -

PN203

MR WARWICK: I can assure the Commission that it certainly did not happen.

PN204

MS FITTON: Up to leading firefighter it has happened.

PN205

THE PRESIDENT: All right. You are asking me for an interpretation, you are not asking me to provide you with a variation, or are you?

PN206

MR BAKER: No, President. What we are seeking is a direction to the parties to fix it up.

PN207

THE PRESIDENT: Mr Warwick?

PN208

MR WARWICK: Thank you, Commissioner. We agree that ultimately this thing has got to be sorted out one way or another and I guess that is why we are here, and putting it in your hands. I would just like to pick up a few points in relation to the submission put to you by Ms Fitton. My learned colleague said that when there was a person appointed some years ago because no one applied - internally applied for the job, I think her words were, "We did not have an issue," to which I would say, "Oh yes, we did." It caused major problems for us within the context of our debate with our members, particularly in the north of the State, and - - -

PN209

THE PRESIDENT: So why didn't anybody apply for it?

PN210

MR WARWICK: Because of those reasons that I talked about, as the day work positions being viewed as a form of punishment and that is not idle chatter, it is a fact. It happened for many, many years and it still imbues the culture in the north of the State, and we were at great pains to point out over a long period of time, that is the leadership of the union to the members, that if they don't apply for jobs and day work jobs, then they will be lost to the career side of the service and in fact there will be another matter coming to the Commission very shortly, which has been flagged already - it has already been flagged at other proceedings before the Commission, of five people who have come from outside, they don't come from career firefighting background, they do work in training services and those sorts of areas, Tas Fire Training, and they are paid differentially to the career firefighters and they believe they have a just cause for a complaint and it has caused no end of problems and difficulty both for the union and for the employer, so we certainly did have an issue about that.

PN211

In addition we refute absolutely the assertion made that the award is - or the lateral entry clause operates to be silent about positions above pay point 7. With respect, Ms Fitton wasn't there when the clause was negotiated and I was, and it was clearly intended that that would be the only way in which people would come in laterally. The central thrust of the clause was that you would not employ station officers directly, and the reason for that was we said to the employer, "Why would you want to send that signal to your leading firefighters, the future of the fire service, the future leaders?"

PN212

THE PRESIDENT: You are looking at it as part of a career progression?

PN213

MR WARWICK: Yes. Why would you want to disenfranchise them? Why would you want to say to them, "You're not good enough," because that is what this action by the employer is doing. It is saying to the leading firefighters in the Tasmania Service, "You're not up to scratch. We recognise that you are entitled to act up, we want you to act up whenever there is a staff shortage, to save us over time, but you're not good enough to get the job."

That is the signal that Tasmania Fire Service is sending and our submission to you is that it is just an appalling way to behave on their part. There are probably 30 people who have come in laterally under this clause and it has worked perfectly well, there have been no problems with it.

PN214

THE PRESIDENT: So they have all come in under that - - -

PN215

MR WARWICK: Yes. There has been a high degree of acceptance amongst the membership about this approach and there isn't the feeling of people being - their advancement and their jobs being threatened, so the fire service is essentially wrecking, in our view, a perfectly working and functioning system and in respect to the submission that the award is silent about lateral entry above pay point 7, we say that station officers are also firefighters in the generic sense. Whether you be a district officer or a recruit or anywhere in between, you are a firefighter and - - -

PN216

THE PRESIDENT: But there is a reason for the provision being there and it does limit it and there has got to be a reason for that. I mean, otherwise if you could just bring anybody in at any level you don't need the clause.

PN217

MR WARWICK: That is right.

PN218

THE PRESIDENT: That is what I am having difficulty understanding.

PN219

MR WARWICK: Well, the intention was, it was an honourable agreement between the union and the fire service that the way to manage lateral entry was to bring people in anywhere between recruit and pay point 7 and not above and that is what the clause was intended to mean and no spin can change what the intention was and the practice over the last 10 years proves that that was what the intention was, and our complaint is that the fire service is now walking away from that agreement and it is going to create a whole lot of problems over and above the one they have got right now.

PN220

THE PRESIDENT: If, as you say, it has worked reasonably well up till now, why would you think that there is a change in approach? Is there a shortage of highly qualified people who would apply for these positions?

PN221

MR WARWICK: No. The person who applied was highly qualified and experienced.

PN222

THE PRESIDENT: That is the internal applicant?

PN223

MR WARWICK: Yes.

PN224

THE PRESIDENT: All right. So if - - -

PN225

MR WARWICK: The fire service says its merit. Well, you know - - -

PN226

THE PRESIDENT: Merit is merit.

PN227

MR WARWICK: Merit is merit but it is also going to create a mess.

PN228

THE PRESIDENT: But at the end of the day it would be merit, wouldn't it, if you have internal and external applicants.

PN229

MR WARWICK: Yes.

PN230

THE PRESIDENT: Someone then decides whether it is - that someone is appointed on merit - - -

PN231

MR WARWICK: Yes.

PN232

THE PRESIDENT: - - - and if that is then challenged it goes to the State Service Commissioner.

PN233

MR WARWICK: Yes.

PN234

THE PRESIDENT: That is the sort of procedure that has to be followed.

PN235

MR WARWICK: That's right.

PN236

THE PRESIDENT: But your argument is that it shouldn't get that far?

PN237

MR WARWICK: That's right. Well, no, what happened was the person who made an appeal - who contested an employer decision to the State Service Commissioner, did so on the basis of this clause, not on his view about whether he was better or not.

PN238

THE PRESIDENT: On merit.

PN239

MR WARWICK: He chose - that was a decision that he took.

PN240

THE PRESIDENT: Sure. No, I understand that.

PN241

MR WARWICK: Which has led to us being here. It has highlighted the operation of the clause. We agree, as I said, that it needs to be clarified. You know, we have a fear that it will be clarified in a way that won't be good for the fire service so I guess that is why we are here making these submissions, and our principal submission is that the fire service is making a really, really bad mistake.

PN242

THE PRESIDENT: I can't comment on that.

PN243

MR WARWICK: No, absolutely not, Commissioner - - -

PN244

THE PRESIDENT: No.

PN245

MR WARWICK: - - - but the transcript can be circulated near and far.

PN246

THE PRESIDENT: That is out of my hands, too.

PN247

MR WARWICK: If the Commission pleases.

PN248

THE PRESIDENT: All right, thank you.

PN249

MR NEWELL: Sorry, President, if I can just speak for a moment just to clarify some of what Richard has covered there.

PN250

THE PRESIDENT: Yes.

PN251

MR WARWICK: Hang on, so they get - - -

PN252

THE PRESIDENT: He doesn't, but you are trying to clarify something, are you? You can respond if - - -

PN253

MR WARWICK: I was responding to Ms Fitton's submissions.

PN254

MR NEWELL: From the Tasmania Fire Service perspective as in coming from within and we are talking about the number of - - -

PN255

MR WARWICK: Yes. Well, Mr Newell, there are certain rules about how this Commission operates and that is the applicant makes a submission and the respondent makes a further submission and the applicant makes a submission in reply and that is it.

PN256

MR NEWELL: I apologise. I just saw some grey areas in what was said so I was just - - -

PN257

THE PRESIDENT: If you are going to clarify something you can do that - - -

PN258

MR NEWELL: Yes.

PN259

THE PRESIDENT: - - - and Mr Warwick can respond if he wants to argue or disagree with what you have said, but if it is going to clarify something it may be helpful.

PN260

MR NEWELL: Okay.

PN261

THE PRESIDENT: I'm not too sure.

PN262

MR NEWELL: Yes, I don't know if it is going to help with this or not, so - and when you were sort of talking about why is it that the TFS may look from the outside is the fact that we are talking about regional areas which is what Richard is saying, sometimes we only get one or two actual applications or the actual pool of applicants that we are actually choosing from is only one or two people, so we are talking about a station officer position which is actually quite important, so the community is actually having the best person for the position. We are actually opening up, like we're trying to now, we've actually got a bigger pool of applicants so we can actually get a better standard of applicant which may also go back to why there was no discussion over merit in terms of this sort of case. That is all.

PN263

THE PRESIDENT: Okay. I had figured that, I had worked that out for myself anyway, so I understand what you are saying. All right - - -

PN264

MR WARWICK: Well, I will respond to that if I may? I just reiterate the point I have made earlier, what the fire service is doing is saying to qualified leading firefighters who are used every day to be inserting controllers to respond to major incidents, you're not good enough, and we want a better pool of - - -

PN265

THE PRESIDENT: When a position becomes available?

PN266

MR WARWICK: Yes, you're not good enough.

PN267

THE PRESIDENT: You're saying that is the message; yes. No, I understand what was being put and, you know, on the ground that possibly makes a lot of sense but we don't always deal with sense when it comes to trying to work out what the words mean and what was intended and there is sometimes a quantum leap between the two, but never mind, I shall consider what has been put. I think there is some hurry, is there not, for this to be - - -

PN268

MR WARWICK: In the interests of the two members of the union concerned, yes, it is.

PN269

THE PRESIDENT: Right, so they're waiting for an outcome. All right, I will deal with it as soon as I can. In that case I will reserve a decision. Thank you.

**ADJOURNED INDEFINITELY**

**[2.55pm]**