



Industrial Relations Commission  
of New South Wales

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**CITATION:** FBEU & NSW Fire Brigades [2010] NSWIRComm 1067

**PARTIES:** APPLICANT  
New South Wales Fire Brigade Employees Union  
RESPONDENT  
NSW Fire Brigades on behalf of the Director Public Employment

**FILE NUMBER:** 884 of 2010

**CORAM:** Ritchie C

**CATCHWORDS:** Dispute notification section 130.  
Respondent sought to vary the selection and qualification of Inspectors working in the country.  
Applicant believed such action in breach of the award.  
Respondent had difficulty in appointing Inspectors to particular country regions.  
Respondent sought to create a new designation and a new programme of training  
Applicant objected contrary to award  
Award interpretation of particular clause  
Found that what respondent sought to do contrary to award  
Made orders

**LEGISLATION CITED:** Industrial Relations Act, 1996  
Fire Brigades Act, 1989

**CASES CITED:** Bryce & Anor v Apparley (1998) 82IR448  
Brokern Hill Pty Co Ltd and the Federated Ship Painters & Dockers Union of Australia, New South Wales Branch, Re Tank Tops (1961) AR (NSW 312 @314.  
Zoological Parks Board of New South Wales v Australian Workers (2004) 135 IR56.

**HEARING DATES:** 28/10/10

**DATE OF JUDGMENT:** 2 December 2010

**LEGAL**

**REPRESENTATIVES:**

Applicant

Ms G Lawrence and Mr C Reid of the Union

Respondent

Mr M Easton of Counsel

Ms I Iacumin of the Fire Brigade

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**PUBLICATION  
RESTRICTION:**

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30/11/2010

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

CORAM: Ritchie C

2 December 2010

Matter No IRC 884 of 2010

IN THE MATTER OF: Dispute FBEU & NSW Fire Brigades re award breach.

DECISION

[2010] NSWIRComm 1067

1 The NSW Fire Brigade Employee's Union (the applicant) filed a dispute notification against the NSW Fire Brigade (the respondent) on 20 August 2010 under section 130 of the Industrial Relations Act, 1996 (the Act) in the following terms :

a) This dispute relates to the selection and qualification of Inspectors working in country areas.

b) Specifically, the department is in breach of Clause 7 and 13 of the Award by calling for Station Officers to apply for Country Inspector positions in today's In Orders.

c) the parties have dealt with this issue before, which resulted in an agreed policy for filling Country Inspector and Station Officer positions (see Attachment A).

d) The Union wrote to the Department advising them of the Award breach advising that In Order should not be published (see Attachment B).

The award involved is the Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008 (the award).

2 As was advised during the first compulsory conference held on 24 August  
2010 bans had been placed by the applicant on particular administrative  
work.

3 A Statement and Recommendation by the Commission was provided to the  
parties on the following day requiring immediate action by the State  
Secretary of the applicant to cease all work bans forthwith and that  
administrative work not completed due to the work bans be now completed  
and that the respondent take immediate action to withdraw the  
advertisements with respect to Wagga Wagga and Dubbo.

4 Further conferences were held on 30 August, 2 September, 9 September and  
28 September 2010. At that point the Commission determined that further  
conferences would not be successful in resolving the dispute therefore  
Directions for the filing and serving of evidentiary material were provided to  
the parties. A hearing of the dispute was held on 28 October 2010 with the  
Decision being reserved.

5 A Notice of Attempted Conciliation was provided to the parties.

#### Case for the Applicant.

6 Affidavits were filed on behalf of Mr C Read and Ms G Lawrence officers of  
the applicant union. Neither were required for cross examination.

7 In the first of her affidavit's Ms Lawrence stated that on 8 September 2010  
she attended a meeting of the Training Review Committee(TRC). At that  
meeting the respondent proposed an amended training programme for two  
employees who it intended to fill the Inspector roles in Dubbo and Wagga  
Wagga. At that meeting Chief Superintendent and Assistant Director  
Operational Personnel Connellan advised that the proposed training was an

interim arrangement only and not to apply to future Inspector Promotion Programs (IPP's.)

- 8 On 27 September 2010 correspondence was received by the applicant from the respondent containing a proposal to introduce a new rank of Acting Inspector and to introduce training for that rank. At no stage was the TRC asked to consider training requirements for this new rank nor asked to consider new content or a new format for the Inspectors Promotional Program (IPP) Pre-Entry Test.
- 9 Ms Lawrence also stated that there was approximately 67 people sitting for the Inspectors Pre-Entry Test on 26/27 October, 5 of which had advised the applicant that they were interested in taking up an Inspectors country position.
- 10 In an affidavit in reply to Chief Superintendent Connellan's affidavit Ms Lawrence stated that to her knowledge there had not been a training analysis of the new 6 week duration IPP course. The two additional subjects as noted by Chief Superintendent were voluntary and did not make up part of the IPP Programme. She also disagreed with the statement that Leading Firefighters are able to act up as Station Commanders without having completed the Station Officers Promotion Programme( SOPP). In her view it would be contrary to clause 7.1 of the Award. She also stated that a Senior Firefighter may act in charge of one of the identified stations where the absence of the Station Officer is not known in advance, where another Station Officer or Leading Firefighter is not available and the absence is for three days or less. This procedure is in accordance with the Country Staffing Agreement.
- 11 In the affidavit of Mr Reid was outlined the agreement that resulted in *the Guidelines for the allocation of unfilled Country Station Officer and Inspector( Guidelines)*. Discussion and agreement took place in 2002/3.

It was his view that the agreement did not allow a Station Officer to act up to an Inspector until the officer had completed the IPP. The In Order reflected this agreed position. Since the agreement the respondent has used the Guidelines to fill Station Officer and Inspector vacancies in the country.

He also stated that a new clause 36 was inserted into the current award . This new clause incorporated a number of clauses( clause 4, 19,13 and 38) that existed in the previous award, and it was intended by the Full Bench that the new clause 36 would be in lieu of those clauses which allowed for change.

- 12 In submissions the applicant stated that what is being sought by the respondent has not previously occurred. That in itself was not the issue. What was being sought was in breach of clause 7 and or 13 of the award.

*Clause 7 Higher Duties* states that an employee is not permitted to perform higher duties unless he is qualified to do so and that he is at the rank or classification immediately below the rank or classification in which the relief is to be performed. Therefore for the respondent to allow a Station Officer who has not successfully completed the IPP to act in an Inspectors position would be in breach of Clause 7.1. The Acting Inspector would be in a temporary situation until they have completed the IPP and then they would be promoted to Inspector.

Conversely if the respondent promotes a Station Officer to Inspector who has not undertaken the Inspectors' Pre-Entry Test and or successfully completed the IPP it would be in breach of subclause 13.11 of the award. By introducing a new classification of "Acting Inspector", the proposed "Acting Inspector" would not receive the same training as present Inspectors, in fact the respondent has yet to advise just how the training would occur. The proposed establishment of this classification has not been before the TRC as required

by subclause 13.13.2. The proposal to establish the new classification is just an attempt to circumvent to operation of clause 7.1

Also it stated that there has not been sufficient consultation between the parties about the amended IPP as intended by clause 13 and 36 of the award.

- 13 In response the applicant stated that only the Commissioner has the power to create a new and additional rank of Acting Inspector in the context of the award. Also that clause 36 of the award was inserted by the Full Bench of this Commission to allow the Commissioner to make changes in accordance with the subclauses of clause 36, following consultation with the applicant or on advice of the TRC. Clause 36 has no effect in regards to other sub-clauses contained within clause 13 that do not specifically allow for change, including the merit process for selecting Inspectors. Change under clause 36 is allowed if permitted by the applicant or this Commission. It does not permit unilateral change as expressed by the respondent.
- 14 The applicant dismissed the respondent's view that the Acting Inspectors would have carried out the '*essential components of the IPP.*' As yet there has been no review of the present 6 weeks training programme and it would be irresponsible to reduce training as a consequence of a workforce training issue in the absence of a proper training review. The applicant also did not accept the respondent's separation between the 'assessable' and 'non-assessable' components of the IPP.
- 15 In final submissions Ms Lawrence stated that the agreement reached between the applicant and the respondent in September 1998 where Senior Firefighters act in charge the station taking the place of an absent Station Officer in country locations, was for specific reasons and up to a maximum period of three days. It could not be applied to this matter.

To promote a Station Officer to the rank of Inspector without completing the pre entry test and the IPP would be in contravention of clause 13. Also they disagreed with the approach to unilaterally create a rank to step around the provisions of the award.

- 16 The applicant stated that the power of the Commissioner accruing from the *Fire Brigades Act 1989* to make changes with respect to ranks is subject to any award being made by a competent industrial tribunal.
- 17 The applicant sought orders from the Commission that the rank of 'Acting Inspector' not be established and that any decision purporting to establish such position be revoked. That the content and format of the PPI remain unaltered until agreed otherwise between the parties or in accordance with the processes set out in clause 13 and 36. That the respondent withdraw the advertisements as found in In Orders 2010/18 dated 20 August 2010.

#### Respondent's Case.

- 18 Chief Superintendent Michael Connellan filed an affidavit and was subject to cross examination.
- 19 In his affidavit he gave an overview of how promotion and transfer take place in the state and the content of the IPP. Whilst the Commissioner of Fire Brigades has the power to under section 27(3) of the *Fire Brigade Regulation 2008* to direct a firefighter to serve at any location the respondent has not sought to enforce this for a number of social reasons.
- 20 Generally officers are promoted to a rank and appointed to a position.
- 21 The current IPP goes for 6 weeks with the last one being held in May 2009.



- 22 He stated that the respondent has advertised for Inspectors to apply for vacant positions as Duty Commanders at Wagga Wagga (June 2010) and Dubbo (January 2010) and then both re advertised in August 2010. As a consequence of these two positions not being filled the respondent has had to put a "reliever" in each position each month which created problems in itself.
- 23 The Training Review Committee (TRC) meets monthly and consists of three representatives from both the applicant and respondent. The Fire Commissioner is not bound to accept the advice given by the TRC and may act independently of the TRC to implement changes to training, competencies and other matters covered by Clause 13 within the respondent provided that notice of any decision to implement change is notified in accordance with Clause 36.6 in which case clauses 36.7 to 36.9 inclusive shall apply.
- 24 Attached to the affidavit of Chief Superintendent Connellan was a history of communication that has passed between the applicant and respondent concerning the issue of the respondent's difficulty of filling the two country positions and the respondent's proposal of changing the method of delivering the IPP.
- 25 The respondent proposed that where a country Inspector vacancy is unable to be filled by an employee who has completed the IPP, the vacancy will be advertised and filled on merit. The successful applicant will then complete two weeks of assessable incident management training and one week of operational training prior to taking up the position as an "Acting Inspector" on the same remuneration as an Inspector. The leadership and management theory components of the IPP will be completed within 12 months of the appointment either by on-line or face to face delivery.

- 26 The rank of "Acting Inspector" can be established by the Commissioner pursuant to Regulation 7 of the Fire Brigades Regulation 2008.
- 27 In their submissions the respondent stated that if clause 36 of the award had application for "change" then it must be read as such. Clause 13 deals with progression and promotion in the context of the Fire Brigades Act and regulations with clause 36 permitting changes to how progression and promotion occur. It is the employer's capacity to promote and appoint persons under clause 13 and 36 of the award. There exists a fettered discretion to make changes and that the Commission should not lightly interfere with matters that are essentially management prerogative unless there is a relevant unfairness that arises in it. No evidence came before the Commission to show unfairness to anyone.
- 28 The respondent stated that the Act gave the Fire Commissioner the power to appoint people and appoint them to ranks. Clause 36 of the award recognises that power and the power to make changes and that is how clause 36 applies to 13. The intention of clause 36 to make changes was expressed by what is found in the annexure (Cost Offsets/Efficiencies and Improvements Summary) to the Full Bench Decision of 19 September 2008 in point 7 Organizational Change. The Commissioner can make changes subject to the consultation found in clause 36. Clause 13 has to be read next to clause 36.
- 29 The respondent by what it seeks to do is to have a changed operation for clause 13(11) of the award. The essential part of the course is done in an initial block and then the balance of the course is completed afterwards. In essence the respondent stated that they have the power to appoint someone into a role who has yet to completely qualify.
- 30 What is proposed would not offend clause 7 Higher Duties because the Commissioner proposes to establish the rank and position of Acting Inspector. As such the employees would not be performing higher duties. The

person would be qualified because they have done the essential components of the course.

31 Also the respondent stated that what is proposed should not be read as a fundamental change forever. It is only to fill the two vacancies in two particular area of NSW. Consultation had taken place as shown by the annexures to Superintendent Connellan's affidavit.

32 In response to orders sought it was the respondent's submission that the Commission does not have the power to make order 1, should not make order 2 and should not make order 3 as it travels beyond the scope of the dispute.

#### Considerations and Decision.

33 As expressed earlier in this Decision the respondent has a requirement to fill the position of Inspector at two country centres in NSW being Wagga Wagga and Dubbo. The respondent has advertised twice but has not succeeded in filling either of the vacancies. It now seeks to fill the two vacancies by appointing two officers to the vacant positions and classifying them as "Acting Inspectors". On appointment the two officers will have completed only part of the IPP. The residue of the IPP will be completed some time in the future. On completion the two officers will then be confirmed as Inspectors.

34 It was the applicant's submission that such intended action by the respondent would be in breach of the award. The respondent did not believe such intended action would be in breach of the award.

35 Both parties took the Commission to the Full Bench Decision of 19 September 2008 which created the present award. The Decision of the Full Bench was arrived at through negotiation and recommendations utilising the "Bluescope Model". One outcome of the settlement was the introduction of a new clause 36 *Organisational Change under clause 36.2*.

Under a summary document entitled *Cost Offsets/Efficiencies and Improvements Summary* is expressed the following:

## 7. Organisational Change

An Organisational change clause has been inserted into the Award to deal with change in specified clauses in lieu of the requirement for agreement between the parties. The clause sets out the process for consultation to occur regarding the introduction of change in the nominated areas. This change will increase NSWFB's flexibility and operational efficiency thereby enhancing service delivery.

36 Clause 7 of the award is expressed in part in the following form:

### Higher Duties

7.1 An employee shall not be permitted to perform Higher Duties unless, firstly, the employee is qualified to perform such duties and, secondly, where a rank or classification structure applies, the employee is at the rank or classification immediately below the rank or classification in which the relief is to be performed.

7.2 An employee performing Higher Duties shall be paid, for the period of relief, the difference between the employee's usual rate of pay and the minimum rate of pay for the classification in which the higher duties are performed. Such employees shall not be entitled to allowances in subclauses 6.6.3 to 6.6.14 (inclusive) where they are performing higher duties in an Operational Support position.

37 Clause 13.11 is expressed in the following form:

### **Station Officer Level 2 to Inspector**

13.11 Promotion from Station Officer Level 2 to Inspector shall be subject to the occurrence of a vacancy and the successful completion of the Inspectors' Promotion Program, the content and format of which shall be specified by the Commissioner following consultation between the Department and the Union.

13.11.1 Applications for entry into each Inspectors' Promotion Program shall be called for from Station Officers Level 2 in In Orders. The number of positions available in each Inspectors' Promotion Program shall be specified in the same In Orders, and will be solely dependent on the forward planning needs of the Department.

13.11.2 The order of merit for entry into each Inspectors' Promotion Program shall be determined by the level of achievement of applicants in a Pre-Entry Test, the content and format of which shall be specified by the Commissioner following consultation between the Department and the Union.

13.11.3 Subject to the provisions of subclause 13.11.4, the successful applicants for each Inspectors' Promotion Program shall be drawn from the top of the order of merit list referred to in subclause 13.11.2. The Department shall accept the same number of those applicants to the Inspectors' Promotion Program as there were positions advertised in accordance with subclause 13.11.1. The order of promotion of Station Officers Level 2 who successfully complete the Inspectors' Promotion Program shall be determined by their placement on the order of merit list arising from assessments forming part of the Inspectors' Promotion Program.

13.11.4 Station Officers Level 2 who do not successfully complete their initial Inspectors' Promotion Program shall gain automatic entry to the next subsequent Inspectors' Promotion Program and, provided this second Program is successfully completed, such employees shall take precedence in the order of promotion of that Program's successful participants. If a Station Officer Level 2 does not successfully complete the Inspectors' Promotion Program upon this second attempt then that employee will be required to undertake the Pre Entry Test as described in sub clause 13.11.2.

38 Clause 13.20 is expressed in the following form:

The Commission is not bound to accept the advice of the TRC and may act independently of the TRC to implement changes to training, competencies and other matters covered by clause 13 within the NSW Fire Brigades provided that notice of any such decision to implement change is notified in accordance with clause 36.6 in which case clauses 36.7 and 36.9 inclusive shall apply.

39 Clause 36 is expressed in the following form:

#### Clause 36. Organisational Change under subclause 36.2

36.1. This clause recognises the capacity of the Commissioner to make decisions to effect change within the Department.

36.2. This clause applies to consultation and decisions regarding clauses 4 (Definitions), clause 8 (Hours of Work), clause 13 (Progression and Promotion Provisions), clause 19 (Examination and Assessment Leave) and clause 39 (Drug and Alcohol Protocol), to the exclusion of the procedures under clause 35.

36.3 Prior to making any decision to effect change under the specified clauses the Commissioner must consult with the Union.

36.4 Consultation will commence with a written notification to the Union regarding the proposed change(s).

Thereafter there will be a reasonable opportunity for the Union to present its views in relation to the proposed changes.

36.5 If, during the consultation process, there is a reasonable basis for the Commissioner to conclude that the consultation process has been exhausted, the Commissioner shall advise the Union accordingly and the following procedures shall then operate.

36.6. The Commissioner will notify the Union and the workforce affected by the proposed change of his/her decision in relation to the subject of the proposed change as well as the process and timetable for its implementation.

36.7 If the matter remains in dispute and is referred by the Union to the Industrial Relations Commission within 7 days of the notification of the decision under clause 36.6, there will be no implementation of the change until the Industrial Relations Commission determines the matter or orders otherwise.

36.8 The Union and the Commissioner shall be bound by any order or determination of the Industrial Relations Commission in relation to the dispute.

36.9 If Industrial action is engaged in at any stage in the operation of the process under this clause, then the prohibition on implementation under clause 36.7 ceases to operate.

36.10 The operation of this clause shall be reviewed at the end of one year from the date of its commencement, for the purpose of considering whether any amendments are appropriate.

40 . The respondent whilst having the power to relocate persons to another location has not used this power. The Dubbo position has been vacant since at least January 2010 and Wagga Wagga since at least June 2010.

41 The intention of the respondent was expressed in correspondence dated 27 September 2010 directed to the applicant when Commissioner Mullins stated in part:

In light of the above and the need to promptly fill country Inspector positions where the position is unable to be filled by an employee who has completed the IPP, I have determined that where a country Inspector vacancy occurs it will be advertised and filled on merit. The successful applicant will be required to complete two weeks of assessable incident management training and one week of operational training prior to taking up the position. For the sake of clarity, upon completion of this training the applicant will be able to take up the

position as an 'Acting Inspector', remunerated at the same rate as an Inspector. For the purpose of filling country Inspector positions I have established the rank of 'Acting Inspector' pursuant to regulation 7 of the *Fire Brigades Regulation 2008*.

To ensue adequate time to complete the leadership and management theory, the successful applicant will be able to complete the theory within twelve months following appointment to the position either by on-line learning or face to face delivery.

42 What is therefore being proposed departs from previous practice to fill a country Inspector position. The applicant stated that it was not of their concern that it departs from previous practice but that it breached the award and it created a designation not expressed in the award.

43 Clause 7 Higher Duties notes that an employee shall not be permitted to perform Higher Duties unless, firstly the employee is **qualified to perform** such duties (emphasis added)

In my view qualified means that the intended person has successfully completed such a recognised formal program that allows the person to be able to carry out the role.

The person carrying out the higher role receives a financial benefit. In this matter no financial benefit is derived as the 'Acting Inspector' is to receive the same rate of pay as an Inspector. I therefore do not believe this clause is relevant to this dispute.

44 Clause 13.11 Station Officer Level 2 to Inspector sets out in detail what the promotional procedure consists of.

13.11 Promotion from Station Officer Level 2 to Inspector shall be subject to the occurrence of a vacancy and the **successful completion of the Inspectors' Promotion Program**, the content and format of which shall be specified by the Commissioner following consultation between the Department and the Union (emphasis added).

Clause 13.11.3 states in part :

.....The order of promotion of Station Officers Level 2 who successfully complete the Inspectors' Program shall be determined by their placement on the order of merit list arising from assessments forming part of the Inspectors' Promotion Program ( emphasis added).

and

Clause 13.11.4 states

Station Officers Level 2 who do not successfully complete their initial Inspectors' Promotion Program shall gain automatic entry to next subsequent Inspectors' Promotion Program and, provided this second Program is successfully completed, such employees shall take precedence in the order of promotion of that Program's successful participants. If a Station Officer Level 2 does not complete the Inspectors' Promotion Program upon this second attempt then that employee will be required to undertake the Pre Entry Test as described in sub clause 13.11.2 (emphasis added).

In my view this promotion progression is based on the officer successfully completing the IPP.

- 45 What is being promulgated by the respondent does not require the officer to successfully complete the IPP at the time of their appointment to the 'Acting Inspector' role.
- 46 The respondent submitted that the officer would be an Acting Inspector ( same rate of pay as an Inspector) and work as such until completion of the IPP. On completion the officer would then be an Inspector. The officer would complete three weeks training consisting of two weeks of assessable incident management training and one week of other training directly related to role of Inspector. The leadership and management theory delivered by Charles Stuart University would be completed at a later date.



The splitting up of the IPP between critical and desirable components was not acceptable to the applicant who considered all components of the six week course to be critical.

47 The IPP changed from a thirteen week to one of a six week duration in 2009. Since that time only one six week course has been held . No review of the six week course has yet to take place to ensure that the training given is sufficient.

48 The designation of Acting Inspector is not expressed in the Award. Whilst the Fire Commissioner has the power to create a new rank it has to do so in the context of the Award. The Fire Brigades Act 1989 section 74 states:

#### Regulations relating to members of fire brigades

a) 74 Regulations relating to members of fire brigades

(1) The regulations may make provision for or with respect to the employment of members of permanent fire brigades and the service of members of volunteer fire brigades, including the conditions of that employment and service and the discipline of members.

(2) Any such regulations relating to conditions of employment or service, or discipline:

(a) have effect subject to any relevant award made by a competent industrial tribunal and to any industrial agreement to which the Authority is a party, and

(b) have effect despite any determination of the Authority under section 71 (Authority may fix salaries, wages etc).

No application has been made to vary the award and insert a new designation of Acting Inspector.

49 Clause 13.20 of the award provides the Fire Commissioner the power to implement change with respect to training, competencies and other matters

covered by Clause 13 provided such a decision of change, that notice is given in accordance with 36.6 in which case clauses 36.7 to 36.9 inclusive shall apply.

- 50 Both parties made brief submissions on the Country Staffing Agreement and its relevance to this matter. Up to a maximum of three days a Senior Firefighter may act in charge of one of the named fire stations where the Station Officer is not available.

It is my view that such an agreement is not relevant to this matter. The agreement between the parties had been negotiated and was confined to particular officers in particular circumstances at particular stations.

- 51 There is a considerable body of jurisprudence developed by this Commission concerning the relevant principles of construction to be applied when interpreting Awards.

In *Bryce & Anor v Apperley* (1998) 82 IR 448 at 452, the Commission stated:

In our view, in construing the true meaning of an industrial award, like any other instrument with legal force, the task requires an approach according to the actual words used and their plain, ordinary English meaning. As was said by Kelleher J in *Re Dispute between Broken Hill Pty Co Ltd and the Federated Ship Painters and Dockers' Union of Australia, New South Wales Branch, Re Tank Tops* [1961] AR (NSW) 312 at 314:

"The meaning is to be ascertained primarily from a consideration of the words actually used and, while it is proper to pay regard to the surrounding circumstances and the purposes for which the provision was intended, this cannot justify a meaning being given to the words which they are not fairly capable of bearing. Particular words or expressions, having a special trade significance, however, may need to be construed in that light".

These principles were reaffirmed by the Full Bench in *Zoological Parks Board of New South Wales v Australian Workers Union* (2004) 135 IR 56, where at [43] the Commission held:

The relevant principles to be applied when interpreting industrial instruments are well settled: for example, *Kingmill Australia Pty Ltd (t/a Thrifty Car Rental) v Federated Clerks Union of Australia (NSW Branch)* (2001)

106 IR 217 and *Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Delta Electricity* [2003] NSWIRComm 135 at [44] - [46].

Broadly speaking, the primary consideration in such matters is the actual words used (and these should be given their plain, ordinary meaning) and the context in which the words are used.

The Full Bench then went on to consider the ability of the Commission to consider the history of the relevant instrument in conjunction with an analysis of the plain and ordinary meaning of the words used stating at [44]:

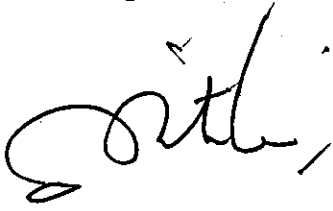
The construction of an award may include the history of the instrument in some circumstances. The words must be considered in the context of the instrument as a whole although in a practical sense, some parts of the documents will be very significant and others less significant or of no moment at all. We note, in this respect, the observations of Walton J, Vice-President in *Fox v GIO Australia Ltd* (2002) 56 NSWLR 512, 120 IR 401 at [46] as follows:

The modern approach to statutory interpretation insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by reference to legitimate extrinsic material such as explanatory memoranda and law reform reports, one may discern the statute was intended to remedy: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

52 It was the respondent's submission that clause 36 of the award allowed for change by the Commissioner and clause 13 is listed as one that it applied to. Post discussion of the intended change where agreement is not achieved then the Union may notify this Commission. This matter had been listed by the Union on 20 August, 2010. It was latter in the dispute that the respondent sought to introduce the new designation of 'Acting Inspector'.

- 53 I do not accept the submission of the respondent that clause 36 allows the degree of change that it seeks, that is by creating a new designation of 'Acting Inspector' and appointing such a person without completing the IPP.
- 54 When one considers the words from sub-clause 13.11 to 13.11.4 the expressed requirement for progress is that of completing the Pre-Entry Test and then successfully completing the IPP. The content of the IPP has gone through recent change to now be completed in a six week period but in accordance with the words of the clause it has to be completed, past tense, prior to appointment.
- 55 For an Officer to be appointed as an 'Acting Inspector', paid as an Inspector and have only partly completed the IPP would be in my view an action of circumventing the award.
- 56 I can sympathise with the respondent in their endeavours over a lengthy period to fill a position in an area of the state that has proven to be most difficult, but the filling of such positions must be in accordance with the requirements of the award.
- 57 In conclusion, it is therefore my finding that what the respondent seeks to do would be in breach of clause 13 of the award.
- 58 As a consequence of coming to that finding I do not believe it necessary to direct the respondent not to continue with the action of creating the position of 'Acting Inspector' .
- 59 I Order that the filling of the Inspector vacancies in Wagga Wagga and Dubbo should continue in accordance with the award requirements.

60 I Order that the content and format of the IPP, as applied prior to the notification of this matter, remain unaltered until agreed otherwise between the parties or in accordance with the processes set out in Clauses 13 and 36.

A handwritten signature in black ink, appearing to read 'D. Ritchie', with a stylized flourish at the end.

D. RITCHIE  
COMMISSIONER