



Industrial Relations Commission

New South Wales

Case Name: Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2023;; Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2023;; Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2023

Medium Neutral Citation: [2023] NSWIRComm 1080

Hearing Date(s): 20 March 2023, 17 April 2023, 17 May 2023, 15 June 2023, 29 June 2023, 6 July 2023, 31 July 2023, 1 August 2023 and 8 August 2023

Date of Orders: 8 August 2023

Decision Date: 8 August 2023

Jurisdiction: Industrial Relations Commission

Before: Commissioner McDonald

Decision: Recommendation made

Catchwords: EMPLOYMENT AND INDUSTRIAL LAW — Awards — Approval and creation – Conciliation - Recommendation made to resolve impasse - Proposal for trial of health screening program

Category: Procedural rulings

Parties: Industrial Relations Secretary on behalf of Fire and Rescue NSW (2023/00045256; 2023/00045309; 2023/0045321)
Fire Brigade Employees' Union of New South Wales (2023/00050147; 2023/0050173; 2023/0050334)

Representation: S Huang (Solicitor, Crown Solicitors Office) for the Industrial Relations Secretary

M Kuga (Solicitor) and R Krouskos (Fire Brigade Employees' Union of New South Wales)

File Number(s): 2023/00045256; 2023/00045309; 2023/0045321;
2023/00050147; 2023/0050173; 2023/0050334

Publication Restriction: Nil

RECOMMENDATION

- 1 Applications for new awards to be known as the *Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2023 (Permanent Award)*, *Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2023 (Retained Award)* and *Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2023 (Death and Disability Award)* (together, the **FRNSW Awards**) are currently before the Commission for conciliation.
- 2 The parties have asked the Commission to assist the parties in resolving one outstanding matter which affects each of the FRNSW Awards, being the current health checks system and the FBEU's claim for a health screening program.
- 3 Following discussions between the parties in conciliation and having listened to informal arguments from both sides during private conference, I make the below recommendation:
 - (a) The parties are to agree to a trial of the health screening program, the terms of which are to be agreed between the parties. The agreed terms are to be drafted as a clause in both the Permanent and Retained Award.
 - (b) The health screening program is to operate as a trial for a period of up to 3 years, commencing on a date to be agreed between the parties. The trial is to be subject to a review (designed through consultation between the parties) 12 months after the date of commencement.
 - (c) The parties should ensure that, during the trial, proper governance arrangements are able to be implemented by the employer, so that the employer can meet its obligations under the *Fire and Rescue Act 1989*, *Work Health and Safety Act 2011*, *Government Sector Employment Act 2013*, *Government Sector Employment (General) Rules 2014* and *Government Sector Employment Regulation 2014*.

- (d) The current "Health Check" program established under the Death and Disability Award is to be held in abeyance during the term of the trial. A new clause is to be drafted and agreed between the parties to achieve this intent. Clauses relevant to the current health checks in the Death and Disability Award process are to be reviewed to ensure consistency with the principle and intent of the new health screening program, including clause 4, clause 8, clause 12 and Annexure A.
- (e) Within 6 months of the commencement of the trial, the parties are to implement voluntary comprehensive cancer screening and PFAS/PFOA testing. Consultation is to occur prior to that implementation.
- (f) The health screening program is to consist of the current testing regime contained in Annexure A of the Death and Disability Award.
- (g) The current health standard is to be maintained. However, the parties are to review the current health standard with a view to developing a new health standard specific to the firefighting industry which is intended to update or replace the current agreed health standard in any future FRNSW Awards.
- (h) The health screening program is to be non-punitive and is to seek to maintain doctor patient confidentiality.
- (i) Employees are to undertake a health screen in accordance with an agreed clause which reflects this recommendation.
- (j) The current independent occupational physician provider is to no longer perform a role within the health screening program.
- (k) Health screening is instead to be conducted by a health practitioner of the employee's choice. The employee may elect for the Brigade Medical Officer to be their nominated health practitioner. The employee's nominated health practitioner is to complete a clearance form following completion of specified tests and an assessment of the employee against the health standard and the inherent requirements of the employee's role.
- (l) The employee's nominated health practitioner is to have access to a Brigade Medical Officer while conducting the health screening, should they require advice or assistance with understanding the employee's role or further information regarding the testing and/or the health standard. Any discussion between the employee's nominated health practitioner and the Brigade Medical Officer is to only occur in a deidentified manner and will not identify the employee concerned.
- (m) On completion of the health screen, the employee's nominated health practitioner is to specify which of the following categories an employee falls into:

- (i) that the employee is fit to perform the firefighter's ordinary duties without any requirements or restrictions; or
 - (ii) that the employee is fit to perform the firefighter's ordinary duties with specified requirements or restrictions; or
 - (iii) that the employee is temporarily unfit to perform the firefighter's ordinary duties but fit to perform alternative duties; or
 - (iv) that the employee is temporarily unfit to perform any FRNSW duties; or
 - (v) that the employee is permanently unfit to perform the firefighters' ordinary duties but fit to perform alternative duties; or
 - (vi) that the employee is permanently unfit to perform the firefighter's ordinary duties or any other FRNSW duties.
- (n) Where the employee is listed as either in category (i) or category (ii) no further action is to be taken by the employer. Where the employee is listed in category (ii) the nominated practitioner may seek assistance from the Brigade Medical Officer. Where the employee is listed in categories (iii)-(vi) the employer may seek that the employee's health screening outcome is reviewed by the Brigade Medical Officer. Any such review is to operate under clear parameters with agreed timelines for such review to occur and be completed by no later than 21 days from the date the employee submits their health screen to the employer.
- (o) The health screen clause is to provide a clear, non-punitive process to apply to the employee if they fall into categories (iii)-(vi). Such process will be focused on ensuring the employee is provided with alternative duties where possible. Temporary stand down of an employee and/or permanent medical or other retirement is to be a last resort only.
- (p) Where the employer has formed a reasonable belief, based on direct evidence, that, should the employee remain on duty or perform duties they may endanger themselves, their colleagues or the public, and the firefighter disagrees with this belief, the employer may require the employee to undergo the health screening process to assess their fitness for duty at more frequent intervals than the 5 years.
- (q) The costs of the health screening process is to be paid for by the employer, and the employee is to be paid for all time spent participating in the process.
- (r) Should any employee disagree with an outcome reached under the health screening program, they are to be entitled to seek a review of the matter in accordance with the applicable disputes procedure and are to suffer no loss of pay until that dispute is resolved between the parties or determined by the Commission.

Janet McDonald

Commissioner

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