

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s70(1) appeal against decision

Minister administering the State Service Act 2000
(T13644 of 2010)

and

Glenn E Gibson

FULL BENCH:

PRESIDENT P L LEARY

DEPUTY PRESIDENT TIM ABEY (dissenting)

COMMISSIONER J P McALPINE

HOBART, 22 November 2010

Appeal against a decision handed down by Deputy President P C Shelley arising out of T13435 of 2009 – Appeal upheld by majority decision – Decision revoked

REASONS FOR DECISION

LEARY P AND McALPINE C

[1] This is an appeal against a decision of Deputy President Shelley in matter T13435 of 2009. The matter before the Deputy President was an application pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) in respect to an industrial dispute arising out of the translation review process prescribed in Appendix 1 of the Tasmanian State Service Award (the award).

[2] The Minister Administering the State Service Act 2000 (MASSA) has appealed the decision.

[3] The applicant, Glen Gibson, submitted before the Deputy President that he should properly be classified at band level 7 rather than band level 6 which was the outcome of the 'point to point' translation.

[4] The following is the process agreed between the parties for the resolution of disputes about classification translations¹:

“CLASSIFICATION RESOLUTION PROCESS

The process to resolve classification disputes arising from the introduction of Tasmanian State Service Award (TSSA) and the Health and Human Services (Tasmanian State Service) Award (H&HS(TSS)A) is detailed below.

¹ T13394 and T13411 of 2009 MASSA and HSU1 application to vary TSSA and HAHS to formulate processes and procedures for the effective review mechanisms, 16/4/09

This process is to be followed by all agencies. It supplements the Review Process of those awards and completes the procedure to resolve disputes lodged with the Tasmanian Industrial Commission (TIC).

This process has been agreed by the public sector unions and endorsed by the TIC.

1. *An employee who lodges a dispute with the TIC regarding the classification of their assigned duties is to provide:*
 - (i) *The current Statement of Duties (SOD);*
 - (ii) *A completed Form 5 - Job Evaluation Questionnaire; and*
 - (iii) *The response to the request for a reclassification provided by the Agency during the internal Review Process.*
2. *The Agency is to provide the TIC, with copies to the relevant unions and the PSMO, with the following within 5 working days of receiving notification of the dispute by the TIC:*
 - (i) *the current SOD; and*
 - (ii) *an explanation for the classification of the assigned duties, including reasons for rejecting the employee's claim.*
3. *The TIC, in consultation with the parties, will determine a date for hearing that allows for a conference to be conducted by the Public Sector Management Office (PSMO) before the hearing date.*
4. *The PSMO will convene a conference of the parties to the dispute to clarify the matters that are not agreed in an attempt to resolve the dispute.*
5. *Full disclosure by the parties of all the particulars of the dispute is required for the PSMO conference. Witness statements, if available are to be provided at the PSMO conference.*
6. *A notification of a dispute may be made by an individual employee as a representative of a group of employees who are classified according to the same generic SOD. The outcome of this dispute is to be applied uniformly to employees in the group with the same work value. When notifying a dispute that may affect similar employee(s) the details of the employees affected are to be provided.*
7. *The outcome of a dispute by an individual employee, which results in duties being reclassified, is to be applied to other employees within the same work group with the same generic SOD from the same operational date, regardless of whether those employees lodged a dispute application for reclassification.*
8. *The outcome of a dispute may have implications for other employees. The effects on other employees are to be examined for job design consequences. An employee(s) whose duties are reclassified as a result of a dispute process is regarded as being part of the translation process of the awards and is to be*

translated accordingly from the date a revised workplace restructure and/or classification occurs.

9. *An employee who intends to lodge a dispute with the TIC as a result of a review of a SOD conducted by the State Service Commissioner (SSC), is to do so within 14 calendar days of either:
 - (i) *receiving advice from SSC that the SOD is as determined by the Agency; or*
 - (ii) *receiving advice from the Agency that the SOD has been altered to comply with the SSC's recommendation and/or determination and assessed against the classification descriptors.**
10. *Witness statements, if required to support a claim, are to be provided for the PSMO conference. The relevance of the material and role of witnesses in clarifying the issues in dispute will be assessed by the parties, for their own purposes, in the event the dispute is unresolved and the matter is to proceed to the TIC."*

[5] The Full Bench said in its decision in T13394 and T13411 of 2009 issued 16 April, 2009²:

"If the Classification Resolution Process fails to resolve the claim the matter will be heard and determined by the Commission in the normal manner."

The translation process

[6] The process agreed by the parties and endorsed by the Commission is comprehensive and provides the opportunity for any employee not satisfied with their translated position to pursue a claim to resolution. All positions have been translated "*point to point*" which ensures that there is no financial disadvantage to any employee. "*Point to point*" translation is common place and has been undertaken successfully over many years.

[7] We note that the decision of the Deputy President is the first decision of the Commission which discusses the translation review process. Accordingly in this appeal it will be necessary to identify what exercise it was that the Deputy President undertook; was it a review of the translation process or was it a classification review taking into account the factors normally considered in a classification review? The end result may be the same, that is either in favour of the applicant or not in his favour; however the process is important as it relates to future applications dealing with disagreements about translations under the award.

[8] A translation exercise follows a review and rewrite of an award or awards or the collapse of a number of awards into a lesser number. In fact it could be said that a translation is little more than an administrative exercise. It is not an undertaking to change the work requirements of incumbents but may in some instances change Statements of Duties (SODs). Classification descriptors may also be rewritten but do not necessarily change the previous intended meanings. No evidence was presented to suggest that a rewrite of descriptors in this exercise changed the previous meanings.

² supra

[9] A change to a SOD may result in a reclassification but only if there has been a demonstrated change in the work requirements, skills and qualifications or responsibilities.

[10] Mr Baker, for MASSA, submitted, when seeking to vary the award (and the Health and Human Services (Tasmanian State Service) Award, (HAHSA), and seeking direction from the Commission in respect to the agreed process that:

"And I suppose the reason that we need this extra process formalised is because of an enormous backlog for quite a number of years of employees who were aggrieved but didn't necessarily have the means, in terms of the tools in which to get their classification grievances addressed..."³

[11] It would seem from that submission that grievances about alleged incorrect classifications had not been addressed effectively or efficiently over a period of time. We observe however that the Commission has over the years determined many claims alleging incorrect job classifications.

[12] The process agreed by the parties was to *"streamline the internal process"....rather than "anything to do with how the Commission deals with it..."⁴*

[13] The internal process is prescriptive and anticipates consistency of approach.

[14] In this matter the subsequent review process, including the Public Sector Management Office (PSMO) conference, confirmed the original decision of the Department of Treasury and Finance to translate Mr Gibson at band 6.

[15] The parties have followed the resolution process and there is no disagreement between them as to the content of the SOD.

[16] Further they are agreed that Mr Gibson performs no work functions outside the agreed SOD. The issue in dispute is the classification level for Mr Gibson's position of Manager Technical and Systems Audit (TASA) which has been translated to a band 6 classification. Mr Gibson argues that it should be a band 7 classification.

[17] Absent agreement as to classification level the matter was referred to Deputy President Shelley to determine.

The proceedings before the Deputy President

[18] It seems to us that the Deputy President should first have determined what it was the parties were asking her to do.

[19] It is of particular importance that the SOD is an agreed document.

[20] There was no evidence that Mr Gibson's role had changed in any way since it was initially classified in 2006 following the introduction of the position of Manager TASA

[21] There was no evidence or submission that Mr Gibson had challenged the initial classification at that time or since.

³ T13394 and T13411 of 2009, transcript page 5 line 36

⁴ T13394 and T13411 of 2009, transcript page 5, line 27

[22] There was no evidence or submission that the descriptors had changed which resulted in his position being incorrectly classified. There was no examination of the current descriptors against the descriptors of Mr Gibson's previous level 9 position under the provisions of the Administrative and Clerical Officers Award.

[23] Having regard to the agreed status of the SOD, it is our view that the only claim Mr Gibson could pursue with any chance of success would be for him to demonstrate that the requirements of his position had changed such as to justify a reclassification to a higher band level.

[24] It seems to us therefore that where the SOD is agreed; there is no financial disadvantage to the employee by the translation and evidence that the work requirements remain unchanged, that that is the end of translation process and any dispute between the parties could only be about a reclassification rather than an issue of incorrect translation. Before a claim comes to the Commission it has been through a comprehensive internal review process, which may or may not have included a review by the office of the State Service Commissioner. What then is the role of the Commission? That was the first question the Deputy President should have asked the parties prior to proceeding with the hearing.

[25] It seems in part that the Deputy President undertook a reclassification exercise and considered some elements of work value. Further she has relied on evidence about "one off" projects which were considered in the initial classification in 2006.

[26] In a decision handed down on 19 January 2010 the Deputy President concluded:⁵

"The employer submitted that there were 'very minor aspects' of Mr Gibson's duties that could be considered to be band 7, but the 'best fit' was with band 6. This is not borne out by the evidence. The definition for bands 7 and 8 describes the work performed by Mr Gibson, although he also performs work described at band 6. The position aligns with band 6 and with band 7 in relation to the descriptors dealing with autonomy and technical skills. However, whereas the descriptors are the same in relation to technical skills, band 7 is at a higher level as far as autonomy is concerned. Substantial and significant aspects of the work, such as management responsibilities and management of stakeholder relationships, align more closely with band 7 than with band 6. In respect of the management role, the descriptor for band 7 exactly describes the role of the Manager TASA. I find that the 'best fit' is with band 7.

I find that the position held by Mr Gibson, Manager Technical and Systems Audit, is at band 7 of the award.

I hereby order, pursuant to section 31 of the Act, that the position of Manager Technical and Systems Audit be classified at band 7 of the Tasmanian State Service Award and that Mr Glenn Gibson be translated to band 7 of the Tasmanian State Service Award, effective from 5 March 2009."

⁵ T13435 para 166

The Appeal

[27] The employer has identified 16 grounds of appeal.

[28] S.70(1A) of the Act reads:

"70. Rights of appeal

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

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

(i) made a legal error; or

(ii) acted on a wrong principle; or

(iii) gave weight to an irrelevant matter; or

(iv) gave insufficient weight to a relevant matter; or

(v) made a mistake as to the facts; or

[29] The provisions of the Act reflect, in general terms, the decision of the Full Court of the High Court in *House v King* decision⁶ which provides:

"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance. In such case although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Background

[30] The background to this matter is conveniently set out in the Deputy President's decision:

"Mr Gibson is employed in the Department of Treasury and Finance (the Department) within the Division of Liquor and Gaming (the Division) in the position of Manager, Technical and Systems Audit (TASA). The position's objective is to:

⁶ (1936) 55 CLR 499.

'establish and maintain effective systems to approve and monitor the operation of gaming devices, gaming equipment and gaming systems used in all forms of gaming, including interactive gaming and wagering activities and the operation of betting exchanges.'
(Exhibit A12)

The Manager TASA has a team of five staff, three of whom work on approving and monitoring interactive gaming and wagering, essentially Betfair (a betting exchange). Two work in monitoring and approving gaming machines. Both areas are involved in accreditation and in ongoing relationships with testing facilities. TASA develops and maintains standards for equipment and systems.

Under the previous award, the Administrative and Clerical Officers Award, the position was at Level 9; it was created in 2006 to deal with the increased complexity due to the introduction of Betfair.

Mr Gibson was translated to band 6 of the new award, the Tasmanian State Service Award, effective from 5 March 2009. He has disputed this pursuant to Appendix 1 – Clause 3 – Review Process – of the award. The review process is complex and protracted. Mr Gibson's claim is that the work he performs is work that best fits the level of band 7.

The award provides that where an employee has issues or grievances with their duties, responsibilities or translation classification band, they have 14 days in which to initiate discussion at a local level with their manager. Following that discussion, outcomes with reasons are to be provided to the employee within 14 days. Following that, if an employee is dissatisfied, they can lodge an application for review with the Director/Manager Human Resources (HR) within 28 days of the receipt of the notification of outcome. There is then an internal agency review process, which involves a review signed off by the Director/Manager of HR with recommendations to the Head of Agency or delegate. The employee is then notified of the outcome of the internal review within 28 days of the application being received. If the employee is dissatisfied with the outcome, then, if the dispute relates to the assigned classification level, the employee may seek a review of the classification band, which is the case in this instance, pursuant to clause 3(e)(iv) of Appendix 1 of the award.

Mr Gibson's agreed Statement of Duties sets out his primary duties, level of responsibility, direction and supervision. The primary duties include:

- Efficiently supervise designated resources and provide effective leadership within the work area to ensure that work objectives are completed in a timely manner and to a high standard;*
- Developing guidelines, systems and procedures to ensure the timely and effective approval of technical*

equipment and other systems used in the delivery of gaming;

- *Managing the development of systems for the monitoring and audit of gaming operations and the development and operation of standards and technical requirements;*
- *Regulating components of, and report on all forms of gaming covered by a Tasmanian Gaming Licence including betting exchange operations;*
- *Liaising with testing facilities, gaming equipment manufacturers, gaming operators, suppliers and software developers to manage the process of testing and approval of gaming equipment and systems and represent the Branch and the Department as required;*
- *Supervising, reviewing and reporting on the performance of testing facilities;*
- *Providing advice, reports and briefings to the Tasmanian Gaming Commission and the Department on technical issues relating to the security, fairness and ability to audit gaming equipment and gaming systems including the verification of gaming taxation and broader technical policy issues;*
- *Assisting other areas of the Branch in the formulation of gaming policy;*
- *Preparing high level correspondence including reports and submissions to the Tasmanian Gaming Commission and other bodies as required;*
- *Representing the Department and the Tasmanian Gaming Commission on working parties and other forums as may be required from time to time;*
- *Maintaining a network of peers and specialist contacts in the area of gaming equipment and system regulation;*
- *Developing a contemporary and productive work environment that fosters responsibility, accountability and improvement in meeting operational goals and objectives; and*
- *Contributing to the management of the Liquor and Gaming Branch through participation in the Branch planning process and monitoring and reporting on Branch performance, as determined."*

The level of responsibility, direction and supervision is described as:

'The Manager, Technical and Systems Audit will operate with a significant degree of independence of action and autonomy in day to day activities and is accountable to management in terms of strategic direction and meeting objectives. The Director, Liquor and Gaming will provide broad direction. The Manager, Technical and Systems Audit may be required to provide authoritative specialist advice generally or as it relates to a particular work area. Delegations exercised at this level may include being the final authority in approving expenditure, undertaking specific policy action or reviewing previous actions or decisions. The Manager, Technical and Systems Audit may also supervise a small team of employees, which involves technical or professional skill and judgment.' "

[31] The award prescribes the Band levels at 4,5 and 6 as follows:

"Work involves the maintenance and modification of guidelines, systems and processes according to a defined policy and regulatory operating environment. The operating environment is Agency-specific in terms of organisational design, planning, structures and interpretation of government objectives.

[32] And at Bands 7 and 8:

"Work involves the interpretation and modification of policy and regulatory settings according to operational requirements (internal – how we work) and service delivery (external - what we do) demands a broader whole-of-Agency and/or whole-of-government perspective."

[33] Further it prescribes the difference Between Band 6 and Band 7 as follows:

"Band 7 work leads a complex activity or program unit requiring the development and/or determination of the operational methodology according to the decision-making framework and service delivery requirements.

[34] Clause 1(a)(ii) of Part III of the award provides a definition of 'best fit' which is the terminology adopted for classification assessment in translation:

"The job components have equal weight or effect and no description within a component has more importance than another. Some descriptors, however, are more relevant in describing different types of work than others, and therefore will have more influence in classifying that work. Naturally, not each and every descriptor applies to any individual job. These descriptors are appropriately used when particular job components and the overall theme or 'feel' of a particular band provides the 'best fit' to an employee's duties.

In using the descriptors it is important to consider particular organisational arrangements, such as the reporting relationships above and below specifically assigned duties."

[35] Mr Gibson was previously classified at a level 9 and under the point to point translation his position became a Band 6 classification. It was his evidence that his position had remained unchanged since that time other than some involvement with TOTE and that Betfair has continued to grow.

Grounds of Appeal

[36] We have addressed all of the appeal grounds but record that we consider the primary grounds of appeal are appeal grounds 2 and 15.

[37] We uphold both of those grounds.

[38] It is our view that the decision is attended with sufficient error in respect to those 2 grounds of appeal to be fatal to its standing.

[39] Whilst we have addressed all grounds of appeal we note there are similarities in a number of grounds which address the same issues. In any case a number of the grounds of appeal are of little or no consequence to our determination.

Ground 1

The Deputy President gave insufficient weight to the classification resolution process and evidence provided as directed by the Tasmanian Industrial Commission in matter T13411 of 2009 and as outlined in Appendix 1 Translation Arrangements of the Tasmanian State Service Award.

[40] It was the submission of Ms Fitton, for MASSA, that the Deputy President gave insufficient weight to the findings of the internal review process, and gave no weight to the fact that the matter had followed the agreed translation process. She said that the matter had proceeded in part on a notion of a work value case.

[41] Whilst there was agreement between the parties as to the content of the SOD it would seem that they were in disagreement on virtually every other point. There is no doubt that the internal review process has been comprehensive nonetheless the parties are still not agreed as to the correct classification for Mr Gibson.

[42] Mr Grey, for MASSA, observed during the proceedings considering the classification review process that:

"As Mr Baker said, this process is much more to streamline the internal process to be followed by the parties, than it really is anything to do with how the commission deals with it. It is an order that the parties are satisfied by the time a matter comes here for resolution that all the facts are known, and it's only a matter of whether they're agreed or accepted, I suppose, which is what the commission will no doubt determine."

[43] Mr Baker said that the

"...process is consistent with the obligations that are imposed upon the Commission at section 20(1)(b) of the Act which provide that the Commission:

'Shall do such things as appear to it to be right and proper for effecting conciliation between parties, for

preventing and settling industrial disputes, and for settling claims by agreement between parties...' "

[44] He noted that the process proposed could not and did not inhibit the right of an individual to seek direct access to the Commission but urged that the process proposed be followed in the first instant.

[45] Ms Fitton said that the classification review process supplements the review process in the award and that account should have been taken of the process undertaken by the parties prior to the matter reaching the Commission.

[46] The Deputy President agreed with Ms Fitton saying:

"....I don't think it's been argued that the processes that have gone before shouldn't form part of what I consider when reaching my decision."

[47] The Deputy President referred to the Review Process in several paragraphs in her decision.⁷

[48] Whether or not appeal ground 1 should be upheld or rejected would depend on the view taken as to what was the understanding and intention of the parties when an application came to the Commission for resolution and how much, if any, reliance was to be placed on the review process. We understand the intent of the parties was that the review process was an attempt at resolution. The process allowed that any differences be identified to allow an application to the Commission to proceed. The comments of Mr Grey reproduced above would seem to support that view.

[49] In any case a determination of appeal ground 1 would have little impact on the outcome of the appeal.

[50] Nonetheless we are of the view that the Deputy President did take into account the processes of review undertaken by the parties prior to the application to the Commission and has referred to that process a number of times in her decision.

[51] Accordingly we detect no error and reject appeal ground 1.

Ground 2

The Deputy President has acted on a wrong principle in not determining that the statement of duties as agreed by the parties is the pivotal document for the determination of the duties of an employee.

[52] At paragraph 109 the Deputy President said:

"The employer submitted that it is the Statement of Duties, not what the person does, that determines the classification level. Whilst the actual Statement of Duties is not in dispute in the instant case, I disagree with this proposition. In my view, the classification level is determined by what the employee actually does, it is not determined by what the words on the position description say, although, of course, the words are of interest and may be an aid in determining the correct classification level. However, it is possible, and, indeed, in my

⁷ T13435 of 2009 paras 7, 8, 105, 106, 107, 108

experience, it is not uncommon, for there to be a dissonance between what is written in a Statement of Duties and what duties are actually performed."

[53] By ignoring the primacy of the SOD Ms Fitton contended that the Deputy President made her determination on the assessment of the work undertaken by Mr Gibson rather than the duties required of the role and found in the SOD. Further, if the Deputy President's statement is accepted, then the whole agreed translation review process has been of no consequence.

[54] Ms Fitton referred to the following comment of the Deputy President:

*"...this classification dispute is no different to any other classification dispute and that she would look at what the employee was required to do and what the employee actually does.....and that while the SOD is informative and of interest that where there is a difference it is not the SOD which is determinative it is what the employee actually does."*⁸

[55] Further the Deputy President said that:

"...if an employee says he needs a particular knowledge to do the job that is an important consideration and this is what is considered."

[56] The resolution process requires that disputes relating to actual duties and responsibilities are to be referred to the State Service Commissioner. This occurred in this matter and it is common ground that the resulting SOD is an agreed document.

[57] To have regard to qualifications or duties not required by the SOD is tantamount to declaring the SOD irrelevant. It is our view that the SOD is the pivotal document on which a classification is determined. It is the Head of Agency who decides the skills and qualifications required for performance of the work, not the incumbent. It is our view the comment by the Deputy President is simply incorrect.

[58] We strongly disagree with the Deputy President's view and are satisfied that she fell into error.

[59] Whilst it was agreed that there was no evidence of any work performed by Mr Gibson that was not envisioned by the SOD the Deputy President relied on functions that were *'one off'* and not part of the regular or day to day requirements of the role. Reliance was also placed on events that preceded the creation of Mr Gibson's current position, e.g. the trip to the UK in respect to the introduction of Betfair and the Traffic Light system neither of which are relevant to the considerations in this matter.

[60] We note that the classification for Mr Gibson's position was determined in 2006 when the position was created. This followed the introduction of Betfair and Mr Gibson's involvement in setting up the process. Accordingly any *'work value'* associated with that project has been considered in the initial classification determination and is not relevant to this application. There is no evidence to indicate Mr Gibson disputed the original level 9 classification.

[61] We are of the view that the Deputy President has fallen into error and that the error is fundamental to the decision. The primary document for review is the SOD and

⁸ Transcript page 85 line 14

the functions, qualifications and actual work performed by the incumbent, if not prescribed by the SOD, are irrelevant to any finding as to the correct classification.

[62] We uphold appeal ground 2.

Ground 3

The Deputy President acted on a wrong principle in not determining that the Head of Agency has the power to assign duties.

[63] It was submitted that the Deputy President acted on a wrong principle as she ignored the power of the Head of Agency to assign duties and develop organisational structures within their Agency.⁹

[64] We presume that this appeal ground relates to appeal ground 2 inasmuch as a rejection of the primacy of the SOD somehow ignores the right of the Head of Agency to assign duties.

[65] We do not think that because the Deputy President said she did not consider the SOD as the pivotal document for consideration that it necessarily follows that she does not accept the role of the Head of Agency.

[66] In any case we have noted that the duties performed by Mr Gibson are in accord with the requirements of the SOD.

[67] Ms Fitton submitted that in respect to 'best fit' that it was within the purview of the Head of Agency to determine whether TASA is an activity within the meaning of the award and it was determined that the position was a band 6. We accept that submission but do not consider it relevant to the appeal ground as we are unable to find any error that would support the contention of the appellant.

[68] We reject appeal ground 3.

Ground 4

The Deputy President gave weight to an irrelevant matter in taking into account the uncontested statement of Ms Fitzgerald.

[69] Mr Gibson reported to Ms Fitzgerald when he was employed in the Research and Policy section of the Liquor and Gaming Branch. Her unsworn statement provided her assessment of Mr Gibson's skills and where she thought those skills should be placed within the classification descriptor framework. When employed with Ms Fitzgerald, Mr Gibson undertook a trip to the UK to investigate the integrity, security and operations of the Betfair UK operations; however, little, if any, of Ms Fitzgerald's statement addressed contemporary work requirements for Mr Gibson.

[70] The unsworn statement was presented in the proceedings below and Ms Fitton submitted that there was no opposition to the tendering of the statement but that she had submitted at that time that little weight should be applied to it. She said that during the review process it was thought that Ms Fitzgerald would attend and the employer would have been able to examine her on the content of her statement. However she did not attend so she has not been examined.

⁹ s.34 State Service Act 2000

[71] It is not unusual for unsworn statements to be tendered in Commission proceedings however they need to be considered with some caution and it is noted in this matter that the employer did submit before the Deputy President that the content of the statement was irrelevant and should not be relied upon.¹⁰ The appeal refers to the fact that the Deputy President gave weight to the statement and we note that as a rule sworn evidence is preferred to unsworn evidence.

[72] The statement of Ms Fitzgerald does no more than express her “*understanding*” of the role now performed by Mr Gibson; the reference to the Betfair project is not relevant as that was a specific project and not part of his role requirement as of today. Likewise Ms Fitzgerald’s “*understanding*” of the requirements of the band 6 and band 7 position is also irrelevant and of no consequence.

[73] Accordingly we reject the findings of the Deputy President which relied on the statement of Ms Fitzgerald. Likewise the Deputy President’s comment that

“...there is no evidence that Mr Gibson has ever been instructed that the duties he was performing and the level at which he was performing them were not what was required of the position.”¹¹

is no more than an observation not relevant to the exercise before her. Ms Fitzgerald provided no evidence to support a finding that Mr Gibson was performing duties at a higher level and in any case was in no position to provide such evidence.

[74] It is our view that little, if any, regard should have been placed on the statement of Ms Fitzgerald for a number of reasons which we have already discussed.

[75] Accordingly we are of the view that the Deputy President did give weight to an irrelevant matter by placing reliance on the statement of Ms Fitzgerald.

[76] We uphold appeal ground 4.

Ground 5

The Deputy President made a mistake as to the facts in relying on Ms Fitzgerald’s statement in relation to the applicant’s technical skills.

[77] This appeal ground relates to appeal ground 4 where we have made comment about the status of Ms Fitzgerald’s statement and said that the statement provides an opinion as to some of the tasks performed by Mr Gibson; however they do not refer to the SOD and are related to a period of employment when he worked with Ms Fitzgerald, worked on a specific project and do not relate to his current position.

[78] As we noted in appeal ground 4 we have concluded that the Deputy President did apply inappropriate weight to the statement of Ms Fitzgerald. In any case, as we have noted earlier, Mr Gibson’s individual technical skills are not a matter for consideration in determining the appropriate classification level. It is the skills required for the position as described in the SOD which are the relevant skills to be taken into account.

[79] We are satisfied that the Deputy President erred in placing weight on the Fitzgerald statement.

¹⁰ Transcript page 75 line 40

¹¹ T13435 Para 110

[80] We uphold appeal ground 5.

Ground 6

The Deputy President gave insufficient weight to the narrow focus of the duties compared with the classification descriptors of Band 7.

[81] The employer argued that the Manager TASA works within a defined field of activity and does not have a broader, whole of Agency or whole of Government approach, as described at band 7.

[82] In her decision the Deputy President observed:¹²

"The employer relied upon the reference in the band 7 definition to a "broader whole-of-Agency and/or whole of government perspective", in particular, the fact that the position only deals with the gaming and Betfair aspects of the Branch's operations, and does not include the liquor licensing side. I have no doubt that there are many positions across the state sector which are at band 7 and above which are specialised positions with a focus which it could be argued is not 'whole-of-Agency' or 'whole-of-government'. It is difficult to determine what is meant by 'perspective' in this context. The proper regulation of gaming must surely be essential from both an Agency and government perspective. Ms Jackson said that \$85 million per annum is collected in gaming tax plus \$8 million from Betfair. She said that his role had a direct and significant effect on organisational outcomes.

It seems to me that the liquor and gaming versus gaming only argument is of little use in determining the classification level. Obviously, specialist skills and knowledge may be of a higher order than generalist skills and knowledge, an obvious analogy is the medical profession...."

[83] The descriptors taken as a whole provide guidance as to the appropriate band level. The standards are broad and not every descriptor necessarily applies to any individual job. The provision for band 7 clearly states that the perspective relates to "a broader whole of Agency and/or whole of government" relationship.

[84] The Macquarie Dictionary provides the following:

"perspective: the relation of parts to one another and to the whole, in a mental view or prospect."

[85] Accordingly we are of the view that the "broader whole of Agency and/or whole of Government" relationship is a relevant consideration and that the evidence clearly reveals that Mr Gibson's role is of narrow focus and within a defined field of activity and does not satisfy this criteria for classification at band 7.

[86] The evidence of the employer witnesses was that TASA was part of the compliance function and had responsibility for approvals and compliance for gaming

¹² T13435 para 117

machines, gaming and the regulation of Betfair.¹³ The role is designed to manage the processes of approvals and is about receiving reports and ensuring they meet the Gaming Commission requirements. Mr Atkinson-MacEwen, Director Liquor & Gaming since August 2007, said that the *Gaming Control Act* is very prescriptive and proscribed as compared to the *Liquor Licensing Act* which is much less prescriptive; he also said that the Commissioner for Licensing has none of the powers that the Gaming Commission holds.¹⁴

[87] Further it was his evidence that liquor and licensing is far more complex and potentially of a much higher risk than the defined area of gaming machines etc.¹⁵ He said that the *Gaming Act* itself, being highly prescriptive, provided guidance and direction. Mr Atkinson-MacEwen also said that the other managers at band 7 had responsibilities across both liquor and gaming and deal at a slightly higher level in terms of a more strategic approach whereas Mr Atkinson-MacEwen himself provides strategic direction to Mr Gibson. Mr Atkinson-MacEwen did not agree that the TASA manager role had a direct and significant effect on organisational outcomes.

[88] Mr Gibson holds a number of delegations, as do most, if not all, of the other employees in the area including Mr Atkinson-MacEwen who said that the delegations are straightforward and that the manner in which they are to be exercised is well documented in the Gaming Commission's decisions and in the papers that led to those decisions. It was his evidence that the delegations are not complex nor are they of a highly technical nature.¹⁶ He did concede however that some delegations are about matters that are more complex than others and judgment varies but is appropriate to the level of the officer exercising the delegation. The focus is confined to gaming machines and gaming machine games approvals and Betfair.

[89] Mr Gibson has the authority to conduct and commit to outcomes regarding operational processes. Anything complex or of a strategic nature would go to the Gaming Commission or the Director for action or review. The papers written by Mr Gibson are generally straightforward and not complex. All papers which go the Gaming Commission go through the Director first.

[90] Mr Atkinson-MacEwen said that Mr Gibson's role focused on a fairly fixed and narrow group of issues; he does not deal at the broad strategic level. When representing the Gaming Commission on committees he has clear guidelines and knowledge and operates under direction.

[91] Mr Gibson testified that only some of the reports he prepares are complex.¹⁷ In respect to the many delegations which he holds he said that:

"...about 12% of them have criteria around them, or some direction otherwise they just state the section of the Act..."¹⁸

[92] We are of the view that the Deputy President gave insufficient weight to the evidence which in our view supported the view that Mr Gibson's role is of narrow focus when compared with the descriptors required of band 7.

¹³ Transcript Page 95 line 20

¹⁴ Transcript Page 95 line 43

¹⁵ Transcript Page 125 line 36

¹⁶ Transcript Pages 108-17

¹⁷ Transcript Page 64 line 46

¹⁸ Transcript Page 67 line 20

[93] We uphold appeal ground 6.

Ground 7

The Deputy President acted on a wrong principle in determining that the quantum of revenue collected in gaming was a determining factor in the focus of the duties.

[94] In paragraph 117 the Deputy President said:

"It is difficult to determine what is meant by 'perspective' in this context. The proper regulation of gaming must surely be essential from both an Agency and government perspective. Ms Jackson said that \$85 million per annum is collected in gaming tax plus \$8 million from Betfair. She said that his role had a direct and significant effect on organisational outcomes."

[95] As we understand this ground of appeal it would seem that the appellant relies on the content of paragraph 117 to claim that the Deputy President determined that the amount of revenue collected was a factor in determining the classification level for Mr Gibson.

[96] We are unable to accept that the Deputy President made such finding and it seems she did no more than repeat that part of Ms Jackson's (Mr Gibson's advocate in the hearing below) submissions.

[97] Accordingly we reject appeal ground 7 as we do not accept that the Deputy President made the finding as claimed by the appellant.

Ground 8

The Deputy President made a mistake as to the facts in determining that the Technical and Systems Audit Section [TASA] was a "program" within the scope of the Tasmanian State Service Award.

[98] The award defines "program" as "...may stand alone or located within a functional unit" and "function" as "a related and aligned area of activities combined to form a unit (typically a Branch)..." If the "functional area" is the Liquor and Gaming Branch, then TASA is the activity or program unit.

[99] The Deputy President found:

"The evidence has revealed that Mr Gibson leads a complex program unit according to a decision making framework.

The classification descriptor under the heading 'focus' for band 6 describes:

'A management role interprets policies, regulations and guidelines and designs and implements plans, systems and procedures to deliver services consistent with program objectives.'

The descriptor for band 7 describes:

'Roles with a management focus, or specialists involved with a specialised program, lead an activity or program unit within a functional area.' "

[100] Miss Fitton said that the TASA field of activity comes under the wider Compliance activity within the program of Gaming within the Liquor and Gaming Branch. It was her submission that the Deputy President had made a mistake and had ignored the fact that the role was one of narrow focus and aspect as part of the entire gaming program under the wider compliance activity. It was also submitted that the Deputy President had not taken into account the hierarchical structure of the branch.

[101] In clause 1(a)(ii) dealing with *"best fit"*, the following appears.

"In using the descriptors it is important to consider particular organisational arrangements, such as the reporting relationships above and below specifically assigned duties."

[102] From this we conclude that the reporting relationship is an important and material consideration in determining a classification. To that end the evidence reveals that Mr Gibson reports to the Executive Officer and that all reports he prepares are cleared by the Executive Officer before going to the Gaming Commission, likewise when exercising his delegations anything that is new or unfamiliar is referred to a more senior person or to the Gaming Commission.

[103] The *"Focus"* of band 6 refers to a *"defined field of activity"* whereas band 7 refers to *"work within a specialised program or engaged in complex activities within a functional area."*

[104] The sworn evidence of Ms Sawford, Executive Director, Licensing & Gaming Division, was that the Manager TASA's role was:

*"to manage the processes around the approval of gaming machines, and gaming machine games, gaming machine systems, and to manage the relationship with the accredited testing authorities that do the testing of those machines and systems."*¹⁹

[105] We are of the view that the Deputy President has misunderstood the evidence and confused a number of concepts.

[106] We uphold appeal ground 8.

Ground 9

The Deputy President made a mistake as to the facts in determining requirements of the role that did not form part of the statement of duties.

[107] There was no evidence to show that Mr Gibson performed any duties outside the requirements of his SOD and this was agreed between the parties. Nonetheless the Deputy President took into account information and requirements not contained in the agreed SOD to make her assessment. Some of the comments of the Deputy President, whilst unclear as to their purpose, would suggest that she has considered matters not part of the SOD; for instance a comment at paragraph 110 would suggest that she was of the view that Mr Gibson was working above his band level as well as her reliance on

¹⁹ Transcript Page 160 line 20

the Fitzgerald statement regarding the skills of Mr Gibson demonstrate error on her part. As we have noted earlier in this decision it is the SOD requirements which are tested against the descriptors not the particular skills or qualifications of the incumbent.

[108] It seems to us that the basis of her finding that Mr Gibson's appropriate band level was a level 7 took into account matters not required of the SOD including "one off" projects.

[109] We uphold appeal ground 9.

Ground 10

The Deputy President gave insufficient weight to the evidence that supported the level of direction provided in exercising delegations as provided for in the classification descriptors of the Tasmanian State Service Award.

[110] The Deputy President has, in our view, misconstrued the evidence in regard to the issue of the delegations which were discussed at length. The evidence of all witnesses was that the delegations are provided under the terms of the *Gaming Act* which is prescriptive and proscribed, further it was said that decisions exist as to the exercise of some of those delegations and that those decisions provided additional guidance. That evidence was not challenged or refuted. It was also the evidence of the witnesses that most were routine and straightforward but some had complexities of various degrees and in fact the Deputy President recognised that as being the case. Mr Gibson testified that the delegations prescribe the particular section of the Act under which the delegation is referred and as such describe the power of the delegated duty. The example he provided was straightforward and concise. It was his evidence that those delegations for which the Commission had issued decisions or direction, provided guidance as to their exercise.²⁰

[111] We are not sure that the Deputy President has made a finding on the delegations issue. In her decision she has expressed a number of opinions and provided speculation about a number of issues which makes it unclear as to what are findings and what are mere commentary or opinion.

[112] Nevertheless we are of the view that the Deputy President erred inasmuch as her commentary in regard to the delegations did not reflect the evidence. It would seem that she has concluded that *the level of skill, responsibility, expertise and knowledge necessary to carry out those delegations* is relevant but it is not clear what weight, if any, she has placed on that comment or on what basis she has come to such conclusion in light of the whole of the evidence presented. That part of her decision seems more commentary and opinion rather than being a finding based on the evidence.

[113] Accordingly we uphold appeal ground 10 as the Deputy President has erred in that her conclusion does not reflect the evidence in respect to the delegations.

Ground 11

The Deputy President gave weight to irrelevant matters and made a mistake as to the facts in deciding the complexity of the role as a determining factor of the classification.

[114] At paragraph 138 the Deputy President said:

²⁰ Transcript Page P67 line 43

"Ms Sawford's evidence was that there was a requirement for the capacity to understand mathematical concepts, rather than a requirement for a particular qualification. She said that whilst the gaming machine approvals are a 'very specialised area of expertise' many approvals were straightforward. She said that the papers prepared by Mr Gibson required the interpretation of technical reports and relaying them to a non-technical party – the Gaming Commission."

[115] Ms Fitton submitted that the above paragraph supported the claim that the Deputy President had made a mistake as to the facts by confusing a *"specialised area of expertise"* with a high degree of complexity. Our reading of paragraph 138 however seems to do no more than record the evidence of Ms Sawford and does not include a finding albeit the paragraph is under the general heading of Findings.

[116] Further it was claimed that the Deputy President had made an error of fact where she said in paragraph 149 that *"the problems related to human behavior and gambling would also be complex."* Ms Fitton said that the TASA position involved the testing of gaming machines and systems, not the impact of gambling on human behavior. However we note the Deputy President has recorded in paragraph 67 reference to the evidence of Ms Sawford that the position *"deals with complaints from people unhappy with the outcomes of their interactions with gaming providers, and sometimes they are difficult because they are very aggrieved."* The reference is without clarification and is therefore unclear as to its meaning or impact or what weight has been applied to it, if any. It seems to us that the Deputy President has expressed nothing more than a personal, but irrelevant, view in respect to the problems related to human behaviour and gambling.

[117] In considering the technical nature of the work performed by Mr Gibson the Deputy President has again relied on the statement of Ms Fitzgerald to determine the complexity of the role. We also note that the Deputy President has said that the *"complexity or otherwise of the matters to be dealt with"* are not relevant to her determination.²¹

[118] We agree with Ms Fitton that there is a difference between a *'specialised area of expertise'* and a high degree of complexity, they are not synonymous.

[119] The Deputy President said:

"...The witnesses were generally agreed that there were occasionally complex papers and issues. As with many other areas of work, the evidence showed that a lot of what Mr Gibson does is relatively straightforward, but it is the ability and requirement to deal with complex issues as they arise that assists in the determination of the value of the work. In Mr Gibson's case, the evidence showed that he does deal with highly technical and occasionally complex issues in an area requiring specialist expertise." ²²

[120] In this statement the Deputy President seems to accept the fact that Mr Gibson *"occasionally"* deals with complex issues and as a consequence should be classified at band level 7. It is our view that an occasional requirement to deal with complex issues

²¹ T13435 Para 149

²² T13435 Para 142

is not a sufficient basis on which to determine that the position is under classified. In any case it is a given that Mr Gibson has the capacity to refer an issue to a more senior officer. Further that finding by the Deputy President seems to contradict her earlier finding or opinion found in paragraph 149 that the complexity of the work was not relevant as it was the *"management of people and the unit that is relevant."*

[121] We are of the view that the Deputy President has erred and uphold appeal ground 11.

Ground 12

The Deputy President made a mistake as to fact in determining that the technical nature of the work was that of band 7.

[122] Ms Fitton submitted the Manager TASA does not require a high level of complexity and therefore the Deputy President made a mistake of fact in determining that the technical nature of the work aligned to band 7.

[123] There is no reference in the SOD to any requirement for any particular qualifications but *"a high level understanding of the operation of gaming devices, gaming equipment and gaming systems, and the ability to keep abreast of rapid technological advances"* is the position objective. The evidence suggests that the understanding and knowledge is gained on the job although the SOD suggests some qualifications are highly desirable but not mandatory.

[124] The Deputy President relied to some extent on the statement of Ms Fitzgerald in her assessment of the level of technical skills and also notes that the evidence showed that the witnesses *"generally agreed that there were occasionally complex papers and issues."*

[125] We agree that the evidence reveals that there *"were occasionally complex papers and issues"* but a classification is not determined on work performed occasionally, a classification determination is based on the major and substantial work required of the position.

[126] The Deputy President has made a mistake by relying on the statement of Ms Fitzgerald and has misunderstood the evidence in finding that the technical nature of the position is a band level 7. We note also some contradiction in the Deputy President's findings to justify a band level 7 classification.

[127] We uphold appeal ground 12.

Ground 13

The Deputy President made a mistake as to fact in determining that managerial duties were band 7.

[128] At paragraph 151 the Deputy President said *"I think that a clear difference between band 6 and band 7 is the management aspect..."*

[129] Ms Fitton submitted that the Deputy President made a mistake in determining that there is a clear difference in the management role of the bands. Ms Fitton said that insufficient weight was given to the fact that the band 6 descriptors also clearly encompass management positions.

[130] At paragraph 157 the deputy President said:

"The Band 7 descriptor, on the whole, fits with the evidence given in relation to the role of Manager TASA. It is unlikely that any position will exactly align in all respects with descriptors. Mr Gibson does interpret policies, regulations and guidelines, and does determine methods and priorities to support complex activities within a specified area. Mr Atkinson-MacEwen agreed that Mr Gibson determined priorities."

[131] The Deputy President concluded at paragraph 166 that *"substantial and significant aspects of the work, such as management responsibilities and management of stakeholder relationships align more closely with band 7 than with band 6."*

[132] We agree with the Deputy President that it is unlikely that any position will exactly align in all respects with the descriptors and for that reason when determining an appropriate classification it is necessary to look at all of the descriptors and requirements of the position in context and not forensically examine every word and/or function selecting only the *"best"* rather than the *"best fit"*.

[133] It seems to us that the Deputy President has made a mistake in her determination that the managerial duties are band level 7 when managerial duties are a requirement of both band level 6 and band level 7. We are not satisfied that her finding reflects the evidence.

[134] We uphold appeal ground 13.

Appeal Ground 14

The Deputy President gave undue weight to the role in stakeholder management in determining the level of the duties.

[135] The management of stakeholders is a specific and identified requirement of band level 7 whereas Ms Fitton submitted that the Deputy President fell into error in observing that *"stakeholder management"* does not appear below band 7. She said that liaison and dealing with stakeholders is included at all levels and is included in the band 6 descriptors which prescribe:

"Informs and negotiates to gain the acceptance of others regarding the application of policies, plans and processes in providing defined service and program delivery outcomes."

[136] In fact the Deputy President said:

"There is no equivalent reference to the management of stakeholder relationships in the descriptor for band 6."

[137] In our view this statement is correct. Whilst State Servants at all levels must inevitably have relationships with external providers, it is not until band 7 that there is reference to stakeholder management (our emphasis).

[138] The evidence on this particular aspect of the SOD was limited, not pursued in any great degree and was generally non specific and on that basis only we accept that the finding was reasonably open and we detect no error.

[139] We reject appeal ground 14.

Ground 15

The Deputy President gave insufficient weight to the "best fit" determinant in the classification of the duties as provided in the Tasmanian State Service Award.

[140] Clause 1(a)(ii) of the Award describes the "best fit" approach as follows:

"The job components have equal weight or effect and no description within a component has more importance than another. Some descriptors however are more relevant in describing different types of work than others and therefore will have more influence in classifying that work. Naturally, not each and every descriptor applies to any individual job. These descriptors are appropriately used when particular descriptors of job components and the overall theme or 'feel' of a particular band provides the 'best fit' to an employee's duties."

[141] At paragraph 166 of the decision the Deputy President said:

"The employer submitted that there were 'very minor aspects' of Mr Gibson's duties that could be considered to be band 7, but the 'best fit' was with band 6. This is not borne out by the evidence. The definition for bands 7 and 8 describes the work performed by Mr Gibson, although he also performs work described at band 6. The position aligns with band 6 and with band 7 in relation to the descriptors dealing with autonomy and technical skills. However, whereas the descriptors are the same in relation to technical skills, band 7 is at a higher level as far as autonomy is concerned. Substantial and significant aspects of the work, such as management responsibilities and management of stakeholder relationships, align more closely with band 7 than with band 6. In respect of the management role, the descriptor for band 7 exactly describes the role of the Manager TASA. I find that the 'best fit' is with band 7."

[142] Ms Fitton submitted that " 'best fit' relates to what is most often the case, rather than the extremes at either end of the role."²³

[143] We agree with the basic premise of Ms Fitton's submission and consider that "best fit" has a similar meaning to "major and substantial" when it refers to the determination of a classification level. Both mean that the classification level should reflect what work the employee is required to perform for the major part of his/her time at work and takes into account skills and qualifications necessary to do so. It does not intend an exercise of cherry picking certain requirements and selecting the "best" to allow a favourable reclassification. It does not take into account "one off" events such as special projects and short term events or matters already considered in the initial classification determination. We are of the view that the major and substantial expression satisfies the overall theme or "feel" of a particular band.

[144] The Deputy President has in this exercise examined each word of the SOD and the work performed by Mr Gibson and compared it with the requirements of band 6 and band 7. She has concluded on the evidence that the position of Manager TASA is a band 7 classification.

²³ Transcript p 32

[145] At paragraph 111 she has said:

"The dispute is essentially about which band best fits the duties, skills and level of responsibility of the work performed by Mr Gibson; whether it should be classified band 6 or band 7."

[146] We are of the view that the Deputy President has misunderstood the task before her and has on a number of occasions erroneously inferred or stated that the exercise was about determining the appropriate band level for Mr Gibson based on his skills and the level of responsibility of the work performed by him. In fact the exercise before the Deputy President should have been an assessment of the SOD and a determination of what was the appropriate band level for that SOD.

[147] It is our view that the Deputy President has erred and we uphold appeal ground 15 which we note has a relationship with appeal ground 2.

[148] We consider appeal grounds 2 and 15 to be the primary grounds of appeal.

Ground 16

The decision is plainly unjust and unreasonable as the decision did not take into account the translation review process contained in matter T13394 of 2009.

[149] There was nothing further advanced under this appeal ground. Nevertheless we have previously noted that in our view the Deputy President did acknowledge the translation review process but as we have said we are uncertain as to the relevance of the appeal ground other than to be satisfied the parties have complied with their award obligations. Its relevance to this application is obtuse.

[150] We reject appeal ground 16.

Observations:

[151] It is unclear just what process the Deputy President followed, that is perhaps not surprising as it appears that the parties are also unclear as to what process should have been followed. Even if we accept that the Deputy President considered the application as a re-classification exercise she erred on a number of fronts. It seems that she has considered aspects of work value, the work performed, expertise and qualifications of Mr Gibson, other positions at both band level 6 and band level 7 and in the final assessment has relied on facts which in our view are not supported by the evidence.

[152] AT paragraph 113 the Deputy President makes the statement that

".. the fact that a position meets a number of descriptors for the band below is not an argument that the lower level is the appropriate level. Being a continuum, it is to be expected that a position would meet most if not all of the descriptors for a band and also meet a number of the descriptors for the bands immediately above and below. Where a position sits on the continuum can be difficult to determine, especially where the position is on the cusp. A judgment must be made as to whether it falls above or below."

[153] We disagree with this statement, it is not always the case that a position would impinge on the classification descriptors above and below, certainly most descriptors

would reflect functions below the level but not necessarily above the level. In any case the well tried and tested method for ascertaining a classification level where some functions do cross an upper level is the "*major and substantial*" test (or best fit), that is to say that if the major and substantial work is reflected in the lower classification level that is the appropriate level. It appears the Deputy President has not considered that test.

Conclusion

[154] We uphold the appeal and revoke the decision of Deputy President Shelley.

P L Leary
PRESIDENT

REASONS FOR DECISION

DEPUTY PRESIDENT TIM ABEY (DISSENTING)

[1] In an application pursuant to s.29(1) of the Act, Mr Glenn Gibson (the applicant) sought a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (the employer) arising out of the translation review process provided for in Appendix 1 of the *Tasmanian State Service Award* (the award) (T13435 of 2009). The applicant submitted that he should properly be classified at band 7 rather than band 6, which was the outcome of the point to point translation.

[2] The subsequent review process, including the Public Sector Management Office (PSMO) conference, confirmed the original decision of the Department to classify Mr Gibson at band 6. Accordingly the matter was referred to Deputy President Shelley to determine. In a decision handed down on 19 January 2010 the Deputy President concluded:²⁴

"The employer submitted that there were 'very minor aspects' of Mr Gibson's duties that could be considered to be band 7, but the 'best fit' was with band 6. This is not borne out by the evidence. The definition for bands 7 and 8 describes the work performed by Mr Gibson, although he also performs work described at band 6. The position aligns with band 6 and with band 7 in relation to the descriptors dealing with autonomy and technical skills. However, whereas the descriptors are the same in relation to technical skills, band 7 is at a higher level as far as autonomy is concerned. Substantial and significant aspects of the work, such as management responsibilities and management of stakeholder relationships, align more closely with band 7 than with band 6. In respect of the management role, the descriptor for band 7 exactly describes the role of the Manager TASA. I find that the 'best fit' is with band 7.

I find that the position held by Mr Gibson, Manager Technical and Systems Audit, is at band 7 of the award.

I hereby order, pursuant to section 31 of the Act, that the position of Manager Technical and Systems Audit be classified at band 7 of the Tasmanian State Service Award and that Mr Glenn Gibson be translated to band 7 of the Tasmanian State Service Award, effective from 5 March 2009."

[3] The employer has appealed against this decision identifying 16 grounds of appeal.

[4] In considering an appeal against an exercise of discretion (which this matter clearly is) the Commission relies on the principles established in the judgment of the High Court in *House v The King*:²⁵

"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in

²⁴ T13435 para 166

²⁵ [1936] 55CLR499, at 504-505 per Dixon, Evatt and McTiernan JJ.

exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance. In such case although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[5] S.70(1A) of the Act reads:

" 70. Rights of appeal

...

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

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

(i) made a legal error; or

(ii) acted on a wrong principle; or

(iii) gave weight to an irrelevant matter; or

(iv) gave insufficient weight to a relevant matter; or

(v) made a mistake as to the facts;

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

[6] It is my view that in any appeal proceeding arising out of the translation review process a Full bench will only interfere with a decision of the Commission below where there is a clear and demonstrated error of fact, law or principle.

[7] To make this perfectly clear, in the absence of demonstrated error, an exercise of discretion in matters such as degree of complexity, expertise, autonomy, strategic management, level of supervision etc, which is reasonably open, should not be overturned notwithstanding that the Full Bench, either collectively or individually, may have reached a different conclusion had it been heard in the first instance.

[8] I intend to follow this approach in the instant matter.

Background

[9] The background to this matter is conveniently set out in the Deputy President's decision:

“Mr Gibson is employed in the Department of Treasury and Finance (the Department) within the Division of Liquor and Gaming (the Division) in the position of Manager, Technical and Systems Audit (TASA). The position’s objective is to:

‘establish and maintain effective systems to approve and monitor the operation of gaming devices, gaming equipment and gaming systems used in all forms of gaming, including interactive gaming and wagering activities and the operation of betting exchanges.’²⁶

The Manager TASA has a team of five staff, three of whom work on approving and monitoring interactive gaming and wagering, essentially Betfair (a betting exchange). Two work in monitoring and approving gaming machines. Both areas are involved in accreditation and in ongoing relationships with testing facilities. TASA develops and maintains standards for equipment and systems.

Under the previous award, the Administrative and Clerical Officers Award, the position was at Level 9; it was created in 2006 to deal with the increased complexity due to the introduction of Betfair.

Mr Gibson was translated to band 6 of the new award, the Tasmanian State Service Award, effective from 5 March 2009. He has disputed this pursuant to Appendix 1 – Clause 3 – Review Process – of the award. The review process is complex and protracted. Mr Gibson’s claim is that the work he performs is work that best fits the level of band 7.

The award provides that where an employee has issues or grievances with their duties, responsibilities or translation classification band, they have 14 days in which to initiate discussion at a local level with their manager. Following that discussion, outcomes with reasons are to be provided to the employee within 14 days. Following that, if an employee is dissatisfied, they can lodge an application for review with the Director/Manager Human Resources (HR) within 28 days of the receipt of the notification of outcome. There is then an internal agency review process, which involves a review signed off by the Director/Manager of HR with recommendations to the Head of Agency or delegate. The employee is then notified of the outcome of the internal review within 28 days of the application being received. If the employee is dissatisfied with the outcome, then, if the dispute relates to the assigned classification level, the employee may seek a review of the classification band, which is the case in this instance, pursuant to clause 3(e)(iv) of Appendix 1 of the award.

Mr Gibson’s agreed Statement of Duties sets out his primary duties, level of responsibility, direction and supervision. The primary duties include:

- *Efficiently supervise designated resources and provide effective leadership within the work area to ensure that work objectives are completed in a timely manner and to a high standard;*

²⁶ Exhibit A12 Manager, Technical and Systems Audit Statement of Duties

- *Developing guidelines, systems and procedures to ensure the timely and effective approval of technical equipment and other systems used in the delivery of gaming;*
- *Managing the development of systems for the monitoring and audit of gaming operations and the development and operation of standards and technical requirements;*
- *Regulating components of, and report on all forms of gaming covered by a Tasmanian Gaming Licence including betting exchange operations;*
- *Liaising with testing facilities, gaming equipment manufacturers, gaming operators, suppliers and software developers to manage the process of testing and approval of gaming equipment and systems and represent the Branch and the Department as required;*
- *Supervising, reviewing and reporting on the performance of testing facilities;*
- *Providing advice, reports and briefings to the Tasmanian Gaming Commission and the Department on technical issues relating to the security, fairness and ability to audit gaming equipment and gaming systems including the verification of gaming taxation and broader technical policy issues;*
- *Assisting other areas of the Branch in the formulation of gaming policy;*
- *Preparing high level correspondence including reports and submissions to the Tasmanian Gaming Commission and other bodies as required;*
- *Representing the Department and the Tasmanian Gaming Commission on working parties and other forums as may be required from time to time;*
- *Maintaining a network of peers and specialist contacts in the area of gaming equipment and system regulation;*
- *Developing a contemporary and productive work environment that fosters responsibility, accountability and improvement in meeting operational goals and objectives; and*
- *Contributing to the management of the Liquor and Gaming Branch through participation in the Branch planning process and monitoring and reporting on Branch performance, as determined.*

The level of responsibility, direction and supervision is described as:

'The Manager, Technical and Systems Audit will operate with a significant degree of independence of action and autonomy in day to day activities and is accountable to

management in terms of strategic direction and meeting objectives. The Director, Liquor and Gaming will provide broad direction. The Manager, Technical and Systems Audit may be required to provide authoritative specialist advice generally or as it relates to a particular work area. Delegations exercised at this level may include being the final authority in approving expenditure, undertakings specific policy action or reviewing previous actions or decisions. The Manager, Technical and Systems Audit may also supervise a small team of employees, which involves technical or professional skill and judgment.'

..."

Grounds of Appeal

[10] Whilst 16 grounds of appeal are pursued there are a number of key issues which recur in a number of grounds. It is convenient to address these important issues before going to the separate grounds.

The Status of the Statement of Duties (SOD)

[11] At para 109 the Deputy President said:

"The employer submitted that it is the Statement of Duties, not what the person does, that determines the classification level. Whilst the actual Statement of Duties is not in dispute in the instant case, I disagree with this proposition. In my view, the classification level is determined by what the employee actually does, it is not determined by what the words on the position description say, although, of course, the words are of interest and may be an aid in determining the correct classification level. However, it is possible, and, indeed, in my experience, it is not uncommon, for there to be a dissonance between what is written in a Statement of Duties and what duties are actually performed."

[12] Ms Fitton submitted that the SOD was an agreed document, as noted by the Deputy President at para 108. By ignoring the primacy of the SOD, Ms Fitton contended that the Deputy President made her determination on the assessment of the work undertaken by Mr Gibson rather than the duties required of the role. Further, if the Deputy President's statement is accepted, then the whole agreed translation review process has been of no consequence.

[13] In part the observation of the Deputy President is referring to earlier s.29 disputes whereby a dissonance between what is written in a SOD and the duties that are actually performed has, I agree, not been uncommon. However this process is quite different.

[14] The translation review process makes it quite clear that disputes relating to actual duties and responsibilities are to be referred to the State Service Commissioner. This occurred in this matter and it is common ground that the resulting SOD is an agreed document. It follows that the Deputy President's comment in relation to this process, as distinct from earlier s.29 disputes, was misplaced.

[15] Having said that, notwithstanding the Deputy President's comment, neither the parties nor the Full Bench were able to identify any actual duty performed by Mr Gibson which could not be encompassed within the agreed SOD.

[16] Subject to the above qualifications, I conclude that, in making the observation in para 109, the Deputy President fell into error.

[17] For future guidance I offer the following observations.

- The SOD is the pivotal document in the translation review process. (T13394 and T13411 of 2009)
- Any disputes as to duties performed and the SOD are to be determined by the State Service Commissioner, consistent with the agreed process.
- The personal attributes of an incumbent are not a relevant consideration. The process involves a consideration of the position, not the individual.

Does a band 7 classification require, as a minimum, a whole of Agency perspective?

[18] Clause 1 of Part III of the award deals with classification descriptors. Sub clause (iv) relevantly reads:

“(iv) The General Stream descriptors define work in 4 broad levels according to the focus of the work and the framework in which it is performed. These are as follows:

....

(2) Bands 4, 5 and 6

Work involves the maintenance and modification of guidelines, systems and processes according to a defined policy and regulatory operating environment. The operating environment is Agency-specific in terms of organisational design, planning, structures and interpretation of government objectives.

(3) Bands 7 and 8

Work involves the interpretation and modification of policy and regulatory settings according to operational requirements (internal – how we work) and service delivery (external - what we do) demands. A broader whole of Agency and/or whole of government perspective.”

[19] In this matter the employer contends that Manager TASA works within a defined field and does not have a broader, whole of Agency or whole of Government approach, which it contends, is a prerequisite to be classified at a band 7 and above. In relation to this contention the Deputy President observed:²⁷

²⁷ T13435 para 117

"The employer relied upon the reference in the band 7 definition to a "broader whole-of-Agency and/or whole of government perspective", in particular, the fact that the position only deals with the gaming and Betfair aspects of the Branch's operations, and does not include the liquor licensing side. I have no doubt that there are many positions across the state sector which are at band 7 and above which are specialised positions with a focus which it could be argued is not 'whole-of-Agency' or 'whole-of-government'. It is difficult to determine what is meant by 'perspective' in this context. The proper regulation of gaming must surely be essential from both an Agency and government perspective. Ms Jackson said that \$85 million per annum is collected in gaming tax plus \$8 million from Betfair. She said that his role had a direct and significant effect on organisational outcomes.

It seems to me that the liquor and gaming versus gaming only argument is of little use in determining the classification level. Obviously, specialist skills and knowledge may be of a higher order than generalist skills and knowledge, an obvious analogy is the medical profession...."

[20] The descriptors taken as a whole provide guidance as to the appropriate band level. The standards are broad and not every descriptor necessarily applies to any individual job. It follows that it would be unusual, and indeed likely to be unsafe, to rely on one aspect of the descriptors without reference to the totality of the framework. In this case the preliminary question is whether the whole of Agency perspective referred to above is a mandatory prerequisite for a band 7 classification?

[21] The band 7 *Focus* reads:

"Work within a specialised program or engaged in complex activities within a functional area.....Roles with a management focus, or specialists involved with a specialised program..."

[22] I conclude that notwithstanding the whole of Agency/Government perspective referred to in clause 1(iv)(3), the actual descriptors for band 7 contemplate specialist managers operating in a specialised program or activity, provided of course that the balance of the descriptors are satisfied on a '*best fit*' basis. Indeed as Ms Tyson noted, the expression "*whole of Agency*" is not mentioned at all in the band 7 descriptors.

[23] It makes sense that the descriptors should have an enduring quality capable of riding the moving feast of Agency arrangements. For example, a position which currently has a whole of Agency perspective might suddenly lose that in the event of Agency amalgamation, notwithstanding that the position remains unchanged. The converse could be equally true in the event that an existing Agency was split into two or more entities.

[24] Whilst whole of Agency perspective will be relevant in many cases, in others it may be artificially arbitrary in nature.

[25] I conclude that a whole of Agency/Government perspective is not necessarily a minimum prerequisite for classification at band 7. However this conclusion in no way dilutes the requirement to satisfy the descriptors as a whole on a '*best fit*' basis.

What does 'best fit' mean?

[26] Clause 1(a)(ii) of Part III reads:

“(ii) ‘Best Fit’:

The job components have equal weight or effect and no description within a component has more importance than another. Some descriptors, however, are more relevant in describing different types of work than others, and therefore will have more influence in classifying that work. Naturally, not each and every descriptor applies to any individual job. These descriptors are appropriately used when particular job components and the overall theme or “feel” of a particular band provides the ‘best fit’ to an employee’s duties.

In using the descriptors it is important to consider particular organisational arrangements, such as the reporting relationships above and below specifically assigned duties.”

[27] Ms Fitton submitted that ‘best fit’ *“relates to what is most often the case, rather than the extremes at either end of the role.”*²⁸

[28] Whilst this approach may be appropriate in some circumstances, in my view it amounts to an oversimplification of the intent of the sub clause.

[29] I do not accept that the notion of ‘best fit’ can be reduced to a simplistic arithmetic exercise whereby what happens most of the time prevails in determining the appropriate band level. The *majority rules* or *major and substantial* concept does not sit comfortably with the expression *“overall theme or feel’ of a particular band.”*

[30] In my view it is the inherent requirements of the position and regularity of the requirement which is of greater importance. For example, if a position is required to perform a particular function at a higher level once a week, every week, it is likely that a ‘best fit’ judgment will be at that higher level, notwithstanding the function occupies a relatively small proportion of the week in terms of time. Conversely, a requirement to perform the higher level function on an *ad hoc* or irregular basis may well lead to a different conclusion.

[31] In my view the notion of ‘best fit’ invokes a range of considerations, of which *“what happens most often”* is but one.

[32] I now turn to the detailed Grounds of Appeal.

Ground 1

The Deputy President gave insufficient weight to the classification resolution process and evidence provided as directed by the Tasmanian Industrial Commission in matter T13411 of 2009 and as outlined in Appendix 1 Translation Arrangements of the Tasmanian State Service Award.

[33] Ms Fitton submitted that the Deputy President gave insufficient weight to the findings of the internal review process, including specifically Exhibits A9 and R3 and

²⁸ Transcript p 32

gave no weight to the fact that the matter had followed the agreed translation process. Instead the matter proceeded in part on a notion of a work value case.

[34] The internal review process, including the PSMO conference, is on any measure, both thorough and comprehensive. However, at the end of the process the parties may not be agreed, indeed it would seem in this case that the parties were in fundamental disagreement on virtually every point.

[35] Both the employer and the applicant are equal partners in the process. In the event of disagreement, the matter is referred to the Commission for determination. By necessity, the Commission must consider the matter afresh. It is not a review of what has gone before in the nature of the appeal test (*House v The King*). In such circumstances it is appropriate for the Commission to take into account whatever is put forward by way of argument, evidence and supporting papers. This may include, but is not limited to, supporting documentation provided in the internal review process.

[36] When the Classification Review Process was included in the Award Mr Grey (for MASSA) observed:²⁹

"As Mr Baker said, this process is much more to streamline the internal process to be followed by the parties, than it really is anything to do with how the commission deals with it. It is an order that the parties are satisfied by the time a matter comes here for resolution that all the facts are known, and it's only a matter of whether they're agreed or accepted, I suppose, which is what the commission will no doubt determine."

[37] In the matter below the following exchange is relevant to this issue:³⁰

"It also remains our submission that this is different to what you might call your average section 29 dispute about classifications or work value. This application has been made specifically in line with the translation review processes, and as part of an agreed classification review process, which was agreed between the parties, and issued as a direction by the Full Bench of this Commission. That decision states that:

The classification resolution process, as outlined in the decision, supplements the review process in the award, and completes the procedure to resolve disputes lodged with the Tasmanian Industrial Commission.

It is acknowledged that the applicant has a right, as any employee has a right, who is aggrieved, to make application to the TIC. However, account, we say, in these circumstances, should be taken with the relevance of the documents provided, and the process that has already occurred. And, in our submission, to that is the statement of duties is actually a pivotal document.

THE DEPUTY PRESIDENT: Yes. And I don't think that Ms Jackson is disagreeing on that. She's made frequent reference to what happened in the PSMO office discussions for example. I mean, I don't want to

²⁹ T13394 and T13411 Transcript p 5

³⁰ T13435 Transcript p 178

Speak for you. You can address this later, but I don't think it's been argued that the processes that have gone before shouldn't form part of what I consider when reaching my decision."

[38] In the decision the Deputy President referred to the Review Process in paras 7, 8, 105, 106, 107, 108.

[39] It is true that the Deputy President did not specifically analyse Exhibit A9 (Internal Review Assessment) and Exhibit R3 (Review of Classification). However in light of the comprehensive evidence from the three employer witnesses and Mr Gibson, which was comprehensively reviewed, this is not surprising. In essence it would be a traversal of the same material.

[40] I detect no error in the approach of the Deputy President.

[41] I would reject appeal ground 1.

Ground 2

The Deputy President has acted on a wrong principle in not determining that the statement of duties as agreed by the parties is the pivotal document for the determination of the duties of an employee.

[42] This ground has been discussed in the preliminary part of the decision. For the reasons outlined, and subject to the same qualifications, I conclude that the Deputy President fell into error.

[43] I would uphold appeal ground 2.

Ground 3

The Deputy President acted on a wrong principle in not determining that the Head of Agency has the power to assign duties.

[44] Ms Fitton submitted that the Deputy President ignored the power of the Head of Agency to assign duties and develop organisational structures within their Agency (s.34 *State Service Act 2000*).

[45] I have some difficulty in understanding the thrust of this ground. The power of the Head of Agency to assign duties, (and by inference develop organisational structures) is not in doubt and I am unable to detect where this power was challenged or questioned by the Deputy President.

[46] I have already found that the duties performed by Mr Gibson are entirely consistent with the SOD.

[47] The task therefore is to test these duties against the classification descriptors, which is the process followed by the Deputy President.

[48] At para 112 the Deputy President said:

"Most of the employer's evidence and argument was aimed at establishing that Mr Gibson's role was a 'best fit' with band 6; and they did not address to any great extent the descriptors for band 7. Conversely, the union's evidence was directed at proving that the 'best

fit' was with band 7, and they did not address in any detail whether the position aligns with descriptors for band 6. In my opinion, the proper approach is to assess the position against both bands, and then to determine which is the 'best fit'."

[49] Whilst Ms Fitton contended that this was inaccurate in that the band 7 descriptors were considered in the internal review process, it was an observation directed equally at both parties and it is the conclusion which is important.

[50] The Deputy President concluded that the proper approach is to assess the position against both bands, and *then* determine which is the *'best fit'*. I detect no error in this conclusion.

[51] I would reject Appeal Ground 3.

Ground 4

The Deputy President gave weight to an irrelevant matter in taking into account the uncontested statement of Ms Fitzgerald.

[52] At para 30 the Deputy President reproduced in full a statement provided by Ms Sarah Fitzgerald, who was the Assistant Director of the Liquor and Gaming Branch until mid 2008. The statement was provided in the context that Mr Gibson reported to her when his work formed part of the Research and Policy function of the Liquor and Gaming Branch.

[53] The statement covered the following aspects:

- Ms Fitzgerald's view on where Mr Gibson's technical, decision making and management skills fitted within the descriptor framework.
- Mr Gibson's role in the establishment of the Betfair license, including a trip to UK to investigate the integrity, security and operations of the Betfair UK operations.

[54] Ms Fitton submitted that there was no opportunity to cross-examine Ms Fitzgerald and her statement was irrelevant in that it largely related to a period of project work prior to the establishment of the Manager TASA position.

[55] No objection was taken to the tendering of Ms Fitzgerald's statement. It follows that the inability to cross-examine is not the issue. It is quite common for unsworn statements to be tendered in Commission proceedings. Indeed the appellant contends that the Deputy President erred in not taking into account documents used in the internal review process, documents which have exactly the same status.

[56] The real issue is the weight accorded to such statements. Generally speaking, where there is a conflict, sworn evidence which is subject to cross-examination is to be preferred over unsworn statements.

[57] I largely accept Ms Fitton's contention that the evidence relating to the establishment phase, including the UK trip is largely irrelevant. I do however acknowledge that the establishment phase project was part of a continuum, which in the words of Ms Jackson in the matter below, "*morphed*" into the Manager TASA position. To that extent it is of interest and useful background, but I put it no higher than that.

[58] It is not entirely clear how much weight the Deputy President placed on the Fitzgerald statement. There are references to the statement in paras 110, 134, 135 and 142, but it is not clear whether the Deputy President supported this material over the sworn evidence of the employer witnesses.

[59] On balance I suspect that the Deputy President may have given undue weight to the Fitzgerald statement in that she did not give any indication as to its standing *vis a vis* the other evidence. I propose to uphold this ground with the proviso that it is unlikely that this error on its own would be of sufficient moment to overturn the decision.

[60] I would uphold appeal ground 4.

Ground 5

The Deputy President made a mistake as to the facts in relying on Ms Fitzgerald's statement in relation to the applicant's technical skills.

[61] The standing of unsworn statements was discussed under ground 4.

[62] In this ground the appellant refers specifically to para 134 which reads:

Ms Fitzgerald described the assessments made by Mr Gibson as being '...often a complex task requiring an in-depth understanding of the technical and system requirements...' She said:

'His understanding of system operation in highly technical and ever changing areas such as:

- Verification of software;*
- Electronic identity verification;*
- Systems and database design;*
- Auditing; and*
- Risk Management.*

This knowledge was invaluable.' "

[63] Ms Fitton submitted that the Deputy President's reliance on this statement has led to the conclusion that the role aligns to band 7 descriptors, which is incorrect.

[64] A review of paras 126 to 144 reveals that the Deputy President undertook a detailed analysis of all the evidence and submissions before her, including the evidence of the three employer witnesses, which to some extent conflicted.

[65] Para 134 is no more than a description of what Ms Fitzgerald said, rather than an endorsement of the statement. In my view the statement was part of the mix and it is not open to conclude that this evidence was preferred to that of the other witnesses.

[66] I conclude that the Deputy President properly considered all the evidence before her and reached a conclusion that was reasonably open. Whilst an indication of which evidence was preferred might have been helpful, I detect no error in terms of the appeal test.

[67] I would reject appeal ground 5.

Ground 6

The Deputy President gave insufficient weight to the narrow focus of the duties compared with the classification descriptors of Band 7.

[68] Ms Fitton submitted that in paras 114 to 118 the Deputy President acted on a wrong principle and gave insufficient weight to the narrow focus of the role versus the breadth required for band 7 as outlined in the Award.

[69] In substance this ground comes down to the argument as to whether a whole of Agency/Government perspective is required as a prerequisite for a band 7 classification.

[70] This aspect has been discussed in the preliminary section of this decision.

[71] I have concluded that band 7 does contemplate specialist managers and a whole of Agency/Government perspective is not necessarily a prerequisite provided the balance of the descriptors are satisfied on a best fit basis. A number of these descriptors are canvassed in subsequent grounds of appeal.

[72] Ms Fitton submitted that the Deputy President failed to take into account the absence of any reference in the SOD to "*modification of policy or regulatory settings.*" (Part 3 subclause 1(c)(iv)(3)). Whilst it is true that there is not such a specific reference, the same can be said of the SODs for the Manager Communications and Education³¹ and Manager Operations,³² both of which are classified at band 7.

[73] I note that there is one element which appears in identical terms in all three SODs. It reads:

"contributing to the management of the Liquor and Gaming Branch through participation in the Branch planning process and monitoring and reporting on Branch performance, as determined."

[74] I conclude that the findings and observations of the Deputy President on this aspect were reasonably open and I detect no error.

[75] I would reject appeal ground 6.

Ground 7

The Deputy President acted on a wrong principle in determining that the quantum of revenue collected in gaming was a determining factor in the focus of the duties.

[76] In para 117 the Deputy President said:

"It is difficult to determine what is meant by "perspective" in this context. The proper regulation of gaming must surely be essential from both an Agency and government perspective. Ms Jackson said that \$85 million per annum is collected in gaming tax plus \$8 million from Betfair. She said that his role had a direct and significant effect on organisational outcomes."

³¹ Exhibit A3

³² Exhibit A4

[77] Ms Fitton submitted that this was not supported by the evidence of the employer witnesses to the extent that the compliance activity is compartmentalised and that the TASA team are focused on a narrow range of matters that parallel and complement other equally narrow fields of activity under the broader compliance activity.

[78] The appellant further submitted that the TASA role has no direct responsibility for designing the relevant tax systems, nor the generation and collection of tax. The role has an indirect effect and not a direct effect as the Deputy President incorrectly concluded.

[79] I make the following observations.

- Firstly, the Deputy President discussed the issue of revenue in the context of the 'whole of Agency/Government' argument, a question I have already dealt with.
- Secondly, the reference to 'direct and significant effect on organisational outcomes' is a submission of Ms Jackson, not a finding of the Deputy President. I note that Ms Tyson contends that neither the quantum nor the context of Ms Jackson's submission in the hearing below was refuted by the employer. On my reading of the transcript, this assertion is correct.

[80] The appeal ground lies against a finding that Deputy President simply did not make. It therefore must fail. I observe that even if the Deputy President had made this finding, it is largely an exercise in semantics [direct v indirect], and would not amount to demonstrable error.

[81] I would reject appeal ground 7.

Ground 8

The Deputy President made a mistake as to the facts in determining that the Technical and Systems Audit Section [TASA] was a 'program' within the scope of the Tasmanian State Service Award.

[82] At paras 152 -155 the Deputy President stated:

"The evidence has revealed that Mr Gibson leads a complex program unit according to a decision making framework.

The classification descriptor under the heading "focus" for band 6 describes:

'A management role interprets policies, regulations and guidelines and designs and implements plans, systems and procedures to deliver services consistent with program objectives.'

The descriptor for band 7 describes:

'Roles with a management focus, or specialists involve with a specialised program, lead an activity or program unit within a functional area.'

The award defines 'program' as '...may stand alone or located within a functional unit' and 'function' as "a related and aligned areas of

activities combined to form a unit (typically a Branch)...’ *If the ‘functional area’ is the Liquor and Gaming Branch, then TASA is the activity or program unit.*”

[83] The appellant submitted that this finding ignored the hierarchical nature of the branch operations and the fact that the role is working in one narrow aspect of the entire gaming program, that being compliance. It was submitted that the TASA field of activity comes under the wider Compliance activity within the program of Gaming within the Liquor and Gaming Branch.

[84] The relevance of this is that the *“Focus”* of band 6 refers to a *“defined field of activity”* whereas band 7 refers to *“work within a specialised program or engaged in complex activities within a functional area.”*

[85] Ms Tyson submitted that the Functional Structure as submitted with the appeal documents was new and confusing and should be struck out. The document was accepted into the proceedings on the basis of Ms Fitton’s assurance that it was consistent with the submissions and evidence in the hearing below.

[86] There is no doubt that the Band 6 *“Focus”* is targeted at a defined *“field of activity.”* It is perhaps significant that it is expressed in the singular, as is the definition of contained in clause 2 Reference Framework. In light of the examples provided it is strongly arguable that TASA embraces at least two fields of activity, i.e interactive gaming and wagering activities and the operation of betting exchanges (SOD).

[87] There is no definition of *“activity”* (singular) in clause 2. It is difficult therefore to accept the employer’s contention that there is a compliance activity which is made up of a number of fields, within the meaning of the Award.

[88] The band 7 *“Focus”* uses the expression *“specialised program”* or *“complex activities within a functional area”* interchangeably. Presumably the work could fit within either category.

[89] In the SOD the position is described as being the *“Technical and Systems Audit”* Section. There is no mention of Compliance. The position reports to the Director, Liquor and Gaming, as does the Manager, Compliance (a band 7 position).

[90] In clause 1(a)(ii) dealing with ‘best fit’, the following appears.

“In using the descriptors it is important to consider particular organisational arrangements, such as the reporting relationships above and below specifically assigned duties.”

[91] From this I conclude that the reporting relationship is an important and material consideration.

[92] I detect no error in the Deputy President’s approach. A conclusion that TASA is either a specialised program or a group of complex activities was reasonably open.

[93] I would reject appeal ground 8.

Ground 9

The Deputy President made a mistake as to the facts in determining requirements of the role that did not form part of the statement of duties.

[94] This aspect has been addressed earlier in this decision.

[95] Neither the parties nor the Full Bench were able to identify any duty performed by Mr Gibson which could not be accommodated within the SOD, notwithstanding the Deputy President's misplaced comment at para 109.

[96] I would reject appeal ground 9.

Ground 10

The Deputy President gave insufficient weight to the evidence that supported the level of direction provided in exercising delegations as provided for in the classification descriptors of the Tasmanian State Service Award.

[97] The Manager TASA position has 172 delegations under the *Gaming Control Act 1993*.

[98] The ground relates to the level of autonomy exercised by the position in exercising these delegations.

[99] Mr Gibson's evidence was that in 88% of cases the delegations were not subject to conditions (para 22).

[100] The evidence of the employer witnesses was that most delegations are routine and straightforward and matters which are unusual or which have policy ramifications are referred back to the Gaming Commission (paras 33, 34 and 49).

[101] At para 123 and 124 the Deputy President said:

"Much was made of the fact that Mr Gibson operates under delegations from the Gaming Commission. That is also the case for employees within the Branch who are classified at higher levels than Mr Gibson. In any event, in my view, the fact that an employee is acting under delegation is irrelevant. Neither is the number of delegations particularly significant. What is at issue is the level of skill, responsibility, expertise and knowledge necessary to carry out those delegations. It was argued that the delegations themselves contained guidance as to how they should be exercised, although the evidence did not support this. Mr Gibson testified that in 88% of cases the delegations were not subject to conditions and that only 12 per cent of the delegations had directions or criteria attached. This was not challenged in cross examination. He said that even when something was unprecedented he was required to make a judgement about whether to refer it to the Gaming Commission.

Exhibit R14 was a list of the delegations under the Gaming Control Act. A number of them have decision numbers shown against them, which are decisions of the Gaming Commission. It was argued by the employer that those decisions provided guidance. There was no evidence as to what those decision numbers referred to, although it was agreed that a number of them could be decisions simply changing the name of the holder of the delegation. It is certainly the case that in a considerable number of cases the same decision number appears opposite a large number of the delegations, which would seem to

support that proposition. Obviously, such procedural decisions would not provide anything to guide the actual exercise of that delegation. Mr Gibson said that there are no written guidelines in relation to delegations."

[102] From the structure of the decision it would seem that the "*delegation*" issue was part of a wider consideration of the guidance, direction and autonomy applicable to the position. It is not readily apparent that the Deputy President made a finding on the delegations issue other than to record and offer some comment on the evidence.

[103] It is apparent that there was a level of conflict between the evidence of Mr Gibson and employer witnesses. In my view it is not for the Full Bench to revisit the minutiae of the competing evidence, unless there is demonstrated error, which there is not. It is quite wrong to suggest the Deputy President 'ignored' the evidence of the employer witnesses. The Deputy President recorded the evidence of both parties and made observations which were reasonably open.

[104] I detect no error in the Deputy President's approach.

[105] I would reject appeal ground 10.

Ground 11

The Deputy President gave weight to irrelevant matters and made a mistake as to the facts in deciding the complexity of the role as a determining factor of the classification.

[106] At para 142 the Deputy President said:

"There is a striking difference between the evidence of Mr Atkinson-MacEwen, in describing the work as 'straightforward' and that of the other witnesses, including Mr Gibson's own evidence, Ms Fitzgerald's reference to 'highly technical areas', Ms Sawford's evidence that the approvals required a very specialised area of expertise, and Mr Hoult's evidence that the TASA papers were occasionally complex. The evidence was that although not all reports prepared by Mr Gibson for the Gaming Commission required highly technical specialist expertise, many of them did. According to Ms Sawford's evidence by the time they get to the Gaming Commission they have already been interpreted by Mr Gibson in such a way as to enable the non-technical members of the Gaming Commission to understand them. The witnesses were generally agreed that there were occasionally complex papers and issues. As with many other areas of work, the evidence showed that a lot of what Mr Gibson does is relatively straightforward, but it is the ability and requirement to deal with complex issues as they arise that assists in the determination of the value of the work. In Mr Gibson's case, the evidence showed that he does deal with highly technical and occasionally complex issues in an area requiring specialist expertise."

[107] Ms Fitton submitted that the application of 'best fit' relates to what is most often the case, rather than the extremes at either end of the role. I have already addressed this issue and concluded that 'best fit' does not necessarily equate to a simple, arithmetic majority. Rather, there are a range of considerations in determining the theme and/or 'feel' of the descriptors.

[108] Ms Fitton submitted that the Deputy President made a mistake as to the facts by confusing a 'specialised area of expertise' with a high degree of complexity (para 138). On my reading para 138 relates solely to the evidence of Ms Sawford, rather than a finding or observation by the Deputy President.

[109] Ms Fitton asserted that the Deputy President made a further error of fact in para 149 by stating "*the problems related to human behavior and gambling would also be complex.*" The TASA role Ms Fitton contended involved the testing of gaming machines and systems, and not the impact of gaming machines on human behavior. However, in para 67 there is reference to the evidence of Ms Sawford who said that the position

"...deals with complaints from people unhappy with the outcomes of their interactions with gaming providers, and sometimes they are difficult because they are very aggrieved."

[110] I detect no error in the Deputy President's approach.

[111] I would reject appeal ground 11.

Ground 12

The Deputy President made a mistake as to fact in determining that the technical nature of the work was that of band 7.

[112] Ms Fitton submitted the Manager TASA does not require a high level of complexity and therefore the Deputy President made a mistake of fact in determining that the technical nature of the work aligned to band 7.

[113] The evidence of all witnesses on this aspect is comprehensively covered in paras 127 – 144. The Deputy President's conclusions are found at paras 142-144:

"There is a striking difference between the evidence of Mr Atkinson-MacEwen, in describing the work as "straightforward" and that of the other witnesses, including Mr Gibson's own evidence, Ms Fitzgerald's reference to 'highly technical areas', Ms Sawford's evidence that the approvals required a very specialised area of expertise, and Mr Hault's evidence that the TASA papers were occasionally complex. The evidence was that although not all reports prepared by Mr Gibson for the Gaming Commission required highly technical specialist expertise, many of them did. According to Ms Sawford's evidence by the time they get to the Gaming Commission they have already been interpreted by Mr Gibson in such a way as to enable the non-technical members of the Gaming Commission to understand them. The witnesses were generally agreed that there were occasionally complex papers and issues. As with many other areas of work, the evidence showed that a lot of what Mr Gibson does is relatively straightforward, but it is the ability and requirement to deal with complex issues as they arise that assists in the determination of the value of the work. In Mr Gibson's case, the evidence showed that he does deal with highly technical and occasionally complex issues in an area requiring specialist expertise.

The Statement of Duties says that the Manager TASA may 'be required to provide authoritative specialist advice generally or as it relates to a particular work area...'³³

Based on the weight of the evidence, I find that the Manager TASA's role requires high level specialist expertise."

[114] The Selection Criteria attached to the SOD state:

"5. Technical and Professional

Possess the professional or technical skills needed to perform the position objective, primary duties and responsibilities detailed in the Statement of Duties.

Qualifications and Requirements.

Relevant tertiary, or industry recognised, qualifications are highly desirable."

[115] It follows that a finding in terms of technical complexity of something equivalent to a University degree would be consistent with the SOD.

[116] The following extracts from the SOD are relevant to this question.

"Position Objective

A high level understanding of the operation of gaming devices, gaming equipment and gaming systems, and the ability to keep abreast of rapid technological advances.

Primary Duties.

Supervising, reviewing and reporting on the performance of testing facilities.

Level of Responsibility Direction and Supervision.

...may be required to provide authoritative specialist consultative or managerial generally or as it relates to a particular work area."

[117] The conclusion reached by the Deputy President was reasonably open on the evidence and I detect no error.

[118] I would reject appeal ground 12.

Ground 13

The Deputy President made a mistake as to fact in determining that managerial duties were band 7.

[119] Ms Fitton submitted that the Deputy President made a mistake (at para 151) that the clear difference between band 6 and band 7 is the management aspect. It is

³³ Exhibit A12 Manager, Technical and Systems Audit Statement of Duties

contended that insufficient weight was given to the fact that the band 6 descriptors also clearly encompass management positions.

[120] This aspect is covered in paras 145 – 157. The conclusion at para 157 reads:

“The Band 7 descriptor, on the whole, fits with the evidence given in relation to the role of Manager TASA. It is unlikely that any position will exactly align in all respects with descriptors. Mr Gibson does interpret policies, regulations and guidelines, and does determine methods and priorities to support complex activities within a specified area. Mr Atkinson-MacEwen agreed that Mr Gibson determined priorities.”

[121] The Deputy President did not conclude that band 6 does not include management roles (see para 153).

[122] Rather, the approach of the Deputy President was to analyse all the relevant evidence, test the evidence against the descriptors, and reach a conclusion that band 7, on the whole, fits with the evidence given, noting that it is unlikely that any position will exactly align in all respects with the descriptors.

[123] In my view this conclusion was reasonably open on the evidence. I detect no error.

[124] I would reject appeal ground 13.

Ground 14

The Deputy President gave undue weight to the role in stakeholder management in determining the level of the duties.

[125] This aspect is considered in paras 158–160.

[126] Ms Fitton submitted that the Deputy President fell into error in observing that ‘stakeholder management’ does not appear below band 7. She said that liaison and dealing with stakeholders is included at all levels and is included in the band 6 descriptors. Viz:

“Informs and negotiates to gain the acceptance of others regarding the application of policies, plans and processes in providing defined service and program delivery outcomes.”

[127] What the Deputy President actually said was “There is no equivalent reference to the management of stakeholder relationships in the descriptor for band 6.” In my view this statement is correct. Whilst State Servants at all levels must inevitably have relationships with external providers, it is not until band 7 that there is reference to stakeholder management (my emphasis).

[128] It follows that the question to be determined is whether the Manager TASA had responsibility for stakeholder management. The Deputy President considered the evidence and concluded that it did, albeit at a lower level than that of the Branch Director.

[129] This was a finding that was reasonably open on the evidence and I detect no error.

[130] I would reject appeal ground 14.

Ground 15

The Deputy President gave insufficient weight to the 'best fit' determinant in the classification of the duties as provided in the Tasmanian State Service Award.

[131] It would seem that the arguments presented under this ground have been largely dealt with in the preceding grounds and preliminary findings.

[132] At para 166 of the decision the Deputy President said:

"The employer submitted that there were 'very minor aspects' of Mr Gibson's duties that could be considered to be band 7, but the 'best fit' was with band 6. This is not borne out by the evidence. The definition for bands 7 and 8 describes the work performed by Mr Gibson, although he also performs work described at band 6. The position aligns with band 6 and with band 7 in relation to the descriptors dealing with autonomy and technical skills. However, whereas the descriptors are the same in relation to technical skills, band 7 is at a higher level as far as autonomy is concerned. Substantial and significant aspects of the work, such as management responsibilities and management of stakeholder relationships, align more closely with band 7 than with band 6. In respect of the management role, the descriptor for band 7 exactly describes the role of the Manager TASA. I find that the 'best fit' is with band 7."

[133] I have dealt with each of the components referred to in the Deputy President's conclusion and found them to be reasonably open on the evidence. It follows that I find the Deputy President did not fall into error in bringing the descriptor components together under the banner of 'best fit'.

[134] I would reject appeal ground 15.

Ground 16

The decision is plainly unjust and unreasonable as the decision did not take into account the translation review process contained in matter T13394 of 2009.

[135] The appellant did not advance anything under this ground which has not already been dealt with.

[136] I would reject appeal ground 16.

Conclusion

[137] I would uphold two grounds of appeal.

[138] Under ground 2 I have made it unambiguously clear that the SOD is the pivotal document and the personal attributes of an incumbent are not a relevant consideration.

[139] Had the Deputy President relied on duties performed by Mr Gibson that went beyond the SOD, then such a finding would have been fatal to the decision. The reality

is, however, neither the Deputy President, the parties, nor Full Bench identified any task or duty performed by Mr Gibson which actually fell outside the purview of the SOD.

[140] In summary, whilst the comment of the Deputy President at para 109 was misplaced, it did not have a material impact on the outcome of the application.

[141] In relation to ground 4 I have concluded that this ground alone would be unlikely to be of sufficient moment to overturn the decision. The error of the Deputy President was a failure to give an indication of the weight (if any) she attached to Ms Fitzgerald's statement. Further, I am of the view that the decision of the Deputy President was reasonably open, even if the Fitzgerald statement was excluded in its entirety.

[142] I conclude that the decision of Deputy President was reasonably open and that the level of error identified is not of sufficient importance to overturn the decision.

[143] I would reject the appeal and confirm the decision of Deputy President Shelley.

Tim Abey
DEPUTY PRESIDENT