TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s29 application for hearing of an industrial dispute

Australian Education Union, Tasmanian Branch
(T13930 of 2012)

and

Minister administering the State Service Act 2000
(Department of Justice)

DEPUTY PRESIDENT WELLS HOBART, 27 November 2012

Industrial dispute – Correctional Facility Allowance - principles of award construction – retrospectivity – parties directed to confer on form of final orders

DECISION

[1] On 6 July 2012, the Australia Education Union, Tasmanian Branch (AEU) (the applicant), applied to the President, pursuant to s.29(1) of the Industrial Relations Act 1984 (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA), (the Department of Justice) (the respondent) arising out of an alleged breach of the Tasmanian State Service Award.

[2] The matter was not resolved at conciliation and a hearing commenced in Hobart on 19 October 2012 and continued on 24 and 30 October 2012. Ms R Madsen and Ms C Davey appeared for the applicant. Mr B Charlton, Mr P Baker and Mr J Withers appeared for the respondent. Witness testimony was taken from the applicant's witnesses Mr Michael Anthony McLaughlin and Mr Byron Kelly Jenssen and also from the respondent's witnesses Dr Kay Cuellar, Mr Robert James Patrick McCafferty and Mr Hugh Goodwin. A number of exhibits were also tendered by both parties.

[3] This dispute concerns the non-payment of the Correctional Facility Allowance (CFA) under Part IV Clause 9 of the Tasmanian State Service Award to four members of the AEU who are employed by the Department of Justice in the Prisoner Education and Training Unit (PEaT) and who believe they are entitled to the CFA. The four employees are Michael McLaughlin, Byron Jenssen, Karen Carter and Sandra Duncan. They work with both male and female inmates who are classified minimum, medium and maximum security at prison locations in Tasmania. The majority of their work is undertaken at the Risdon Prison site. They undertake teaching, assessment and program design duties associated with the education of these inmates.

[4] The respondent contends the CFA is not payable to the four PEaT staff as they do not fulfil the requirements of the award clause.

Background

[5] The CFA was incorporated into the Tasmanian State Service Award[1] (the Award) on 1 December 2008 and was payable from the first full pay period following 27 November 2008. There were protracted negotiations in 2007 and 2008 between the MASSA and the public sector unions, which involved the CFA itself (in 2007) and a wages agreement (in 2008).

[6] The relevant clause, Correctional Facility Allowance, reads as follows:

> *"An employee of the Department of Justice engaged in duties classified under this award at the Risdon Prison Complex, Ron Barwick Medium Security Prison, Mary Hutchinson Women's Prison and associated administrative and training buildings, the Hayes Prison Farm, or Remand centres is to receive a Corrections Allowance of 7.5% of their salary subject to having:*
>
> *(a) Regular contact with and who is required to supervise inmates; and*
>
> *(b) Is responsible for the safety, containment and security of assigned inmates."*[2] (my emphasis).

It should be noted that whilst the CFA clause refers to the Hayes Prison Farm, this facility was closed in September 2012.

[7] Three of the PEaT employees who are the subject of this application commenced work for the Department at the Tasmanian Prison Service (TPS) in 2008, those being Mr McLaughlin, Ms Carter and Ms Duncan. Mr Jenssen commenced employment with the Department on 15 October 2002 but did not commence working for the TPS until 23 March 2010. For ease of reference I will refer to these four employees as "the PEaT employees".

[8] On or around mid-2011 the PEaT employees were all members of the AEU.

[9] On 19 March 2012 the applicant wrote to the respondent (Mr Nigel McCulloch) seeking payment of the CFA for the PEaT employees.[3]

[10] Between 27 April and 30 April 2012 there was an email exchange between Ms Davey of the applicant and Mr McCulloch relating to the history of deliberations undertaken by the respondent regarding who the CFA would apply to.[4]

[11] The respondent (Mr McCulloch) responded on 26 June 2012 rejecting the claim by PEaT employees for the CFA on the basis that correctional staff were *"within a reasonable proximity to respond to any incident"*.[5] The applicant continued to contend that PEaT employees were regularly involved in the safety, containment, supervision and security of inmates.

[12] This dispute was lodged with the Commission on 6 July 2012 and following a conciliation conference and the exchange of information, the dispute remained unresolved. The exchange of information involved a list of employees who received the CFA as at 3 August 2012.[6]

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[1] T13227 of 2008
[2] Exhibit R2
[3] Exhibit A5
[4] Exhibit A6
[5] Exhibit A7
[6] Exhibit A8

[13] Further clarification of those in receipt of the allowance was sought by the applicant. The respondent undertook further research subsequent to the exchange of information and a clarification email was sent by the respondent (Mr Brett Charlton) to the applicant on 10 October 2012.[7]

[14] Prior to hearing this matter the parties together with the Commission undertook a viewing of the Ron Barwick Minimum Security Prison (RBMSP), the Mary Hutchinson Women's Prison (MHWP) and the Risdon Prison Complex (RPC) at Risdon. This inspection took place on 1 October 2012.

[15] The matters in dispute in these proceedings relate to whether the PEaT employees fulfil all of the criteria of the CFA clause. The issues to be determined by the Commission are:

- whether the PEaT employees are required to supervise inmates; and
- whether the PEaT employees are responsible for the safety, containment and security of inmates; and
- whether the inmates under the control of the PEaT employees are assigned (my emphasis).

Evidence

[16] Witness testimony was taken in evidence from Mr Michael Anthony McLaughlin, Co-Ordinator of the PEaT unit and Mr Byron Kelly Jenssen, PEaT Support and IT on behalf of the applicant and Dr Kay Cuellar, former Manager of the Integrated Offender Management Unit, Mr Robert James Patrick McCafferty and Mr Hugh Goodwin, both former Correctional Managers, on behalf of the respondent.

[17] There were a considerable amount of submissions, transcript and exhibits in this matter, some of which were more relevant than others. Whilst all the material has been considered in this decision, I only refer to the most relevant matters.

[18] Mr McLaughlin has been employed by the TPS at the Risdon Complex since November 2008 as the Co-ordinator of the PEaT unit. Mr McLaughlin advised through testimony that he was aware of the existence of the CFA in approximately 2009 when he made enquiries about his entitlement to the allowance. He was advised that PEaT unit employees were not eligible and said he was unsuccessful in obtaining detailed information from his manager as to why.

[19] Under testimony Mr McLaughlin advised there were approximately 140 inmates in the RBMSP and these inmates have access through the side gate near the PEaT entrance and come and go freely into his work area and office. Of these 140 inmates there are some 18-20 peer tutors (inmates who assist with other inmates) who work under an employee of the Department of Education (DoE). However that DoE employee is responsible to Mr McLaughlin. Mr McLaughlin stated he supervises the inmates who work in the Risdon LINC area and that the librarian reports to him. The respondent led no evidence to the contrary of Mr McLaughlin supervising these particular inmates.

[20] Mr McLaughlin provided evidence about a number of security matters including the non-operation of security cameras in the PEaT area, the lack of panic buttons in the same area, the use of a soundproof and windowless room at the back of the PEaT area and that the nearest correctional officer is located on the other side of a locked gate

[7] Exhibit A6a

some distance away. He also stated that correctional officers rarely visit the PEaT area to just wander around and that there are no regular walk throughs.

[21] Mr McLaughlin stated the PEaT employees, depending on who is first into work, are required to collect a key in the morning from the correctional officers' station and open the side gate near the PEaT area. He stated it is the exception rather than the rule that the PEaT employees are not totally responsible for that gate all day. The PEaT employees lock the gate at the end of the work day after ensuring all inmates have left the area. There are occasions when, due to staff movements and the PEaT employees needing to leave the area early, they ask the inmates to leave and they lock up. Alternatively they ring the correctional officers to advise those officers they need to ensure the PEaT area is free of inmates and lock the side gate. Mr McCafferty confirmed in his testimony of the arrangement to ring correctional staff and advise if the PEaT employees are leaving early.

[22] Mr Jenssen also gave evidence of the process of collecting the key in the mornings and the responsibility of the PEaT employees to have the key through the day and lock the gate at the end of the day. Under cross examination he confirmed he had collected the key although he had not personally collected it in the mornings for approximately a year as he is no longer the first person to work in the morning. He did say that sometimes the key is handed on by a PEaT employee to another PEaT employee through the day.

[23] Mr Jenssen confirmed in his evidence that if the PEaT employees forget to lock the gate the correctional officers check at some point and that a muster is carried out by correctional officers. Inmates are required to report to these musters. Mr Jenssen described how the PEaT employees close up the library area each day. This includes asking the inmates to leave and checking all rooms to ensure all inmates have left. Mr Jenssen believes this implies the PEaT employees have some level of responsibility for the security of the library/PEaT area. The respondent's witness, Mr McCafferty, stated no such responsibility existed.

[24] Mr McLaughlin testified that whilst the first PEaT employee on site in the mornings collects the gate key, they have a personal key to enter the PEaT area:

> *"I have a key to that door, my own personal key, that allows me in there and then there's another side gate that I unlock if I'm the first person there and leave open for inmates to have access. So they can come into the library but they can't get out through into the court.*[8]

[25] Speaking about locking the side gate Mr McLaughlin testified he believed the PEaT employees are responsible for the safety, containment and security of the inmates, at least in the LINC library area (PEaT area):

> *"…because if anything is going to go wrong who else is going to advise the authorities that there's a problem?"*[9]

[26] Mr McCafferty, on being asked if an inmate could escape because the gate remained unlocked by the PEaT employees, said:

> *"If – they could potentially get out of that building through a rear exit, yep, which goes into a void. Then they would have a fairly good climb to get out – it's a prison, never say never."*[10]

[8] Transcript – McLaughlin p57 line 30
[9] Transcript – McLaughlin p49 line 13
[10] Transcript – McCafferty p158 line 43

However, Mr McCafferty did state the unlocked gate is a risk commensurate with the level of risk already at the site.

[27] Mr McCafferty provided evidence of the muster times and arrangements at the RBMSP and the routine of checking that gates were locked. He stated musters are used by correctional officers for the safety, security and containment of inmates.

[28] Both Mr McCafferty and Mr Goodwin were able to provide evidence in these proceedings on the dynamic security of the prison sites and the roaming patrols that form part of that security. Mr McCafferty explained that roaming patrols of the PEaT and library area occur regularly to see what might or might not be happening. Mr McCafferty was not of the opinion that the PEaT employees are responsible for the safety, containment and security of inmates in the PEaT rooms. Asked if the PEaT employees have any control of the inmates he said:

> *"The only control that would be there I suppose is the expectation that if they're participating in a class that they would ask or, you know, inform somebody that they're leaving".*[11]

[29] There was some conjecture as to how often the roaming patrols enter the PEaT and library area. Mr McCafferty said they occur several times a day with Mr McLaughlin and Mr Jenssen advising that correctional officers only come into the area when they have a specific task to undertake such as to locate an inmate for a visit.

[30] As part of his role in the PEaT unit Mr McLaughlin stated he does on occasion have to advise inmates they are no longer allowed in the PEaT area due to their behaviour. Mr McLaughlin believes this implies the PEaT employees exercise a level of responsibility and control over the inmates in the PEaT area. To support this Mr McLaughlin referred to an email from Mr Ricky Geeves (Manager at RBMSP) to him dated 26 July 2012 which read:

> *"Hi Mike, We are now recording all inmate movements out and in thru the X Gates and in the Forecourts on every occasion. Can you please instruct <u>your staff to ensure all inmates under your control</u>* (my emphasis) *are not to be let out thru the Education gate into the XGates area, they are all to move around past the shower block to the staff office for access thru the X Gates and the Forecourts by the correctional staff only."*[12]

And further:

> *"I have been told by – well, I often ring up and ask that inmates, if they want to get out, is it okay for me to let them out, and Ricky basically said to me whenever that activity is happening, you make the judgment".*[13]

[31] Mr McLaughlin stated his SOD did not reflect his current role and that he had attempted to have it changed. He started the process but a change in manager meant the process was never progressed. Mr McLaughlin gave evidence of his job interview prior to commencing with the TPS:

> *"…even at the interview when I was getting the job the chairman of the panel who was Jonathon Field indicated to me that I would be responsible for the <u>supervision of inmates employed within the education sector</u>"* (my emphasis).

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[11] Transcript – McCafferty p157 line 32
[12] Exhibit A12
[13] Transcript – McLaughlin p65 line34

> *That's not reflected in the statement of duties?.....That's one of the things that I think John Chunkey was concerned that should have been written in at the time."*[14]

[32] Both Mr McLaughlin and Mr Jenssen gave evidence stating that unlike other non-uniformed employees, their roles require them to work in the prison all the time. This evidence was not contested by the respondent.

[33] Mr Jenssen gave evidence that he also had issues with his SOD and had experienced a number of issues trying to obtain a copy of his SOD from the Department's HR group.

[34] Mr Jenssen advised under testimony he had raised the issue of his SOD with his manager Mr McLaughlin some time in 2010. It became obvious to the Commission during these proceedings that Mr Jenssen had been working without a finalised SOD since approximately 2008 and that this seemed to have occurred due to a confluence of matters. Dr Cuellar was, after a break in her testimony, able to access an email to her from Mr Jenssen relating to his SOD. Dr Cuellar confirmed she had received the email but that she thought it was about 'establishing' a SOD for Mr Jenssen rather than him being unhappy with the wording of a current SOD. Dr Cuellar also stated she was unaware that there were issues regarding the SOD of Mr McLaughlin. Mr Jenssen advised his position had evolved over time and that the role he went into when he transferred to the TPS was not the same as the role he had left. This went largely uncontested by the respondent.

[35] Mr McLaughlin and Mr Jenssen both provided testimony that the PEaT employees all transport inmates from time to time under s42 Leave Permits and that inmates can be placed into the custodianship of a number of different people, depending on circumstances and the risk profile of the inmate. Both witnesses stated some leave permits had only been granted by the Director of Prisons on the basis of inmates being placed in the custody of the PEaT employees. There was some conjecture about this matter but the respondent led no evidence to the contrary.

[36] Both Mr McLaughlin and Mr Jenssen advised that it was expected that the PEaT employees would take on the role of custodian under s42 Leave Permits and if they did not do it the inmates would not get to attend the training.

[37] Mr McLaughlin indicated in cross examination that individual risk assessments are done on inmates the subject of s42 Leave Permits, however there were incidents sometimes with these inmates:

> *"Well, I mean, the inmates who get section 42s, there are risk assessments done, but I draw to your attention that not too long ago there was a risk assessment done on an inmate who went out on a section 42 and it was sent out to Bender Drive to an education area and absconded.*
>
> *Did somebody take him out there?.....One of the correctional officers did."*[15]

[38] Both Mr McLaughlin and Mr Jenssen during cross examination by the respondent stated they are not required to intervene physically to prevent any issue of security or containment and confirmed that is not the expectation of their employer. However, they both testified they have a responsibility toward those matters in that they have to report to authorities if security or containment has been breached. This aligns with the evidence of Mr Goodwin, Mr McCafferty and Dr Cuellar who stated:

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[14] Transcript – McLaughlin p50 line 21
[15] Transcript – McLaughlin p70 line 26

> *"So you see that they have a responsibility to do something in that situation?....Certainly not to intervene with the prisoner, but yes, to – to make a phone call and advise that that has occurred.*[16]

[39] Mr Goodwin's testimony contended that under a s42 Leave Permit the onus of responsibility is on the inmate to behave themselves and that custodianship created no other responsibility for the PEaT employees for the safety, containment and security of an inmate. When the question was put to Mr Goodwin about responsibilities of the PEaT employees to report, should an inmate attempt to abscond, he said:

> *"So would you say that that's a responsibility and an expectation that is on that employee in a circumstance such as that"…..I'd say yes."*[17]

[40] Under cross examination a considerable exchange took place on the discharge of Mr Jenssen's responsibilities. The respondent ultimately put to Mr Jenssen that his responsibility toward an inmate when transporting them was no different than that of a taxi driver. Mr Jenssen said:

> *"Yes it would be; I'm employed under the Tasmanian Prison Service and in a lot of the examples as well, it is that because we're PEaT staff members, we are given for whatever reasons that TPS management have decided, we're able to act as a custodian and allow these things to happen whereas if it was any other custodian it would not happen".*[18]

[41] Mr Jenssen described the details of his work at the MHWP when working with maximum security prisoners which included six inmates in the computer laboratory (lab). This required him being locked in with the maximum security inmates for up to 90 minutes as they are not allowed to mix with lower classified inmates.

[42] Mr Jenssen stated that an altercation had occurred at MHWP when correctional officers moved the maximum security prisoners to the education area:

> *"…there was an altercation when they came through this open area and I was – to be honest I was a little bit surprised that I was still locked in there with them because they were really sort of pumped up and so it was my – I suppose my role to try and calm [them] down after that incident".*[19]

[43] Further evidence from Mr Jenssen provided an example of him having to bang on the computer lab door in MHWP to have it unlocked at the end of a training session. He stated he had to wait up to five minutes on occasion before a correctional officer walked past and noticed he was banging on the door. He believes this is evidence that the correctional officer station nearby was not able to hear him. There are no operational cameras in this room although he does carry a personal duress alarm. He also stated on occasion he does have to ask other inmates to leave the computer lab room when he is conducting training. Mr Jenssen also advised there is no line of sight to the computer lab or recreation room in the MHWP from the correction officer's station. The recreation room is used by the other PEaT employees but not by him.

[44] In relation to supervision and safety Mr Jenssen stated his interaction with and supervision of inmates was like a teacher at a school and that he discussed OH&S issues with inmates at the start of sessions in the computer lab.

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[16] Transcript – Cuellar p141 line 31
[17] Transcript – Goodwin p187 line 19
[18] Transcript – Jenssen p110 line 26
[19] Transcript – Jenssen p92 line 6

[45] Mr Jenssen gave evidence of his responsibility under the Suicide and Self-Harm Prevention (SASH) training he had undertaken and that this is evidence of their responsibility of safety towards inmates. Under cross examination Mr Jenssen admitted that other staff members had undergone the training and had the same responsibility. Dr Cuellar also offered evidence that all non-uniform staff had received SASH training with some staff receiving an additional layer of training (ie psychologists and nurses).

[46] During cross examination it was put to Mr Jenssen that the service role the PEaT employees have is no different to other non-correctional positions in the prisons and that there is no different level of responsibility for the PEaT employees. Mr Jenssen advised he is not aware of any other employees being locked in a room with six maximum security prisoners. Dr Cuellar, former Manager of the Integrated Offender Management Unit, was emphatic in her evidence as to the level of responsibilities the PEaT employees hold. She believed they hold a general duty of care but that their level of responsibility is the same as all of her other staff. In addition Dr Cuellar stated that the PEaT employees have no different a role than others in relation to the security or containment of inmates.

[47] There was considerable testimony from witnesses dealing with the issue of urology drug testing at the Risdon Prison site. An example given by Mr Jenssen was that at the start of a semester he had six inmates in his class. Within a space of four to five weeks his class lost two inmates through failed drug tests with them returning to medium security in the RPC. Whilst this evidence does not assist the Commission in the principles of award construction, it does provide an insight into the changing risk levels encountered. Mr McCafferty's evidence in relation to drug testing gave an insight into the testing regime and he was able to confirm the reclassification of inmates who failed these tests.

[48] Mr Jenssen stated in testimony that the inspection undertaken by the parties and the Commission on 1 October 2012 did not give a feel of the environment in which they work because no prisoners were visible in the RPC section. He described the work environment he and other PEaT employees were in when working with inmates in the medium and maximum section of the Risdon Prison, stating that the most challenging area was in the Franklin Tamar section which was *"old style solitary confinement"*. He said that section of the prison was not inspected during our visit. He advised there were no cameras in the Mersey Huon maximum security training room, but there was a panic button in the room with the door always being shut and sometimes electronically locked.

[49] In relation to the correctional officers stationed near the maximum security Mersey Huon training room and the observation window Mr Jenssen stated:

> *"The only time I normally see a custodial officer at that window is when they are making perhaps a cup of coffee."*[20]

Mr Jenssen also said the view from the observation window does not allow the correctional officers to view the whole room and further that the positioning of the work stations for correctional officers in the maximum security stations means their backs are always to the observation window and they are looking in the opposite direction with no line of sight. Also there are no cameras in the medium security training rooms and no line of sight from the correctional officers' station into the training rooms.

[50] Mr Goodwin likened the service provision of the PEaT employees to that of any other NGO providers coming into the Risdon Prison site believing them to be no more responsible than the NGO employees. He stated they only have contact for short bursts (half an hour or an hour) and then leave. He contended this was different for the

[20] Transcript – Jenssen p98 line 31

industries who are there five days a week. When questioned by the applicant as to whether he was aware of the working arrangements of the PEaT employees within the prison system, Mr Goodwin said:

> *"Not fully, no".*[21]

and also:

> *"So do you know of any other service providers or NGO's that would be locked in with six maximum prisoners in a room on their own without a camera, are there any other cases of that occurring, an NGO for example?.....Just a query, they're locked in, you say they are locked in?"*[22]

[51] Since the inspection visit Mr Jenssen said the small kitchenette training room in Mersey (maximum) had been shut down. To the best of his knowledge it was a 'no line of sight' issue to the correctional officer station. The respondent contended during cross examination that Mr Jenssen was surmising the closure was a line of sight issue.

[52] Mr Jenssen testified as to an incident when an inmate tried to involve him in trafficking. Mr Jenssen indicated he saw this as a security issue.

[53] Mr Jenssen gave testimony relating to the use of 'shivs' as weapons and the possible use of computer equipment as weapons, such as the cords attached to a computer mouse or keyboard. He also discussed the equipment in the training rooms such as a leg having been broken off a table by an inmate. This incident of a leg being used by an inmate to smash up a room was also part of Mr Goodwin's evidence. Under cross examination Mr Goodwin stated:

> *"Yeah, look, a prison always has, there's a potential for hazards."*[23]

[54] Mr Jenssen stated that whilst the PEaT employees are not required to keep a formal register of dangerous items, they are required to count the number of scissors on arrival and departure and also are asked to count the number of textas.

[55] Both Mr McLaughlin and Mr Jenssen contended the PEaT employees are responsible for the supervision, safety, security, and containment of inmates.

[56] Mr McCafferty's evidence stated he took his leave from Director's Standing Orders (DSO(s)) when it came to responsibilities. He stated he saw a difference between the PEaT roles and the industry roles through the DSOs. Mr Goodwin gave evidence that the DSOs and Standard Operating Procedure (SOP) ensure registers are maintained for dangerous tools and equipment. He stated it is the industry supervisors who are responsible for ensuring all dangerous tools and equipment are accounted for.

[57] In relation to responsibility for containment Mr Goodwin gave evidence that if an inmate left a training session that the educator would notify the officer that an inmate had left without authority.

[58] Dr Cuellar when asked to clarify her position whether in her opinion the PEaT employees were entitled to the CFA, her testimony was:

> *"Right, so you held this view that PEaT staff shouldn't have access or don't meet the criteria for this allowance for some time, would that be fair to say?.....Certainly when it was raised with me, as I have said in my statement,*

[21] Transcript - Goodwin p185 line 15
[22] Transcript - Goodwin p184 line 9
[23] Transcript – Goodwin p186 line 46

> *I don't believe there is a greater – a greater claim if you like, to the allowance than for other sentence management staff.*[24]

[59] Both Dr Cuellar and Mr McCafferty confirmed in their testimony that they were not part of the formal discussions as to who would receive the allowance.

[60] Mr McCafferty gave evidence as to the assigning of classifications to inmates. When asked if the Sentence Management Review panel ever got it wrong he said:

> *"You know, we certainly got it wrong on the 21st of February – January this year with two escapes, but you know those sorts of things you don't know they're going to happen until after they happen basically…"*[25]

[61] Mr Goodwin provided evidence in his witness statement that the PEaT employees do not have responsibility for inmates and are responsible only for their own personal safety and wellbeing.

[62] Mr Goodwin stated the correctional officer posted at the education block in medium security is there to provide security for the people who work in there and also to make sure the inmates behave themselves. He said if there is an incident the PEaT employees only have to push their duress alarm and wait for the correctional officers to arrive.

[63] Evidence was adduced during proceedings which indicated that formal risk assessments had never been carried out for the PEaT area and other training rooms within the Rison prison site. Whilst this is extremely concerning to the Commission I find this issue has little value in determining the points of award construction or entitlement in this matter.

Submissions

[64] This matter deals with the principles of award construction and whether the PEaT employees fulfil the criteria of the CFA. The respondent submitted that clearly this was a matter of the parties interpreting the criteria differently.

[65] Both parties agreed there is little or no evidence to assist the Commission in understanding the intention of the framers of the CFA clause and the respondent was unable to provide any historical documentation on the establishment of the entitlement to the CFA.

[66] The PEaT employees are required as part of their duties to provide educational services to inmates of correctional facilities within Tasmania. This involves training with anything up to six maximum inmates, four medium security inmates, one on one maximum security inmates in a single room and up to 10 inmates present at any one time in the Tamar, Mersey, Derwent areas (maximum security area), all without a correctional officer in the training room.[26]

[67] The parties were able to agree the PEaT employees meet the following four criteria of the CFA clause:

- They are employees of the Department of Justice; and
- They are employed in positions classified under the State Service Award; and

[24] Transcript – Cuellar p146 line 44
[25] Transcript – McCafferty p162 line 16
[26] Exhibit A17

- They are employed at either or all of the RBMSP, MHWP and RPC sites or remand centres; and
- They are required to have regular contact with inmates as part of their roles.

[68] The remaining four criteria of the CFA clause which are in dispute are:

- The requirement of the PEaT employees to supervise inmates; and
- The responsibility of the PEaT employees to the safety of assigned inmates; and
- The responsibility of the PEaT employees to the containment of assigned inmates; and
- The responsibility of the PEaT employees to the security of assigned inmates.

[69] The applicant offered a number of dictionary definitions (Concise Oxford Dictionary) relating to words contained within the CFA clause namely:

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- *"require"* – means to depend on
- *"safety"* – means condition of being safe
- *"contain"* – means prevent from moving or extending
- *"security"* – a secure condition or feeling; guard against something

[70] The applicant stated that whilst the PEaT employees are not required to manage the safety, containment and security of inmates they are expected to contribute towards, and in fact have a responsibility for, these elements. The Commission notes the Concise Oxford Dictionary definition for "*assign"* is – *allot as a share or responsibility.*

[71] The respondent contended that the PEaT employees are not assigned inmates, rather inmates are assigned to work areas within the working prison system and handed up the Directors Standing Orders.[27]

[72] The applicant submitted there was no evidence to support the position taken by the Department as to how it finally came to an understanding on who or what positions were to receive the allowance. They continued saying the email exchange between McCulloch and Davey (Exh A6) indicates a process but provides no supporting evidence of what took place, such as assessment criteria:

> *"At the time the correctional facility allowance was introduced an assessment of the TSS, the Tasmanian State Service Award and employees of the Tasmanian Prison Service was undertaken to determine which positions could be eligible and this process included the PEaT staff. The matters considered include the type of activities they undertook involving inmates, the nature of their contact with inmates, the work location where this contact occurred and the proximity of correctional staff.*
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> *These deliberations were undertaken in consultation with the union that we understood to be representing non-correctional TPS staff at that time. An agreed list of positions eligible for this allowance for (sic) subsequently determined and this did not include any PEaT positions."*

The respondent contended that it was a leap to suggest that deliberations had not taken place purely on the absence of documentation that would have proved such deliberations had occurred.

[73] Whilst there had been some debate about whether the applicant was seeking an extra claim, the applicant submitted it was not seeking to change the wording of the

[27] Exhibit R8

Award, only that the CFA clause be applied properly to the PEaT employees. The respondent provided no argument on this matter on the basis that the applicant had excluded two previously named members from the application who were employed by the DoE. These members therefore fell outside coverage of the clause.

[74] The applicant submitted that the failure of the PEaT employees to receive the allowance was an oversight due to them being a small group and the CPSU not having coverage of these workers at the site. The PEaT staff were only recently unionised (sometime in 2011) and only became aware of the allowance in recent times. However I believe the witness testimony of Mr McLaughlin is at odds with this last part of the applicant's submissions.

[75] Mr Charlton representing the respondent contended that both he and Mr Baker could speak with some authority on the clause but had limited recollection and could not provide any documentation. Mr Charlton stated an agreed list of roles was prepared reflecting the understanding of the parties and that that list did not include the PEaT staff.

[76] The respondent submitted that the CFA was not designed to be a site-wide allowance or a reward for staff who have some level of interaction with inmates when performing their duties, and whilst that was the case, either all or at least the majority of employees of the TPS were aware of the existence of the CFA.

[77] It was submitted by the respondent that all the criteria of the CFA clause were mandatory and it was not sufficient to meet only some of the criteria or to be paid only part of the allowance on the basis of not meeting all of the criteria.

[78] The respondent submitted that at the time of introduction of the CFA the PEaT staff were a sub-unit of the Integrated Offender Management Unit which also included psychologists, counsellors and sport and recreation officers, all who provide services to inmates. There had been no wholesale change in the work environment of the PEaT employees. The respondent sought to rely on this point to say there had been no oversight at the time of introduction.

[79] The respondent submitted that whilst the PEaT employees were required to report occurrences this did not make them responsible for, or to manage the safety, security or containment of inmates. The applicant submitted that the clause contains nothing about differing levels of responsibility only that a responsibility must exist.

[80] The respondent went to some lengths during submissions to state this matter was not about comparing the PEaT employees against other roles within the TPS who might receive the CFA, stating that *"two wrongs don't make a right"* and that the application must *"live and die"* on the requirements of the clause and the intent of the framers of the clause. The applicant did not make submissions contrary to this point but sought to rely on the actions of the framers at the time of introduction of the allowance (who it was awarded to) to support what was the intent at that time.

[81] The respondent stated that of the four PEaT employees, two positions were almost identical but the remaining roles had considerable differences, such as the roles of educator and co-ordinator. They submitted this may lead the Commission to find that only some of the PEaT employees are eligible for the CFA. Whilst the respondent stated they would point out these differences there was very little evidence led either by way of testimony or submissions as to this. The applicant contended that there was an appropriate level of witness testimony to prove all criteria had been met by all of the PEaT employees, regardless of the differing roles.

[82] The applicant submitted in the absence of any evidence as to the intent of the framers of the clause, all the Commission has to guide it are the words of the clause itself and the principles of award construction from the various authorities.

[83] Ms Madsen representing the applicant stated that a reasonable person would expect that if one of the PEaT employees failed to fulfil their responsibilities relating to safety, containment and security of inmates, they would be called into account. Further the union contended these employees would be subject to disciplinary action and even a code of conduct if the circumstances warranted it, for failing to carry out these responsibilities.

[84] The applicant submitted that the respondent had, throughout the proceedings, argued to add extra criteria to the CFA clause. The applicant said these arguments included the proximity of correctional officers, the regularity of activity undertaken, the level of responsibility required, the length of time employees spent with inmates and some environments being 'more risky' than others. The applicant submitted none of these arguments were relevant to the wording of the clause.

[85] Referring to exhibit A8 - the list of recipients of the CFA - the applicant submitted that there was no consistency applied to who should receive the allowance and that the list did not reflect occupations that could fulfil the criteria now argued by the respondent. The applicant contended the criteria, as now argued, could not reflect the intent of the framers at the time the list was negotiated and that rather than a strict legal interpretation being applied, an interpretation of what a 'reasonable person' would apply was needed.

[86] The applicant submitted as there are no panic buttons and or line of sight for correctional officers in or into training rooms, the PEaT employees have a responsibility to supervise or report or alert the authorities as to security or safety concerns relating to inmates.

[87] The applicant submitted that the PEaT employees have a responsibility when transporting inmates to training and education courses outside of the TPS environment. Further, that taking on the custodianship of an inmate who is released on a s42 Leave Permit[28] (issued by the Director of the prison) carries with it obligations of supervision and to report on matters of containment and security (ie an escape by an inmate) and to be responsible for the safety of the inmate.

[88] The respondent submitted that the PEaT employees have no more responsibility to an inmate under a s42 Leave Permit than any other person, citing that members of an inmate's family may also be given custodianship of an inmate under such a permit and that no obligation exists for PEaT employees to physically restrain an inmate in their custody who may be trying to escape. The respondent's position was that the only obligation or responsibility a PEaT employee has is to report any incidents to the authorities.

[89] The applicant submitted that the PEaT employees are responsible for the collection of a key each morning from the correctional officers' station near the cross gate in the RBMSP. This key unlocks a gate near the PEaT area which the applicant submitted creates a responsibility for the security and containment of inmates. The applicant relies on an email from Mr R Geeves to Mr McLaughlin dated 26 July 2012[29] which indicates a level of responsibility for the PEaT employees for the control and containment of inmates. The respondent contends the correctional officers remain responsible for the security and containment of inmates in the PEaT area and the only

[28] Corrections Act 1997 s42
[29] Exhibit A12

reason the PEaT employees are required to collect a key in the morning is to personally gain access to their work space. I will deal with this in my findings.

[90] The applicant submitted that the PEaT employees are responsible for the safety of inmates under their control in the PEaT area and other training rooms throughout the TPS. The respondent contended that the PEaT employees are only responsible for their own safety and not that of others in the course of their duties.

[91] During final submissions the respondent submitted that the PEaT employees are not fully responsible for the direct (my emphasis) supervision of inmates, but the respondent did accept the PEaT employees work closely with inmates at times. However, this was on a service provision basis, rather than a supervisory basis. This was backed up by the evidence of Dr Cuellar and Mr Goodwin.

[92] The respondent believes there are four broad categories of non-correctional positions and that they are positions which provide services to inmates (including PEaT employees), positions that supervise inmates (prison industry), positions that undertake administration or technical activities (not directly with inmates) and positions that undertake management or supervisory actions. The respondent further contended that CFA recipients generally fall under the second category (my emphasis).

[93] The respondent submitted that the Statements of Duties (SOD(s)) for the PEaT employees did not include or require supervision of inmates or that they are responsible for the safety of inmates. However, the applicant contended that this in itself did not mean the responsibility was not carried out and that other roles in receipt of the CFA also do not require supervision or safety of inmates under their SODs.

[94] Witness statements and testimony were presented to demonstrate that the SODs for the PEaT employees do not accurately reflect the roles undertaken by Mr McLaughlin and Mr Jenssen. There was certainly some conjecture about Mr Jenssen's SOD and the fact it appeared he has been working without a SOD since some time in 2008. The respondent questioned the amount of time spent teaching, indicating that Mr Jenssen spends around 25% of his time teaching inmates and that Mr McLaughlin teaches infrequently. The applicant contended that the amount of teaching time was irrelevant. Rather it was simply a matter of fitting the criteria or not.

[95] The respondent submitted for comparison the SODs for the Laundry and Woodwork industry supervisor and Laundry Hand positions[30], reading excerpts from them relating to the supervision and safety of inmates. It should be noted the respondent did not provide any other SODs for recipients of the CFA. The applicant did however tender the SODs for Maintenance Supervisor[31], Stores Officer[32] and Cleaner[33] in their final submissions. There was no mention of supervisory functions in the latter three SODs and the applicant stated it was hard to understand how all eight criteria, as the respondent was arguing, could be fulfilled by these roles. Further, the applicant submitted that there was even some question over the roles of industry supervisors fulfilling all eight criteria.

[96] The respondent submitted that industry prison staff selection criteria describe negotiation conflict resolution skills. This is not a common feature of the PEaT positions.

[97] The respondent submitted there was no supervisory role for Mr McLaughlin of peer tutors but did not mention the supervision of the librarian and other inmates working in the library. Further the respondent submitted that Mr McLaughlin had no

[30] Exhibit R13
[31] Exhibit A19
[32] Exhibit A20
[33] Exhibit A21

more responsibility toward all inmates than a librarian at any public LINC site in Tasmania.

[98] Both parties were aware and agreed that the PEaT area in RBMSP doubled as the Risdon LINC and inmates were able to come and go into that area to access computers, books and newspapers, along with accessing the PEaT employees. The respondent contended that the PEaT area was not an area where inmates required constant supervision.

[99] There were a large number of submissions dealing with the key to the gate near the PEaT area and the actions of the PEaT employees when they leave work early on some occasions. The respondent stated that as they are able to depart early and leave the responsibility to lock the gate with the correctional officers, the responsibility to supervise the inmates and lock the gate is not a material one. The applicant contended that whenever the PEaT employees leave the area unattended toward the end of the day they contact correctional officers and advise them of such, in effect transferring their responsibility by making the appropriate authorities aware.

[100] The respondent submitted that you can only be supervising a person when you have some authority over them and that being "charged with" a responsibility is when you are considered responsible.

[101] To this end the respondent submitted that the definition to "notify" – is to *make known, announce, report inform or give notice to* and further that not only do the PEaT employees not need to do anything about the actual issues at hand but that they are not responsible for them having occurred.

> *"So, for example, if an inmate was in your care, you're responsible for ensuring that inmate is safe. You're responsible for taking steps to ensure that that inmate stays safe and if something starts to happen that leads it not to be safe, then you're responsible for taking steps to the best of your ability to return that inmate to a safe state".*[34]

[102] There were also many submissions on both sides around the relationship of risk in the prison environment and how that applies to the criteria of the CFA clause and the intersection of this risk for non-correctional employees with their day to day duties. This included the issue of urology drug testing and the failure of these tests by inmates at the RBMSP, their subsequent reclassification to medium or maximum security and thereby going to the volatility of the prison environment. Much of this 'risk' information was not directly relevant to the clause itself but I have considered this material in light of how it plays a part in framing the responsibilities of the PEaT employees. However the respondent submitted that the PEaT employees are only responsible for managing their own personal safety and wellbeing. Whilst the respondent submitted that personal duress alarms are given to employees to manage their own personal safety only, witness testimony for both parties indicated otherwise.

[103] The respondent contended the PEaT employees have no greater level of responsibility to inmates than anyone else. Mr Charlton for the respondent stated:

> *"In a work setting, if I notice a colleague is experiencing dizziness then I would notify the first aid officer or call an ambulance, but again I do not suddenly become responsible for the injured colleague's safety".*[35]

[34] Respondent's submissions transcript p211 line 38
[35] Respondent's submissions transcript p215 line 10

[104] The respondent submitted there is a clear and significant distinction between the responsibility to tell someone of an issue and a responsibility to ensure that an issue does not arise and to resolve it when it does. The applicant contended that the PEaT employees have clear responsibilities whilst they are in contact with inmates and that the CFA wording only spoke of 'responsibility for' and not differing levels of responsibility.

[105] The respondent submitted that all PEaT training rooms located within the correctional facility are low risk areas that are open and where the occupants of those rooms can be heard (my emphasis) by other staff or correctional officers. Witness testimony was received which is contrary to this submission.

[106] There were submissions from both parties relating to the provision (or not) of cameras in the training rooms and PEaT area, the provision (or not) of panic buttons in training rooms and the presence (or not) of correctional officers within a close proximity.

[107] The respondent submitted that the PEaT employees do not meet the containment criteria as their vast majority of interactions with inmates are contained within correctional facilities with no means of escape. The respondent contended the only meaningful exception to this is when PEaT staff transport inmates.

> *"In the vast majority of interactions the PEaT staff have with inmates they are contained within correctional facilities and have no means of removing themselves. The only meaningful exception occurs when PEaT staff transport inmates on those rare occasions…"*[36]

[108] The respondent submitted that if the applicant is successful in these proceedings then it anticipated a range of claims from other TPS staff, not only from those who provide services but potentially from many other positions. The applicant contended that this dispute only related to the PEaT employees in question and that each occupation would have to mount its own case as to satisfy the clause criteria.

[109] Further the respondent contended a finding in favour of the applicant would risk a watering down of the definition or interpretation of the clause, stating:

> *"As has been stated previously, any attempts to determine the eligibility of the PEaT roles simply by looking to other recipients of the allowance may result in an unwarrantable erosion in the standards required for receipt of this allowance…"*[37]

[110] Mr Baker for the respondent was able to put some context around the creation of the list of CFA recipients at the time of implementation. He submitted that during October and November 2008 intensive negotiations took place and agreement was reached between MASSA and the CPSU on the effective date of any wage rises and also as to what positions would receive the CFA. The Department contended the Crown was under some pressure to finalise the Award re-write and negotiations due to the industrial action undertaken by the unions in 2008. Mr Baker contended all of these actions were run concurrently with a re-write of the allowances contained within the Award.

[111] Mr Baker submitted:

> *"…but can I say to you, and I put this on the record, that that really wasn't a consideration of who was a member of the union and who was not, it was*

[36] Respondent's submission transcript p223 line 31
[37] Respondent's submission transcript p237 line 35

> *about which positions should qualify for the allowance, and that was the manner in which the discussions occurred, …"*[38]

[112] The respondent submitted that the allowance was agreed to as was the list of recipients and that the applicant was now seeking an extra claim dressed up as an interpretation of the Award. Mr Baker referred to a decision of City of Wanneroo v Holmes, French J.[39] although the respondent did not seek to hand it up as an authority:

> *"Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties."*

The respondent said perhaps the words are not as clear as they should be (as in Wanneroo v Holmes) but the respondent should not be penalised because of that. However in the Wanneroo decision, French J went on to say at p380:

> *"Accepting the serious and binding nature of industrial awards, a strict approach is not in my opinion appropriate and would be inconsistent with the general principles of interpretation."*

[113] The applicant submitted that whilst the union had entered into the Award and agreement with the respondent they were only dealing specifically with clauses that were relevant to their members at the time as that is how unions operate. Accordingly the CPSU would have submitted a list of occupations or workgroups it believed should be considered for the CFA, as again this is how unions operate. They do not negotiate for workgroups where they have no coverage. Further the applicant contended that if there were only specific areas, such as industry, to which the clause was to apply then why did Mr Baker not make the wording of the clause specific.

[114] The respondent submitted that they now saw this dispute as an opportunity for the Department to do a review of the list of CFA recipients as perhaps they may have been over-generous previously. However, there was no confirmation by the respondent that anyone on the list should not or would not be receiving the CFA into the future. Further a review had taken place by the respondent prior to 3 August 2012 and three employees had had the CFA removed.[40]

[115] Mr Charlton for the respondent submitted it was his understanding that the role in the maintenance area, the subject of the applicant's Exhibit A19, involved assigned inmates working in the area. However there was no evidence led to support this submission. The respondent made further submissions about the Stores Officer and Cleaner positions in relation to supervision. There were no other submissions from the respondent in relation to these positions or the remaining criteria.

[116] The applicant requested that should the Commission find in favour of the applicant then back pay for the CFA should be payable to the PEaT employees for the period of their employment since the introduction of the allowance. The respondent submitted that as the existence of the CFA was widely known on all TPS sites and by the majority if not all employees and that Mr McLaughlin by his own testimony admitted to have knowledge of this allowance in early 2009, there should be no question of retrospectivity should the Commission find in favour of the applicant.

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[38] Respondent's submission transcript p242 line 1
[39] City of Wanneroo v Holmes (1989) IR p380
[40] Exhibit A6a

Findings

[117] Both parties cited the authorities of ANF v MASSA, Abey DP,[41] as relevant which in turn referred to the Full Bench matter of MASSA v ANF. [42] For convenience, the principles of these decisions are set out below:

- *Terms of awards (and agreements) must be interpreted in light of their industrial context and purpose, including the commercial and legislative context in which they apply. (*Amcor Ltd v CFMEU *(2005) 222 CLR 241 at (2) and (13))*

- *The matter must be viewed broadly, and after consideration is given to every part of the award, the Court must endeavour to give it a meaning consistent with the general intention of the parties, to be gathered from the award as a whole. (CFMEU v Master Builders Group Training Scheme (2007) 161 IR 86 at 91)*

- *The relevant 'context' to be considered in interpreting the award extends to the origins of the particular clause. However, most often the immediate context, being the clause, section or part of the award in which the words to be interpreted appear, will be the clearest guide. (Short v FW Hercus Pty Ltd (1993) 40 FCR 511 at 517-19 (Burchett J, Drummond J agreeing).*

- *Whilst context and purpose of an award will be relevant, ultimately a Court or Tribunal's task is to give effect to the meaning of the award as expressed in its words, objectively (as opposed to subjectively) construed. (Amcor, supra, at (69), (70) and (77)-(114))*

- *Other cases in which Courts or Tribunals have interpreted similar words in different awards and agreements, must also be treated with caution. This is because Courts and Tribunals are required to give effect to the terms of an award in the manner intended by the framers of the document (determined objectively.) (Kucks v CSR Limited (1996) 66 IR 182 at 184 (Madgwick J)*

- *Further, it is not appropriate when undertaking that task, to look to evidence of prior negotiations or surrounding circumstances to contradict the language used by the parties. If the words used are susceptible to more than one meaning, only then will objective evidence of background facts be relevant to the interpretation of an award, to the extent it shows mutuality of intention. (AMWU v QANTAS Airways Ltd (2001) 106 IR 307 at (21) and (31)) The subjective evidence of a party's own particular intentions, is not admissible. (Harbour City Real Estate Pty Ltd v Cargill (no 3) (2009) 186 IR 260 at (61)-(62) (McKerracher J))*

- *It is forbidden to use subsequent conduct as an aid to the construction of an award or industrial agreement. (CFMEU v John Holland Pty Ltd (2010) FCAFC 90 at (94); Short v Hercus Pty Ltd (1993) 40 FCR 511 at 517.)*

- *Whilst some assistance might be obtained from the previous conduct of the parties to an award, particularly where the terms have been re-enacted, this is only so where it can be shown by clear evidence that the*

[41] T13858 of 2011 cl.24
[42] T13586 of 2009 p12-13

parties have conducted themselves according to a common understanding of the relevant provision, as opposed to common inadvertence. (ALHMWU v Prestige Property Services Pty Ltd (2006) 149 FCR 209 at (44); SDAEA v Woolworths Ltd (2006) 151 FCR 513 at (31))"

- *"the history of any provision is relevant and the fact that the parties have re-stated a provision which they have treated as bearing the particular meaning is relevant to the construction of the provision in the new agreement/award (see Short v FW Hercus Pty Ltd (1993) 41 FCR 511 at 517);*

- *the beginning point of an award interpretation is to interpret the words in the context in which those words apply. Whilst it is so that frequently the immediate context is the clearest guide the Commission 'should not deny itself all other guidance in those cases where it can be seen that more is needed'. The context in which a document is to be interpreted may extend to the entire document with which there is an association. (Short v FW Hercus at 518)*

- *in constructing an award or agreement the search is for the meaning intended by the framers of the document bearing in mind that they were likely to be of practical bent; it is justifiable to read an award or agreement to give effect to its evident purposes. Meanings which avoid inconvenience or injustice may reasonably be strained for. (Kucks v CSR Ltd (1996) 66 IR 182 at 184)".*

The applicant contended dot points 4 and 10 as contained above were the most important in this matter, whilst the respondent sought to rely more heavily on the final dot point.

[118] Further both parties sought to rely on para 25 of ANF v MASSA which stated:

"The meaning of an industrial agreement, like the meaning of a contract, is to be determined by what a <u>reasonable person</u> (my emphasis) *would have understood it to mean having regard not only by the text but also by surrounding circumstances known to the parties and the purpose and object of the transaction. (Toll [FGCT Pty Ltd v Alphaform Pty Ltd [2004] 219 CLR 165 at 41)*.

[119] The principles of award construction were more succinctly stated by Koerbin P. in HEFA v Mental Health Services Commission[43] which are not at odds with and complement the authorities above. Koerbin P. said:

- *First: Construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts. It is futile to attempt such an exercise in any other way.*

- *Second: It must be understood that in presenting an argument in support of or in opposition to a disputed construction relating to an award provision it is not permissible to seek determination of the matter on merit; that is, on the basis of what one party or the Commission believes the provision in question should mean.*

- *Third: Provided the words used are, in the general context of the award and its application to those covered by its terms, capable of being*

[43] HEFA v Mental Health Services Commission, T30 of 1985

construed in an intelligible way, there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage.

- *Fourth: An award must be interpreted according to the words actually used. Even if it appears that the exact words used do not achieve what was intended, the words used can only have attributed to them their true meaning.*

- *Fifth: If a drafting mistake has been made in not properly expressing the intention of the award maker, then the remedy lies in varying the award to accord with the decision given.*

- *Sixth: Where genuine ambiguity exists, resort may be had to the judgment accompanying the award as an aid to discovering its true meaning.*

- *Seventh: It is not permissible to import into an award by implication a provision that its language does not express. The award being a document which is to be read and understood by persons not skilled in law, or versed in subtleties of interpretation, any omission or imperfection of expression should be repaired by amendment rather than by implying into it provisions which are not clearly expressed by its language.*

[120] As stated previously the parties to the proceedings both relied on identical authorities which in turn did not assist the Commission in differentiating the approach of the parties.

[121] When looking at the principles of award construction the starting point must always be the actual words used and the industrial context. Unfortunately viewing the award as a whole in this case or the transcript of proceedings when the new CFA clause was incorporated in the award, provides no guidance as to context.

[122] I reproduce the wording of the clause here for ease of reference:

"An employee of the Department of Justice engaged in duties classified under this award at the Risdon Prison Complex, Ron Barwick Medium Security Prison, Mary Hutchinson Women's Prison and associated administrative and training buildings, the Hayes Prison Farm, or Remand centres is to receive a Corrections Allowance of 7.5% of their salary subject to having:

(a) Regular contact with and who is <u>required to supervise</u> inmates; and

(b) Is <u>responsible</u> for the safety, containment and security of <u>assigned</u> inmates."[44] (my emphasis).

[123] The respondent submitted (which was uncontested by the applicant) that all the criteria of the CFA clause were mandatory and that meeting only some of the criteria did not confer an entitlement. The clause reads:

"…subject to having:

(a) Regular contact with and who is required to supervise inmates; and (my emphasis)

[44] Exhibit R2

(b) Is responsible for the safety, containment and security of assigned inmates."

The intent of the clause here is clear. The expression is to be read conjunctively rather than disjunctively. I find that all eight criteria of the CFA clause must be met in order to establish an entitlement to the allowance.

[124] I have placed my emphasis on the words within the clause that are fundamental to the way the clause should operate. I find the words have no ambiguity about them with the exception of the word "assigned".

[125] It is clear these words relate to employees who work closely with inmates in a prison environment and who <u>are not</u> correctional officers. It does not discriminate against whether those employees provide a service to inmates or whether they are managing inmates in an industry type environment. The only matters that need to be determined is whether the employees have a responsibility as part of their duties to the supervision, safety, containment and security of assigned inmates.

[126] As the word "assigned" needs clarification I will deal with this matter first.

[127] The word *"assign"* in the Macquarie Concise Dictionary has the meaning of *to make over or give; allot*.[45] The respondent submitted that 'assigned' inmate was a reference to inmates being assigned to an industry workgroup within the prison, such as the laundry. During final submission there were a number of SODs handed up as exhibits which related to positions that did receive the CFA. I note that these SODs did not mention any responsibility as to assigned inmates and are not contained in the industry areas of the prison. In light of the fact the framers of the CFA clause were also the negotiators for who would receive the allowance, I can only infer that the intent of the framers was that the term 'assigned' had a differing meaning to the more literal connotation given to it by the respondent in these proceedings.

[128] Further, the respondent contended that because Directors Standing Orders do not specifically say that inmates are assigned to the PEaT employees, those inmates cannot be construed as assigned. The evidence suggests there is a clear 'giving' or 'allotment' of responsibility once an inmate undertakes a form of training with a PEaT employee or that inmate is transported by a PEaT employee. In this industrial context the term 'assigned' is used to differentiate inmates or groups of inmates who, at the time of contact with non-uniformed staff, do not form part of the general populous of the prison.

[129] A person not skilled in law or versed in subtleties of interpretation would view these inmates as being assigned to their educators for the purposes of undertaking education, training or being transported. It is illogical to suggest that inmates undertaking education with the PEaT employees are somehow un-assigned for this purpose. Accordingly, I find the PEaT employees are assigned inmates.

[130] I now turn to how the clause applies to the duties of the PEaT employees. The term *"required to supervise"* is an important one. The Macquarie Concise Dictionary states *"require"* means *to have need of. "Supervise"* means *to oversee during execution or performance.* Applying this to the evidence of proceedings it is clear that whilst the Statements of Duties of the PEaT employees did not specifically mention a requirement to supervise an inmate, this is an inherent part of a PEaT employee's role as an educator. There is a clear correlation between the role of the PEaT employees and that

[45] The Macquarie Concise Dictionary, Third Edition

of a teacher of students in a normal class room environment. They are required to oversee the actions of inmates under their tutelage.

[131] Secondly, I look at the word *"responsible"*. The Macquarie Concise Dictionary states *"responsible"* to mean *involving accountability or responsibility*.

[132] The respondent, and through witness testimony, stated the PEaT employees do have some responsibility, but believed that responsibility does not fall within the intent of the CFA clause. The respondent's basis for this belief is that whilst the PEaT employees have a responsibility to report on matters of safety, security and containment, they are not physically responsible to do anything about those matters.

[133] If a reasonable person looked at the picture drawn by the evidence of the respondent's own witnesses, they would conclude the PEaT employees are responsible for the supervision of the inmates under their teaching. Further they would have to conclude that in the absence of any other authority, that educator is responsible for the safety, containment and security of those inmates, albeit not to physically intervene but at least to report on those elements.

[134] The respondent submitted the term 'supervision' only relates to some of the non-uniformed staff as contained in their SODs or under DSOs. Again I do not believe a reasonable person would agree with this intent. It is apparent that a number of the SOD's for recipients of the CFA do not include the supervision of inmates. PEaT employees are required to train inmates, sometimes behind locked doors, with either no line of sight to correctional officers or no operational cameras. Under these circumstances the only people able to provide supervision are the PEaT employees. For the respondent to suggest otherwise would be importing an implication which is simply not supported by the ordinary meaning of the words. I find the PEaT employees do supervise inmates.

[135] The respondent argued that the PEaT employees do not have the same level of responsibility as other non-uniformed staff. This may well be the case however it is not for the Commission to make a finding in relation to that matter, only whether the PEaT employees fit the criteria.

[136] I accept the applicant's argument that the CFA clause does not call for a specific level of responsibility, only that a responsibility is present. Evidence was provided of the PEaT employees taking custodianship of inmates for the purposes of s42 Leave Permits for inmates to attend training and other duties outside the prison confines. The *Corrections Act* states that inmates are *"…to be in the custody of…"*.

[137] Whilst the PEaT employees are not expected to physically restrain an inmate if they try to abscond from their custody, they are responsible to stay with their vehicle and alert the authorities of the containment issue. The respondent submitted that the PEaT employees are no different to a family member of an inmate with custodianship. I cannot accept this argument. A PEaT employee is carrying out the duties of their employment and this is the ultimate differentiation in these matters.

[138] The issue of the collection of a security key and the locking and unlocking of the side gate near the PEaT area received much coverage in these proceedings. The respondent contended that whilst the PEaT employees lock and unlock this gate they are not responsible for the security or containment of inmates. The applicant relied on the email exchange between Geeves and McLaughlin indicating there is an acceptance that the PEaT employees are in some part responsible for ensuring the secure egress of inmates to and from the PEaT area and access to the courtyard area is to be restricted.

[139] Cross-examination under affirmation of Mr Goodwin, elicited the following response:

> *"…are you aware of the working arrangements of the PEaT employees within the prison system?.....Not fully, no".*[46]

and also:

> *"So do you know of any other service providers or NGO's that would be locked in with six maximum prisoners in a room on their own without a camera, are there any other cases of that occurring, an NGO for example?.....Just a query, they're locked in, you say they are locked in?"*[47]

It is obvious to the Commission that at least one witness for the respondent is not fully aware of the conditions under which the PEaT employees are working.

[140] There was conflicting testimony as to the reasons for collection of the security key. Mr McCafferty stated the key is collected solely so the PEaT employees can access their work area. Mr McLaughlin advised he has his own personal key to enter the PEaT unit area. Mr McCafferty's evidence was less definitive and because of this I have preferred the evidence of Mr McLaughlin on this point. Therefore, I find the collection of the key in the morning by the PEaT employees is not for the sole purpose of gaining access to their work area.

[141] It is however clear from testimony and the email from Mr Geeves to Mr McLaughlin the PEaT employees play a role in the security of the gates in that area, albeit that on occasion they do not undertake that responsibility (ie when they leave early). Instead they advise the correctional officers that they are unable to exercise that duty on that day and request the correctional officers to undertake it.

[142] It is inherent in a correctional environment that an employee who is required to work closely and alone with inmates (that is, no correctional officer being present) has a responsibility to ensure the security and confinement of inmates. Through witness testimony the respondent submitted that there is a level of responsibility on the PEaT employees, but that responsibility stops short of physically intervening should an inmate be attempting to abscond. Looking to the award wording, there is no mention of a particular level of responsibility. I refer again to the words of Koerbin, P:

> *"Provided the words used are, in the general context of the award and its application to those covered by its terms, capable of being construed in an intelligible way, there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage".*

I cannot accept the respondent's argument or the respondent's witness testimony that a particular level of responsibility needs to be present before the criteria are fulfilled. To place this interpretation on the criteria would be unintelligible and is not justifiable. It would require reading into the clause words which simply are not there. Accordingly, I find the PEaT employees are responsible for the containment and security of assigned inmates.

[143] There were considerable submissions and testimony dealing with the issue of safety. Evidence relating to urology drug testing and the process for classification of inmates proved an element of volatility which places additional responsibility on the PEaT employees to ensure the safety of inmates under their control.

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[46] Transcript - Goodwin p185 line 15
[47] Transcript - Goodwin p184 line 9

[144] The respondent and their witness, Mr Goodwin, contended that the PEaT employees are only responsible for their own safety when dealing with inmates and further that they have no more responsibility for inmate safety than a contractor coming onto site. I do not accept this position for two reasons. Firstly, on a number of occasions the respondent was involved in an exchange and accepted the applicant's witness' testimony that the PEaT employees are to (and do) activate their duress alarm if they feel an inmate is in an unsafe situation. Secondly, by the very nature of working with inmates as part of their duties, the PEaT employees have a responsibility to safety under the relevant legislation:

> *"While at work, an employee must –*
>
> *(a) Take reasonable care for the employee's own health and safety and for the health and safety of other persons, including persons working under the direction or supervision of the employee, who may be affected by the employee's acts or omissions at the workplace; ….*[48]

This clause in effect places an onus of safety on an employee who is directing or supervising another person. Therefore, it is an inherent responsibility that is present, at least, until it is transferred to another person of greater authority or skill (such as a manager, responsible officer or first aid officer). Accordingly, I find that the PEaT employees are responsible for the safety of assigned inmates.

[145] The respondent submitted that a finding in favour of the applicant would risk a watering down of the definition or interpretation of the CFA clause. The meaning of the award is the meaning of the award and should only be influenced by extraneous matters if they are supported by the principles of award construction. I find this is not a relevant argument to the issues relative to this dispute.

[146] In relation to the respondent's submissions that these proceedings would provide a catalyst for a review of the application of the CFA, there was no evidence led to suggest in any tangible way that such a review would take place in the future. In fact the exhibits provided show a review had already taken place prior to 3 August 2012 with the removal of three employees from the list of CFA recipients. I therefore do not accept the submissions from the respondent that anyone currently receiving the CFA would be doing so without a legitimate entitlement.

[147] In accordance with my findings above and the palpable evidence available, even on the part of the respondent that there is some 'level of responsibility', I find the PEaT employees fulfil all of the criteria of Cl9 of Part IV of the Award, Correctional Facility Allowance.

[148] The final finding relates to retrospectivity of the CFA. Evidence was provided that the Co-ordinator (or Manager) of the PEaT unit was aware in early 2009 that the CFA was in existence. Whilst he was advised that he was not entitled to the allowance his own testimony indicated that he was aware there was some ambiguity around that advice.

[149] The issue of retrospectivity has been dealt with under appeal by a full bench of this Commission (Leary P., Shelley DP. and McApline C.) in Zinifex Australia Limited v TESA Group & Anor.[49] One of the grounds for the appeal was:

> *"The learned Commissioner erred in determining that employees of Skilled Group Limited and the TESA Group Pty Ltd, who are engaged in the*

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[48] *Workplace Health and Safety Act 1995* s16
[49] Zinifex Australia Limited v TESA Group P/L & Anor. T12321 of 2005, Full Bench

> *production process at the Risdon Smelter of Zinifex, are subject to the terms of the Zinifex Hobart Smelter Enterprise Award, effectively from 21 September 2005 and no retrospectively from the date of the Award."*

The Full Bench granted the appeal on this ground and found as follows at paras 31-33:

> *"We agree with that submission; if the Zinifex award has application to the employees of TESA and Skilled then it has application for the period of their employment on the Zinifex site.*
>
> *Accordingly we are of the view that the Commissioner erred in limiting the application of the award to a nominal date of 21 September, 2005.*
>
> *We confirm the finding of the Commissioner that the Zinifex award has application to TESA and Skilled but vary the Order by deleting reference to an effective date of 21 September, 2005."*

[150] In effect the Full Bench decision of T12321 states that the award is the award at a particular point in time. It either applies or it does not. There is no discretion for this Commission to apply award entitlements from a particular point in time, if that particular point in time differs from the timeline contemplated in the award. The application of the CFA for the PEaT employees is for the period of their employment post the date of implementation of the CFA, and I so find.

Directions

Pursuant to s31(1) of the Act I direct the parties to confer as to the form of final orders to be issued in this dispute AND THAT such conference between the parties take place by 18 December 2012 AND THAT a further hearing day be listed before the Commission to take place in January 2013 where I will hear submissions on the form the final orders shall take.

N Wells
DEPUTY PRESIDENT

Appearances
Ms R Madsen for the applicant
Ms C Davey for the applicant (19 and 24 October 2012 only)
Mr B Charlton and Mr P Baker for the respondent (MASSA)
Mr J Withers for the respondent (Department of Justice)

Date and place of hearing:
October 19, 24 and 30
2012
Hobart