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TRANSCRIPT OF PROCEEDINGS

O/N 1045

TASMANIAN INDUSTRIAL COMMISSION

DEPUTY PRESIDENT P.C. SHELLEY

T No 11324 of 2004
T No 11477 of 2004
T No 11488 of 2004

GENERAL CONDITIONS OF EMPLOYMENT AWARD

Applications pursuant to the provisions of section 23(2)(b) of the Industrial Relations Act 1984 by the Community and Public Sector Union (State Public Services Federation Tasmania Inc) and the Minister Administering the State Service Act 2000 to vary the above award re location and travel allowances

HOBART

2.30 PM, THURSDAY, 12 AUGUST 2004

Continued from 17.6.04

This transcript was prepared from tapes recorded by the Tasmanian Industrial Commission

HEARING COMMENCED **[2.35pm]**

PN184

THE DEPUTY PRESIDENT: Any changes in appearances?

PN185

MR C. LANE: Madam Deputy President, I seek to leave to intervene in this matter on behalf of the Australian Education Union Tasmanian Branch. I do say if I may quickly state, Madam Deputy President, that I was unaware of earlier hearings on this matter and when informed realised that we have members in the locations who are subject to the provisions of the application and would seek the right to intervene and make a submission on all three matters before you, if that is possible?

PN186

THE DEPUTY PRESIDENT: Thank you. I will hear from the other parties in relation to the application to intervene. Mr Miller, have you got any - - -

PN187

MR MILLER: I have - good afternoon, ma'am, I have no instructions to the contrary.

PN188

THE DEPUTY PRESIDENT: Thank you. Mr Pearce?

PN189

MR PEARCE: No objection, Madam Deputy.

PN190

THE DEPUTY PRESIDENT: Thank you. Leave is granted, Mr Lane.

PN191

MR LANE: Thank you.

PN192

THE DEPUTY PRESIDENT: Now, where we were up to is that Mr Pearce has actually presented some submissions but Mr Miller still wanted to address matters in T11477 and T11324 so I propose that Mr Miller does that and then Mr Lane makes any submissions and that Mr Pearce then be given another opportunity to make submissions in response if he wishes. Is that acceptable to the parties? Okay, Mr Miller?

PN193

MR MILLER: Before I commence ma'am, there is one or two threshold issues that I need to advise the parties of. In T11324 the proviso clause at clause 24(b) - - -

PN194

THE DEPUTY PRESIDENT: So you say - in the draft order in the application, is that what you are talking about?

PN195

MR MILLER: Yes.

PN196

THE DEPUTY PRESIDENT: Pardon?

PN197

MR MILLER: Yes, ma'am, sorry.

PN198

THE DEPUTY PRESIDENT: Thank you. Clause?

PN199

MR MILLER: Twenty four (b).

PN200

THE DEPUTY PRESIDENT: Yes.

PN201

MR MILLER: Should read as follows:

PN202

> *Provided that an employee with dependents residing with the employee shall be regarded as an employee without dependents if their partner -*

PN203

and I think these words need to be added in, "or spouse":

PN204

> *...of entitlement arising from employment is in receipt of the district allowance.*

PN205

The reason there being, ma'am, is that in reviewing the - an issue which I will come to, the Relationships Act 2003. It is necessary to incorporate those words to cover what could be regarded as a partner, as defined, and the common understanding of the word spouse.

PN206

THE DEPUTY PRESIDENT: Okay. Now, do you have those words in writing, Mr Miller, to hand up?

PN207

MR MILLER: I have them only on my speaking notes unfortunately but I can undertake to provide copies to all parties at a later stage or even - - -

PN208

THE DEPUTY PRESIDENT: Yes. It would have been preferable if you had had copies so that the parties and myself can have them in front of us so we could more clearly comprehend exactly what it is saying.

PN209

MR MILLER: I do apologise.

PN210

THE DEPUTY PRESIDENT: So you are seeking to amend your application in order to insert those words?

PN211

MR MILLER: Indeed.

PN212

THE DEPUTY PRESIDENT: Okay. Is there any objection to that amendment of the application?

PN213

MR PEARCE: No objection.

PN214

THE DEPUTY PRESIDENT: Okay, so amended.

PN215

MR MILLER: I repeat it is only the words, or spouse, after the word partners as indicated.

PN216

THE DEPUTY PRESIDENT: Okay.

PN217

MR MILLER: Thank you. I should also indicate, ma'am, that I have correspondence addressed to you, dated today.

PN218

THE DEPUTY PRESIDENT: From the Health and Community Services Union?

PN219

MR MILLER: That is correct, authorising me to appear on their behalf in these matters.

PN220

THE DEPUTY PRESIDENT: Yes. I think that we had previously received such a letter.

PN221

MR MILLER: That is correct, that was dated 16 June but in conversation with Mr Jacobson it was thought appropriate to advise the Commission.

PN222

THE DEPUTY PRESIDENT: Yes, belts and braces.

PN223

MR MILLER: Just the braces, ma'am - not terribly colourful but they work. I intend to address initially the matter T11488/2004.

PN224

THE DEPUTY PRESIDENT: That is in respect of the travelling allowances. You have already addressed that application so hopefully you are not going to repeat submissions already made, you are enlarging upon those already made.

PN225

MR MILLER: I hope I shall not repeat myself, however in transcript I did make note of the fact that I wished to come back to speak to this issue; I shall of course be brief.

PN226

THE DEPUTY PRESIDENT: Yes, continue.

PN227

MR MILLER: There is no indication or request from the CPSU that the current number of air fares off the island, that is currently in the award as three, is insufficient for current needs at this stage.

PN228

THE DEPUTY PRESIDENT: Okay, it is up to three - it is not three, it is up to three.

PN229

MR MILLER: Up to three, yes. The issues of reason behind the inclusion of the current numbers in the award is not under review. It is contended that the position currently held of an employee has been considered by the head of agency and the post or the posts have been - that they hold, have been classified in accordance with the classification standards of relevant awards, that is the State Service Act section 34(1)(d). Thus posts that people hold on the islands have been tested under work value principles and they have been given a salary range as being considered under awards and classification standards of this - that have been through this Commission as being appropriate for the post or posts.

PN230

Thus we contend a post undertaken at say Admin and Clerical Level 3 is recognised as being the rate for that job within the State Service of Tasmania, regardless of its location. Flights off the island therefore cannot be interpreted as being a recompense for additional costs for persons being recruited from off the island without discovery of the origin or reasons of that clause. That question is not at issue in this hearing. This Commission has found that employees on the Bass Strait Islands are subject currently to certain discretionary powers and reasons for entitlement for considerations put to it that to access air fares off the island for - - -

PN231

THE DEPUTY PRESIDENT: Sorry, what did you just say? Did you say this Commission has found that people are entitled to a discretionary payment? I don't know that this Commission has ever found any such thing.

PN232

MR MILLER: Well, persons who are - or the Commission has indicated by the award being placed as it is, or being found as it is, the issue of air fares off the island having been run through this Commission previously to get it into the award, those persons are now, the agencies are saying, are subject to discretionary powers of the head of agency.

PN233

THE DEPUTY PRESIDENT: Oh the agency is saying, not the Commission is saying.

PN234

MR MILLER: And the reasons are - and reasons are entitled for consideration put to it that to access air fare off the Bass Strait Islands for up to three times per

year. What the CPSU seeks to do only is to remove what we consider to be outdated wording as previously indicated by a previous Deputy President and a current Commissioner. To go beyond or outside of those issues is a matter that is not sought by the applicant. We are purely and simply maintaining that we have been given a direction by this Commission which we are following faithfully and to some extent extending it, I would admit, in order to remove outmoded wording.

PN235

Air fares could have been considered to be accessible to employees in recognition for such matters as medical treatments unable to be accessed off the Bass Strait Islands, social, education, recreational needs and as is in the award for additional expenses. Nothing has been put forward by the Minister administering the State Service indicating that this proposition is incorrect and we would find it abhorrent that the Minister should even attempt to remove long standing air fares access to existing or indeed future staff. However, the matter of removal or interpretation is not at stake in any of the applications from either the CPSU or the Minister administering the State Service and the TIC could thus - cannot involve itself other than, I believe, to address the matters in terms of the application.

PN236

THE DEPUTY PRESIDENT: So you are saying that you have got members who currently are receiving it, who were resident on the islands at the point of recruitment?

PN237

MR MILLER: Indeed I am.

PN238

THE DEPUTY PRESIDENT: Okay.

PN239

MR MILLER: And in previous cases - - -

PN240

THE DEPUTY PRESIDENT: So it is not just DPIWE, it is other departments?

PN241

MR MILLER: Indeed, ma'am.

PN242

THE DEPUTY PRESIDENT: Yes.

PN243

MR MILLER: I have to modify my response by saying that albeit the award does not indicate that pro rata entitlements - sorry, that pro rata payment is entitlement. It is certainly true and is certainly encompassed in what I call the Abey decision that air fares - and it was mentioned on transcript that certain departments, Education being one of them, is at the present time paying - and I believe that evidence was produced although I can't quite recall it now, that persons in the Education Department who were part time employees were receiving pro rata entitlements for air fares up to three times per year off the island.

PN244

I contend that as nothing has been put to the Commission that can be reasonably described as cogent argument or to show due cause why the clause should continue in its current form, then the Commission should uphold the tenor and spirit of the variation application emanating from the previous decisions of the former Deputy President Robinson and Commissioner Abey. If the Commission pleases.

PN245

THE DEPUTY PRESIDENT: Thank you. And that completes your submissions in relation to all of the applications?

PN246

MR MILLER: No.

PN247

THE DEPUTY PRESIDENT: No, okay, keep going then.

PN248

MR MILLER: Perhaps it is appropriate that at this time I hand up some exhibits for numbering. I really apologise to Mr Lane, I didn't realise that he would need copies also, ma'am, but I will hand a copy to - we will share ours - hand a copy to Mr Pearce.

PN249

THE DEPUTY PRESIDENT: Thank you. We will mark the Relationships Consequential Amendments Act RM1.

EXHIBIT #RM1 COPY OF RELATIONSHIPS CONSEQUENTIAL AMENDMENTS ACT

PN250

THE DEPUTY PRESIDENT: The Relationships Act RM2.

EXHIBIT #RM2 COPY OF RELATIONSHIPS ACT

PN251

THE DEPUTY PRESIDENT: The High Court decision in The Queen v Spencer, RM3.

EXHIBIT #RM3 COPY OF THE HIGH COURT DECISION IN THE QUEEN V SPENCER

PN252

THE DEPUTY PRESIDENT: And then - - -

PN253

MR MILLER: That is a full extract, ma'am from TP1 that Mr Pearce handed up at the last hearing.

PN254

THE DEPUTY PRESIDENT: Okay. Well, it is an A3 size document, we will mark RM4.

EXHIBIT #RM4 FULL EXTRACT OF TP1

PN255

THE DEPUTY PRESIDENT: The document emanating from the Public Service Commissioner in Hobart on 2 October, whatever year that might be.

PN256

MR MILLER: Nineteen thirty.

PN257

THE DEPUTY PRESIDENT: Nineteen thirty, we will mark that RM5.

EXHIBIT #RM5 COPY OF DOCUMENT FROM THE PUBLIC SERVICE COMMISSIONER IN HOBART DATED 02/10/1930

PN258

THE DEPUTY PRESIDENT: The Government notice we will mark RM6.

EXHIBIT #RM6 COPY OF GOVERNMENT NOTICE

PN259

THE DEPUTY PRESIDENT: The letter from the Department of Primary Industry to Mr Willingham, dated 1991, we will mark RM7.

EXHIBIT #RM7 LETTER TO MR WILLINGHAM DATED 1991

PN260

THE DEPUTY PRESIDENT: And the double sided document with nothing except a heading on the first page - I guess that is right, that is - - -

PN261

MR MILLER: That is part of a response from Mr Willingham, ma'am.

PN262

THE DEPUTY PRESIDENT: Okay, well the document that bears Mr Willingham's signature, or a copy thereof, we will mark RM8.

EXHIBIT #RM8 DOCUMENT BEARING MR WILLINGHAM'S SIGNATURE

PN263

MR MILLER: If you will bear with me, ma'am, I will just mark my exhibit sheet up if I may?

PN264

THE DEPUTY PRESIDENT: Okay. Now, which application are you addressing now?

PN265

MR MILLER: What I have done, ma'am, is to combine the remaining two issues and addressing them as one submission.

PN266

THE DEPUTY PRESIDENT: That is fine.

PN267

MR MILLER: Commissioner Abey, in his decision of T11180/2004, directed the CPSU to submit to it, that is to the Commission, an application to vary the award in accordance with his directions contained in the decision mentioned above, T11180, that is that clause - sorry, that decision reflects on all fours I believe the decision of the then Deputy President Robinson in his decision on a like matter at T3218/1991.

PN268

THE DEPUTY PRESIDENT: So that is to delete the offending words at the determination of the controlling authority and also to insert the word shall.

PN269

MR MILLER: Insert the word shall, indeed, ma'am. That is - I am sorry I have to repeat myself, that is that at clause 24(b)(2) vary to remove the - by removing the words, 'may on the determination of the controlling authority', and replacing those words with the word, 'shall'.

PN270

To delete the word, 'permanently' and this has been submitted to the Commission as directed. The CPSU has taken what we believe to be a pro-active stance by removing obvious gender biased language. The CPSU has sought to remove the words, 'his spouse' and to replace them with non-sexist language, 'partner and spouse' as we indicated on the threshold matter.

PN271

This word, spouse, and its meaning is taken from the - that described in the Tasmanian Industrial Relations Act and it follows through at various clauses within that Act such as clause 3, clause 6 and 5. The extracts that you have are at exhibits 1 and 2.

PN272

THE DEPUTY PRESIDENT: Yes, you said the Industrial Relations Act, I think you meant the Relationships Act.

PN273

MR MILLER: Did I, I beg your pardon. I do beg your pardon, ma'am. Tasmanian Relationships Act, together with the Relationships Consequential Amendments Act 2003. In support of the Deputy President, Commissioner Abey is seeking to remove those words at the discretion of the controlling authority. I take the bench to exhibit 3, which is a decision of the High Court of Australia, Queen v Spencer, ex parte The Waterside Workers Federation of Australia 1957 100 CLR 312, in which - and I take you to the bottom of the page almost, approximately six lines up from the bottom of the page and I read into transcript:

PN274

Decision of Dixon, McTeir and Williams, Webb, Kitto, Taylor et al in Sydney ...(reads)... and must be governed or bounded by some ascertainable tests or standards.

PN275

I take some comfort in those words and I contend that what we are seeking to do on the direction of this Commission falls in line with those words which are contained in that decision of the High Court. I won't go back to the words of Messrs Deputy President Robinson and Abey but I think that Mr Deputy President Robinson described the situation accurately, concisely and fairly.

PN276

THE DEPUTY PRESIDENT: Perhaps you can expand a little bit more of exactly how this quote from a Full Bench of the High Court has applicability to the current situation?

PN277

MR MILLER: The words that His Honour uses is:

PN278

Necessary to add that discretion must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards.

PN279

I would suggest, ma'am, that the discretionary powers currently in the award and currently under review by this Commission in this particular instance are such as that there are no ascertainable tests or standards. It is purely on the whim of a so-called controlling authority to determine whether or not a person should or should not have a particular allowance. If one went back to the agency to ascertain by what test or what standard they applied to the case to be able to give a decision on that, there is no - I believe no legitimate standards or boundaries by which they make that decision. And Deputy President Robinson himself indicated the same thing. It is not for a controlling authority, which is an outdated - and in actual fact doesn't exist any longer, it is not up to a controlling authority to make those decisions but this Commission.

PN280

Mr Pearce handed up his exhibit TP1. If I may talk to that. In 1974 there was a concept of permanency within the State Service which I believe has now changed. Employees no longer have any entitlement, perceived or real, that they own a discrete position in a discrete location, and that they cannot be transferred. Indeed, the recently departed Premier Bacon required of the State Service

generally that posts should, where feasible, indicate that the work required of an advertised post need not - need not be undertaken at any particular location. This is to enable successful applicants to work remotely using technology to fulfil their duties. The State Service Gazette has indicated and has conformed in appropriate instances to that directive, which was a result of a benchmark of the Tasmania Together program.

PN281

THE DEPUTY PRESIDENT: Mr Miller, I don't know that Mr Pearce would necessarily be against you on the argument that you are putting forward at present. If you look at their application, they are saying, putting aside the argument based on whether you have relocated or are already located there, that the allowances should apply, irrespective of whether the employee is a permanent employee or a fixed-term employee, and there is no mention - I mean, it doesn't seem to me that they are seeking to limit it through any notion of being fixed, temporary or permanent. I really can't speak for Mr Pearce. I should let him speak for himself, but - - -

PN282

MR PEARCE: Your summary is on all fours with our position.

PN283

THE DEPUTY PRESIDENT: Thank you. So he is not against you on the argument that you are currently putting forward.

PN284

MR MILLER: I am pleased to hear it, but if I may - in any case, I have just about finished that particular part. There are examples ad nauseam on the gazette to that effect. Employees are now, by arrangement, working from home in several instances. Head of agencies appear to take some comfort in that they consider the State Service Act at section 34E authorises them, that they can relocate employees. Now, that matter is yet to be tested and I don't believe that too much at this point in time falls from that, but I would like to get that on transcript.

PN285

It is interesting to take Mr Pearce's exhibit and delve a little further. The Minister Administering the State Service takes the issue of the mainland allowance and attempts to persuade the bench that this matter should be given weight. However, if you then turn to exhibit RM4, subclause (e), bottom of page 3:

PN286

> *Where an officer is required in the performance of his duties to reside permanently in one or other of the following districts* -

PN287

etcetera. Now, if the bench accepts there has indeed been a change to the concepts contained in the '73 and the '84 State Service Acts, then it is patently obvious that as an employee there is no entitlement to reside permanently in any location as an employee of the State Service. That is, the employer is currently espousing that section 34E of the State Service Act 2000 gives them power to move employees from one location to another as operational needs dictate. But it appears also to be saying that to access the allowance in question you have to be

permanently resident on the islands, but that they have the right to locate you off the islands when it suits. So that is the notion that permanent residency is, I believe, negated.

PN288

Permanent indicates that something is immutable, forever, never to change, no matter what reason is proposed. I suggest that not even the Minister Administering the State Service can give the bench that assurance in terms of this issue. Certainly it would change the whole tenor of current employment practices within the State Service. It is almost like having your cake and eating it.

PN289

THE DEPUTY PRESIDENT: It is interesting to note that in this exhibit, which is the Public Service Conditions of Service No 4 of 1974; that is correct - that the district allowances are not at the determination of the controlling authority back at that point in time. Do you know when "at the determination of the controlling authority" was inserted?

PN290

MR MILLER: I have been unable to ascertain that.

PN291

THE DEPUTY PRESIDENT: Okay. But 30 years ago it was a right, if you were permanently - if the job was on the island:

PN292

Where an officer is required, in the performance of his duties, to reside permanently -

PN293

then it was an unfettered right to that allowance.

PN294

MR MILLER: It would appear so.

PN295

THE DEPUTY PRESIDENT: Yes, it would appear so. It might not be the case. There might be some words lurking elsewhere that qualify that, but certainly not in there.

PN296

MR MILLER: I can't find them; certainly not in the remainder of the exhibit that Mr Pearce put to the bench.

PN297

MR PEARCE: Madam President, would it assist if I were to merely state that the use of the word "permanent" is to distinguish between the nature of the residency on the island and to exclude persons who are there temporarily or itinerantly?

PN298

THE DEPUTY PRESIDENT: Well, you may continue.

PN299

MR MILLER: That may be Mr Pearce's submission or interpretation, but until such time as that interpretation is tested it is but conjecture.

PN300

THE DEPUTY PRESIDENT: Yes, I think that was a submission, not a clarification, but continue.

PN301

MR MILLER: There is nothing in the award or evidence presented that there are caveats or restrictions on employees accessing the allowance by showing original residency or not. The words are there. This Commission has directed that certain words are to be removed and/or added to reflect the Tasmanian Industrial Commission decisions. It has not required the parties to extrapolate on the reasons behind the allowance. If it saw the need to do so, it would have raised the issue. It hasn't. So the reasons for the allowance are not before us here to be discussed or attempted to be interpreted today. I submit that nothing has been produced by matter which negates the decisions of Messrs Commissioner Abey and Deputy President Robinson. No evidence was produced by MASSA that their propositions that the location is not for all employees living on the islands, regardless of the place of recruitment, or by transfer by direction.

PN302

Mr Pearce some years ago astounded me by coming back and using the Harvester case as a means to persuade the Commission to give a ruling in his favour and I now take him back to 2 October 1930 in which, in exhibit RM5, a memorandum from the Office of the Public Service Commissioner dated 2 October 1930 indicated to the Honourable Chief Secretary that the words "if employed on" be removed from district allowances clauses, and the words "if residing on" be inserted.

PN303

THE DEPUTY PRESIDENT: So this is RM5?

PN304

MR MILLER: This is RM5.

PN305

THE DEPUTY PRESIDENT: Okay. Where does it say that?

PN306

MR MILLER: Sorry, because of the extreme age of this document, the print - - -

PN307

THE DEPUTY PRESIDENT: Which paragraph are you - - -

PN308

MR MILLER: It is the last one, ma'am, I think I take you to and I read into transcript:

PN309

There are others on the north-west coast also drawing district allowance. Could the situation be met by adopting the regulation of the Education

Department, but instead of using the words "if employed on" prescribe "if residing on".

PN310

That is, if residing on the north-west coast. Later, on 5 February 1931, those regulations were changed and gazetted by gazette notice number 36, therefore any kind of issue of permanent residency was removed at that date.

PN311

THE DEPUTY PRESIDENT: And married officers got twice as much as unmarried officers. Of course, that is the Harvester decision, isn't it? They have got to be able to support a family in modest comfort.

PN312

MR MILLER: Ask Mr Pearce about the Harvester decision, ma'am. He is an expert on it. He will no doubt regale you with it very shortly.

PN313

MR PEARCE: Fear not, Madam Deputy.

PN314

THE DEPUTY PRESIDENT: Pardon?

PN315

MR PEARCE: Fear not.

PN316

MR MILLER: My further research showed also some issues in the early 1920s, but I won't be frivolous. We then go to exhibit number 7 - - -

PN317

THE DEPUTY PRESIDENT: Yes.

PN318

MR MILLER: - - - a letter from - - -

PN319

THE DEPUTY PRESIDENT: The indignant response to Deputy President Robinson's decision.

PN320

MR MILLER: A most fair decision and I can't understand why on Earth a person such as a secretary of an agency would rail against such a concise, erudite decision. I just can't understand it. However, the view of the secretary is expressed there within. He does indicate that it is his view that it is intended to compensate employees who are transferred to the islands from more central or less remote locations. I have no understanding where that conclusion could be drawn from because as I have already advised a position is classified in accordance with the work value of that job. Anything over and above that, by way of remote location, is not an incorporation into the salary wage, it is for expenses and other issues over and above the work value that has been decided for particular positions. At the bottom paragraph of the first page, ma'am, the words are:

PN321

I wonder, however, if the Deputy President is aware of the greater implications of his interpretation.

PN322

There was no interpretation. There was application of the award. The matter was, I believe, a dispute lodgment, not an interpretation. Excuse me, if the bench pleases, if I am nitpicking, but I think it should be pointed out. He then goes on to say at the bottom of page 2 of that same letter, and I quote:

PN323

It follows too, that similar "anachronistic" references in other public sector awards will be removed so that agency heads will have no "perceived discretion" to, among other things, refuse an increment to an employee whose conduct, diligence and/or efficiency has been unsatisfactory.

PN324

It appears to me that the defences attempting to be thrown up by the agency is but to ensure that powers of head of agency, discretionary powers, are contained within, or retained, I should say, by heads of agency. There appears to be a concern that their so-called powers are being shorn from them, when in fact the law of this State, this Commission, has indicated that it is unfair and unjust that those words be included in the same ways in which they are at the present time and should be removed, and again I come back to the fact, we are following a decision of this Commission twice, twice over.

PN325

I take you to exhibit 8, ma'am. Mr Willingham indicates that he is somewhat confused and indicates that residents on the Bass Strait islands who are engaged de novo should not attract the district allowance. Well, if that was the case, then I would have thought that Mr Willingham, in his capacity, would have at some stage attempted to lodge with this Commission to remove those - or to retain words that he believed were appropriate to the award. That has never been followed through.

PN326

THE DEPUTY PRESIDENT: But he is not saying that that is one thing which should be read; he is saying he is agreeing with the proposition.

PN327

MR MILLER: And if he agrees with that proposition why didn't he do anything about it?

PN328

THE DEPUTY PRESIDENT: But I understand - I don't know whether it is in these proceedings, but in similar proceedings, that the head of agency was acting on a policy that had been in place for 20 years that had emanated from the Office of Industrial Relations. So they are acting on a policy, not on the award provision.

PN329

MR MILLER: What I was saying is, if there has been recognised an issue with the award or its application, which gave cause for concern to the employer, then presumably they should have moved to rectify that.

PN330

THE DEPUTY PRESIDENT: Well, they are doing it now.

PN331

MR MILLER: And I am moving to rectify an omission on the part of the CPSU, which is only 10 years old, in accordance with directions from this Commission.

PN332

THE DEPUTY PRESIDENT: Thirteen; 13 years.

PN333

MR MILLER: I do beg your pardon. 1991.

PN334

THE DEPUTY PRESIDENT: 1991.

PN335

MR MILLER: In that document even Mr Willingham indicates he makes no distinction between temporary and permanent employees, which was at the time that the Beeton case went through by Deputy President Robinson. I note from the award - that is the General Conditions of Employment Award - that the definition clause at 7 defines an employee, but does not define who the employer is, and that term and word "employer" is used again, ie, at clause 13 for instance. Again, at clause 16(a):

PN336

An employer is required by the head of agency, with the approval of the controlling authority -

PN337

and similarly at subclause (b). There exists confusion, which I believe needs to be addressed at a later stage, as it may be, with the terminology being used throughout this award, but this application is to vary in the terms sought and that is all that is in front of us for determination at the moment. I have no confidence in any premise from any source that such matters as are laid before you today will in fact be picked up and dealt with under, say, outcomes from any proposed award restructuring or modernisation in the foreseeable future. Bitter experience shows, unfortunately, that these issues, which often are contained under clauses of various awards, that something is going to happen within the life of the agreement, etcetera, tends, because of workloads and political pressures, etcetera, to be put on the back-burner, shall we say.

PN338

THE DEPUTY PRESIDENT: Well, it is open to any part to the award to make an application at any time under section 23 to have the award varied.

PN339

MR MILLER: I understand that, madam, but as I was saying, there are discussions between - or hopefully going to be discussions between the parties who are party to the last public sector wages agreement on various issues which also fall in line with various awards of this organisation, such as the General Conditions of Employment Award and salary awards. Certain issues are to be removed, restructured and inserted in those awards at some stage within the next

three years. This is not one of them, and I still fall back to my original premise, that I don't have any real confidence in the fact that those types of issues will be picked up by award restructuring proposals. There is a raft of issues there.

PN340

THE DEPUTY PRESIDENT: But you can still make application to have anything amended at any stage and argue it on its merits.

PN341

MR MILLER: Unfortunately, ma'am, I cannot. I am but a mere functionary.

PN342

THE DEPUTY PRESIDENT: Your organisation can.

PN343

MR MILLER: Indeed. I would rebut in total the application made by MASSA.

PN344

THE DEPUTY PRESIDENT: There is nothing in it that you might want to - that you can't see any merit in?

PN345

MR MILLER: Apart from - apart from that - I believe it is at clause 24(b) - 24, location allowances, subclause (b) as follows - this is item 2 of the claim by MASSA. That is, and I quote into transcript:

PN346

> *(iii) Where a part-time employee is eligible for an allowance under paragraph (ii) such allowance shall not be subject to any proportionate reduction.*

PN347

I go along with that.

PN348

THE DEPUTY PRESIDENT: I thought you might.

PN349

MR MILLER: The cost for an individual coming off the island, no matter whether they are on a part-time, temporary, full-time, permanent or whatever, is still the same. The costs are exactly the same for an employee, a non-employee, an unengaged person, etcetera, etcetera; it still costs you to get off the island, and I believe - - -

PN350

THE DEPUTY PRESIDENT: I don't really see - I think I said it before - I don't see how you can have a pro rata air trip.

PN351

MR MILLER: Well, you get half way and then jump out.

PN352

THE DEPUTY PRESIDENT: Parachute.

PN353

MR MILLER: Or go by sea half the way and get picked up at Seal Island. And it is good to see that MASSA doesn't discriminate against part-time staff and that, I think, again falls - I would suggest falls on all fours with Deputy President Robinson's and Abey's decisions. Going to clause 32, I would suggest that having been directed by a head of agency - I don't understand what that means, because as far as I can understand it, under the Act it is either a voluntary transfer to go on from one place to another - it is either a voluntary transfer, a secondment being voluntary, a promotion, and a person taking up a position from outside the State Service.

PN354

Now, I really find it difficult to indicate or to be shown that those instances can be described as being directed in an authoritarian sense. Such direction necessitates the employee being both relocated to, and taking up permanent residence in that district, and it just fails on those counts. I believe that the application of the Minister undermines those two previous decisions of Robinson and Abey. There is no such thing any longer as being permanently stated in the State Service. No one can say that they are there for life whatsoever.

PN355

We reject the application of MASSA almost in its entirety for the reasons already alluded to in matters 3219 of '99, T11180 of '04 and T11489 of '04. The only part of that application of the Minister that we can agree to, and we do so, is that part of his application seeking to vary clause 24(b)(iii) which removes proportionate reduction, that is pro rata air fares for part-time staff.

PN356

I would suggest, ma'am, to accede to the application of MASSA would, with a certain inevitable elegance, undermine the decisions of Robinson and Abey; two decisions which have never been appealed or contested in this Commission by MASSA. I commend our applications, our amendments, to you. I decry the application of the Minister apart from that particular part already mentioned. If the Commission pleases.

PN357

THE DEPUTY PRESIDENT: Thank you. Mr Lane?

PN358

MR LANE: Madam Deputy President, unfortunately the Australian Education Union, Tasmanian Branch, was for some time unaware of the initial proceedings in this matter and as a consequence our knowledge of what has already occurred or been said is somewhat limited.

PN359

THE DEPUTY PRESIDENT: Do you want a short adjournment to be provided with the transcript of previous days of hearing to enable you to read it?

PN360

MR LANE: Madam Deputy President, having listened to my colleague from the CPSU, I believe that that may only result in me repeating certain things which have been said and I don't think that is necessary. I think I can safely just state our support for much of what has already been said, but I do wish to make a short

submission to you and I don't think it is really necessary for me at this stage to hold up proceedings further, but I thank you for your offer.

PN361

I intend today, Madam Deputy President, to focus solely on three aspects. Firstly, I want to have a look at the employer's applications; I then want to briefly look at the application of the CPSU, and I then wish to mention some of the factors that I think this Commission should consider in coming to a decision on the claims that are before you.

PN362

Just to begin, Madam Deputy President, I keep on being reminded when I have read the applications of the fact that I have been in this game for many years, probably far too many, actually, and I do remember those times where the employer did all it could to make life difficult for its employees. These times saw such things as moves to reduce pay, or eliminate the annual leave loading, or refuse to negotiate reasonably with the unions, and at one stage even some massive cuts in employee numbers. Now, things have improved. We do grant you that. So the question may be asked, why look at the dim dark past at this time? Well, quite frankly, Madam Deputy President, the employer's application is reminiscent - reminiscent of the unreasonable, illogical and unjustifiable approach taken to industrial employee relations so many years ago.

PN363

Having said that, I would like to focus attention - I would like to move to the GCOE Award, particularly on paragraph (ii) of subclause 24(b), which deals with the right of employees to a district allowance because of where they are located. That is basically what this is about. The employer, in looking at this particular paragraph, seeks to have the entitlement to this allowance restricted, and that restriction to be based on the following. Firstly, the employer's application says:

PN364

> *Employees must have been directed to undertake their duties in that location.*

PN365

Secondly, their application says:

PN366

> *Employees must be required to relocate to and then reside permanently in that location prior to them being able to access the allowance.*

PN367

Madam Deputy President, it has always been my belief that award provisions must be logical and easily interpreted, easily comprehended, and easily applied. What the employer has proposed contains none of these elements. In fact it appears to run contrary to all of them.

PN368

I would like to look at the logic of the employer's application or the lack thereof. The clauses proposed says it will apply to employees whether permanent or fixed term, or, if you like, temporary. So it will apply to permanent employees and fixed-term employees. How can it apply to fixed-term employees when it

requires that they reside permanently in that location? It is totally contradictory. So if successful with its application, the employer would be able to immediately deny the allowance to fixed-term temporary employees as they would be unable to demonstrate that they had relocated to reside permanently in that location. And a previous comment by Mr Pearce seemed to suggest the truth of that, that it would not apply to those who are temporarily moved into such locations.

PN369

In fact, Madam Deputy President, how could any employee demonstrate that they would permanently reside in their new location? Consequently, the employer's proposal could result in no persons receiving the allowance. I realise that teachers don't come under this award, Madam Deputy President, however there is no doubt that if there was success on the employer's part with their application, they would immediately seek similar provisions elsewhere.

PN370

THE DEPUTY PRESIDENT: Well, this is why you might have benefited from reading the transcript, because Mr Pearce did foreshadow that if the Government were successful then moves would be made to vary a number of awards in like manner, and I think a number of occupations were referred to.

PN371

MR LANE: Well, yes, and given that fact there is no doubt that most or many of the employees who would be affected would be not only just the teaching support - or the support staff in schools, but teachers in schools within these locations. Now, given that the proposal put forward by the employer, Madam Deputy President, if that were the case, very few teachers would be eligible to receive the allowance. The vast majority of teachers, whether permanent or temporary - and many of them are temporary or fixed term - go to these areas for a limited amount of time, probably three years, because that is provided for under an agreement, a transfer agreement which we have with the employer. And in such circumstances, Madam Deputy President, they could not claim to have taken up permanent residence. How could you? "I'm only here for three years, or four maybe." So immediately the vast majority of such employees would be denied the allowance. Now, such an outcome is outrageous, especially when we look at the purpose of the allowance, which I will comment on later.

PN372

What do we, or more precisely, what does the employer mean by "directed"? Does that exclude those who seek to go to such locations, even if for a long time, or for a limited period of time? Does one need to be ordered, or instructed to move residence permanently to the location? What is meant by "permanent residence"? If it does not mean "permanent", which according to the Macquarie has such things as "lasting or intending to last indefinitely, remaining unchanged, not temporary, enduring, abiding"; if it is not one of those, then the use of the word is a nonsense. Such uncertainly and the ability, especially by the employer, to interpret and therefore apply the provision as it sees fit makes their proposition totally unsuited for inclusion in any award.

PN373

Madam Deputy President, the comments I have made relating to the employer's proposed amendments to paragraph (ii) of subclause 24(b) could also be said

about their suggested changes to paragraph (ix), subclause (c) of clause 32. That is the one to do with getting off the islands, travel allowances, which regulates the access employees have to assistance in leaving the Bass Strait islands for recreation leave and medical purposes. Yet again we see here another attempt to unjustifiably differentiate between employees who are faced with exactly the same difficulties, regardless of whether they were directed to that location, or intend to live permanently there. The grounds proposed for that intended differentiation are not acceptable. They would create an inequity within workplaces and would cause and create problems between employees undertaking the same work, faced with the same difficulties, and yet being treated differently.

PN374

Having said that, Madam Deputy President, I am inclined to comment more favourably on that part of the employer's proposal regarding clause 24(b)(iii), which provides the same access to part-time employees. Now, this is a fair and reasonable proposition. Looking at the purpose of the allowances there is no doubt that the need for the allowance is created by the location where you have to reside. It doesn't depend on whether you are full time, or part time, or permanent, or temporary, or whether you were directed to that location, or volunteered to go to that location; it has nothing to do with those factors.

PN375

Now, I wish to look briefly, Madam Deputy President, for the purpose of the allowance in question, which we are all very aware of, but on behalf of the Education Union, would like to place it on record. For the district allowances provided for in clause 24, the purpose is clearly stated and it states:

PN376

> *The purpose of this general allowance is to compensate for extra costs necessarily incurred by an employee living in an isolated area.*

PN377

Now, as far as I am aware, Madam Deputy President, the cost of living in such a location is the same for all employees, whether directed, whether you volunteered, whether you are permanent, or you are temporary, or full time, part time, or whether you previously had resided there or you have moved into the area. I think given this fact, Madam Deputy President, it is an appropriate time to note, especially for Mr Pearce, who is representing the employer, that in exercising its jurisdiction, this Commission must act according to equity and good conscience. Clause 20 of the Act requires that:

PN378

> *In exercising its jurisdiction the Commission shall act according to equity, good conscience and the merits of the case.*

PN379

That alone should be reason enough for the employer to withdraw their application, which lacks any notion of equity.

PN380

As far as clause 32, travelling allowance, is concerned - that is to travel off the islands - in particular subclause (c), travelling - in paragraph (ix) concerning

assistance for employees on the Bass Strait islands who wish to leave for recreation leave or medical purposes, the purpose of the assistance here is not as clearly stated as it was with the previous clause. However, Madam Deputy President, one would not need to be Einstein to realise that in order to attract and retain employees in such locations, whether resident on the island or not prior to employment, such assistance is more than helpful in attracting and retaining people in employment.

PN381

Madam Deputy President, in moving to the proposed amendments to the award as proposed by the CPSU, I wish to do so via the two previous decisions of members of this Commission, and I won't - which are directly pertinent and which I am sure have been referred to and I know have been referred to in these proceedings. Now, my reference to these decisions may not be in passing, however, it will be brief, because the decisions themselves are quite clear, especially in providing guidance to the union as to the appropriate course of action.

PN382

Firstly, Madam Deputy President, I would like to refer to matter T3218 of 1991, which is the decision of Deputy President Robinson on 8 October 1991, and he points out quite clearly at the beginning of his reasons for decision the purpose of the general allowance - he is referring to the district allowance here - to compensate for excess costs necessarily incurred. In part of his decision he makes it quite clear when he states the following under the heading Decision:

PN383

In my view the wording of clause 8 of the General Conditions of Service Award contains expressions which are anachronistic ...(reads)... it cannot delegate that responsibility to any single interested party to determine industrial matters.

PN384

Further on, Madam Deputy President, he says:

PN385

I have not the slightest doubt that the district allowances for living in the district concerned ...(reads)... living in other areas of Tasmania which are not so isolated.

PN386

He then goes on after a couple of paragraphs to state:

PN387

In my view the controlling authority has fallen into error ...(reads)...on the basis that they are classified as temporary.

PN388

And later he states:

PN389

And as earlier stated, I do not believe that the function of determining industrial matters ...(reads)... can be transferred to a controlling authority.

PN390

Now, he then goes on to state quite clearly to the Public Service Association at that time that they should immediately make application, as we are well aware by this stage of the award, by deleting the word "permanently" from clause 8.2.2 and delete the words "may on the determination of the controlling authority substitute the word 'shall' in clause 8.2.2". Now, in my opinion that is a clear, straightforward decision and quite frankly it is a pity perhaps that it wasn't addressed and the issues addressed at that particular time and for reasons which - I know it was a very busy time industrially for many unions; it probably got overlooked.

PN391

However, of course, as we are well aware, Madam Deputy President, Commissioner Abey found himself in a situation last year in matter T11180 of 2003 addressing very nearly the same issue, and very briefly let me just refer you to a couple of the matters that are raised in his decision. He points out to begin with in paragraph 2 of the reasons for decision that:

PN392

This application concerns a refusal of the Department of Primary Industry Water and Environment to pay the district allowance prescribed ...(reads)... at the time of engagement by the department.

PN393

Now, in addressing the issue or the claim from the CPSU at that time he points out very clearly again what the purpose of the - in paragraph 21 what the purpose of that allowance is. In paragraph 22 he makes the comment:

PN394

On the plain meaning of these words there is no basis for distinguishing between categories of employees based on place of residence at the time of recruitment.

PN395

Quite clearly - that is very clear. In my view, had the allowance been intended to apply only in circumstances whereby an employee is relocated the clause would have clearly said so. And then he goes on to say - and who would have thought this many years ago:

PN396

I agree with Deputy President Robinson -

PN397

I looked at that and I thought, this is wonderful -

PN398

that the expression "on the determination of the controlling authority" is anachronistic and has no place in a clause of this nature ...(reads)... not the unfettered discretion of the agency.

PN399

And again we see that Commissioner Abey, in his order number 2 says:

PN400

The CPSU have lodged an application to vary the award in a manner ...(reads)... and further deletes the word "permanently" in the same subclause.

PN401

THE DEPUTY PRESIDENT: The application lodged by the Minister actually does remove that discretion.

PN402

MR LANE: It does, Madam Deputy President. It certainly does, but it again provides further grounds, if not for discretion - - -

PN403

THE DEPUTY PRESIDENT: It doesn't remove the discrimination, but it does remove the discretion.

PN404

MR LANE: It has replaced discretion with discrimination, I guess that would be one way to put it, or differentiation.

PN405

THE DEPUTY PRESIDENT: Differentiation - - -

PN406

MR LANE: It has decided to differentiate.

PN407

THE DEPUTY PRESIDENT: - - - is probably a better word.

PN408

MR LANE: I will withdraw the discrimination and talk about differentiation.

PN409

THE DEPUTY PRESIDENT: I think I used it first, but I accept that differentiation is probably a better description at this stage.

PN410

MR LANE: Thank you, Madam Deputy President, I take your advice. Madam Deputy President, the CPSUs applications and their proposed amendments, we submit to you, are in line with the directions issued by both members of this Commission. They seek to provide equity and they also seek to provide certainty, which should be core elements of any award clause. It shouldn't be open to interpretation and it shouldn't be open to create differences along the lines suggested by the employer's application, and so the CPSUs application, I believe stands in stark contrast to the intention and certainly the outcomes of the employer's proposal.

PN411

I know I don't need to remind you, Madam Deputy President, of the Commission's responsibilities under the Act when it comes to the exercise of its jurisdiction in making awards, however, in the hope that perhaps the employer may take some note of what is said and they may well desist from bringing forward such applications in future, I will refer to some of those responsibilities of the Commission.

PN412

Now, I have already mentioned, Madam Deputy President, the need for the Commission to act according to equity, good conscience and the merits of the case in exercising its jurisdiction under section 20(1) of the Act. It should also be noted, Madam Deputy President, that section 36 of the Act states the following:

PN413

Before the Commission makes an award under this Act ...(reads)... is consistent with the public interest.

PN414

And it says in subsection (2) of section 36:

PN415

In deciding whether a proposed award or a proposed industrial agreement would be consistent with the public interest ...(reads)... considered by the Commission to be relevant to the public interest.

PN416

Now, it is our submission, Madam Deputy President, that the union's application - that is the CPSUs application - in contrast to that of the employer, clearly complies with the public interest test. Most of the employees in isolated areas, including the Bass Strait islands, are able to access, under the current clause, the current allowances. Not all employees - and that is what this - we hope that the union's application will address.

PN417

Now, consequently we submit the increased costs would not harm the economic position of the Government agencies concerned. There is no possibility that a decision in line with the CPSU proposal will affect the economy of Tasmania, or lead to reduced employment. At the end of the day, Madam Deputy President, we believe that part of the public interest consideration, especially under (c) where you are able to take into account any other matter you consider relevant to the public interest, we would believe that part of the public interest consideration should be whether the outcome sought is fair and equitable and likely to assist in Government agencies being able to attract and retain good quality employees in such locations.

PN418

Now, there is no doubt that the employer's proposal would not assist in achieving that outcome, therefore, Madam Commissioner, on behalf of the Australian Education, Tasmanian Branch, I ask that - except for consideration of the allowances being provided to part-time employees in line with the employer's proposal, and with that in mind I commend the CPSUs application to you and thank you for the opportunity to make this submission. If the Commission pleases.

PN419

THE DEPUTY PRESIDENT: Thank you. Mr Pearce?

PN420

MR PEARCE: Madam Deputy President, I don't intend to detain the Commission or the parties for too long a period. Suffice it to say that Mr Miller's

exhibits are yesterday's exhibits. The Minister's application deals with the here and the now. Mr Miller makes comments in relation to exhibit RM7 and also the RM8 of some alleged failure of the employer to do anything to support its particular position. Those are in respect to decisions of 1991 of Deputy President Robinson. It is ancient history and on the record that applications were made in 1991 by the Minister in almost precise same terms as the application which is currently before you today, and had Mr Lane the benefit of reading the transcript, then perhaps about 10 minutes of his submission may have been truncated.

PN421

Madam Deputy President, in relation to the use of the word "permanent" - and it seems both the CPSU and AEU are fairly hung up on it - if I can go back to paragraph number 144 of the transcript of 17 June 2004, and I quote:

PN422

In this context we submit that the use of the words "permanently stationed" ...(reads)... such as auditors, inspectors, Tribunal members, etcetera.

PN423

That is, any officer who had no legitimate claim to being permanently stationed at that headquarter - and we contend that the words "permanently stationed" in the context of the district allowance description is in no way different to that then contained in the mainland allowance. It is used purely and simply to distinguish between itinerant or temporary residence. If I stay a night on the island, I am a resident of that island, albeit for a night.

PN424

THE DEPUTY PRESIDENT: It might be less ambiguous if it were to say "is stationed for more than three months" as it currently does, with the access to the air fare.

PN425

MR PEARCE: Yes, I think that - look, your earlier description of belts and braces, perhaps the use of the word "permanent" in that context, if you remove it it still says "residence". We know what it means, but it then becomes fertile ground for argument what is "residence", and I say if you have one night there, that is a resident. You are there taking up residence.

PN426

THE DEPUTY PRESIDENT: Well, presumably the parties to the award at some stage agreed that three months was a reasonable figure for the air fares.

PN427

MR PEARCE: Whether it was by agreement or whether it was something put in place by the then controlling authority, the Public Service Board, at their whim, I don't know the antecedent nature of that particular provision, but it is still there, so perhaps the three months may be - - -

PN428

THE DEPUTY PRESIDENT: Anyway, we raise that as a possibility and I will give the other parties the opportunity - - -

PN429

MR PEARCE: That three months may be a relevant consideration in that context, Madam Deputy President. Madam Deputy President, we merely rely upon our submissions as advanced between paras 125 and 188 inclusive of the hearing of 17 June. We consider that they are succinct and in simplistic terms identify the employer's fundamental position, which relates to the fact that entitlements are intended for those who, because of the direction of the employer, have little choice apart from, as I described it before, as Hobson's choice, of taking up residence on the island in pursuit of their further employment in the State Service. Those who are on the island by choice, we say it is in respect of those persons - - -

PN430

THE DEPUTY PRESIDENT: Mr Lane raised the question about what about somebody who volunteers to go there, if it is only restricted to people who have been directed to go there.

PN431

MR PEARCE: Well, clearly, no, anyone who goes to the island as a matter of their own choice - as a matter of choice, the exercise of free choice, having weighed the pros and cons of going to the island, we say as of now should not receive an entitlement. We have already indicated to the Commission in those earlier hearings that there may well be people benefiting from the entitlements at this point in time whom we might consider - - -

PN432

THE DEPUTY PRESIDENT: What about the other point of Mr Lane's in relation to attraction and retention of quality staff? If you advertise a position on King Island, therefore, and people apply for it and they go there, they have chosen to do that and they wouldn't get those allowances that you - is that what you are saying?

PN433

MR PEARCE: People may go to the island for a whole host of reasons. It may be beneficial to their future career to do so. But it is where the situation is, that if an employee is directed to the island, and in failure to abide by that direction he then basically fundamentally repudiates the contract of employment, those are the circumstances where these people, who have no choice other than to - other than, in pursuit of their continued employment, go to the islands or another district for which the allowance is attracted - - -

PN434

THE DEPUTY PRESIDENT: So there are two categories of employees who wouldn't get it: those who apply for a job who are already living there, and those people who apply for a job who aren't already living there.

PN435

MR PEARCE: Compulsorily transferred, directed. I mean, I made the distinction.

PN436

THE DEPUTY PRESIDENT: Yes. I mean, transferred might well be a better word in terms of achieving your aims because I can forethought the arguments of

people who apply for a job on King Island and then say now, "I need to be directed to go there," and if they wait for the direction and then they qualify. I mean, there is potential for arguments around that issue. Really, you are saying people who are transferred there are the only category who would get it, and then not if it was a voluntary transfer; only if it was an involuntary transfer. So really, what the clause should say is "people who are involuntarily transferred to those remote areas are the only ones who get it."

PN437

MR PEARCE: You certainly understand our position and yes, the use of the word "involuntary" adequately summarises our position.

PN438

THE DEPUTY PRESIDENT: What is the status quo - and I am not sure if this is pertinent, but it seems to me that DPIWE may be the only agency that is actually refusing to pay these allowances and entitlements - what is their position for somebody who is applying for a job, a new job, for argument's sake, are they currently paying those people the allowances? So if persons residing on mainland Tasmania now applied for a new position on the island and are sent there, or go there to take it up, do they get the air-fare allowances and the district allowances at the present time?

PN439

MR PEARCE: I don't know the factual answer to that, Madam Deputy President.

PN440

THE DEPUTY PRESIDENT: I suspect that they are not, because the correspondence from the then secretary of that department indicates that the policy is - the policy is not to pay it to people who resided on the island at the point of recruitment.

PN441

MR PEARCE: Yes.

PN442

THE DEPUTY PRESIDENT: So this is a change from that policy. What you are proposing here is a change from that policy that DPIWE have currently applied, so it is even less beneficial to employees of that department in the current situation.

PN443

MR PEARCE: If I am an ordinary resident on mainland Tasmania - not in the State Service - and I see a job advertised on King Island or Flinders Island, I make a decision to apply.

PN444

THE DEPUTY PRESIDENT: Yes, you do, but my point is that that is changing the status quo even for DPIWE, whose current policy is not to pay it - only not to pay it to those people who were resident on the island at the point of recruitment, not those who were resident on the mainland of Tasmania at the point of recruitment. So it is further restricting access to entitlements.

PN445

MR PEARCE: Well, that would only be true if what you say is factually correct.

PN446

THE DEPUTY PRESIDENT: Yes, and there has certainly been submitted to this Commission quite recently - I think it was in June that that indeed is the case with DPIWE, and it is also what is outlined in RM7.

PN447

MR PEARCE: Can I say, Madam Deputy President, that our position is encapsulated in our application and is supported, underpinned by this Commission on 17 June. Now, whether that varies any particular arrangements which were applying with interstate service agencies on the island, that may be a consequence of acceptance by this Commission of our position. Our application reflects what it is that we wish this Commission to adopt, and subject to the use of the words "permanently resident", we stand by those applications.

PN448

THE DEPUTY PRESIDENT: And your application is actually seeking to quite significantly reduce conditions of employment for employees covered by the terms of this award, apart from within one agency who is currently applying these tests.

PN449

MR PEARCE: Is that because of the benign use of the discretion by a number of agencies? We have said that if the Commission buys our particular position, then we will consider those employees who are currently getting the entitlement, who might otherwise be considered to be disentitled. We are saying that we would have regard to existing circumstances pertaining to current employees. But our particular position is unequivocal. It is contained in our application and it is quite expressly stated who should get it and therefore, by implication, those who won't get it.

PN450

THE DEPUTY PRESIDENT: And you are basing that on some notion - it seems to me that the only - and if there are other streams please point them out, but the only basis for this is this question of choice.

PN451

MR PEARCE: Correct.

PN452

THE DEPUTY PRESIDENT: And do you have any industrial precedents around this question of choice as related to employment provisions and entitlements?

PN453

MR PEARCE: I haven't turned my mind to it, Madam Deputy President, but I suspect that they abound. See, it is the directions of the employer which commit the employee to go to the island. We say that it is the action of the employer that attracts the additional expense to the employee and that those additional expenses should be met by way of this compensatory allowance, district allowance, call it what we may, and it is the involuntary relocation to the islands which gives rise to the entitlement to the air-fare benefits for those people to travel off the island

back to presumably the area from which they were involuntarily transferred at first instance.

PN454

THE DEPUTY PRESIDENT: Would you agree that the district allowance is a disability allowance?

PN455

MR PEARCE: It could be a zone allowance, a climatic allowance, a disability allowance, a relocation allowance, a remote allowance. It is a whole - - -

PN456

THE DEPUTY PRESIDENT: But it is an allowance for the disability of living in a remote location and the additional cost.

PN457

MR PEARCE: The disability - and central to the issue of the disability is how someone acquired the disability. Did they acquire it by choice or by involuntary transfer? Our response to that is involuntary transfer.

PN458

THE DEPUTY PRESIDENT: So you are saying that the disability allowance shouldn't apply where people have chosen the disability.

PN459

MR PEARCE: Correct.

PN460

THE DEPUTY PRESIDENT: Did you want to add anything?

PN461

MR PEARCE: No, I am content to leave it there, Madam Deputy President.

PN462

THE DEPUTY PRESIDENT: Well, I will give Mr Lane the opportunity to respond. I think you have already had the opportunity, Mr Miller, to respond to - the right of reply, because Mr Pearce is simply relying upon the submissions that he made on the previous occasion. But if you wish to - if you want to suggest that you should be given the opportunity for a right of reply, there probably will be no objection.

PN463

MR MILLER: If I could just rise, madam, if I may, very, very briefly, just to indicate that that which fell from Mr Pearce; I would just like to remind the bench that there are some people in some departments being impeded by the agency to access the allowances, whilst across the road, in a school, or in a police station, for example, there are persons there in other departments who are getting the allowance, irrespective of where they were recruited from in the first instance.

PN464

So, at the moment, to my certain knowledge, on the islands there are persons in discrete agencies, having been recruited from the island, one or several who are not receiving any of the allowances, and across the road, in another department, there are people who are receiving those allowances. I would suggest also that as

this Government holds itself to be an exemplary employer, that the cases as laid out before you on the applications submitted by the CPSU should be upheld. If the Commission pleases,.

PN465

THE DEPUTY PRESIDENT: Yes. Well, Commissioner Abey has already noted his surprise at the failure of that particular department to honour the spirit and the intent of the previous decision in 1991. Now, Mr Lane - - -

PN466

MR MILLER: Actually, I should put for the record just again that what falls from Mr Pearce - - -

PN467

THE DEPUTY PRESIDENT: Yes.

PN468

MR MILLER: - - - my belief is that the application made by the predecessor of the Minister Administering the State Service certainly was on record and I believe we may have mentioned that earlier in the Abey decision, or in the Abey hearing, but to my knowledge that matter was never pushed through by the Minister himself, so if there is an indication of blame or responsibility then I think both parties have to bear that responsibility and blame for not pursuing the matter at an appropriate time. If the Commission pleases.

PN469

THE DEPUTY PRESIDENT: Thank you. Mr Lane?

PN470

MR LANE: Madam Deputy President, to a great extent I have probably said it all, but to me what appears to be happening here is that we have got currently a situation where there is discretion and as pointed out earlier if the employer's proposal was accepted we would move away from discretion to differentiation, for no good reason. As I have pointed out to you earlier, the cost of living, regardless of how you got into or went to a particular area, the costs that you face are exactly the same, and the allowance, especially under clause 24, the district allowance, is specifically to assist employees. It doesn't talk about whether or not it is people who - regardless of how they got there, it is to compensate for the extra costs that are involved in living there, and to move to the system that is being proposed by the employer would ensure that virtually every employee was not allowed to access that particular allowance.

PN471

Can I just say, in education, the normal way of getting there is to seek employment and the department offers you a position and you accept it. Now, that is not a directive. You aren't directed, but if you don't accept it, you probably haven't got a job. So it just seems to me that what the employer is proposing is basically and inherently unfair and unreasonable, and as I pointed out earlier it opens a can of worms because it is not clear, it does not state clearly what your entitlement is without a great deal of argument about whether I was directed or whether I volunteered or whether I am going to be there permanently or whatever else. Wherever possible award clauses should never put us into that situation.

Award clauses should be clear, easily understood and easily applied. The CPSUs proposal is in that vein. The employer's is not.

PN472

I mean, it just raises a question in my mind, after listening to Mr Pearce: if you are directed to go there to, let us say, King Island, you are directed. So you move and you are entitled to the allowance and you happen to marry a local who lives on the island, has lived there all that person's life, what - do they continue forever and a day while they are employed to retain that allowance, whereas somebody else who was permanently, or lived on the island prior to recruitment, doing exactly the same job, suffering exactly the same difficulties, can't get that allowance or the flights? I mean, that to me is inherently inequitable and I don't think this Commission should put its name to the inclusion of such clauses in an award and I would urge you to look at the CPSU provision and at least ensure that that is put in place. If the Commission pleases.

PN473

THE DEPUTY PRESIDENT: Thank you. Well, I indicate to the parties that I shall reserve my decision, which will be issued in due course, and the matter is adjourned.

ADJOURNED INDEFINITELY **[4.20pm]**

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