

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Police Association of Tasmania

(T13581 of 2009)

and

Commissioner of Police

DEPUTY PRESIDENT TIM ABEY

HOBART, 9 March 2010

Industrial dispute - alleged breach of award - transfer - property purchase expenses - findings and recommendations issued

REASONS FOR DECISION

[1] On 10 November 2009, the Police Association of Tasmania (PAT) (the union), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Commissioner of Police (the employer) arising out of the alleged breach of the Police Award.

[2] A hearing commenced in Hobart on 9 December 2009 and continued on 15 December and 17 December of the same year. Mrs A Smith and Mr M Kadziolka appeared for the union while Mr T Martin and Ms H Jordan appeared for the employer.

[3] This matter concerns the failure of Tasmania Police to reimburse Property Purchase Expenses for three officers who transferred from one location to another. The PAT contends that this was contrary to the provisions of clause 12.3.2 of the *Police Award* [the award]. In addition, the PAT seeks an order "*that the method of applying this entitlement, which was used by the Controlling Authority prior to July 2001, be reinstated and adopted as standard.*"

[4] To provide context, clauses 12.2 and 12.3 are reproduced in full.

"12.2 Property Sale Expenses

12.2.1 A member transferred from one location to another requiring a change in residence shall be entitled to property sale expenses for the sale of a property in their old locality provided that:

- (a) the property is owned and occupied by the member; or*
- (b) the property was being purchased under a contract of sale providing for vacant possession; or*
- (c) the property was being constructed for the member's own occupation on completion of construction;*

- (d) at the date of sale the transfer of the member was approved and signed; and
- (e) the expenses shall not exceed:
 - (i) \$14,271 for a sale in a capital city and greater metropolitan area within the capital city,
 - (ii) \$10,655 for a sale in a non capital city; or
 - (iii) such proportion which reflects the member's equity in the property owned jointly or in common with a person other than the members spouse or dependent relative; and
- (f) the amount paid shall be reimbursement for reasonable expenses approved by the Controlling Authority incurred in the sale of the property owned or part-owned by the member.

12.3 Property Purchase Expenses

12.3.1 A member who transfers to another locality and receives property sale expenses is entitled to property purchase expenses for the purchase of a property in the new locality, provided that:

- (a) the expenses shall not exceed:
 - (i) \$12,650 for a purchase in a capital city and greater metropolitan area within the capital city, or
 - (ii) \$8,590 for a purchase in a non capital city;
- (b) the amount paid shall be for reasonable expenses approved by the Controlling Authority incurred in the purchase of a property; and
- (c) the members occupies the purchased property or intends to occupy the property upon completion of construction.

12.3.2 The Controlling Authority may approve payment of the property purchase expenses for the purchase of a property in the new locality, to a member who does not sell a property in connection with transferring to another locality, if the Controlling Authority is satisfied the transfer necessitated the member to purchase a property in the new locality.

12.3.3 In addition to paragraph 12.3.2, a member who was required to reside in Departmental accommodation at their old locality is entitled to claim property purchase expenses for the purchase of a property at their new locality, provided the member was entitled to and claimed property sale expenses when the member transferred to the old locality.

12.3.4 (a) A member is not entitled to claim property sale or property purchase expenses in respect of a sale or purchase of a property, which is effected more than two years after the date on which the members takes up duty in the new locality; or

(b) After the date on which the transfer appears in the Police Gazette as the member's transfer date back to the previous locality if less than two years.

12.3.5 The Controlling Authority may approve both property sale and property purchase expenses outside the two year time frame in special circumstances upon application by the member.

12.3.6 Property sale or property purchase expenses may be approved at the discretion of the Controlling Authority for a member transferred to a locality as a result of misconduct.

12.3.7 Where a member's spouse is also a member of the Police Service only one claim may be made in respect to property sale or property purchase expenses for the sale of a property or the purchase of a property that they own jointly or in common or intend to own jointly or in common with their spouse.

12.3.8 An application for property sale and/or property purchase expenses shall be accompanied by written documentary evidence of payment by the member of the allowable expenses, being evidence that is satisfactory to the Controlling Authority.

12.3.9 The monetary amounts stated in subparagraph 12.2.1(e) and subparagraph 12.3.1(a) are effective from 1 December 2007 and these amounts will be reviewed annually by the Controlling Authority."

Applications in Dispute

[5] The following is a summary of the pertinent facts relating to each application for Property Purchase Expenses declined by Tasmania Police.

Senior Constable W

[6] Transferred from Queenstown to Glenorchy on 25 May 2009. Had resided in departmental accommodation in Queenstown for two years. In the knowledge that a transfer to the Hobart area was imminent, Senior Constable W purchased a property in Austins Ferry in February 2009. In supporting documentation, Senior Constable W referred to special storage requirements, the difficulty of the rental market in relation to dog ownership, and the financial advantages of purchasing rather than renting.

Constable C

[7] Transferred from Devonport to Hobart [Eastern District] on 15 December 2008. Purchased a property in Lutana in February 2009. Whilst in Devonport, Constable C resided in an "Officer next door" residence.

Constable S

[8] Since graduating from the Police Academy in 2000 Constable S either rented Departmental accommodation or participated in the *officer next door* program at the three positions held in Devonport, Queenstown and New Norfolk. The Constable also resided in a *officer next door* residence during a period of temporary transfer to Bridgewater, prior to the compulsory transfer to Glenorchy on 7 April 2008. Constable S purchased a property in Rosetta on 7 August 2008.

[9] It would seem that a common element in the above three applications was the non availability of Departmental accommodation in the new location.

History of how This Clause Has Been Applied

[10] Mrs Smith provided a detailed history of this clause and how it has been applied.

[11] Prior to 1994 the matter of transfer expenses was provided for in the 1974 *Police Regulations*.

[12] In 1994 the provision was inserted in the Award.¹ The relevant sub clause read:

"11.11.4 The Controlling Authority may approve payment of the property purchase reimbursement allowance to a member who does not sell a dwelling and/or land in connection with transferring to another position if the Controlling Authority is satisfied with the transfer necessitated the member purchasing a dwelling and/or land on which to erect a dwelling."

[13] Mrs Smith contended that this did not involve any new standards; simply a consolidation of existing provisions.

[14] The earliest reference to this issue is found in correspondence from Tasmania Police dated 16 February 1981. Relevantly this correspondence stated:²

"Transfer Provisions (Property Allowance)"

As you are aware, to be entitled to a Property Allowance members must be transferred to meet the needs of the department and in the case of a purchase of residence no departmental accommodation is to be available. When the relevant legislation was introduced considerable discussion took place between representatives of various government departments and instrumentalities to ensure that some uniformity existed in introducing this new allowance. At that time it was agreed that the proviso to meet the needs of the department should be included and this department's representative stated that as modern housing is available for police officers the allowance for a purchase should not apply to any employee who refused to accept departmental accommodation.

It was never the intention of the legislation that payment should be made to all police officers who are transferred and I do not consider that this department has refused to meet any valid claim. I will continue to give full consideration to all claims of this nature providing the requirements of the regulations are met."

[15] Mrs Smith surmised that the issue giving rise to this correspondence was likely to have been members opting to purchase property rather than occupy what they considered to be sub standard departmental accommodation.

[16] Mrs Smith submitted that historically [pre 2001], where a property purchase allowance was claimed in the absence of a claim for a property sale allowance, if suitable

¹ T2399

² Exhibit A5

departmental accommodation in the new location was not available, the claim satisfied the test that the transfer necessitated the purchase and the allowance was paid. This position, she submitted, was supported by a dispute in 1997 whereby Tasmania Police determined:³

"Although the position the Sergeant applied for was inadvertently not gazetted with 'Quarters may be available,' it did not necessitate the Sergeant having to purchase a dwelling-house within the area when he transferred. Had he made the appropriate enquiries, departmental accommodation was available in the area at the time of his transfer, as per the report of Superintendent YOUNG. It is therefore deemed unnecessary for the Sergeant to purchase a dwelling-house upon his transfer."

[17] Mrs Smith said that this matter was subsequently resolved in favour of the Sergeant, as it was agreed that the available departmental accommodation was not suitable to the member's needs.

[18] In 2001 the Award was substantially rewritten resulting in an amalgamation of the 1997 Award and three Enterprise Agreements. However the sub clause relevant to this dispute, whilst modified to reflect new terminology, did not, in essence, change according to Mrs Smith. The 2001 sub clause read as follows:⁴

"12.3.2 The Controlling Authority may, approve payment of the property purchase allowance for the purchase of a property in the new locality, to a member who does not sell a property in connection with transferring to another locality, if the Controlling Authority is satisfied the transfer necessitated the member to purchase a property in the new locality."

[19] Shortly after the publication of the new award two claims made pursuant to the sub clause were rejected. The disputed claims were referred to the PAT, who on 13 November 2001, wrote to Tasmania Police in the following terms:⁵

"I refer to our meeting last Thursday 8th November at which you, Inspector Chambers, Sharon Pavier, Constable Kendra Hey and myself were present.

...

It was pointed out at the meeting by Sharon Pavier, that during the recent negotiations for the last enterprise agreement the intent of transfer expenses (in a general sense) was that members should not be financially disadvantaged, or perhaps that these expense related allowances are not there for members to benefit from. As I recall and indeed as I said at the meeting that we have no argument with that concept. Members who claim and receive transfer expense related allowances are only receiving their rightful entitlement.

As the meeting went on, it became apparent that from the implementation of the new Police Award (1/7/01), a conscious decision was made by you to change the method of applying Award provisions by doing so in a consistent and restrictive manner and in relation to Clause 12.3.2, to pay

³ Exhibit A6

⁴ Exhibit A8

⁵ Exhibit A9

more attention and interpret the requirements and the intention of the clause. Interpretation of the word 'necessitate' was not discussed at any length. Although, it was evident that previous claims may have had to prove a necessity (in some form) to purchase and since the 1 July this has been applied differently.

Subsequently, members who have made claims since the 1 July 2001 have had their claims denied and have contacted the Association knowing full well other members allegedly similarly circumstanced have had their claims approved, albeit prior to 1 July. These members are obviously aggrieved.

I had discussed this matter with Mark and we were both perplexed as to why some received the allowance and others didn't. Whilst transfer expenses underwent significant changes arising from the last enterprise agreement, the particular clause at issue hasn't changed at all.

The meeting did clear that matter up; I now understand that you have applied this clause differently since the 1 July 2001 (for the reasons stated above).

However, this is still a cause for concern, and as I pointed out at the meeting, you have 'moved the goal posts' so to speak. The members have had no knowledge or warning that you were to apply this clause differently to how it was applied in the past. It was custom and practice to approve claims of this nature and members rightly have an expectation that they would have an entitlement."

[20] On 16 January 2002 Tasmania Police responded indicating that the claims had been reviewed and, as a consequence, approved. The correspondence went on to state:⁶

"This decision is based on the transfer actually occurring prior to the Police Award being approved (Parry in May 2001 and Broadribb in December 1999) and a reasonable expectation that an eligibility existed for this allowance when the primary dwelling was purchased (Parry in August 2001 and Broadribb in August 2001).

The Department maintains its position in relation to claims for property purchase allowance under the new Police Award that the primary criteria is sale of a principal residence at the former location. The intention of this property allowance provision under the new Award is to re-imburse defined costs in property purchase when a member is transferred and re-establishing themselves in a similar situation (owning a house) compared to their previous accommodation.

Clause 12.3.2 provides a discretionary power for the Controlling Officer to approve payment in special circumstances where a member does not sell a property in connection with the transfer. It was the clear intention at the time this provision was negotiated that Clause 12.3.2 was not based solely on the member determining it is time to purchase rather than rent.

The attached gazette notice has been drafted to reconfirm the new Police Award provisions. You may wish to comment."

⁶ Exhibit A10

[21] The PAT responded on 30 January noting that the Gazette notice had not been attached, Further:⁷

"I note the comments in your letter about the intention of the related clause and the new 'Award'. The department's position is clearly at odds with our position on the matter. We are of the firm opinion that the intent of Clause 12.3.2 has not changed at all with the introduction of the new Award. I reiterate our position as stated in our letter to Commander McClymont on the 13 November 2001."

[22] Notwithstanding a follow up from the PAT on 12 March 2002, it appears that nothing was forthcoming from Tasmania Police.

[23] On 27 May 2002, a Gazette notice was published in the following terms:⁸

"PROPERTY PURCHASE ALLOWANCE"

The new provisions under the Police Award 2001 in relation to Property Purchase Allowance (Clause 12.3) are drawn to the attention of members.

Where a member is transferred from an old locality to a new locality (as defined) which requires a change in residence and that member receives the property sale allowance there is an entitlement to a property purchase allowance for the purchase of a new property in the new locality. The intention of this provision is to reimburse costs associated with a member re-establishing the residential status of him/herself in the new location similar to those in the old location ie home ownership.

Under Clause 12.3.2 the Commissioner has a discretionary power to approve property purchase allowance where property sale allowance was not reimbursed. It is likely that this will only be approved where a member is able to demonstrate exceptional circumstances. A decision by a member to change from rental accommodation to home ownership in the new location is unlikely to be sufficient to be eligible for this allowance."

[24] Mrs Smith submitted that the period 2002 to 2004 was one of ongoing disputes in relation to the subject clause. She said:⁹

"By mid 2004 the Police Association had five unresolved claims made pursuant to the subject clause. The five unresolved claims involved three claims where members had resided in departmental housing in the former location. One owned his own residence in the former location but chose not to sell. And one sold his home in the former locality prior to his transfer and briefly resided in heavily subsidised police housing – sorry – departmental government housing also known as the officer next door program. In all instances, departmental accommodation was not available in the locations. In all instances, the claims would have been approved and paid prior to the department's change of view as previously mentioned."

⁷ Exhibit A11

⁸ Exhibit A13

⁹ Transcript p11

[25] Despite ongoing discussions it appeared that the disputes would not be resolved and the PAT foreshadowed a reference to the Industrial Commission. Following renewed consultations an agreement was reached which settled the outstanding claims and an agreed set of guidelines for future applications. These guidelines were subsequently published in the Gazette on 12 May 2005.¹⁰

"Property Purchase Reimbursement"

Approval under clause 12.3.2

'For the Controlling Authority to be satisfied the transfer necessitated the member to purchase a property in the new locality' the following are taken into account:-

Reimbursement under this clause for costs associated with purchase where property sale reimbursement has not occurred may be approved in the following circumstances.

- (a) *housing purchased in the new locality is the principal residence for member and family.*
- (b) *the member did not own a suitable house within reasonable proximity of the new locality prior to transfer.*
- (c) *the member does not retain ownership of a house retained in previous location, subject to (e)*
- (d) *the member rented a departmental residence or was involved in the 'officer next door program' at the former location and/or can demonstrate a trend of renting departmental houses as a result of transfers.*
- (e) *In circumstances where the member retains a house in the former location. If the member returns to the former locality and undertaking is provided that the member will not claim reimbursement for sale or purchase at that locality associated with that transfer.*
 - *Unlikely to be approved (unless special circumstances are demonstrated by member):-*
 - *Suitable departmental houses are available in area to which the member transfers; or*
 - *The member previously rented in private market and moves to new location where there is a rental market (urban location), unless the member demonstrates unusual and special circumstances which maintain family and/or personal requirements; or*
 - *Not sufficient (of itself) to establish home ownership for the first time; or*
 - *Not for venture capital purposes."*

¹⁰ Exhibit A15

[26] The Gazette notice apparently ushered in a period of stability whereby, according to Mrs Smith, if the criteria were satisfied, the allowance was paid.

[27] However in 2009 three applications were declined. These are the applications the subject of this matter before the Commission. Mrs Smith submitted that all three claims met the criteria of the Gazette notice.

[28] In the case of Constable S, the PAT corresponded with the Acting Commissioner of Police. The response from the Acting Commissioner on 10 March 2009 said in part:¹¹

...Whilst Guidelines published in the Police Gazette dated 12 May 2005 outlines criteria that may be taken into account in relation to property purchase reimbursement, I am not satisfied that the transfer necessitated the member to purchase a property in the new location. The reason given by Assistant Commissioner Wilkinson; namely that a reasonable rental market in the new location exists remains valid.

The determination does not rest on meeting some or all of the criteria outlined in the Police Gazette dated 12 May 2005 which is the substance of her claim and your correspondence; rather those are matters that may be taken into account by the Controlling Authority in making a determination based on the Controlling Authority being satisfied that the transfer necessitated the member to purchase a property in the new locality."

[29] In relation to claims made since 2005, Mrs Smith said:¹²

"As a result of the current disputes where the three claims were rejected, the police association made an application under the Freedom of Information Act for all claims made pursuant to clause 12.3.2 since April 2005, which is the month prior to the agreed guidelines being implemented and appearing in the Police Gazette. We requested all claims that were approved or rejected because we wanted to get the big picture. The findings show that the department had consistently approved all claims that met the gazetted guidelines since 2005. Since May of 2005 until earlier this year, the PAT had not dealt with any disputes where claims that met the guidelines were rejected. In all, 21 separate claims were received under the FOI application. Of those, 14 were approved. Two applications did not meet the Gazette criteria and were not approved; three applications were approved but were entitlements under other clauses and were not relevant to clause 12.3.2. When you actually went through the claims you saw that they were not relevant to that particular clause. The remaining two that we received were Constable S's and Constable C's and obviously they were rejected, but they clearly met the criteria, as is the case with the other approved applications. Constable W's claim was rejected after the FOI application was made, so it was not included in that documentation."

¹¹ Exhibit A18

¹² Transcript p 14

[30] And later:¹³

"MS SMITH: Of the 14 applications that were approved, 10 were approved in circumstances the same as the three disputed claims before you today. Nine claimants lived in police residences in their formal location, and one took part in the Officer Next Door program, and I do have all of the documentation in relation to that."

[31] Details of the claims referred to by Mrs Smith were tendered.¹⁴

Submissions

Mr Kadziolka; for the PAT

[32] The 2005 Guidelines represented an agreed position aimed at bringing a degree of certainty for both members and the Department. However as a consequence of the Department's policy change, the agreement no longer stands:¹⁵

"The 2005 agreement has been effectively repudiated by the Commissioner's actions. So our view is that we don't want anything to do with that, because, basically, the Department has repudiated and we want to move back to the original position, which is reflected by the award."

[33] The word "may" in sub clause 12.3.2 does not confer an unlimited discretion on the Department. The correct construction is that "may" connotes an intention to pay the allowance provided the required criteria are fulfilled.

[34] It is not open to the Department to arbitrarily decline payment of the allowance if the criteria are met.

[35] In *Barrenger v Coward Gibson* J concluded:¹⁶

"The word 'may' is by a process of statutory interpretation substituted for the word 'shall' in a great number of cases. Thus in Bowden v Bowden (3), Dixon CJ said with reference to the proposition that the word 'may' imported a discretion to withhold matrimonial relief under the Matrimonial Clauses Act 1899-1954 (N.S.W.):"

'It is a word conferring power and as it is judicial power it would be in accordance with common law principle to treat it as giving a jurisdictional of which, the conditions being fulfilled, the party might demand the exercise.'

I think the conditions of subsection (1) having been fulfilled the word 'may' should have been treated as mandatory. (See also Davies v Ryan (4); Ward v Williams (5)."

[36] The only question to be determined is whether the relocation "necessitated" the purchase of a property.

¹³ Transcript p 15

¹⁴ Exhibit A19 to A28

¹⁵ Transcript p 21

¹⁶ Supreme Court of Tas. [LCA 81/1965]

[37] Some guidance can be drawn from *Long Service Leave* authority in the context of “pressing necessity” being a prerequisite for a pro rata entitlement. Whilst arguably this is higher test than that applicable in the instant matter, the tests developed in *Computer Sciences of Australia Pty Ltd v Leslie* as referred to in *Lochnagar Services v Oliver*¹⁷ are to point. Viz.

- “1. Was the reason claimed for termination one which fell within the section?
2. Was such a reason genuinely held by the worker and not simply colourable or a rationalisation?
3. Although the reason claimed may not be the sole ground which actuated the worker in his decision to terminate was it the real or motivating reason for it?
4. Was the reason such that a reasonable person in the circumstances in which the worker found himself placed might have felt compelled to terminate his employment?”

[38] Applied to the instant matter, the critical consideration is whether the geographic relocation requires the officer to find alternative accommodation in the new location. If the answer is Yes, then the decision to purchase rather than rent is entirely a matter for the individual. It is not open to the Department to draw conclusions about the availability of private rental accommodation and deny the claim on this basis.¹⁸

“The PAT argues, Commissioner, that as these members transferred geographically, they needed somewhere to live. The controlling authority says rent. There are numerous good reasons not to rent if you don’t have to. We need to consider this in the context of the reasonable person test. Does the controlling authority seriously believe that purchasing wouldn’t be a necessity if renting meant that it may cost more, or it was financially imprudent, as it is dead money, or you couldn’t get the facilities in a rental property that were needed?”

Obviously, reasonable persons do not abandon common sense when assessing this type of important issue. Intuitively, Commissioner, I believe everyone in this room knows that the concept of the employer dictating your personal circumstances that don’t impact on your work performance, including, in my submission, how and where you live, is plainly unreasonable.”

[39] It follows that the tests outlined in *Computer Sciences*, when applied with appropriate modification, would result in a favourable outcome for the applicant.

[40] The *International Covenant on Civil and Political Rights*¹⁹ confers on all individuals the “right to liberty of movement and freedom to choose his residence.”

[41] It is a matter for the individual to determine whether to rent or purchase. Having exercised that choice, the Department has the ability to decide whether the transfer

¹⁷ T11081 of 2003

¹⁸ Transcript P 28

¹⁹ Exhibit A30

necessitated the purchase. Not all transfers will give rise to a necessity to find alternative accommodation. Eg a transfer from Bellerive uniform to Hobart CIB.

Mr Martin, for the Commissioner of Police

[42] An examination of clause 12 demonstrates that in some cases payment of an allowance is a clear entitlement. Eg Property purchase expenses following the sale of property in the old locality. Clause 12.3.3 is also prescriptive and payment is mandatory when the conditions are met.

[43] By contrast, sub clauses 12.3.5, relating to claims outside the two year time frame, and 12.3.6, relating to transfers as a consequence of misconduct, require the exercise of discretion.

[44] Sub clause 12.3.2 is clearly discretionary, and the Department considers each case on its merits.

[45] There have been several awards since the 2001 dispute, but the PAT has not sought to clarify or amend the clause. The wording today, is for all intents and purpose, the same as in 2001.

[46] The Gazette notice of 2002 made it clear that a decision to change from rental to home ownership in the new location is unlikely to be sufficient to be eligible for the allowance. This position is supported by correspondence from the Department dated 16 January 2002.

[47] Whilst the May 2005 Gazette notice is different from the 2002 notice, the word "may" is still there. The notice outlines the factors which may be taken into account. This does not mean that the satisfaction of any one of the criteria will lead to automatic payment of the allowance.

[48] The criteria relating to the rental of departmental residences is discriminatory in that it can only be met by a handful of members.

[49] Under the *Acts Interpretation Act 1931* the word "may" is to be construed as being *discretionary* or *enabling*, as the context requires. It follows that to grant the order sought, would be contrary s.31[2][a] of the Act.

[50] In the case of Senior Constable W, the property in question was purchased before the transfer was approved. To grant the claim would be inconsistent with 12.2.1[d] which requires that the transfer to have been approved at the date of sale, for Property Sale Expenses to be paid.

[51] Whilst it is open to a member to make a *lifestyle* decision to purchase rather than rent, this does not in itself trigger an automatic entitlement to the allowance.

[52] The purpose of 12.3.2 is not about assisting people into the property market in the nature of a first home owners' grant.

Mr Kadziolka, in reply

[53] The Department has not provided any criteria upon which it relies but claims *discretion* as its foundation and defence.

[54] Sub clause 12.2.1[d] was part of a package of modifications inserted by agreement to ..."eliminate grey areas and improve some of the conditions." It does not apply to property purchased.

[55] It is the PAT which has acted in good faith over the years in an attempt to gain consensus on this entitlement. By contrast it is the Department which has attempted to rewrite the rules.

[56] The Department cites a lengthy period of renting departmental residences as possible justification for a successful claim but offers no guidance as to what is meant by a lengthy period. Further, the claims approved in the period 2005 to 2008 do not differentiate on this basis.

[57] The word "*may*" only makes sense in the context of the sub clause if it is to be construed as *enabling*. It follows that where the conditions are met, payment of the allowance is mandatory.

[58] The Department has not provided any reason for declining the claims of Constables C and S.

Findings

[59] I deal firstly with the nature of the word "*may*" in sub clause 12.3.2.

[60] Tasmania Police contend that this provides an unlimited discretion to the employer to deal with each application on a case by case basis.

[61] The PAT submits that in the context of the sub clause, "*may*" must be construed as *enabling*. It follows that if the conditions are satisfied, then the payment must be made. The only test is whether the transfer "*necessitated*" a property purchase.

[62] I am unable to accept that the sub clause confers an unlimited discretion on the employer to consider applications on a case by case basis without regard to established practice. Whilst I would not for one moment question the bona fides of Tasmania Police management, an unlimited discretion to determine with impunity and without reason the outcome of an award provision conferring an entitlement, could at its worst lead to decisions which are inconsistent or even capricious. This observation is not targeted at Tasmania Police, but more generally at the parties to any industrial instrument. I am unable to accept that the parties to this award intended such a potential outcome.

[63] It follows that I accept in part the PAT contention that "*may*" is to be construed as *enabling*.

[64] The PAT seeks an order that the practice applicable prior to July 2001 be reinstated. The practice was described as follows.

- The transfer requires [for geographic reasons] the member to find somewhere to live in the new location, and
- Suitable departmental accommodation was not available, and
- The member chose to purchase rather than rent

[65] Then the allowance was paid. Further the PAT submitted, such a practice was and is entirely consistent with the award.

[66] I am not prepared to accept this application for a number of reasons.

[67] Firstly, on the available evidence, it is not entirely clear what the practice prior to 2001 actually was. The evidence presented [Exhibits A5 and A6] deal with availability and/or adequacy of departmental accommodation. There is no evidence, one way or the other, as to whether, for example, the renting of departmental accommodation in the old location was a consideration.

[68] Secondly, for reasons outlined below, I am not convinced that position sought by the PAT is consistent with the spirit and intent of Clause 12, Transfer Expenses, when read as a whole.

[69] Thirdly, whatever the practice prior to 2001, I am of the view that it has been overtaken by subsequent events.

[70] It appears reasonably clear that implementation policy used by Tasmania Police changed in 2001. [see Exhibit A10]. However the rationale for this change is anything but clear as the substance of the award provision did not change. Not surprisingly, the changed policy was strongly resisted by the PAT.

[71] After a period of stability and predictability between 2005 and 2008, the PAT asserts that Tasmania Police effectively repudiated the 2005 agreed position and relied on an unfettered discretion to approve or not approve, with little indication as to the criteria utilized. Further, this change in approach has occurred without any consultation with the PAT.

[72] Mr Martin did not refute that a change in approach has occurred.

[73] Again I would observe that there has been no change in award terminology which might have been a catalyst for such a change.

[74] At this point it is useful to look at the scheme of clause 12 in its entirety.

[75] Taken as a whole, I conclude that the intent of this clause is to ensure that members transferred from one location to another, subject to the prescribed upper limits, are not financially disadvantaged as a consequence. That is, so far as is practical, to place members in the new location in the same financial position as they were prior to the transfer. Whilst this objective is entirely appropriate, it would be contrary to the scheme of this clause for members to enjoy a financial windfall as a consequence of such transfer.

[76] In my view the same approach should extend to sub clause 12.3.2. In this context I accept Mr Martin's contention that intent of the provision is not to assist individuals into the property market by way of a payment akin to a first home owner's grant.

[77] To accept the PAT position in its entirety might well give rise to such an anomaly. For example, a member residing in private rental accommodation in Launceston transfers to Hobart. The member chooses to take this opportunity to purchase a property in Hobart, and under the PAT proposal, attract payment Property Purchase Expenses. This can be contrasted with a member residing in private rental accommodation in Hobart, who chooses for lifestyle and/or financial reasons to purchase a property in Hobart. In such circumstances the purchase expenses would clearly not be paid.

[78] The position outlined above might well encourage members to ensure that their decision to enter the property market for the first time coincides with a transfer, whereby it might otherwise occur either sooner or later. Such a scenario is not in my view consistent with the objective of ensuring individuals are not financially disadvantaged as a consequence of a transfer. Indeed it could well give rise to a financial windfall.

[79] I emphasise that this case is not about whether the Department may dictate decisions about rental v purchase or where an individual chooses to live [International Covenant on Civil and Political Rights]. Those decisions can only be made by the individual. This matter turns on whether there is eligibility for reimbursement of Property Purchase Expenses in certain circumstances.

[80] The agreed position which was subsequently gazetted on 12 May 2005 was not canvassed in any detail during the hearing, presumably because both parties adopted positions at odds with this notice.

[81] The notice does however appear to address the notion of maintaining the individual in a similar financial position to that which was enjoyed prior to the transfer. In particular, there is reference to a member renting a departmental residence or being involved in the "officer next door" program at the former location. Whilst not explained during the hearing, I surmise that in both cases the individual is paying rent significantly below the market rent. If such opportunity is not available in the new location presumably the member will be placed in a relatively worse financial position in the new location, thus establishing a *prima facie* case for the payment of Property Purchase Expenses.

[82] I note Mr Martin's contention that this provision is discriminatory in that not all members have the opportunity to rent departmental properties. That may or may not be the case, but if it is held to be discriminatory now, that would also have been the case in 2005 when the parties entered into an agreed position.

[83] There can be no doubt that in 2005 the parties freely entered into an agreement which was subsequently reflected in the Gazette notice. To my knowledge the notice has not been rescinded and/or replaced. Accordingly it remains on foot and it is not open to either party to simply walk away from the terms of this agreement without proper consultation and appropriate notice.

[84] Whilst the Gazette notice refers to matters to '*be taken into account*,' a consistent pattern of application appears to have applied between 2005 and 2008. In my view this approach should be maintained into the future unless there are compelling reasons to change, and then only after full consultation.

[85] Accordingly I find that the 2005 Gazette notice remains in place and is binding on the parties.

[86] I turn now to the three disputed applications. Prima facie, these applications appear factually consistent with a number of successful applications during the 2005 - 2008 period.

[87] I note Mr Martin's contention about the timing of the purchase in Senior Constable W's case. I would observe however that the tenure arrangements meant that the senior Constable knew with some certainty that a transfer was imminent, and in any event neither the award nor the Gazette notice is prescriptive on this aspect.

[88] I strongly recommend that Tasmania Police review the three applications in question with the view of testing the circumstances in each case against the criteria identified in the 2005 Gazette notice and the pattern of implementation of these criteria for applications lodged between 2005 and 2008.

[89] In the event of an unfavourable outcome, leave is reserved to the PAT to apply to the Commission for a determination. Should that occur the test will be as outlined in the preceding paragraph.

Tim Abey
DEPUTY PRESIDENT

Appearances:

Mrs A Smith and Mr M Kadziolka for the Police Association of Tasmania
Mr T Martin and Ms H Jordan for the Commissioner for Police

Date and place of hearing:

2009
December 9, 17 and 21
Hobart