

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s70(1) appeal against decision

POLICE ASSOCIATION OF TASMANIA

v

COMMISSIONER OF POLICE

(T13898 of 2012)

PRESIDENT P L LEARY
COMMISSIONER M A GAY
COMMISSIONER B DEEGAN

8 August 2012

Appeal against a decision handed down by Deputy President T J Abey arising out of T13844 of 2011 - Appeal dismissed by majority decision – Decision confirmed

DECISION OF PRESIDENT LEARY

[1] This is an appeal by the Police Association of Tasmania (PAT or the Appellant) against a decision of Deputy President Abey in Matter T13844 of 2011.

[2] S70(1A) of the *Industrial Relations Act 1984* (the Act) provides:

"A Full Bench is not to uphold an appeal under subsection (1) unless in its opinion:

(a) The Commissioner against whose decision the appeal is made, in reaching that decision has –

- (i) made a legal error; or*
- (ii) acted on a wrong principle; or*
- (iii) gave weight to an irrelevant matter; or*
- (iv) gave insufficient weight to a relevant matter; or*
- (v) made a mistake as to the facts; or*

(b) the decision was plainly unreasonable or unjust."

[3] The matter on appeal arose from a notification of a dispute pursuant to s.29 of the Act as to whether a PAT member held the requisite "approved tertiary qualifications", to advance to Sergeant Level 7(ii). The Appellant had submitted before the Deputy President that the award

provision allowed the member to seek advancement to level 7(ii) as he satisfied the 3 criteria specified in clause 8.5.2(e) of the Police Award 2008.

[4] Clause 8.5.2(e) provides as follows:

"Clause 8.5.2(e)

8.5 Annual Salary Increments

8.5.2 Sergeant

(e) Advancement to level 7(i) will only occur for a member who has been at level 6 for 12 months and has successfully completed the Inspector Qualifying Course or approved tertiary qualifications.

Clause 8.5.2(f)

8.5 Annual Salary Increments

8.5.2Sergeant

(f) Advancement to level 7(ii) will only occur for a member who has been at level 6 for 12 months and has successfully completed the Inspector Qualifying Course and approved tertiary qualifications." [our emphasis]

[5] In his decision of 11 March 2012 the Deputy President found that the Graduate Certificate in Police Studies, when completed as part of the Inspector Qualifying Course was not an "approved tertiary qualification" for the purposes of advancement to Sergeant Level 7(ii).

[6] The Deputy President found that there were two questions to be determined;

1. *"Does the expression Inspector Qualifying Course as it appears in the award subsequent to 2008 mean Inspector qualifying process?"*
2. *If the answer to 1 above is No, does the expression 'approved tertiary qualifications' as it appears in clause 8.5.2(f) include the Graduate Certificate in Police Studies when gained as part of the Inspector qualifying process?"*

[7] The Deputy President found as follows:

"[61] *It follows that the expression Inspector Qualifying Course as it appears in the 2008 and 2011 Awards, (and for that matter the 2004 Award) cannot be construed as meaning the broader Inspector qualifying process.*

[62] *This finding takes the Commission to the second question, namely, does the expression "approved tertiary qualification" as it appears in clause 8.5.2(f) include the Graduate Certificate in Police Studies?*

[63] *The memorandum from Corporate Services dated 8 February 2005 together with the Gazette Notice No 71 dated 12 May 2005 put beyond doubt that TEAS approved tertiary qualifications will be accepted as an "approved tertiary qualification" for the purposes of clause 8.5.2(d) of the 2004 Award. In this context I am prepared to accept*

the PAT contention that TEAS approval removes the discretion from the approval process, unlike a tertiary qualification which does not have TEAS endorsement.

[64] Importantly the Gazette notice is prefaced with the following:

"The following have been approved by the Commissioner in relation to the Police Award 2004 after extensive consultation within the Department of Police and Public Safety and with the Police Association of Tasmania."

[65] Clearly the consultative process giving rise to the Gazette notice conferred a significant element of 'ownership' by the industrial parties on the process inherent in then clause 8.5.2(d).

[66] It is also clear that the Graduate Certificate in Police Studies is TEAS approved, thus entitling the member to departmental support.

[67] Given this combination of factors, there can be no doubt in my mind that the Graduate Certificate in Police Studies has been accepted as an approved tertiary qualification since 2004, and thus amounts to 'custom and practice.' The Gazette Notice has not been repealed. Further, it is common ground that the new Level 7(i) arising from the 2008 Award is directly equivalent to Level 7 in the 2004 Award.

[68] There are numerous authorities on the issue of 'custom and practice' and how this relates to the notion of 'management prerogative.' I reaffirm my view which has been expressed in previous decisions referred to by the applicant. Well established custom and practice should not be altered without proper consultation and the giving of appropriate notice. This is particularly so when the practice has been implemented following consultation and underpinned by solid documentation, as is the case in this matter.

[69] I have no hesitation in concluding that, notwithstanding the memorandum from Corporate Services dated 17 April 2008, the Graduate Certificate in Police Studies should continue to be recognised as an 'approved tertiary qualification' for the purposes of clause 8.5.2(e). That is, for the purposes of advancement to Level 7(i)."

And further:

"[80] I do however accept the employers contention that level 7(ii) is new (in 2008) and custom and practice which had hitherto applied to Level 7 does not automatically extend."

[8] No issue was taken by the Appellant with the Deputy President's finding in relation to the expression "Inspector Qualifying Course".

[9] The Appellant pursued the appeal on the following grounds:

Appeal Ground 1:

"The Deputy President erred in holding that previous custom and practice applicable to advancement to level (i) did not extend to level 7(ii)."

Appeal Ground 2:

Appeal ground 2 was not pursued.

Appeal Ground 3:

"In the circumstances the Deputy President erred in finding that new business rules applied to advancement to level 7 (ii) notwithstanding the failure of the employer to consult with the applicant, or the employee organisation about any such rules, or procedures or ever to disclose them, when the employer's failure in that regard was unconscionable."

Appeal Ground 4:

"In the circumstances the Deputy President erred in finding that new business rules applied to advancement to level 7(ii) (by giving no weight or insufficient weight to the principles that changes to custom and practice require consultation and reasonable notice of an intention to change in order to be applicable."

Appeal Ground 5:

"The Deputy President erred in giving no weight, or insufficient weight to his finding that the employer's position with respect to the construction of the award, and in particular Clause 8(5)(2), was the subjective evidence of its own intentions, when that finding rendered the employers evidence in that respect inadmissible for the purposes of award construction, and by extension to the processes made under it."

Appeal Ground 6:

"The Deputy President erred in giving no weight, or insufficient weight to the history of negotiations between the employer and the employee organisation about matters relevant to advancement under the award and to the importance of those historical matters as evidence of the intentions of the parties thereto as to the implementation of changes, and changed procedures for advancement under level 7(ii)."

Appeal Ground 7:

"The Deputy President erred in giving weight to the fact of the Corporate Service Memorandum dated 17 April 2008, and to its terms, when that fact and the terms of that Memorandum had not been gazetted, and, in that context, in giving no weight or insufficient weight to the fact that the procedure for advancement to level 7(i) had been the subject of a Corporate Services Memorandum which was gazetted, and which gazette notice had not been rescinded, and was applicable to clause 8.5.2 unless and until it was replaced or supplanted by further notice."

Appeal Ground 8:

"Such further or other grounds as may be advanced at the Appeal."

[10] It is convenient to deal with the grounds of appeal in the same manner as the Appellant. The majority of the Appellant's submissions on appeal were directed at Ground 1.

[11] It was submitted by the Appellant that the custom and practice applicable to the application of level 7(i) had been developed as a result of consultation between the parties and agreement was reached as to the criteria for determining "approved tertiary qualifications". It

was put that without consultation new rules should not replace previous custom and practice and that the use of the words "approved tertiary qualifications" in both level 7 (i) and level 7 (ii) indicated the intention to apply the past custom and practice.

[12] The Commissioner of Police, the respondent to the appeal, put that the Appellant had identified no error of law in the Deputy President's finding that the custom and practice that clearly attached to advancement to Level 7(i) could not automatically extend to advancement to new Level 7(ii). It was argued for the Respondent that as there was no definition of "approved tertiary qualifications" in the Award it was open to the Deputy President to find that the respondent was permitted to exercise managerial prerogative in determining which tertiary qualifications would be approved for advancement to Level 7(ii).

[13] In his decision the Deputy President dealt with the matter as follows:

"[78] The employer maintains that the intention of the new Level was to reward members 'who do that bit extra' in terms of gaining additional qualifications. This does not include the Graduate Certificate in Police Studies when completed as part of the Inspector qualifying process. Whilst I have no reason to suspect that this is other than a genuinely held view, it has not in any way been documented, discussed or communicated to the members affected, or their organization. Indeed as the PAT points out, the memorandum upon which the employer relies, outlines a process, not criteria for approval or otherwise.

[79] I conclude that the employer position as advanced in the hearing amounts to "subjective evidence of a party's own particular intentions" and is not admissible in a matter of award construction. (See Harbour City Real Estate Pty Ltd v Cargill).

[80] I do however accept the employers contention that level 7(ii) is new (in 2008) and custom and practice which had hitherto applied to Level 7 does not automatically extend"

[14] There is one issue requiring consideration and that is whether the Graduate Certificate in Police Studies is an approved tertiary qualification for advancement to level 7 (ii).

[15] The Deputy President determined that the expression *Inspector Qualifying Course* "cannot be construed as meaning the broader *Inspector qualifying process*". The expression *Inspector qualifying process* is not recognised in the Agreement.

[16] The Deputy President noted at paras [6] and [7] that:

"[6] Prior to 2003 Sergeants who wished to become eligible for promotion to Inspector were required to complete the Inspector Qualifying Course. This was a course largely provided internally at the Police Academy. Since 1998 members who completed the course received a 25% credit towards the Graduate Certificate in Police Studies, a program provided by the University of Tasmania (UTAS). The graduate certificate was not however a requirement of the Inspector qualifying process.

[7] In May 2003 the Graduate Certificate in Police Studies became a requirement of the Inspector qualifying process. Thus from that point on, to be eligible for promotion to Inspector, a member was required to:

- *Complete the Inspector Qualifying Course*

- Sit and pass two x 2-hour exams
- Obtain the Graduate Certificate in Police Studies"

[17] The Deputy President also noted that:

"[63] The memorandum from Corporate Services dated 8 February 2005 together with the Gazette Notice No 71 dated 12 May 2005 put beyond doubt that TEAS approved tertiary qualifications will be accepted as an "approved tertiary qualification" for the purposes of clause 8.5.2(d) of the 2004 Award. In this context I am prepared to accept the PAT contention that TEAS approval removes the discretion from the approval process, unlike a tertiary qualification which does not have TEAS endorsement."

[18] In my view the Deputy President provided little reason for rejecting the claim by the appellant that the Graduate Certificate in Police Studies was an approved tertiary qualification for the purposes of level 7(ii) particularly as he acknowledged that its standing remained as being 'approved'. The accepted practice has been that to be an approved qualification it requires TEAS approval and the Graduate Certificate in Police Studies continues to be TEAS approved. The Deputy President's rejection seems to be that 7(ii) is a new provision albeit the words 'approved tertiary qualification' have had a clear and concise meaning and are identical for level 7(i) and level 7(ii). I am of the view that the Deputy President has made a mistake as to the facts and his decision is inconsistent.

[19] The test now applied for advancement to level 7(ii) does not recognise the Graduate Certificate in Police Studies as an approved tertiary qualification when undertaken as part of the Inspector Qualifying Course. The words in the agreement do not state that intention.

[20] It has been an accepted practice that approval for tertiary qualifications means approved by TEAS not qualifications approved by the respondent as has been the case in this matter.

[21] Nonetheless I fully support the reasoning behind the respondent's initiative to insert an additional classification level but consider that the Deputy President erred by giving insufficient weight to what has been the past custom and practice and the accepted and continuing status of the Graduate Certificate in Police Studies as an 'approved tertiary qualification' which are the words used in level 7(ii)..

[22] Absent any consultation, absent any specific reference in the agreement that there is now a different requirement for advancement, albeit the words remain unchanged, as well inadequate information to members that the same words have different meanings, is confusing and unsatisfactory.

[23] I also note that there has been an acknowledged lack of consultation as required under the award and the Agreement.

[24] I support and endorse the sentiments expressed in the Deputy President's Order directing the parties to consult as to the application and criteria to be applied in respect to the Sergeant level 7(ii) classification which may result in a variation to the current provision to remove any ambiguity or uncertainty.

[25] I would allow the appeal and revoke the finding of the Deputy President.

P L LEARY
PRESIDENT

DECISION OF COMMISSIONER GAY AND COMMISSIONER DEEGAN

[26] We have had the opportunity to read the decision of the President. We agree with the facts and characterisation of the appeal as set out in her decision at paragraphs [1] to [14]. With respect, we are unable to agree with the remainder of her decision.

[27] It is our view that it was clearly open to the Deputy President to decide that the custom and practice which determined that the Graduate Certificate in Police Studies would be accepted as an approved tertiary qualification for the purposes of advancement to Level 7(i) did not automatically extend to the new Level 7(ii) introduced in 2008. We can discern no error of law or of fact which has infected his decision in this regard. In our view there was nothing before him upon which he could have reached the contrary conclusion.

[28] New Level 7(ii) was introduced in 2008 as an employer initiative to be an incentive to *"reward those members who undertake additional tertiary studies for both their own advancement and the overall professionalism of the Police Service."* The employer determined that the Graduate Certificate in Police Studies, when gained as part of the Inspector Qualifying Process is not an approved tertiary qualification for the purposes of advancement to Level 7 (ii). We accept the Deputy President's view that it would have been preferable had the employer consulted with the appellant concerning this decision but inadequate consultation cannot elevate custom and practice relating to a separate and distinct salary advancement process to be the determining factor in the approval of qualifications for advancement to a further level.

[29] The lack of consultation was clearly a concern to the Deputy President and he addressed that concern in making the Order directing the parties to engage in consultation. Neither the insufficient detail provided in the new business rules nor the lack of consultation about the approval of tertiary qualifications for advancement to the new level was sufficient reason, in the Deputy President's view, to impose a definition of "approved tertiary qualification" for the purposes of clause 8.5.2(f) of the Award for which there was no proper basis. Custom and practice in relation to clause 8.5.2(e) did not provide such a basis.

[30] So far as the Appeal Grounds 3 to 7 are concerned we can identify no error in the Deputy President's reasoning. It is clear from the Deputy President's decision that he gave full consideration to the matters raised with him about the promulgation of the business rules and was critical of the lack of consultation. We do not consider that the Deputy President gave these matters any less weight than was warranted in the circumstances. Nothing in the Deputy President's decision suggests that he considered management prerogative to be an unfettered right that can be exercised unreasonably.

[31] We dismiss the Appeal and uphold the findings and the decision of the Deputy President. We also support and endorse the sentiments expressed in his Order directing the parties to consult as to the application and criteria to be applied in respect to the Sergeant level 7(ii) classification.



B Deegan
COMMISSIONER