

**TASMANIAN INDUSTRIAL COMMISSION**

**Industrial Relations Act 1984**

s29 application for hearing of an industrial dispute

**Police Association of Tasmania**

(T13844 of 2011)

and

**Commissioner of Police**

HOBART, 29 MARCH 2012

DEPUTY PRESIDENT TIM ABEY

**Industrial dispute – salary advancement criteria– approved tertiary qualifications – custom and practice – management prerogative – consultation – application dismissed – order made re consultation on advancement criteria**

**REASONS FOR DECISION**

**[1]** On 7 October 2011, the Police Association of Tasmania (PAT), 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 refusal to Salary Advance for Senior Sergeant Harper.

**[2]** Hearings were held in Hobart on 4 November 2011, 16 January, 15 February and 1 March 2012. Mrs A Smith and Mr M Kadziolka appeared for the PAT while Mr T Martin appeared for the employer with Inspector S Burk and Commander M Mewis.

**[3]** In this matter the PAT, on behalf of member Senior Sergeant Harper, disputes a decision by the employer to refuse advancement to Sergeant level 7(ii) in accordance with clause 8.5.2(f) of the Award.

The relevant sections of the Award are:

***“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.*

*(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.”*

**[4]** Senior Sergeant Harper completed the Inspector Qualifying Course and the Graduate Certificate in Police Studies in December 2003. Sergeant level 7(ii) was

introduced into the Award in March 2008. In May 2008 Senior Sergeant Harper made application for advancement to level 7(ii), (from 7(i)), on the grounds that he had completed both the Inspector Qualifying Course and the Graduate Certificate in Police Studies.<sup>1</sup>

**[5]** The application was refused in correspondence dated 2 July 2008, which relevantly stated:<sup>2</sup>

*"The Graduate Certificate of Police Studies, when completed as part of the Inspectors Qualifying Process, is not considered an approved tertiary qualification by the Controlling Authority for advancement to Sergeant level 7(ii)."*

### **History of Inspector Qualifying Process**

**[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:<sup>3</sup>

- Complete the Inspector Qualifying Course
- Sit and pass two x 2-hour exams
- Obtain the Graduate Certificate in Police Studies

**[8]** The completion of the three steps identified above is referred to in this decision as the Inspector qualifying process, as distinct from the Inspector Qualifying Course.

**[9]** Post 2003, completion of the Inspector Qualifying Course continued to provide a 25% credit towards the Graduate Certificate in Police Studies.

**[10]** Completion of both the Inspector Qualifying Course and the Graduate Certificate in Police Studies, whether prior to 2003 or after, requires a combination of study within and outside normal working hours, with most costs being met by the employer.

**[11]** Upon completion of the Inspector Qualifying Course (pre 2003), or the Inspector qualifying process (post 2003), the member is designated as Senior Sergeant (Qualified), is entitled to wear the appropriate insignia, and is eligible to be considered for promotion to the rank of Inspector.

### **History of Award Variations**

**[12]** Prior to 2004 there were six salary points in the Sergeant scale.

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<sup>1</sup> Exhibit A1

<sup>2</sup> Exhibit A1

<sup>3</sup> Exhibit A4

**[13]** In 2004 a new salary point '7' was introduced together with an accompanying sub clause which read:<sup>4</sup>

*"Advancement to Level 7 will 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 at degree level. For the purposes of this subclause the "12 months" is deemed to have commenced from 1 July 2004."*

**[14]** Between 2004 and 2008 the employer accepted the Graduate Certificate in Police Studies as an "approved tertiary qualification" for the purposes of then clause 8.5.2(d). It follows that a member who had completed the Inspector Qualifying Course or the Graduate Certificate in Police Studies (or for that matter, both), would, after 12 months service at level 6, be advanced to level 7.

**[15]** In 2008 an additional salary level 7(ii) was introduced. It is common ground that this was an initiative of the employer which was ultimately agreed by the PAT. It is also common ground that the salary level 7(i) in the 2008 Award was equivalent to level 7 in the 2004 Award. The relevant accompanying wording, which remains unchanged today, reads as follows:<sup>5</sup>

*"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."*

**[16]** The matter was not discussed during the 2010 negotiations. However the Commission was informed that subsequent to signing the 2010 Agreement, but prior to Commission approval, the employer sought to change "Inspector Qualifying Course" to "Inspector qualifying process." The PAT did not agree to this proposed change and the 2011 Award was approved with the relevant 2008 wording still in place.

### **Questions to be Determined**

**[17]** The issues before the Commission, which involve matters of award construction as distinct from merit, essentially resolve to two questions:

- Does the expression Inspector Qualifying Course as it appears in the Award subsequent to 2008 mean Inspector qualifying process?
- 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?

### **PAT Submissions**

**[18]** Fundamental to the PAT position is the contention that the Inspector Qualifying Course and the Inspector qualifying process are separate and distinct entities. The Inspector Qualifying Course is the first part of a three part process which has been in place since 2003. The other two components, namely the passing of two x 2 hour exams and the gaining of the Graduate Certificate in Police Studies, combine to complete the Inspector qualifying process, a concept which is not referred to in the Award.

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<sup>4</sup> Exhibit A9

<sup>5</sup> Exhibit A15

[19] Mrs Smith comprehensively traced the history of this issue making the following points:

- The requirement for the Graduate Certificate in Police Studies to be completed as a component of the Inspector qualifying process commenced in 2003. The 2004 agreement negotiations were conducted in the full knowledge of this change. The wording relevant to the new level 7 salary point was put forward by the employer and agreed by the PAT. Had there been an intention to change the award to reflect the changed qualification requirements that would have been the time to do it. The words that were included by consent at the time represented a mutuality of intent.
- The Graduate Certificate in Police Studies has been consistently accepted by the employer as an approved tertiary qualification. The qualification is approved for the purposes of the Tertiary Education Assistance Scheme [TEAS], thus entitling members to departmental support.<sup>6</sup>

[20] A memorandum from Corporate Services dated 8 February 2005 states that advancement to level 7 will occur where a member:<sup>7</sup>

*“(c) has successfully graduated with a relevant degree qualification or above which has been approved by TEAS Board including previous courses of study approved by TEAS Board; or;...”*

[21] This was confirmed by Gazette Notice No. 72 dated 12 May 2005.<sup>8</sup> Commenting on this notice Mrs Smith said:<sup>9</sup>

*“But you will note that paragraph (c) does not provide any discretion in relation to approval. If the relevant qualification has been approved by the TEAS Board, it is considered an approved course of study for advancement under clause 8(5)(2)(d) in relation to advancing to Level 7. This Gazette Notice still stands today and while it relates to the then new Sergeant Level 7 it is still relevant, as Sergeant Level 7 became Level 7.1 when the new Level 7.2 was introduced in 2008. Both levels refer to the Inspector qualifying course and tertiary qualifications.”*

[22] The Gazette Notice has not been rescinded and thus continues to have application today. It must logically extend to the new classification level 7(ii) in that the same words are used.

[23] Level 7(ii) was introduced in 2008 to give recognition to members who had completed both the Inspector Qualifying Course and attained an approved tertiary qualification. This was an initiative of the employer and naturally subject to discussion during the agreement negotiations. Mrs Smith contended however, that the only issue discussed was the wording for the new clause 8.5.2(f). A memorandum from the Commissioner of Police dated 18/12/2007 states in part:<sup>10</sup>

***“Increase in Salary – Sergeant Level 7***

*“The DPEM proposes an additional salary point (level 7(ii)) has been added to the Sergeant rank which is available to members in possession of approved*

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<sup>6</sup> Exhibit A5

<sup>7</sup> Exhibit A10

<sup>8</sup> Exhibit A11

<sup>9</sup> Transcript P29, L28

<sup>10</sup> Exhibit A12

*tertiary qualifications and who have completed the Inspector Qualifying course."*

**[24]** The position now adopted by the employer was not raised during either the 2008 or 2010 agreement negotiations. Mrs Smith said:<sup>11</sup>

*"We believe the view espoused by Mr Martin during the conference is simply not sustainable. There's absolutely no reference, no mention, nor any indication that this was the intent of the Commissioner or the spirit of what he was trying to achieve. And if it was, it was not shared by us and not reflected in the outcomes of the 2008 wage round. What is overwhelmingly evident and supported by what Mr Martin said is that the Commissioner wanted to recognize members who successfully completed tertiary qualifications. That's it, and I believe the tendered documents support our views in relation to that. There was no criteria attached to the recognition other than it had to be an approved tertiary qualification."*

**[25]** Correspondence from the Commander, Human Services dated 4 November 2010 acknowledges that the Award refers to the Inspector Qualifying Course as distinct from the Inspector qualifying process.<sup>12</sup>

**[26]** There are at least three examples whereby the certificate had been approved for salary advancement purposes in circumstances whereby the Inspector Qualifying Course had been completed prior to the Graduate Certificate in Police Studies becoming a requirement of the Inspector qualifying process, i.e prior to 2003.

**[27]** The degree of effort required by a member is no different whether the Graduate Certificate in Police Studies is achieved as part of or separate from the Inspector qualifying process. In both cases the course is paid for by the employer and the study involved is partly in work time and partly in the member's own time. Senior Sergeant Harper completed the Inspector course at the Police Academy in duty time and completed the remainder of the qualification in his own time. The only difference with three previous examples is that the Graduate Certificate in Police Studies was, in the case of Senior Sergeant Harper, a mandatory requirement of the Inspector qualifying process.

### **Employer Submissions**

**[28]** Mr Martin submitted that the matter in dispute is centred on the ability of the employer to determine the circumstances in which a qualification is approved for the purposes of salary advancement.

**[29]** The underpinning principle in relation to level 7(ii) is that the individual is expected to do extra study in terms of personal and professional development. All the approvals for Level 7(ii) advancement have fallen into this category.

**[30]** Mr Martin submitted that qualification requirements must be seen in the context of the evolving culture and environment with the ultimate objective of a professional police service. This process commenced prior to 2004 with the development of UTAS programs tailored to contemporary policing. The 2004 Award saw the introduction of some of the rewards and incentives developed to encourage personal and professional development. The TEAS Board was established to further this objective by encouraging both sworn and unsworn employees to do something extra.

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<sup>11</sup> Transcript P34, L14

<sup>12</sup> Exhibit A19

**[31]** Whilst the Graduate Certificate in Police Studies is TEAS approved, it must be seen in perspective. The course is open to all employees, not just sworn members or those at Sergeant level.

**[32]** Whether approving or declining applications for advancement, the employer has been consistent. The underlying principle is that the member needs to do that something extra. The Graduate Certificate in Police Studies has not been approved for advancement purposes where it was obtained as part of the Inspector qualifying process. Mr Martin said:<sup>13</sup>

*“Deputy President, the Controlling Authority has been consistent in its approach. It is clear that in exercising management prerogative the Controlling Authority has established a clear custom or practice in relation to how it treats applications for advancement to Sergeant level 7.2 under the then Police Award in 2008 and subsequently the new 2011 Police Award. No change, consistent determinations and clear custom and practice in this area.”*

**[33]** The practice adopted since 2004 as outlined by the PAT is accurate and could fairly be described as custom and practice. However in 2008 a new award was in place with additional levels available for advancement. Hence the custom and practice which had hitherto applied ceased at that point. Level 7(ii) simply did not exist prior to 2008 and it not open to the PAT to argue that custom and practice applicable to then level 7 should simply translate to Level 7(ii) in a post 2008 environment.

**[34]** In relation to the PAT contention that the employer did not seek to alter the award prescription in 2004, Mr Martin said that it was not necessary. There was only one Level 7 and hence it did not make any difference if a member had the Graduate Certificate in Police Studies in addition to passing the Inspector Qualifying Course.

**[35]** The correspondence from Corporate Services<sup>14</sup> and the Gazette Notice<sup>15</sup>, upon which the PAT rely, only have application to Level 7. The introduction of Level 7 (ii) in 2008 saw new business rules. The 2004 and 2008 awards have quite different prescriptions.

**[36]** The new business rules are founded in correspondence from Corporate Services dated 17 April 2008<sup>16</sup> and have the effect of making the rules applicable to the 2004 Award redundant. This correspondence explicitly states that applications for advancement to levels 7(i) and (ii) must be directed to the Manager, Employee Relations, for determination. It follows that discretion as to which qualifications are approved for advancement purposes, rests with the Manager, Employee Relations.

**[37]** The document referred to above has the same standing as the documentation<sup>17</sup> relied upon by the PAT for the rules arising from the 2004 Award.

**[38]** The PAT has not at any time challenged the management prerogative to determine which courses are applicable or not under the 2004 Award. It is however acknowledged that, unlike the position post 2008, there was a level of consultation arising from the 2004 Award.

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<sup>13</sup> Transcript P52, L30

<sup>14</sup> Exhibit A10

<sup>15</sup> Exhibit A11

<sup>16</sup> Exhibit R7

<sup>17</sup> Exhibits A10 and A11

**[39]** The introduction of level 7(ii) in 2008 was an initiative of the Commissioner of Police. It was part of a deliberate objective of creating an environment whereby members were encouraged “...to go out and do that bit extra through obtaining a tertiary qualification. ...It was always about a member who was Inspector Qualified and who received acknowledgement for this, who then went on to complete a further tertiary qualification or who already had made this commitment prior to it.”<sup>18</sup> Mr Martin submitted that by contrast, the PAT was seeking a position whereby all members who completed the Inspector qualifying process would be advanced to 7(ii) without the need for any extra effort. Put another way, a sergeant who qualifies for promotion would be advanced two levels, not one.

**[40]** The order sought by the PAT is contrary to the Act, specifically s31(2)(b) which states:

**“31. Orders arising from hearings**

**(2) A Commissioner shall not make an order under this section –**

**(b) that makes an award or that varies or creates a provision of an award.”**

**[41]** To accept the PAT application would amount to a material variation of clause 8.5.2(f) of the Award, in that the determination of qualifications is a management prerogative.

**PAT Response**

**[42]** The employer position rests entirely on the notion of unfettered management prerogative. However the exercise of management prerogative, whilst legitimate, must be done in a manner which is fair and soundly based. Mr Kadziolka said:<sup>19</sup>

*“While there is some legitimacy in the controlling authority being able to determine the qualification, there is no legitimacy in what Mr Martin was saying. Namely, that management can wipe the slate clean of all the previous history relating to recognition of qualification for advancement in the sergeant’s rank and establish new standards, essentially in a vacuum, not taking into consideration anyone else’s views, namely the PATs or effected members.”*

**[43]** The document upon which the employer relies,<sup>20</sup> provides only for an administrative process, not the criteria upon which applications will be determined. Further, the PAT had never seen the document and consultation on the criteria now applied had been nonexistent. The decision to change the rules was not known until applicants were refused payment. This can be contrasted with the position following the 2004 Award, whereby there had been extensive consultations culminating in the Gazette Notice<sup>21</sup> which was still on foot.

**[44]** There is no documentary material which shows that the employer position (doing that bit extra) was ever raised. It is quite unfair for members not to know what hoops they have to jump through.

**[45]** Clause 26 of the Award requires consultation to occur “on industrial matters pertaining to the relations of the Controlling Authority and members.” Even in the

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<sup>18</sup> Transcript P58

<sup>19</sup> Transcript P79-80, L45

<sup>20</sup> Exhibit R7

<sup>21</sup> Exhibit A11

absence of this award requirement, the employer has an obligation to consult consistent with normal industrial standards.(see *CPSU v Vodafone*<sup>22</sup>).

**[46]** Consultation, Mr Kadziolka contended, is based on the principle of procedural fairness. In *Kioa v West*<sup>23</sup> Mason J concluded:

*“The law has now developed to a point where it may be accepted that there is a Common Law duty to act fairly in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations subject only to the clear manifestation of a contrary statutory intention.”*

**[47]** Members have a “right, interest and legitimate expectation” in that others with the graduate certificate qualification had been advanced in terms of salary and it would therefore be reasonable to expect that they would be treated similarly.

**[48]** This view was confirmed, Mr Kadziolka submitted, by Underwood J in the *Delta Hydraulics* case:<sup>24</sup>

*“It is now widely accepted that unions and organisations of unions not only have a right to be heard on all matters of industrial relations affecting their present and future members but they are a compelling force in describing the terms of those relations.”*

**[49]** Management prerogative is not a barrier to challenge and review where management decisions directly affect the relationship of an employer and employees. In *Robe River* the Full Bench said:<sup>25</sup>

*“Management prerogative is not a sword which can be wielded in wanton disregard of industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly. Almost every initiative that an employer may take can be clothed in the ubiquity of Management prerogative. To espouse this principle does not relieve the employer of the obligation to justify the effect where a change is instituted to some long standing practice or custom.”*

**[50]** In the instant case a practice was established in consultation with the PAT and promulgated to the members through a Gazette Notice. The employer has now effectively repudiated this long standing practice in secret. The Commission should overturn this decision and direct the payment of claims to those who hold that qualification unless the employer goes through the correct process in consultation with affected persons and interested parties.

**[51]** It is well established that if a long standing custom and practice is to be changed, there must be proper consultation and reasonable notice of an intention to change. (see *PSA v Electricity Commission of NSW*<sup>26</sup>; *Minister for Police v WA Police Union of Workers*<sup>27</sup>) Similar sentiments have been expressed by this Commission in T13426 of 2009 and T13164 of 2008.

**[52]** The PAT is not seeking to vary the Award. Rather, it is seeking to have the existing words applied consistent with past custom and practice. It is logically

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<sup>22</sup> PR911257 Smith C

<sup>23</sup> *Kioa v West* [1985] HCA 81

<sup>24</sup> *R v Johnson and Ors Ex Parte AMEU* [1994] TASSC 22 11/3/1994

<sup>25</sup> WAIRC CS676 of 1986

<sup>26</sup> NSWIRC Nos. 1509 and 1527 of 1988 Varnum DP 16/12/88

<sup>27</sup> WAIRC No 831 of 1994 FB 24/11/94

inconsistent to apply the long established rules to level 7(i) and not to Level 7(ii), and it is especially unfair and unreasonable if you don't let anyone know.

## Findings

**[53]** On the material before me I am satisfied that the effort and commitment required to obtain the Graduate Certificate in Police Studies is no different whether it is undertaken as part of the Inspector qualifying process or as a discrete entity. Put another way, the effort necessary to achieve the certificate as part of the qualifying process is not in any way discounted. The credit (25%) is the same, the out of hours commitment is the same and the employer meets the costs.

**[54]** It logically follows that from 2003 it became more onerous to become eligible for promotion to an Inspector by reason that the graduate certificate became a mandatory requirement.

**[55]** I turn now to the question of whether the expression Inspector Qualifying Course as it appears in the Award subsequent to 2008 means Inspector qualifying process.

**[56]** The 2004 Award was negotiated in the full knowledge of the changes which occurred in 2003. The Commissioner's Instructions for the Promotion Qualification and Accreditation Process (PQAP), May 2003<sup>28</sup> clearly identify three components to the Inspector qualifying process, namely the Inspector's course, two x 2 hour examinations and the Graduate Certificate in Police Studies.

**[57]** Against this background the parties chose to use the expression "*Inspector Qualifying Course*" in the 2004 Award. The same expression has been continued in the 2008 and 2011 Awards. Clearly there has been opportunity to change the words but this has not occurred.

**[58]** The matter before the Commission is one of award construction, albeit in an industrial context. This task does allow for considerations of context and purpose, and in certain circumstances the objective assessment of background facts. (see *MASSA v ANF*<sup>29</sup>). However the primary consideration must always be the words actually used, with recourse to other material only available when the words used are susceptible to more than one meaning.

**[59]** In this context the question to be asked is, is it possible to complete the Inspector Qualifying Course and not be eligible for promotion to Inspector level?

**[60]** The answer is clearly 'Yes'. I am satisfied that the Inspector Qualifying Course is but one component of a larger process which an individual must satisfy to become eligible for promotion.

**[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?

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<sup>28</sup> Exhibit A4

<sup>29</sup> T1386 of 2009

**[63]** The memorandum from Corporate Services dated 8 February 2005<sup>30</sup> together with the Gazette Notice No 71 dated 12 May 2005<sup>31</sup> 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:<sup>32</sup>

*"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<sup>33</sup>, 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).

**[70]** The remaining question is whether this 'custom and practice' should extend to Level 7(ii), introduced in the 2008 Award.

**[71]** The PAT contends that not only is this extension entirely logical, it has been the legitimate expectation of the members. This argument is readily understood. I accept that members only became aware of the employer position when applications for advancement were denied.

**[72]** On the other hand the employer contends that Level 7(ii) was introduced at the initiative of the employer, and that new *"business rules"* apply. Authority for this proposition is found in the 17 April 2008 memorandum which relevantly states:

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<sup>30</sup> Exhibit A10

<sup>31</sup> Exhibit R11

<sup>32</sup> Exhibit R11

<sup>33</sup> Exhibit R7

*"5) That a member at the rank of Sergeant Level 7(i) who may be entitled to advancement to level 7(ii) is to make application directed to the Manager, Employee Relations for determination."*

**[73]** This the employer contends, confers on the employer, through the Manager, Employee Relations, the management prerogative to determine which qualifications will be approved.

**[74]** I am satisfied that, whilst there were discussions around the wording of the new clause clause 8.5.2(f), consultation on the criteria to be applied was effectively non-existent. This is in stark contrast to the consultation which clearly followed to 2004 Award.

**[75]** The fact that this clause is now the subject of dispute is of considerable regret. I accept without qualification that the employer has, over the last decade, embarked on an agenda of enhancing the professional status of the Police Service. Indeed there are numerous tangible measures both within and outside the award structure which support this observation. This of course is an approach which confers benefits to both the Department and the members employed.

**[76]** The new Level 7(ii) was an initiative of the employer. With the benefit of hindsight the employer should have at the time outlined the criteria it saw as applying for advancement to this new level. With this knowledge the PAT would have then been in a position to:

1. Accept the employer's proposed criteria, or
2. Attempt to persuade the employer to an alternative view, or
3. Reject the employer proposal, in which case the new level would not have been included in the Award.

**[77]** This did not occur, and as a consequence an initiative which should have been a positive is now a matter of dispute.

**[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*<sup>34</sup>).

**[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.

**[81]** The wording in the previous Level 7 (now 7(i)) refers to the Inspector Qualifying Course or approved tertiary qualifications. Level 7(ii) replaces *"or"* with

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<sup>34</sup> [No 3][2009] 186 IR 260 at 61, 62 McKerracher J

*“and.”* Whilst the wording is similar, it is also sufficiently different to uphold a contention that previous custom and practice should not automatically extend. The authorities relied upon by the PAT going to issues of custom and practice and management prerogative, whilst apposite, can be distinguished from the current circumstances in one important respect. The authorities invariably are dealing with long standing custom and practice which the employer seeks to unilaterally change. I have already found that Level 7(ii) is a ‘new’ provision to which previous custom and practice does not automatically extend. I have reached this conclusion notwithstanding my serious reservations concerning the demonstrable lack of consultation.

**[82]** In the absence of advancement criteria, agreed or otherwise, and relevant custom and practice, the question to be determined is the meaning of *“approved tertiary qualifications”*, or more specifically, who is responsible for ‘approval’? In the circumstances as described, the entity responsible for approval can only be the employer. As a matter of award construction, it naturally follows that, provided it does not act capriciously or unconscionably, it is open to the employer alone to determine the criteria for advancement.

**[83]** I hasten to add that I consider this to be an unsatisfactory situation. Given the long and satisfactory history of consultation behind the development of advancement criteria, I consider it to be highly desirable that the parties once again apply themselves to developing transparent advancement criteria for level 7(i) and (ii). A Direction to this effect follows.

**[84]** In the case of Senior Sergeant Harper, the employer has determined that the Graduate Certificate in Police Studies, when completed as part of the Inspector qualifying process, is not an approved tertiary qualification for the purposes of advancement to Level 7(ii). Consistent with the findings above, I conclude that the decision was, as a matter of Award construction, open to the employer and hence I am not disposed to interfere with it. Accordingly, the application is dismissed.

**[85]** As mentioned above, I now issue the following direction by way of an order:

#### **Order**

Pursuant to section 31 of the Industrial Relations Act 1984, I hereby direct that the parties to this dispute enter into a consultative process at the earliest mutually convenient opportunity, with the objective of developing transparent criteria for advancement to level 7(i) and 7(ii) of the Sergeant’s salary scale.

#### **Post Script**

**[86]** During the hearing an issue arose concerning four applications for advancement which the employer had put on hold pending the determination of this matter. Following representations from the PAT the employer reconsidered the position and on 23 January 2012 Commander Mewis advised by email that approval had been granted and payment would be made for all but one of the applicants.

**[87]** When the hearing resumed on 15 February 2012 Mr Kadziolka stated that payment would not be made until the pay day falling on 29 February 2012. Mr Kadziolka submitted that this delay was inordinate and arguably contrary to clause 8.2.6 relating to ‘short payments.’ He sought comment from the Commission.

**[88]** There can be no doubt that the timely processing of claims which have been approved is highly desirable. If administrative delays are encountered, then this should be communicated to individuals affected.

**[89]** In this case from the time of approval to the date of payment, three pay days have elapsed. I suspect that a reasonable expectation would have been for payment to be made on 15 February. Other than a heavy work load on Mr Martin's part, I was not made aware of any other factors contributing to the delay.

**[90]** In an ideal world I suspect these claims could have been processed in a more timely manner. However a delay of one pay period beyond that which might otherwise have been reasonably expected is not of such moment as to warrant an adverse finding against the employer. I do however reinforce my earlier comment concerning advice to those affected should delays either be anticipated or expectantly occur.

Tim Abey

**DEPUTY PRESIDENT**

**Appearances**

Ms A Smith and Mr M Kadziolka for the applicant

Mr T Martin, Inspector S Burk and Commander M Mewis for the respondent

**Date and place of hearing:**

November 4

2011

January 16

February 15

March 1

2012

Hobart