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TRANSCRIPT OF PROCEEDINGS

O/N 69895

TASMANIAN INDUSTRIAL COMMISSION

DEPUTY PRESIDENT P.C. SHELLEY

T No 13055 of 2007

TOURISM TASMANIA AWARD

Application pursuant to the provisions of section 23(2)(b) of the Industrial Relations Act 1984 lodged by the Minister administering the State Service Act 2000 to vary the above award re clause 7 – definitions and the decision of annexure A

HOBART

9.45 AM, WEDNESDAY, 5 DECEMBER 2007

MR P. BAKER appears with MS J. FITTON for the Minister administering the State Service Act

MS K. TYSON appears for the Community and Public Sector Union

MR M. JOHNSTON appears for the Community and Public Sector Union (State Public Services Federation Tasmania) Inc

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

THE DEPUTY PRESIDENT: Thank you. Appearances.

MR P. BAKER: Deputy President, I appear on behalf of the applicant, P. Baker, and with me this morning is JANE FITTON.

5

THE DEPUTY PRESIDENT: Thank you.

MS K. TYSON: Good morning, Deputy President. Kier Tyson from the Community and Public Sector Union.

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MR M. JOHNSTON: And if it pleases the commission, also appearing for the Community and Public Sector Union (State Public Services Federation Tasmania) Inc, Mat Johnston. Thank you.

15

THE DEPUTY PRESIDENT: Thank you. Mr Baker.

MR BAKER: Thank you, Deputy President. Deputy President, as the application states, this is an application to delete two matters from the current award. One is the definition of “term appointment” which is contained in clause 7 of the award.

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THE DEPUTY PRESIDENT: Are you looking for it?

MR BAKER: Yes, I have just lost it for a moment.

25

THE DEPUTY PRESIDENT: It is on page 3.

MR BAKER: Yes, I went too far. Thank you, Deputy President. The bottom of page 3 which says:

30

That a term appointment means a contract of employment for a fixed period of time as agreed between the employer and employee concerned. Positions covered by a term appointment in Tourism Tasmania are referred to in annexure A of this award.

35

And in annexure A of the award, which is contained at the back of the award, it states as follows:

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The positions listed here are under a specified term appointment positions in Tourism Tasmania. The list as defined may be varied by agreement between the controlling authority and employee organisation.

45

And it lists a number of positions there in relation to both sales and executive positions. They were inserted into the award I am advised many years ago when Tourism was a stand-alone instrumentality or authority, but times have changed and we have reached the stage now where Tourism Tasmania has re-organised a range of functions and the methodology in which it now operates. And what it now seeks to do is to convert those positions which are listed as “fixed-term appointments” into “permanent employees”. There are a number of these employees who have had in

excess of 10 years of employment with Tourism Tasmania with a series of rolling contracts.

5 THE DEPUTY PRESIDENT: I think there was a decision recently from Commissioner McAlpine about such a situation.

10 MR BAKER: You are quite right, Deputy President, which highlights the necessity to do something about this award. Now, unfortunately the agency, and indeed the employer, is prohibited by making these positions permanent because of the annexure that appears in the award. What we are seeking to do is to remove that annexure so that we can by administrative instrument convert these employees from fixed term or "term employees" as they cited in the award - and there's a number of these people - while it talks about management, manager positions are also a number of, if you like, middle-ranking employees that are included in this list.

15 So what we would like to do, what we seek to do, is remove that prohibition that stops us from conversion because the matter has been discussed with the Office of the State Service Commissioner and the issue we have, of course, is that the Commissioner says to us, "Well, I can't do anything about this because the award says this." Now, one of the things that has happened is that the agency, having taken that initial advice, has in fact proceeded to advertise several of the positions. Now, following discussions with our office - and I understand discussions had been held some time ago with the CPSU - - -

25 THE DEPUTY PRESIDENT: So you are saying that these people who have been holding the positions for upwards of 10 years are going to be required to apply for their own jobs.

30 MR BAKER: That is what we are seeking to get around.

THE DEPUTY PRESIDENT: Okay. Let's hear it.

MR BAKER: What we're proposing to do is remove the prohibition.

35 THE DEPUTY PRESIDENT: Yes, that's fine.

MR BAKER: Remove the prohibition and then we would seek to have the current incumbents converted to full-time status within the agency. At the same level - - -

40 THE DEPUTY PRESIDENT: By direct selection.

MR BAKER: - - - direct selection, same level of salary, same level of responsibilities, etcetera.

45 THE DEPUTY PRESIDENT: Sounds fine.

MR BAKER: Now, what has highlighted this exercise is that unfortunately we had to go through the process of seeking to appoint a person via a selection process, and

that has caused some difficulties within the agency which I won't go into this morning.

5 THE DEPUTY PRESIDENT: So why couldn't they all just be directly selected? The State Service Commissioner has the discretion to do that on the recommendation of the Head of Agency?

10 MR BAKER: Because he says he can't do that because of the prohibition that exists in the award, that these persons are fixed term.

THE DEPUTY PRESIDENT: Okay. But if that – there is no longer the prohibition - - -

15 MR BAKER: If there is no longer a prohibition there then the agency will then approach the OSCC – the Office of the State Service Commissioner to have these persons directly selected and translated – converted I should say – for a fixed term to permanent employees, current salary, current status, current position. And that's the basis of the application that's before the Commission this morning. I can't express it any simpler than that.

20 THE DEPUTY PRESIDENT: Thank you very much. Ms Tyson?

MS TYSON: Yes, thank you, Deputy President. First of all for the record we express that this application is not a consent matter. Now, we don't consent to the application to amend the award that includes deleting the definition for term appointment from clause 7 or the definitions - and by deleting the annexure A. So the reasons as to why that we oppose the application at this stage are that the CPSU were not consulted before it was lodged as an application for an award variation. In fact we were only made aware of the situation when we received the notice from this commission on 29 November. So we acted promptly to bring about discussions with the Public Sector Management Office by way of an email from the CPSU from our secretary, Mr Tom Lynch, on Friday, 30 November. It says:

35 *Phil, I have received notice from the Industrial Commission for a hearing to vary an award to which the CPSU is respondent, namely the Tourism Tasmania. Not for the first time this year I find that notice of the hearing is the first time the CPSU is aware of the proposed change. I have no idea what the implications of this change is or why it needs to be made so urgently that consultation was not possible before making the application. Could you please advise. Yours, Tom Lynch.*

Now, in addition, for our reasons to oppose this amendment, at this stage, under clause 7 Definitions:

45 *It appears since 1997 there has been no mechanism to employ people as fixed term under this award apart from those specifically listed in the annexure A.*

So as you can imagine, with this being the case, deleting this clause from this award has a much larger impact for current fixed-term employees across the agency. In fact I am aware of 10 staff or more who were recently employed in September who fall into this category.

5

THE DEPUTY PRESIDENT: So you say there is no mechanism to employ fixed term employees except in those positions in the annexure.

MS TYSON: That is correct. That would be my understanding.

10

THE DEPUTY PRESIDENT: Why would that be? Because it would simply mean that the award is silent on all other classifications in the State Service Act which have effect.

15 MS TYSON: The award specifically states that only fixed-term positions are afforded to people in those positions - - -

THE DEPUTY PRESIDENT: It doesn't say - - -

20 MS TYSON: - - - under Tourism Tasmania.

THE DEPUTY PRESIDENT: Where does it say "only"?

MS TYSON:

25

Positions covered by term appointment in Tourism Tasmania are referred to in annexure A of this award.

30 So my interpretation is that, that specifically says positions covered by term appointment, and term appointment is a contract for a fixed term period in Tourism Tasmania - I refer to annexure A.

THE DEPUTY PRESIDENT: But it doesn't say all positions.

35 MS TYSON: If I read that - - -

THE DEPUTY PRESIDENT: You believe that?

MS TYSON: Yes. Plain English

40

THE DEPUTY PRESIDENT: Okay.

MS TYSON: Yes.

45 THE DEPUTY PRESIDENT: So you are saying that that precludes anybody else from being employed as a fixed-term employee?

MS TYSON: That is correct.

THE DEPUTY PRESIDENT: So why - how does this disadvantage the 10 people who have somehow or other been employed as fixed-term employees and they are not on the list?

5 MS TYSON: All right. I will spell that out for you a bit more clearer. So currently those people have - are on a fixed-term contract. When we look at the Tourism Tasmania Award and I read that clause, the definition of "term appointment", those people way back until 1997 have been incorrectly employed as fixed term when there is only a provision here, as I read it, that term appointment only relates to people
10 covered in annexure A. These are things that - - -

THE DEPUTY PRESIDENT: What status do you say is accorded to those people who aren't on the list who have been employed fixed term?

15 MS TYSON: They should be a permanent employee. If they have an expectation of ongoing work then they should be a permanent employee.

THE DEPUTY PRESIDENT: So you don't want to remove these provisions from the award because you intend to use them as a basis for argument that these other 10
20 people are in fact permanent employees.

MS TYSON: There is far more - perhaps if I can keep going on to explain where we are coming from so we can show that there is a far bigger picture here to just looking at those positions covered in the annexure, and as Mr Baker has explained, that that
25 will fix their status so they become permanent. So we understand this amendment as it stands is unique and of course also what we say our position is that there is no other provisions for fixed term work, so it's very unique in how we are reading it at this stage. But we strongly oppose the application until the parties to the award have had an opportunity to properly assess this impact and withdrawing this clause has
30 serious concerns that we think we have raised so far today.

The CPSU are not averse to amending the annexure, or the current positions on the annexure as it is, but it has just not been possible to look at that to discuss that in further detail because the agency has failed to meet with us. It is further evident in
35 the email we received from Mr Baker yesterday advising that they do not wish to enter into a conciliation conference and they are seeking to have a decision from you today.

THE DEPUTY PRESIDENT: It is up to the commission whether there is a
40 conciliation conference or not. It is not up to the parties.

MS TYSON: Yes. This is further evident in the email received yesterday from Mr Baker:

45 *Morning Tom. Just to confirm my telephone message to you. It is our intention to proceed with our application tomorrow. I must comment that I find your attitude disappointing to say the least. What credibility your organisation will have in respect of fixed term permanent employment will no doubt be the*

feature of debate at some future stage. No conciliation conference, on the record, and a decision is sought. Regards, Phillip Baker.

5 I mean really, we are happy to have further discussions to consider amending the
annexure to include some fixed term arrangements but we do believe in light of the
serious concerns we have raised and our attempts to conciliate this matter with the
Public Sector Management Office previously, we think it would be grossly unfair to
proceed to hearing. We do request that the commission provides an opportunity to
10 have this matter conciliated and possibly remind the representative of the Minister of
how a healthy and procedurally fair consultative process should occur. Thank you.

THE DEPUTY PRESIDENT: Thank you. Mr Baker.

15 MR BAKER: Thank you. Well there's a couple of things. First of all, in relation to
the consultation: I was advised that discussions in fact had taken place at the CPSU
in respect to the matter some six months earlier.

20 THE DEPUTY PRESIDENT: As a matter of course, if you are going to be filing an
application for – it might look like this was just a machinery matter, but it has turned
out not to be so. Would you normally notify the parties before notifying the
commission?

25 MR BAKER: I was under a misapprehension that the discussion had in fact
occurred between the agency and the CPSU, and I expressed that view to Tom –
sorry, Mr Lynch. Mr Lynch expressed the view that that had not occurred, and I
apologise for it on behalf of the Minister for the oversight. Now, that's what
occurred. And I then had two lengthy discussions with Mr Lynch during a trip to
Launceston the other day. And I then conferred again with the agency and I
30 understand Mr Lynch spoke to the agency – well, I know Mr Lynch spoke to the
agency as well in relation to the matter and that was the tone of the email that I sent
back to Mr Lynch that given their, quite frankly, bizarre position in relation to fixing
up fixed term employment, converting people to permanent employment, I sent him
back the correspondence in the tone that I sent it back.

35 Now, let me say this in relation to these fixed term - other fixed-term contracts that
exist within Tourism: we do not have any other fixed term contracts. We have, you
may or may not be aware, Deputy President – well, you are aware - there was a
dispute in Launceston - - -

40 THE DEPUTY PRESIDENT: I am certainly aware.

45 MR BAKER: - - - in relation to the call centre in Launceston where there were a
number of people who were on fixed term contracts of employment. Those fixed
term contracts of employment, if you may recall, or the work entailed - - -

THE DEPUTY PRESIDENT: I recall it.

MR BAKER: - - - was in fact advertised and there were positions filled on a permanent basis. Subsequent to that, there are a number of persons who have been engaged as casual employees to cover the Christmas peak season. They are casual employees and they are included in the Act I note – sorry – in the award at clause 7A
5 and it provides for the employment of casual employees. Now, those persons - and I understand there was an ad in the Mercury newspaper a couple of weeks ago for positions to fill in. But we are moving away from permanent – sorry, fixed-term employment within the agency.

10 Now, the other issue which I have raised with Mr Lynch - and I didn't want to put it on the record this morning, but there is an imperative for us to do it, to get this matter fixed, because it directly impacts upon one of his members. As I have said, in relation to - it was a procedural matter, and I apologise to Mr Lynch that I was of the understanding that the agency had had recent discussions with the CPSU in relation
15 to the matter. They certainly had had discussions but not to the degree that I presumed that they had occurred.

I have had, as I said, several discussions with Mr Lynch in relation to the matter. There have been discussions occur between the agency and Mr Lynch. We see that
20 there would be no good reason as to why the award should not be varied in the terms sought this morning. There has been no position put forward by the CPSU as to why it should not. In fact the position is exactly the reverse. The agency wishes to convert the fixed-term employees to permanent employees and the CPSU are saying, "Not yet." Well, when?

25 THE DEPUTY PRESIDENT: Okay. Well, the CPSU has said - and I will give them another opportunity to speak - has said that there are – they have members - I do not know if they said they were members, but there were employees who may potentially be disadvantaged were those provisions to be removed from the award.
30 You say there are no such employees, that they don't in fact exist, that the only fixed-term employees in Tourism are those as set out in the schedule.

MR BAKER: Well, that's correct. I am unaware that there are any others and even if the annexure was removed, I mean, the annexure goes to a designated number of
35 people. No one else can fall in there. Now I know they have some sort of strange titles that actually go to some of these areas, but, I mean, that is the only group of people that annexure A relates to. If there is anyone else engaged by Tourism Tasmania on a fixed-term basis that is a separate argument.

40 THE DEPUTY PRESIDENT: But I think they're saying that if there is anybody else there shouldn't be because the award doesn't allow it. That's what their argument is. So the question is, are there other people?

MR BAKER: And our argument is, we are moving to get rid of fixed-term
45 employment within the agency, unless of course there is a specific requirement. Now, there have been discussions between he CPSU, HASCU and others in relation to fixed-term employment generally within the commission following the Gaffney decision, and there have been - and there is being put in place a process to address

that throughout the State Service. And this, as we see it, is part and parcel of that, but we cannot address it while the award provision remains.

5 THE DEPUTY PRESIDENT: Ms Tyson, there is this difference of opinion as to whether or not there are employees who could be disadvantaged were the award provisions to be removed. Can you enlighten me?

10 MS TYSON: I have here an advertisement in July this year for five part-time fixed-term positions for seven months, and 10 casual positions. So there is possibly - we don't know what hours those casuals are working, but possibly there's 15 people who may be affected if this is withdrawn according to our interpretation of that clause - according to the commission's - - -

15 THE DEPUTY PRESIDENT: So your interpretation of that clause, let me be certain, would be that they should have been put on as permanent?

MS TYSON: According - yes, that's correct, under that Tourism Tasmania Staff Award.

20 MR JOHNSTON: It has to be tested.

MS TYSON: Yes, it would have to be tested of course.

25 THE DEPUTY PRESIDENT: Yes. And I might be interested in what the intent of the parties was at the time that the provisions went in there.

30 MS TYSON: I am aware from the State Service Commission's report this year that there is around 200 fixed-term employment status people at Tourism Tasmania - at Tourism, Arts and Environment. So really the question is as you said Deputy President, what is - who is affected, how many - I do not believe that there are no fixed-term people within Tourism Tasmania.

35 THE DEPUTY PRESIDENT: Yes. I mean, you're making a jump, "potentially affected". First of all you would have to win the argument that those provisions in the award mean those people could not have been employed as fixed term.

MS TYSON: Yes. These things are not covered though.

40 THE DEPUTY PRESIDENT: And I suspect you might need to put up more of an argument than has been put today.

45 MS TYSON: Yes. But these people are not protected. They are disadvantaged at this stage until we sort that argument out, if this decision was to go ahead today. Now, lengthy discussion - I am aware of lengthy discussions between Public Sector management office and Tom Lynch. I am aware that there may have been a vague discussion 12 months ago about the Tourism Tasmania Staff Award, however that was not in relation specifically to that clause. So I do not agree there has been any type of fair sort of consultative process. And whilst we might agree that it's

imperative to fix the problem of this fixed-term employment this will, we think, have the adverse affect at this stage until we have a proper consultative process. And I think we would have some more answers to these questions raised today should we have an opportunity to have that fair consultative process. If Mr Baker does - is
5 sincerely sorry about the oversight of not consulting with the CPSU, I would have thought he would then allow us to have a much more thorough consultative process to get some of these answers and sort through them to make sure it's not going to disadvantage anyone.

10 THE DEPUTY PRESIDENT: Thank you. Mr Baker, I will give you the opportunity to respond to what has been said about - - -

MR BAKER: The only comment I make – well, two comments. One is in relation to the “term appointments” as defined, term appointments only refer to people in
15 annexure A – it can't apply to anyone else – and the reason that this matter was brought on with the speed that it was is because there was a pressing issue, and unless it is resolved by 31 December it will impact on the employment of a person engaged, currently engaged, by Tourism Tasmania, who I understand is a member of CPSU.

20 THE DEPUTY PRESIDENT: So why does it have to be resolved by 31 December?

MR BAKER: It has something to do with the length of the contract of employment.

25 THE DEPUTY PRESIDENT: Okay. I am going to direct - I am going to adjourn the matter and direct the parties to have those discussions within the next seven days and we will have a report back. Hopefully by that time it will be a consent matter. I don't think we could get this arbitrated before the end of December. So we could
30 have a report back at 10.30 on the 18th - I said a week, didn't I? So at 10 am on the 13th. And I almost think that if it can't be resolved, it might almost be an interpretation matter, and God knows when that will ever get heard.

MR BAKER: Either that Deputy President, or I might move the revocation of the award in its entirety.

35 MS TYSON: Deputy President, just for the record, we strongly aim to have a resolution at that stage. We just need an opportunity to get there first with a proper period of consultation.

40 THE DEPUTY PRESIDENT: Yes. I mean, this is just a general comment, not a decided opinion or anything, but it seems to me that there would be better ways of resolving the problems that you might have with those other employees than doing it through this clumsy mechanism of argument through an award provision. But
45 anyway, I direct you, the parties, to have these discussions and report back at 10 am on Thursday, 13 December.

**MATTER ADJOURNED at 10.10 am UNTIL
THURSDAY, 13 DECEMBER 2007**