

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Police Association of Tasmania

(T13773 of 2011)

and

Commissioner of Police

DEPUTY PRESIDENT TIM ABEY

HOBART, 8 September 2011

Industrial dispute – Isolated Community Expense Allowance - relationship to Change of Residence Allowance – In Principle Agreement – principles of award construction - order issued

REASONS FOR DECISION

[1] On 10 May 2011, the Police Association of Tasmania (PAT) (the union), applied to the President, pursuant to s.29(1) of the Industrial Relations Act 1984 (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Commissioner of Police arising out of the alleged breach of the Police Award.

[2] A hearing commenced in Hobart on 26 May 2011 and continued on 21 June, 5 July and 20 July 2011. Mrs A Smith and Mr M Kadziolka appeared for the union while Mr T Martin and Inspector S Burke appeared for the employer.

[3] This dispute concerns the non-payment of the higher rate of the Isolated Community Expense Allowance under subclause 10.4.2 (a) and (b) of the Police Award 2011 (the Award) to those members who were appointed prior to 3 March 2011 to those stations specified in the provision.

[4] The PAT maintains that members are entitled to be paid at the higher rates until a period of two years has elapsed from each individual's appointment to their respective stations in accordance with the provision. The PAT seeks payment of the appropriate allowance from the date of operation of the clause, namely 3 March 2011.

[5] Tasmania Police maintain that the higher rate is only payable when the transfer occurs after 3 March 2011.

[6] It is common ground that clause 10.4 is a new clause which came into effect on the creation of the 2011 Award on 3 March 2011.¹ It is however acknowledged that components of the new clause had parallels in the 2010 Award.²

[7] The clauses subject to debate in both awards are set out in the table below:

¹ T13764 of 2011

² T13673 of 2010

POLICE AWARD 2 of 2010	POLICE AWARD 1 of 2011																																						
	<p data-bbox="1128 261 1861 288">10.3 Community Assistance Expense Allowance</p> <p data-bbox="1128 325 2045 416">10.3.1. A member who permanently transfers to one of the following stations:</p> <table border="1" data-bbox="1225 421 1944 1134"> <tbody> <tr><td>Alonnah</td><td>Avoca</td></tr> <tr><td>Bicheno</td><td>Bothwell</td></tr> <tr><td>Bridport</td><td>Bushy Park</td></tr> <tr><td>Campbell Town</td><td>Currie</td></tr> <tr><td>Cygnets</td><td>Derby</td></tr> <tr><td>Dover</td><td>Dunalley</td></tr> <tr><td>Fingal</td><td>Geeveston</td></tr> <tr><td>Gladstone</td><td>Hamilton</td></tr> <tr><td>Kempton</td><td>Lady Barron</td></tr> <tr><td>Liawenee</td><td>Maydena</td></tr> <tr><td>Nubeena</td><td>Oatlands</td></tr> <tr><td>Orford</td><td>Queenstown</td></tr> <tr><td>Richmond</td><td>Ringarooma</td></tr> <tr><td>Rosebery</td><td>Scottsdale</td></tr> <tr><td>Smithton</td><td>St Mary's</td></tr> <tr><td>Strahan</td><td>Swansea</td></tr> <tr><td>Traibunna</td><td>Waratah</td></tr> <tr><td>Whitemark</td><td>Woodbridge</td></tr> <tr><td>Zeehan</td><td></td></tr> </tbody> </table> <p data-bbox="1238 1139 1895 1166">shall be paid an allowance of \$2,500 per annum.</p> <p data-bbox="1128 1198 1973 1257">10.3.2. The allowance shall be paid in equal instalments in the member's fortnightly salary.</p> <p data-bbox="1128 1294 2002 1417">10.3.3. The allowance is paid on the provision that the member occupies, and maintains occupancy, of the Departmental owned or leased residence as their primary place of residence.</p>	Alonnah	Avoca	Bicheno	Bothwell	Bridport	Bushy Park	Campbell Town	Currie	Cygnets	Derby	Dover	Dunalley	Fingal	Geeveston	Gladstone	Hamilton	Kempton	Lady Barron	Liawenee	Maydena	Nubeena	Oatlands	Orford	Queenstown	Richmond	Ringarooma	Rosebery	Scottsdale	Smithton	St Mary's	Strahan	Swansea	Traibunna	Waratah	Whitemark	Woodbridge	Zeehan	
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POLICE AWARD 2 OF 2010	POLICE AWARD 1 OF 2011
	10.3.4. Members in receipt of this allowance are not required to pay rent whilst residing in a police owned or leased residence, on the provision that the residence remains their primary place of residence whilst appointed to the station.
<p>11.4 Isolated Area Expense Allowance</p> <p>11.4.1 The purpose of this allowance is to compensate for excess costs necessarily incurred by a member living in an isolated area and without limiting the foregoing includes partial reimbursement for STD phone calls, freight, fuel and depreciation costs.</p> <p>11.4.2 Where a member is stationed permanently at one of the following stations he or she shall, on the determination of the Controlling Authority, be paid an allowance in accordance with the following rates:</p> <p>(a) Alonnah, Currie, Lady Barron and Whitemark A member with dependent relatives residing with him or her: \$3546 per annum</p> <p>Other (no dependants): \$1769 per annum</p> <p>(b) Queenstown, Rosebery, Strahan, Waratah and Zeehan A member with dependent relatives residing with him or her: \$1769 per annum</p>	<p>10.4 Isolated Community Expense Allowance</p> <p>10.4.1. The purpose of this allowance is to compensate for excess costs necessarily incurred by a member living in an isolated area and without limiting the foregoing includes partial reimbursement for phone calls, freight, fuel and depreciation costs.</p> <p>10.4.2. Where a member permanently transfers to one of the following stations, the member shall be paid an allowance in accordance with the following rates:</p> <p>(a) Alonnah, Currie (King Island), Lady Barron and Whitemark (Flinders Island), \$8,000. per annum for the first two years and then \$5,500 per annum for each year thereafter.</p> <p>(b) Gladstone, Liawenee, Waratah, Queenstown, Rosebery, Strahan and Zeehan, \$5,500 per annum for the first two years and then \$3,000 per annum for each year thereafter.</p> <p>10.4.3. The allowance shall be paid in equal instalments in the member's fortnightly salary.</p>

<p style="text-align: center;">POLICE AWARD 2 OF 2010</p>	<p style="text-align: center;">POLICE AWARD 1 OF 2011</p>
<p>Other (no dependants): \$886 per annum</p> <p>(c) Gladstone A member with dependent relatives residing with him or her: \$886 per annum Other (no dependants): \$450 per annum</p>	
<p>12.10 Change of Residence Allowance</p> <p>12.10.1 A member who permanently transfers from one locality to another and reasonably requires a move from one residence to another and who does not receive either a Property Sale or Property Purchase expense is entitled to payment of a one-off allowance of \$5000 to assist with meeting the expenses associated with a change of residence.</p> <p>12.10.2 A member must complete at least two years' service in the relocated position before being eligible for a further payment under this subclause when transferring.</p> <p>12.10.3 The provisions of subclause 12.10 will be reviewed in June 2010 to ensure continued relevance to the Controlling Authority's human resource management strategy.</p>	<p>11.11 Change of Residence Allowance</p> <p>11.11.1 A member who permanently transfers from one locality to another and reasonably requires a move from one residence to another and who does not receive either a Property Sale or Property Purchase expense is entitled to payment of a one-off allowance of \$5,000 to assist with meeting the expenses associated with a change of residence.</p> <p>11.11.2 A member must complete at least two years service in the relocated position before being eligible for a further payment under this subclause when transferring.</p> <p>11.11.3 A member who is in receipt of the Isolated Community Expense Allowance is not eligible to receive the Change of Residence Allowance upon their transfer into the isolated locality.</p> <p>11.11.4 A member who is in receipt of the Community Assistance Expense Allowance, except those also in receipt of the Isolated Community Expense Allowance, shall receive 50% of the Change of Residence Allowance in accordance with clause 11.11.1 upon their transfer into the designated Community Station.</p>

[8] The matter in dispute relates to the construction of the words *“Where a member permanently transfers..”* in clause 10.4.2 of the Award. The question to be answered is whether this expression is limited to members who transfer after 3 March 2011 (Tasmania Police position) or whether it also includes members who had transferred prior to 3 March 2011 but had been in the new location for less than two years (PAT position). The respective arguments are summarised below.

Tasmania Police Contentions

[9] Mr Martin submitted that this was a new clause which should on any measure be read as having prospective application.

[10] The new clause in dispute was part of a total package which conferred substantially improved benefits to officers who work in the designated areas.

[11] An integral component of the package was the interrelationship between the Isolated Community Expense Allowance and the Change of Residence Allowance. Mr Martin said that under the 2010 Award the \$5000 Change of Residence Allowance was payable in circumstances whereby a member transferred to a designated location. Further, members who were now claiming the higher [\$8000] Isolated Community Expense Allowance had actually been paid \$5000 Change of Residence Allowance.

[12] Mr Martin said the 2011 Award was explicit in that clause 11.11.3 states:

“A member who is in receipt of the Isolated Community Expense Allowance is not eligible to receive the Change of Residence Allowance upon their transfer into the isolated locality.”

[13] Mr Martin submitted that the additional \$2500 Isolated Community Expense Allowance payable for each of the first two years in the designated location equated to the \$5000 Change of Residence Allowance which was no longer available.

[14] Mr Martin said that the employer had administratively determined that members who transferred prior to 3 March 2011 would be paid the lower rate applicable after two years, notwithstanding that the members had been in the new location for less than two years. This, he contended, was the legal and equitable position which properly reflected the intent of the package agreement. Mr Martin said:³

“Mr Kadziolka has stated that at no time did the parties discuss any transitional arrangements for the isolated community allowance.

Deputy President, I cannot comment on that statement as I was not at all of the negotiations, however, I was at the negotiations when we spoke of the removal of the change of residence allowance for those members who would receive the new isolated community allowance, and the fact that they would not receive the \$5000 change of residence allowance on the basis that they would, in fact, receive the similar amount over the first two years by being paid two and a half thousand dollars more in the first two years. It was pretty clear at the time that the higher rate in the first two years was to offset by the removal of the change of residence allowance. The Police Association were aware of this as they endorsed the removal of the change of residence allowance for the members who would transfer after the removal of the change of residence allowance on the basis that

³ Transcript p 21

they would not be disadvantaged, because they would receive the higher rate in the first two years.

Deputy President, what the Police Association is seeking in this dispute is a blatant double-dip arrangement for those members who have received the \$5000 as opposed to those members who transfer after 3 March. This arrangement is not equitable and in our view morally wrong."

[15] In essence Mr Martin submitted, the PAT application sought two benefits to compensate the same purpose.

[16] Mr Martin submitted that the term "*transfers*" can only sensibly be read in the future tense. If the clause was intended to have retrospective effect, it would have used the additional term "*or had transferred*." Alternatively transitional arrangements would have been put in place as was the case with other aspects of the package.

PAT Contentions.

[17] In addressing the ordinary meaning of words used, Mr Kadziolka referred to Macquarie Concise Edition definition of "*where*", viz:

"In or at what place; in what position or circumstance; to what place, point or end; in or at what place; in or at the place, part, part, point; in a position, case etc; to what or whatever place; in or at which place."

[18] It follows, Mr Kadziolka submitted, that "*where*" denotes a particular place, position or circumstance. The word "*transfer*", in the context of this subclause, means to convey or remove from one place to another.

[19] Mr Kadziolka submitted that the verb "*transfer*" can be expressed in past, present or future tenses. The word "*transfers*" is in fact an expression in present tense⁴, not future tense as contended by the employer. In the context of subclause 10.4.2, this means that a member who is in the designated location, is entitled to the allowance. Whether it is the higher or lower allowance, is simply a function of time in the location. Mr Kadziolka said that there is nothing in the subclause which alerts the reader to any other construction.

[20] At no time during the negotiations did the controlling authority propose or discuss the position which it now holds.

[21] The PAT negotiated the package outcome in good faith which is reflected in the in-principle agreement and the award. Not all components of the agreement were advantageous, but the agreement was accepted by members as a package. The same should apply to the employer.

[22] Mr Kadziolka submitted that the whole tenor of the in-principle agreement⁵ is expressed in terms of members currently in place, and is not limited to members who might be in designated locations at some point in the future.

[23] Clause 10.4.1 states the purpose of the allowance "*is to compensate for excess costs necessarily incurred by a member living in an isolated area...*" Again, present tense Mr Kadziolka contended.

⁴ Exhibit A4

⁵ Exhibit A3

[24] Mr Kadziolka referred to the hearing in which the in-principle agreement was incorporated into the Award⁶. In particular he referred to following comments from PAT advocate Mrs Smith:

“These changes are the result of the introduction of the community assistance expense allowance and the isolated community expense allowance. Now, the changes here are that if you are in a location where you in receipt of the isolated community expense allowance, you will not be eligible to claim and to receive the change of residence allowance upon the transfer into that locality.

The isolated community expense allowance is new, and this replaces the existing clause 11.4 of the award, which is isolated area expense allowance. The new allowance at clause 10.4 of the proposed award is paid in addition to the community assistance expense allowance to those stations that qualify, and I will talk about the community station allowance in a minute. The existing locations in receipt of the old allowance will receive the new allowance. While there will continue to be varying rates depending on the location of the isolated locality, the distinction of having a rate for a member with or without dependents has been removed. It’s just – it is a flat rate.”

[25] Mr Kadziolka submitted that the employer had applied the reverse and incorrect construction on this provision. Clause 11.11.3 states that a member in receipt of the Isolated Community Expense Allowance is not eligible to receive the Change of Residence. This, contended Mr Kadziolka, is a quite different proposition to that of a member, who had legitimately been paid the Change of Residence allowance under the 2010 Award, being as a consequence disentitled to the Isolated Community Expense Allowance.

[26] Notwithstanding this reverse and incorrect construction, there are three members who were unable to claim the Change of Residence Allowance who are now denied the Isolated Community Expense Allowance.

[27] Both clause 10.3 Community Assistance Expense Allowance and 10.4 Isolated Community Expense Allowance, have similar wording, i.e:

“A member permanently transfers to.....shall be paid an allowance...”

[28] Yet Mr Kadziolka submitted, there is no dispute as to payment of Community Assistance Expense Allowance. It is paid to all incumbent members.

[29] If the employer’s contention is correct, then there is no legal basis for the payment of the lower (after two years) rate to members, the subject of this dispute.

Principles of Construction

[30] Pursuant to s20[4] of the Act, the parties were invited to make submissions in relation to the principles of construction, as set out in MASSA v ANF.⁷ For convenience, these principles are set out below:

- *Terms of awards (and agreements) must be interpreted in light of their industrial context and purpose, including the*

⁶ T13764 of 2011 p13

⁷ T13586 of 2009 p12-13

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 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)”*

Findings

[31] In an exercise of award construction it is permissible to have regard to the industrial context and purpose and the provision, including the intent of the award makers, if that is capable of being ascertained. In this case however, whilst both parties have their own view as to what was intended, there is a clear absence of a mutuality of intention. It follows that in the absence of such mutuality of intent, the overriding consideration is to objectively apply a meaning to the words used.

[32] It is clear that both parties agreed, that in the future, a member in receipt of the Isolated Community Expense Allowance is not eligible to also claim the Change of Residence Allowance upon transfer into the isolated locality. I do however accept Mr Kadziolka’s contention that this is a different proposition from rendering a member, who had legitimately been paid the Change of Residence Allowance under the 2010 award, ineligible for the Isolated Community Expense Allowance simply as a consequence.

[33] I readily acknowledge Mr Martin’s contention as to the possibility of double counting in some cases. However if it had been intended to limit eligibility to those members who transferred after 3 March 2011, it would have been a relatively simple drafting task to achieve this. That didn’t happen and there is no evidence to suggest that this was the intention of the parties, but was simply overlooked.

[34] I also note the uncontested submission from the PAT that three members who transferred prior to 3 March 2011 did not, for unexplained reasons, claim the Change of Residence allowance.

[35] Mr Martin readily acknowledged that the employer had administratively decided to pay the lower (after two years) allowance to the members in question, as this reflected the intent of the package, at least as perceived by Tasmania Police. I do not for one moment question the genuineness of the employer’s administrative action.

However, if there is no legal entitlement for members transferring prior to 3 March 2011 to the higher payment, then it follows that there is no legal basis by which the lower allowance is payable. When the matter is in contest, administrative convenience, however well intended, cannot override what the words say.

[36] In the absence of any transitional provision, I conclude that the words "*where a member permanently transfers*" must be read as present tense.

[37] I am strengthened in this view by a subsequent variation to the same subclause. Operative from 29 June 2011, the allowances in this subclause were increased.⁸ However the text of the subclause remained unchanged. If I was to accept Mr Martin's contention, then presumably only members who transferred after 29 June 2011 would be eligible for the increased allowance, and those already in place would presumably continue to be paid the allowance as it was on 3 March 2011. This clearly would be a nonsensical outcome but in terms of award construction, I am unable to distinguish this circumstance from that which is before the Commission.

Order

Pursuant to Section 31 of the Industrial Relations Act 1984 I hereby order:

That members who had transferred to a designated community not more than two years prior to 3 March 2011 shall be paid the higher allowances specified in subclause 10.4.2 operative from 3 March 2011. Such payment is to continue until the expiration of two years from the date of the member's transfer to the location.

Tim Abey
DEPUTY PRESIDENT

Appearances

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

Date and place of hearing:

May 26
June 21
July 5 and 20
2011
Hobart

⁸ T13787 of 2011