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TRANSCRIPT OF PROCEEDINGS

O/N 0580

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

9.30 AM, THURSDAY, 17 JUNE 2004

HEARING COMMENCED

[11.31am]

PN1

MR R. MILLER: I represent the CPSU (SPSFT) Inc, if the Commission pleases.

PN2

MR T. PEARCE: I appear for the Minister Administering the State Service Act.

PN3

THE DEPUTY PRESIDENT: Thank you. Well, these three are in effect cross-applications. Now, I am in the parties hands as to how we deal with them, we could do it as a whole and the batting order can be decided between you, or we can give the CPSU the opportunity to address - to open, make opening submissions in relation to their two submissions and give Mr Pearce the opportunity to make opening submissions in relation to his application. It is over to the parties how they would prefer this to be dealt with. Mr Pearce, do you have a view?

PN4

MR PEARCE: I am content for the CPSU to lead, Deputy President.

PN5

THE DEPUTY PRESIDENT: Thank you.

PN6

MR MILLER: You made reference to the batting order and as Mr Pearce is a well known dour opening bat we could be here for some considerable time so I take the opportunity to rise and address the issues first up. And again, it behoves me to indicate that it was this week when Spain in 1779 declared war on Britain and the siege of Gibraltar began, I suggest that this may be yet another siege that we have to go through but hopefully we can batter some ramparts down somewhere along the line. If I may I will commence with the - - -

PN7

THE DEPUTY PRESIDENT: Now, I suppose I should ask the parties is there anything to be gained - I will hear the opening submissions but through an attempt at conciliation or is it the view of the parties that we should proceed straight to arbitration?

PN8

MR MILLER: I don't know whether - - -

PN9

THE DEPUTY PRESIDENT: Have there been discussions? Many over the decades or - - -

PN10

MR MILLER: I suppose to some extent, ma'am, there has been some discussion of more of an informal nature than a formal nature given the attitude in the previous decision of Mr Abey or the matter before Mr Abey but those discussions in all truthfulness have been minor. I believe due to the recognition of the parties that there probably is nothing - there was nothing further to be gained to any great

extent. I think the position of the minister is entrenched and certainly, unless I can hear anything to the opposite, I certainly don't have any instructions to pursue any conference or negotiations, whilst not ruling that out, of course, and I don't know what is in Mr Pearce's mind, but is it seems to me that there is little to be gained from any form of conference or negotiation.

PN11

THE DEPUTY PRESIDENT: Yes, and we certainly don't want to have it just for its own sake if it is wasting time.

PN12

MR MILLER: Indeed.

PN13

THE DEPUTY PRESIDENT: If the policy positions are immovable then there is not a lot of point in conciliation but I will ask Mr Pearce.

PN14

MR PEARCE: Deputy President, I have no instructions on that matter that you raise. Suffice to say over the years the employer has expressed a fairly simplistic view of what its policy position is or ought to be and hopefully that will manifest itself in - well, our aspirations are inherent in the counter application that we have made. We are always disposed to being able to talk but I think in the period of time that has elapsed we have had no - and I think our position had been known to the applicant organisation consistently over that period of time as evinced through the attitude of the Department of Primary Industries and Water and Energy.

PN15

That has not found any favour with the applicant union, they are aware of what our position is. I have no instructions to move from that particular position so bearing in mind what Mr Miller has said, whilst I appreciate the offer I don't know that any good would necessarily come of it, particularly if the parties remained convinced of their particular positions.

PN16

THE DEPUTY PRESIDENT: Well, I think we will proceed with the opening submissions following which it may be that as a result of those submissions the parties see some possibility of some ground being given and I will ask the question again at that point, but there is not really evidence to be given, is there? There is really just submissions, I would think, and there is no witness evidence or anything of that nature. There might be documentary evidence - I will ask the question again later but we will proceed on the basis that we are going to full arbitrate the matter now. Mr Miller?

PN17

MR MILLER: Thank you, ma'am. If I deal with T11488 to commence.

PN18

THE DEPUTY PRESIDENT: 11488, yes.

PN19

MR MILLER: It is an application to vary the award for - - -

PN20

THE DEPUTY PRESIDENT: Travelling allowance.

PN21

MR MILLER: - - - air fares off the island.

PN22

THE DEPUTY PRESIDENT: Yes.

PN23

MR PEARCE: Islands.

PN24

MR MILLER: Deputy President, I appear to have come away without a copy of that particular application.

PN25

THE DEPUTY PRESIDENT: Okay, well, we will get you a copy made, but we will - - -

PN26

MR MILLER: I think I may be able to assist there, I have a spare copy of the application, a signed copy of the application.

PN27

THE DEPUTY PRESIDENT: Very good.

PN28

MR MILLER: We deal with T11488 of 2004, an application to vary the clause 32 travelling allowances of the GCOE. The application is in front of all parties and I don't intend to read through it unless there is any need to do so and if there is not I won't. I find it somewhat difficult to proceed on this matter without any knowledge of the decision of the Commission in relation to the prior - previous hearing today, however the application follows the basis of the decisions of the then Deputy President Robinson and Commissioner Abey at T3218 of '91 and T11180 of 2003 respectively.

PN29

The agency when requested to indicate their source of authority to reject payment from air fares has chosen, we believe, not to explain those reasons to the members except to say that this is what has been done for the last 20 years and we are not moving from it and that is it. There was an assumption on behalf of the agency that this matter would be part of an application to vary the award. That assumption is theirs, of course, it is not of mine. The claim follows the precedent set in the two aforementioned hearings, the removal of discretionary powers of the controlling authority and the outmoded terminology used therein and those matters are contained again in those two previous awards - two previous decisions, I beg your pardon.

PN30

Air fares are not, in the view of the CPSU, simply there for those persons who were originally employed from persons resident on the island but for staff in the wider sense of that word. Again the matter of being permanently resident and

permanently stationed I believe is under contention. If anybody leaves the island - I beg your pardon, it appears that the agency or the minister lay some considerable weight upon the fact of the words in the award as they stand at the moment, however for all of those instances which have been previously canvassed this morning we believe that it is not - - -

PN31

THE DEPUTY PRESIDENT: I think you might need to state them for the purposes of this. As you pointed out earlier this is a discrete and separate hearing to the dispute notification so if you have got submissions to make you can't rely on submissions already made in the other case.

PN32

MR MILLER: As the Commission pleases. Thank you. Again, it would appear that the agency rests - sorry, the minister and/or the agency rests upon the current words in the award being permanently stationed and permanently resident. If that is the case then that needs to be established from the agency - I beg your pardon.

PN33

THE DEPUTY PRESIDENT: What you are addressing now is your application to have the award varied to remove the discretion, that is what you need to address.

PN34

MR MILLER: In that context there is reliance placed upon the two decisions that I previously mentioned. In the case of T3218 dealing with a district allowance the then Deputy President Robinson in his decision dated 4 September '91 indicated as follows:

PN35

That the argument propounded by the TPSA was that the allowance applies to persons living in an isolated area. Because of the provisions of the State Service Act no officer, permanent or otherwise, is stationed permanently because there is an inability for the employer to transfer people in accordance with the State Service Act at section 34 of the State Service Act to assign -

PN36

and I don't rely specifically upon the single subclause, but at (e) it says:

PN37

To assign duties to each employee within that agency and to vary those duties.

PN38

And I believe it is from that and from other sections of the Act that the agency has the ability so to do. Other State - and I quote again from the decision of Deputy President Robinson that:

PN39

Other State servants not being permanent employees have in the past and are currently paid the district allowance for living on the Bass Strait Islands.

PN40

Now, whilst this is not to do with the district allowance it is my understanding and belief that certainly one - that other agencies in fact currently pay their employees pro rata air fares off the island for persons who were residents on the island prior to employment.

PN41

THE DEPUTY PRESIDENT: Have you got any evidence of that?

PN42

MR MILLER: I have researched my previous case and the issue that I indicated was in actual fact to do with the district allowance. I have confirmation from Mr Payne by way of email dated 27 November to that effect. Unfortunately I am unable to give you that same reassurance that it also applies to air fares, in writing, but my advice from the agency verbally was that certainly persons such as teacher aides and office assistants who may well be part-time employees do in actual fact get pro rata air fares. Should the Commission need that then I will have to ---

PN43

THE DEPUTY PRESIDENT: I am just trying to get my head around the idea of a pro rata air fare. They drop you off at Seal Island or something, but you mean a pro rata payment?

PN44

MR MILLER: Pro rata payment. I beg your pardon.

PN45

THE DEPUTY PRESIDENT: Yes, thank you.

PN46

MR MILLER: In the decision of Deputy President Robinson he indicates as follows:

PN47

In my view the wording of clause 8 of the General Conditions of Service Award contains expressions which are anachronistic ... (reads) ... temporary employees even when they have been employed for a considerable period of time.

PN48

He goes on to say that:

PN49

I have not the slightest doubt that the "district allowance" is for living in the district concerned ... (reads) ... as are necessarily incurred by way of example.

PN50

He then indicated that:

PN51

*I find also that the employer concerned in this matter has misused a perceived discretion to refuse a payment contained in an award
...(reads)... can be transferred to a controlling authority.*

PN52

He then directs the party as part of the decision to remove the words "permanently" and delete the words "may on the determination of the controlling authority" and substituting the word "shall" in the clause of the award. Whilst we are not dealing with the matter regarding the district allowance and we are dealing with - - -

PN53

THE DEPUTY PRESIDENT: Well, the matters are joined so if there is a general argument that applies to both you can make it in respect of both.

PN54

MR MILLER: In that instance then I take you back to the quote or the part of the decision of Deputy President Robinson in which he indicates that:

PN55

Such extra costs are necessarily incurred by way of example.

PN56

For those persons who are stationed on the islands I believe those persons have the same necessity for social activity, for educational purposes, for family reasons, to be able to remove themselves from the islands to other places to gain whatever social, educational or health matters that they so need and as part and parcel of that proposition for those people stationed on the islands there are costs incurred by them to enable them to access those issues. The proposal to re-word the clause as indicated is I suggest also to bring the award - to bring that part of the award in line with contemporary industrial relations practices and previous decisions of this Commission, even going back to T11180/2003, the Abey decision.

PN57

In that decision the Commission, Commissioner Abey, in my view upheld the decision of Deputy President Robinson and again instructed the parties in that issue to alter the award in accordance with his directions and instructions. To some degree this application picks up that decision and in an attempt to overcome issues existing for at least three persons who are suffering from the impediment or the imposition of the agency to stop them from gaining the air fares it is appropriate that the award clause should also be reviewed and altered in accordance with the spirit, the intent, of those previous decisions mentioned. At paragraph 21 of Commissioner Abey's decision he indicates, and I quote:

PN58

*The purpose of the allowance as described in subclause B(1)
...(reads)... partial reimbursement for STD, fuel, freight and depreciation costs.*

PN59

I take some - place some weight and some reliance upon the fact that he goes on to say, at paragraph 22:

PN60

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.

PN61

23:

PN62

In my view had the allowance been intended to apply only in circumstances where an employee is relocated the clause would have clearly said so.

PN63

24:

PN64

To that extent I agree with the finding of Robinson DP in the earlier matter.

PN65

He then turns, at paragraph 25:

PN66

I turn now to the discretion vested in the controlling authority ... (reads) ... dispute for which a remedy pursuant to section 31 is available.

PN67

I agree with Robinson DP -

PN68

Sorry, this is at paragraph 27 -

PN69

I agree with Robinson DP that the expression "on the determination ... (reads) ... not the unfettered discretion of the authority - of the agency.

PN70

He goes on to say elsewhere that the allowance should be paid to those two persons. For all of those reasons contained in those two decisions and for the instances that have been put to you today, Madam Deputy President, the CPSU believes that the award should be amended in the manner sought and commend it to you. If the Commission pleases.

PN71

THE DEPUTY PRESIDENT: Thank you. Mr Pearce?

PN72

MR PEARCE: Thank you, Deputy President. Just by way of backdrop, you have inquired during the course of Mr Miller's submission other agencies.

PN73

THE DEPUTY PRESIDENT: Yes.

PN74

MR PEARCE: There are, as I understand it and I stand to be corrected, the agencies that do have people located in remote areas such as the west coast, such as the islands, would be education, health, DPIWE - sorry, Department of Primary Industries, Water and Energy - or the Environment, sorry - the Department of Tourism, Parks, Heritage and the Arts and police. They are all bound by various awards which have the same prescription as the general conditions of employment award. We have not at this juncture sought to amend those awards such as the Community and Health Services Award which has similar provisions for district allowance and air travel.

PN75

Education and teaching awards I understand will be in the same vein, the same as the nurses' awards. We haven't done any proactive applications in that area using this as a vehicle to endeavour to persuade the Commission that the view we have is the correct view. If the Commission is minded to accept what it is that we put and favour our application then it would follow that we would severally seek to at a later stage and in the not-too-distant future make application to vary those other awards in the same manner.

PN76

THE DEPUTY PRESIDENT: So at the moment the General Conditions of Employment Award applies only to the people employed by DPIWE in terms of these allowances?

PN77

MR PEARCE: I would say some people within education to whom Mr Miller earlier referred, office assistants, teacher aides if I am not mistaken, DPIWE.

PN78

THE DEPUTY PRESIDENT: No, I should actually indicate that the Commission received correspondence from the Health and Community Services Union authorising Mr Miller to appear on their behalf. We have no such correspondence in relation to the Australian Education Union or anybody else who might cover any of those employees that you were talking about but the effect would be that people would have their conditions of service reduced.

PN79

MR PEARCE: Well, that is an issue that would need to be addressed post any decision you may make which may favour the employer in the sense that we would then have a situation of people who are currently receiving by a variety of arrangements certain benefits that we would ask or that we would seek no longer be paid to any new employee and we would clearly have to address the range of options which would be available in relation to existing employees who would had they been subject to this decision would as you observe *prima facie* be disentitled. It is one thing to vary the award to accommodate what it is that we are seeking; it is another thing to deprive people particularly where they are people of longstanding who have been accustomed to receiving a benefit and may have modelled their lifestyle around that. So I am sure that there will be a beneficial - I would hope that there would be a beneficial approach taken.

PN80

THE DEPUTY PRESIDENT: Well, yes, because otherwise you would be unilaterally altering their conditions of contract of employment.

PN81

MR PEARCE: I think we will be backing you in fairly short order, Deputy President.

PN82

THE DEPUTY PRESIDENT: That is right, yes.

PN83

MR PEARCE: And what we say in our submission is that it has been a benign beneficial interpretation by certain heads of agencies as distinct from the preferred policy position of some agencies who don't pay it. We would certainly have to be cognisant of the fact.

PN84

THE DEPUTY PRESIDENT: And is there a delegated authority from the Minister to the heads of agencies and with respect of the discretion?

PN85

MR PEARCE: The discretion has been around - there are certain delegated authorities and lots of the powers of the Minister are delegated to the heads of agencies. I can't point you to an authority. I can't produce a piece of paper which says, "Here is the Minister's delegated authority for the head of agency to determine or exercise his discretion in relation to district allowances." I can't point to such a document but because it has such a long history attaching to it I think it must be accepted, absent any - - -

PN86

THE DEPUTY PRESIDENT: Yes, and it is not make any difference to these applications whether they were acting outside of their powers or not in the past because we are talking prospectively.

PN87

MR PEARCE: That is correct, yes.

PN88

THE DEPUTY PRESIDENT: Yes.

PN89

MR PEARCE: At the end of the day I assume that the award as it currently stands - - -

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THE DEPUTY PRESIDENT: Will change.

PN91

MR PEARCE: - - - is not going to reflect its current verbiage one way or the other.

PN92

THE DEPUTY PRESIDENT: That is right.

PN93

MR PEARCE: Yes.

PN94

THE DEPUTY PRESIDENT: Now, currently you are responding to the submissions in respect of the travel allowance application by the CPSU.

PN95

MR PEARCE: Well, I was basically going to - - -

PN96

THE DEPUTY PRESIDENT: Or are you going to do a global thing?

PN97

MR PEARCE: I think I will - I think for ease it may be better if I concentrated on the global submission, at the end of which I shall make a couple of comments in relation to a couple of matters which fell from Mr Miller.

PN98

THE DEPUTY PRESIDENT: Okay.

PN99

MR MILLER: If I may rise, Madam Deputy President? I do apologise. I should have indicated prior to the proceedings that I have correspondence which you obviously have which authorises me to represent the Health and Community Services Union in this matter.

PN100

THE DEPUTY PRESIDENT: Yes.

PN101

MR MILLER: That is the application of the Government to vary the award.

PN102

THE DEPUTY PRESIDENT: Yes. I do have some concerns about the effect of this on a number of organisations and their members in that I think that the - who has been notified? Well, the Education Union has been notified, the AMWU, CEPU, CFMEU, HACSU - not the LHMU - and now I understand that the general conditions of service and employment applies to those organisations who were previously exempt. Is - - -

PN103

MR PEARCE: Sorry, Deputy President, I didn't quite follow that last - - -

PN104

THE DEPUTY PRESIDENT: The General Conditions of Employment Award.

PN105

MR PEARCE: Yes.

PN106

THE DEPUTY PRESIDENT: Now, there was a stage - well though people were exempted from the State Service Act, weren't they?

PN107

MR PEARCE: They were.

PN108

THE DEPUTY PRESIDENT: Organisations were exempted and no longer are. It is just that there probably are some gaps in terms of the organisations notified about this matter if it is going to have an impact upon any membership. Now, we are talking about Maria Island, Bruny Island, the west coast and not just the Bass Strait Islands in respect of the district allowance, are we not?

PN109

MR PEARCE: That is correct.

PN110

THE DEPUTY PRESIDENT: So there may be quite a number of organisations whose members are affected that may not have been notified of this hearing.

PN111

MR PEARCE: Well, there may be some who have a vicarious interest but not a direct interest because the only parties that have been notified are those that are actually party to the award.

PN112

THE DEPUTY PRESIDENT: To the General Conditions of Employment Award.

PN113

MR PEARCE: Yes, I am just checking that.

PN114

THE DEPUTY PRESIDENT: Yes.

PN115

MR PEARCE: So all those with a direct interest in the award - - -

PN116

THE DEPUTY PRESIDENT: Have been notified.

PN117

MR PEARCE: - - - have been notified.

PN118

THE DEPUTY PRESIDENT: But are they those to whom the award applies whilst they may not be a party would have an interest in that it could affect their members' conditions of employment.

PN119

MR PEARCE: I don't know. It is possible for example that there are awards which say that, as the conditions of service - - -

PN120

THE DEPUTY PRESIDENT: Yes, that could flow.

PN121

MR PEARCE: - - - "employees under this award shall observe the general conditions of employment award." That organisation - there may be different organisations under that particular award who are not parties here.

PN122

THE DEPUTY PRESIDENT: Yes.

PN123

MR PEARCE: So there are persons who are parties ostensibly affected who do not have direct representation in these proceedings, I would have thought.

PN124

THE DEPUTY PRESIDENT: Well, the peak body, the Tasmanian Trades and Labour Council, has been notified which would presumably if they understood the impact perhaps have made an appearance. Well, we will proceed.

PN125

MR PEARCE: All right, Deputy President. The counter applications made by the Minister are made for the purpose of giving clarity to what we contend should be the correct application in the award entitlements to district allowances and in the case of persons employed on the islands their entitlements to air fares. This is not the first occasion that we have made submissions on the issue of the proper application of the district allowance prescription of this award. Indeed, what I am about to submit has been put to the Commission albeit in the form of section 29 dispute notifications notably in 1991 in the matter before Deputy President Robinson and more recently before Commissioner Abey in matter T11180/2004 and of course earlier proceedings in which the Commission was involved this morning involving the Department of Primary Industry and the CPSU.

PN126

On the earlier occasions the Commission determined the matter in favour of the applicant organisations and against the employer. On both occasions the Commission ordered in part settlement of the dispute that the applicant organisation apply to the Commission to vary the award pursuant to section 23 of the Act so as to in effect mandate the payment of district allowances to all employees in remote, isolated locations in substitution for what the employer had consistently argued was a permissive discretionary clause. Simply put, the Commission sought the making of an application for the purpose of varying the award by removing the words, "May, on the determination of the containing authority," and substituting the mandatory word "shall".

PN127

Following the '91 proceedings the then Tasmanian Public Service Association made the requisite application which gave rise to a counter application by the employer, T3526/1991. At this juncture I wish to counter an observation made by Commissioner Abey in his decision in matter T11180/2004 dated 26 February 2004 but as an aside, at paragraph 34 on page 6, the Commissioner noted that the Deputy President in the '91 matter:

PN128

Did not close the file until he was satisfied that the terms of his decision had been satisfied.

PN129

I interpose to say to say that the filing by the TPSA of application T32 -3424 of '91 satisfied the terms of the Deputy President's order. Paragraph 35 of Commissioner Abey's decision he states:

PN130

It is however pertinent that no alternative award variation which might have supported the party's policy position was subsequently pursued by the employer.

PN131

Whilst not a lot hangs by it it is necessary to correct that observation by the Commissioner which if uncorrected, intimates that the employer was somehow reluctant or reticent at that time in 1991 to support its policy position by - - -

PN132

THE DEPUTY PRESIDENT: So the cross-application that was made at the time, what was the T number of that one?

PN133

MR PEARCE: T3526 of 1991.

PN134

THE DEPUTY PRESIDENT: I can only assume that that was never put before Commissioner Abey.

PN135

MR PEARCE: On transcript of the proceedings before Commissioner Abey on 12 February in matter T11180, Ms Steenhuis appearing for the Department of Primary Industry, Water and Environment Study, and I quote:

PN136

The particular term of the Deputy President's order was complied with by the organisation filing ...(reads)... implementing the terms of the structural efficiency principles -

PN137

and that I am sure that you have fond memories of, Deputy President. Ms Steenhuis continued at para 115:

PN138

The work of the committee lapsed as a consequence of the formal abandonment of then ...(reads)... it is the agency's preferred position that such policy will be maintained.

PN139

So the matter was clearly before Commissioner Abey and he was informed via transcript that the employer had indeed made a counter application in 1991 and therefore the extent to which it influenced the decision we don't know as the matter was not appealed but for the record I take this opportunity to at least put on the record what in fact did occur. I just tender at this stage one exhibit, Deputy President - or I seek to tender. It is a copy of an award provision, The Public

Service (Conditions of Service) Principal Award number 4 dated - Gazette date Friday, 31 May 1974.

PN140

THE DEPUTY PRESIDENT: Thank you. Well we will mark this TP1, as in the letters, not the indian abode.

EXHIBIT #TP1 COPY OF THE PUBLIC SERVICE (CONDITIONS OF SERVICE) PRINCIPAL AWARD NUMBER 4 - GAZETTE DATE 31/05/1974

PN141

MR PEARCE: I take the Commission's attention to clause F on page 4 of the document which is a clause headed Mainland Allowance. I will just read the opening para:

PN142

Where an officer recruited in this State is transferred from this State in the course of his duties to a headquarter situated on the mainland of Australia and is permanently stationed there at, he may, on the determination of the controlling authority concerned, be paid an allowance in accordance with the following rates.

PN143

That provision, Madam, appears in the General Conditions of Employment Award and I think it basically related particularly to people employed in the tourist - mainland tourist bureaus, but what we say is in no way could that mainland allowance provision be construed to provide a district allowance entitlement to a person who was recruited on the mainland to work in that mainland headquarters. It was clearly and solely directed, we submit, at officers transferred from Tasmania to the mainland headquarter, and at which the officer was to be permanently stationed.

PN144

In this context we submit that the use of the words "permanently stationed" had no connotation other than to distinguish between that officer and other officers who might, in normal course of their duties, be required to attend that mainland headquarters on a temporary or intermittent basis such as auditors, inspectors, Tribunal members, etcetera. 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.

PN145

And it remains our position that persons who are resident in remote locations or on the islands, and who are successful in gaining employment in that remote location or on that island, or who are existing employees on mainland Tasmania and who may be required from time to time to visit the islands in the normal course of their duties on an ad hoc temporary or intermittent basis, have no prima

facie entitlement to the district allowance or fares benefits and to that extent we have sought to exclude them by way of our particular award variation.

PN146

The principal objective of the employer's application is to persuade the Commission as constituted that on the merit the conceptual position advanced by the employer ought to be that favoured by the Commission. What we have not done in the course of preparing and filing the draft variation is for example, in the case of the proposed clause 2, that is part-time employees, is to ensure that the amount of payment of a district allowance from wherever sourced to a part-time employee does not exceed the amount payable to a full-time employee in the course of a year.

PN147

I interpose here to say it is possible that a part-time employee may have two jobs on an island, for example. One may be in the private sector, we don't know, one in the public. We intend in respect of the part-time employee, government employment, that that employee will receive the same amount as a full-time employee, if that employee had been directed to go to the island but we do think if necessary - if it follows that the Commission accepts what it is that we are placing, that there would need to be some additional wording to clause - item 2 of our proposed variation.

PN148

Item 1 deals with the provision of a district allowance entitlement, in the case of item 1, to full-time or part-time employees irrespective of whether the employees are permanent or fixed-term employees. The circumstances where such employee is directed to undertake their assigned duties in a specified district or on an island, and as a consequential necessity both relocates to and takes up permanent residence in that district or on that island. The use of the word "permanent" there is to distinguish between those who may be temporarily resident in the sense of being intermittent employees.

PN149

THE DEPUTY PRESIDENT: But it is not a relocation allowance though, is it; it is a location allowance. It is because of where the - the allowance is generated by the fact of where they live.

PN150

MR PEARCE: Yes, and we are not saying it is a relocation allowance.

PN151

THE DEPUTY PRESIDENT: But your argument is based on somebody being relocated.

PN152

MR PEARCE: Yes. Perhaps - I think I will cover that point during the course of my submission but it basically has to do with matters of choice.

PN153

THE DEPUTY PRESIDENT: Yes. Well, I quite understand what your application is doing, that it is removing the argument about the administrative law and whether - and instead it is basing it upon the fact of it is automatic if

somebody is relocated to one of these remote locations. Now, the Commission, as you know, must be guided by equity, good conscience and the merits of the case and I just want - and I hope you are going to address it. I just ask this question; how is it fair that two people working side by side doing the same work get different packages?

PN154

MR PEARCE: I think, you know, it is the antecedent nature of how they came to be in that locality, Deputy President.

PN155

THE DEPUTY PRESIDENT: That is a one point in time thing that happens. You move there. Thereafter you are doing the same work for the same employer under the same award and the locals get less than the imports. We wouldn't like that here on mainland Tasmania if somebody was transferred from Sydney under those same circumstances. I ask how is it fair?

PN156

MR PEARCE: It is a concept, Deputy President. I do address the point in broad terms in my submission. If, with your leave, Deputy President, I will -if you don't consider that I have dealt with it satisfactorily when I come to it, perhaps we can debate a little further. Item 2 of our application specifies that a part-time employee to whom item 1 applies is entitled to the prescribed district allowance and not subject to proportionate discounting. Item 3(1) is couched in similar terms to item 1 but in lieu of the district allowance payment specifies that an employee is entitled to air fare benefits.

PN157

Item 3(2) provides details of the actual air fare entitlement and associated arrangements and item 4 deals with the entitlement of employees who have a *prima facie* entitlement to air fares pursuant to item 3(1) to access an air fare entitlement in the case of an emergency. What the employer's application seeks to do is to remove the discretionary element associated with the existing clause and to remove the words "permanently stationed" and to make specific that the entitlement to payment of a district allowance and for the benefits of air travel is to be solely directed to those employees whose employment is based in a remote or isolated location and whose employment in that remote or isolated location results from a direction of the employer.

PN158

This may come about as a consequence of an involuntary transfer or in the example of first year teachers, nurses, police officers who come out of the academy as I understand, and only those new recruits are utilised in some remote locations. It is those sorts of people that we are directing our submissions toward, and the involuntary transfer is the capacity of the head of agency in assigning functions and duties, is also deemed to include the location at which those functions and duties are to be performed and may be varied.

PN159

In essence in circumstances where a refusal on the part of the employee to locate to that remote or isolated area would amount to the fundamental repudiation of a contract of employment subject, of course, to any appeal or Commission

proceedings. It is our position that persons who are recruited directly from the remote or isolated localities in which they are residing to work in a government department and based in that remote or isolated location should not be recipients of the district allowance or air fares.

PN160

In essence those persons whose residency in the remote or isolated location was in evidence prior to their taking up employment in the department or agency, irrespective of whether that residency status had been of long or short standing. Put another way those persons who by individual or collective choice had exercised their free option to move to and remain in a remote or isolated locality for whatever motivating reason and who subsequently obtained employment in that location with a department or agency ought not, in our submission, be entitled to the allowance or air fares.

PN161

What is logical about an employee residing on an island, long-time resident, unemployed who subsequently gains employment in a government department in that locality, I would have thought in those circumstances the windfall for that employee was merely getting employment. Then to be confronted with a situation where, for that person's previous residency on the island having to meet additional costs which goes with the territory, subsequent upon gaining government employment, not only does that person then gain the district allowance in recognition of those excess costs which that person has borne begrudgingly or otherwise for the previous 30 years, and also the opportunity at the employer's expense, the government's expense, to travel off that island up to three times every year.

PN162

THE DEPUTY PRESIDENT: Do you know what the circumstance is with the taxation zone allowance; is that only - is it applicable to everybody in the zone or

PN163

MR PEARCE: Anyone who works or lives in the zone.

PN164

THE DEPUTY PRESIDENT: Yes.

PN165

MR PEARCE: And I understand the islands are zone B, special. They are the highest rate applying in Tasmania.

PN166

THE DEPUTY PRESIDENT: So that applies whether they were resident before they worked there or not?

PN167

MR PEARCE: Yes. I don't understand the taxation - tax pack thing - - -

PN168

THE DEPUTY PRESIDENT: So why is this different?

PN169

MR PEARCE: Why is this different? In what context?

PN170

THE DEPUTY PRESIDENT: Well, people receive a taxation benefit because of the disability attached to living in a remote area regardless of how they came to live there, whether they were born and bred or went there to work; why is this situation different? This is in effect a disability allowance. I am not talking about the air fares I am talking about the district allowance. It is a disability allowance. Why is the disability not the same for everybody as is seen in the Taxation Act for the zone allowance and as far as this government is concerned the disability is not the same for everybody?

PN171

MR PEARCE: The disability - no, we don't say the disability is not the same and I am just coming to the point. What we say is people who chose, who chose, to reside in remote or isolated areas do so for a variety of diverse reasons. They may choose to continue to reside, for example, on the islands because of a long-standing family residency basis or some other historical attachment; they may choose to reside for climatic reasons or therapeutic reasons; they may go to the island for promotional opportunities; for lifestyle reasons; for self employment pursuits; for rural pursuits; to explore or investigate employment options or opportunities or indeed for whatever reason.

PN172

THE DEPUTY PRESIDENT: Or in the case of Flinders Island to live within the indigenous community.

PN173

MR PEARCE: And that is a very valid reason as well, Deputy President. But for whatever reason an individual and individuals, and couples or a family's decision to remain in or to move to an isolated or remote location, is inevitably a product of the power of choice and in exercising that choice it must be assumed that that person, couple or family, must have weighed the pluses and minuses, the benefits and the down sides, including consideration of additional costs in isolation, of remaining in or moving to an isolated area.

PN174

Contrast this with an employee who has no choice other than perhaps Hobson's choice, and in conformity with the direction of the employer is required to relocate to, to take up residence in and to perform work in an isolated or remote area. That is where the disturbance occurs. That person, for example, being recruited from mainland Tasmania, if he has his roots or if the family has their roots in Tasmania, they are the ones that then suffer the social consequences of an arbitral move on the part of the employer. They have no choice. They get to the island, they are confronted with excess costs.

PN175

We acknowledge that there is - well, evidence was brought in in earlier proceedings which led to the making of the district allowance and clearly the preface to the award clause says it is for excess costs. Those are the people without choice are confronted with those excess; those are the people that have

the genuine reasons for wanting to revisit the mainland, for example, if they have left family behind. It may well be that they are maintaining two houses if they have to take up permanent residence on the island.

PN176

It is this group of employees whom we submit have an unequivocal entitlement to the award allowance and in the case of the employees on the Bass Strait Islands the air fares and it is these persons for whom we seek the draft award variation. Deputy President, that is our submission. Simple in concept, acknowledging that you put that you have two people working side by side doing the same work, one benefiting from a district allowance, one not, and we say that is because of the antecedent nature of how they came to be there.

PN177

THE DEPUTY PRESIDENT: Can we just go off the record?

OFF THE RECORD

[12.31pm]

RESUMED

[1.01pm]

PN178

THE DEPUTY PRESIDENT: Let the record show that there have been discussions between the Commission and the parties and my understanding is that there will be further off-record discussions between the parties after we adjourn today. Mr Miller?

PN179

MR MILLER: Thank you, ma'am. Just in a very brief response to some of the comments made by Mr Pearce, he indicated that at Part 35 - sorry, I beg your pardon, in Mr Abey's decision he made mention of certain issues and I draw to the Commission's attention that at paragraph 36 Mr Abey then went on to say that:

PN180

In the circumstances I am surprised that DPIWE has apparently not observed the spirit and intent of the Deputy President's decision in employment relations, agreements subsequent to that of Ms Beeton.

PN181

So therefore he is indicating that the spirit and intent of that previous decision should have been carried over into the current - and I believe - into the current application to vary the award for the air fares. I think Mr Pearce has a grand future in archery. He does draw a very long bow. I have during the course of some research gone back to 1929 and to 1930 in which one can produce documentation which the then Public Service Board indicated that persons residing in various areas, especially on the west coast, should be paid allowances not because they have been relocated there but because they were residing there. However, given the time and the discussions that are to continue post this meeting today, I will forebear from entering them as exhibits at this point in time.

PN182

My understanding is that the matters that we have in front of us that are yet to be completed are T11477 of '04. I have not touched upon T11324 either by way of response or advocacy and I believe that is the intentions of the parties that this matter is kept open until such time as there has been an outcome reported back to you for any future progress. If the Commission pleases.

PN183

THE DEPUTY PRESIDENT: Thank you. Well, I indicate that the parties will continue to have discussions and hopefully the matter can be settled, in which case both parties would notify me of an intention to withdraw their applications. If that doesn't happen then we will continue with the arbitration. In any event this matter is now adjourned until 4 pm on Thursday, 24 June 2004. Thank you.

ADJOURNED UNTIL THURSDAY, 24 JUNE 2004

[1.05pm]

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