Industrial Relations Commission
New South Wales

Medium Neutral Citation:	**Fire and Rescue NSW v Fire Brigade Employees' Union of New South Wales [2018] NSWIRComm 1076**
Hearing dates:	7 November 2018
Date of orders:	30 November 2018
Decision date:	30 November 2018
Jurisdiction:	Industrial Relations Commission
Before:	Commissioner Sloan
Decision:	(1) The parties are to confer with a view to quantifying any Kilometre Allowance payments the applicant is required to make for any period prior to the date of this judgment, and agreeing on the process by which and time within which any such payments will be made. (2) The matter is adjourned to 25 January 2019. (3) Liberty is reserved to the parties to have the matter re-listed on reasonable notice. (4) If that liberty is not exercised by 25 January 2019 the matter will be closed administratively.
Catchwords:	AWARD INTERPRETATION – principles to be applied – whether construction pressed by employer supported by language of award
Legislation Cited:	Industrial Relations Act 1996 (NSW)
Cases Cited:	Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury [2014] 87 NSWLR 41 State Transit Authority of New South Wales v Australian Rail, Tram and Bus Industry Union, New South Wales Branch, Bus and Tram Division [2014] 247 IR 129 The Secretary of the Department of Transport (in respect

	of Roads and Maritime Services) v Construction, Forestry, Mining, and Energy Union, New South Wales Branch [2018] NSWIRComm 1038
Category:	Principal judgment
Parties:	Fire and Rescue NSW (Applicant) Fire Brigade Employees' Union of New South Wales (Respondent)
Representation:	A Britt of counsel (Applicant) J Nolan of counsel (Respondent)
File Number(s):	2018/188416

JUDGMENT

1 This matter involves a dispute as to the proper construction of cl 9.8.1 of the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2017 ("Award"), and in particular the calculation of an allowance that is payable to employees who are recalled to duty to perform overtime in specific circumstances.

2 Clause 9 of the Award is titled "Overtime". Clause 9.8 is in these terms:

> 9.8 Where an employee recalled pursuant to either subclauses 9.6.2 or 9.7.1:
>
> 9.8.1 Is required to transport the employee's gear from the station/location at which the gear is located to another station/location in order to perform the duties of the recall, such employee shall be paid the Kilometre Allowance set at Item 2 of Table 3 of Part C, for the distance travelled on the forward journey between the two locations, provided that employees who are placed upon a transfer register pursuant to clause 28, Transfers Outside of the GSA, and are claiming residential priority shall instead be paid the Kilometre Allowance for the distance between the permanently staffed station closest to their primary residence and the station/location where the duties of the recall are to be performed.
>
> 9.8.2 Is required to transport the employee's gear back to the station/location at which the gear was located because the Department is unable to do so, the employee shall also be entitled to be paid kilometres equal to the forward journey at subclause 9.8.1. For the purpose of this subclause "distance travelled" means the agreed distance or, if the distance is not covered by a Matrix, the actual kilometres between the two stations/locations.

3 The dispute concerns only the proviso in cl 9.8.1, which relates to employees "who are placed upon a transfer register pursuant to clause 28, Transfers Outside of the GSA, and are claiming residential priority" ("Relevant Employees").

4

It is not necessary to traverse cl 28 of the Award in detail. Suffice it to say, the clause provides a mechanism facilitating the transfer of employees. The applicant must maintain "Transfer Registers" in respect of defined areas ("Transfer Register Areas"). An employee can apply to be placed on a Transfer Register, which then effectively records those employees who are available to fill any operational firefighter vacancies that arise in the relevant Transfer Register Area. An employee who can demonstrate that they have established residency in the Transfer Register Area will be entitled to "claim residential priority", giving them some priority for vacancies arising in that area.

5 It follows that an employee might maintain their primary residence in a particular Transfer Register Area, but work in a different location.

6 The respondent contends that the cl 9.8.1 must be applied literally – if a Relevant Employee is recalled to work overtime, the kilometre allowance referred to in cl 9.8.1 ("Kilometre Allowance") must be calculated on the distance between the permanently staffed station closest to their primary residence ("Local Station") and the station/location where the duties of the recall are to be performed ("Recall Location"). This is the case regardless of whether the employee has returned to their primary residence (in a different area) at the end of their roster or has remained in the area in which they normally work.

7 To clarify the nature of the disagreement between the parties, it is useful to use an example which was cited in the proceedings. A Relevant Employee has a primary residence at Tweed Heads, but he is based for work purposes at Regentville in western Sydney. He performs recall work in the Sydney area, which he could not feasibly perform if he had returned to his residence. In order to do the work he remains in Sydney rather than return to his primary residence at Tweed Heads.

8 On the respondent's construction of cl 9.8.1, the employee would receive a Kilometre Allowance calculated on the distance between the Local Station (in this case being the permanently staffed station closest to his residence at Tweed Heads) and the Recall Location. It is of no consequence that the employee is not in fact required to perform this trip.

9 The applicant disputes this construction of the clause. In the example provided the applicant contends that the Kilometre Allowance should be calculated only on the basis of the distance between Regentville and the Recall Location.

The applicant's case

10 The applicant was represented at the hearing by Mr A Britt of counsel.

11

The applicant read an affidavit of Bernard King, the applicant's Director Employee Relations. Mr King gave evidence at the hearing and was cross-examined.

12 The evidence contained in Mr King's affidavit includes the following:

(1) the relevant history of the Award, and in particular the negotiation of the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2014 ("2014 Award"), the predecessor to the Award. In those negotiations clause 9.7.1 of the 2014 Award was amended to reflect the language which now appears in cl 9.8.1 of the Award;

(2) correspondence that the applicant received from the respondent in connection with the negotiation of amendments to cl 9.7.1 of the 2014 Award;

(3) Mr King's understanding of the purpose and operation of cl 9.7.1 of the 2014 Award, and by extension, clause 9.8.1 of the Award;

(4) Mr King's understanding as to what arrangements (existing at the time the 2014 Award was made) the provision would, and would not, change as a result of the amendments to cl 9.7.1 of the 2014 Award; and

(5) the costs that the applicant will incur if the respondent's construction of cl 9.8.1 of the Award is accepted. The negotiated amendments to cl 9.7.1 of the 2014 "did not attract any costings work" by the applicant for the purposes of the NSW Public Sector Wages Policy 2011.

13 The submissions filed on behalf of the applicant included the following:

> 11. It is clear from the textual analysis of the words of the provision, that is, a consideration of the ordinary words that in order to be paid the Kilometre Allowance set at Item 2 of Table 3 of Part C pursuant to clause 9.8.1 the following conditions need to be met:
>
> > (a) The employee is recalled pursuant to either subclauses 9.6.2 or 9.7.1 (these opening words qualify all of clause 9.8.1); and
> >
> > (b) The employee is required to transport the employee's gear from the station/location at which the gear is located to another station/location in order to perform the duties of the recall.
>
> 12. The requirement to satisfy (b) (above) applies equally to those employees who are placed upon a transfer register pursuant to clause 28, Transfers Outside of the GSA, and are claiming residential priority and those employees who are not. This is clear from the simple words of the clause and is clearly reinforced from a consideration of clause 9.7.2 *[sic]* which refers to the transport of gear back.
>
> 13. It is believed that there is no issue with the calculation of this clause in respect to those employees who are recalled pursuant to either subclauses 9.6.2 or 9.7.1 but who are not placed upon a transfer register pursuant to clause 28, Transfers Outside of the GSA; and who are not claiming residential priority.
>
> 14. The purpose of the clause is to compensate those employees for the inconvenience of transferring their gear when they are recalled to work at another station. This is reinforced by clause 9.8.2 where the allowance is paid for the return journey in circumstances where FRNSW do not transport the gear back to the station/location at which the gear was located.

15. The dispute concerns the calculation of payments in respect to those employees who pursuant to clause 28, Transfers Outside of the GSA are placed upon a transfer register, and are claiming residential priority and who are recalled pursuant to subclauses 9 6.2 or 9.7.1.

16. The issue is whether these employees are paid the allowance from the station/location at which the gear is located to another station/location in order to perform the duties of the recall or whether they are instead paid the Kilometre Allowance for the distance between the permanently staffed station closest to their primary residence and the station/location where the duties of the recall are to be performed.

17. FRNSW submit that in accordance with the intention/purpose of the subclause (as demonstrated by the evidence) is that for those employees who work away from their primary residence and are recalled to work in the area they normally work, the allowance will be calculated by reference to the distance from the station/location at which the gear is located to another station/location in order to perform the duties of the recall. Further, if such employees are claiming residential priority on transfer lists and are recalled in the area their primary residence is located (as distinct from their normal work location) then they will be paid the Kilometre Allowance for the distance between the permanently staffed station closest to their primary residence and the station/location where the duties of the recall are to be performed.

18. In interpreting awards the Commission may consider the consequences of the contrary construction and seek to avoid constructions which would be "absurd", "extraordinary", "capricious", "irrational" or "obscure".

19. In these proceedings the construction sought by the Union would be an absurd/irrational construction. This is demonstrated by a simple example e.g. if there were two employees who both work at the City of Sydney Station, with one who has a primary residence at Lismore and with the other residing in the Sydney area, and both are recalled to duty to the Rocks Station and both transport their gear from the City of Sydney Station to the Rocks, one would be paid the allowance based on the distance from the City of Sydney Station to the Rocks station and the other employee who has a residence in Lismore would be paid the allowance as if he/she had transported their gear from Lismore. The latter has not transported his/her gear from Lismore to the Rocks Station but from the City of Sydney Station. There is no rational reason as to why they would be paid a very substantially different amount of allowance when they have endured the same disadvantage, being the transportation of gear from the City of Sydney Station to the Rocks station.

Conclusion

20. The Commission should find that in order to be eligible to the allowance in clause 9.8.1:

> (a) The employee is recalled pursuant to either subclauses 9.6.2 or 9.7.1 (these opening words qualify all of clause 9.8.1; and
>
> (b) The employee is required to transport the employee's gear from the station/location at which the gear is located to another station/location in order to perform the duties of the recall.

21. If an employee is eligible for the allowance then it will be calculated on the following basis:

> (a) those employees who work away from their primary residence and are recalled to work in the area they normally work, the allowance will be calculated from the station/location at which the gear is located to another

station/location in order to perform the duties of the recall.

(b) those employees who are placed upon a transfer register pursuant to clause 28, Transfers Outside of the GSA, and are claiming residential priority who are recalled to duty in the location of their primary residence (as distinct from their normal work location), then they will be paid the Kilometre Allowance for the distance between the permanently staffed station closest to their primary residence and the station/location where the duties of the recall are to be performed.

22. In the alternative, if the interpretation of FRNSW is not accepted by the Commission, then FRNSW submit that the Kilometre Allowance claimed or payable must approximate the amount of kilometres that gear was transported by a recalled firefighter who is placed upon a transfer register pursuant to clause 28, Transfers Outside of the GSA, and claiming residential priority. The purpose of the clause is to compensate firefighters for same.

The respondent's case

14 The respondent was represented at the hearing by Mr J Nolan of counsel.

15 The respondent read an affidavit of Chris Read, a Senior Firefighter with the applicant and a Senior Industrial Officer with the respondent. Mr Read also gave evidence at the hearing and was cross-examined.

16 The evidence contained in Mr Read's affidavit includes the following:

(1) the respondent's attempts to "correct the uneven amount of overtime worked by permanent firefighters" employed by the applicant;

(2) his involvement in the negotiations for the 2014 Award;

(3) his intentions when he proposed and negotiated cl 9.7.1 of the 2014 Award, and his understanding of its purpose and effect;

(4) the management by the applicant of overtime; and

(5) his understanding of the extent to which employees have ever been required to provide evidence of the transport of their gear or the kilometres actually travelled.

17 The outline of submissions filed on behalf of the respondent may be summarised as follows:

(1) there is no ambiguity in cl 9.8.1 of the Award warranting the Commission going beyond its plain words;

(2) the applicant is asking the Commission to find an interpretation of cl 9.8.1 by reference to terms and words "that simply are not there";

(3) cl 9.8.1 determines how the Kilometre Allowance is to be paid on the sole basis of whether or not the firefighter is claiming residential priority status pursuant to cl 28 of the Award. The applicant is attempting to introduce a second criterion for payment of the Kilometre Allowance, being whether or not the particular recall was worked in the area where the firefighter "normally" works. Clause 9.8.1 contains no reference to "normal work location", and none can be implied;

(4)

the "station at which the gear is located" is the station to which the firefighter is attached, or the firefighter's "base" station. Whether the firefighter is "required to transport the employee's gear" is determined by whether or not the applicant transported the firefighter's gear. If it did not, then the firefighter was required to transport the gear and be paid the Kilometre Allowance accordingly;

(5) it is not the respondent's interpretation of cl 9.8.1 that gives rise to seemingly absurd outcomes of the kind referred to in the applicant's submissions, but rather, it is the applicant's poor management in approving those employees to perform those recalls that does so. It follows that such outcomes are, and were since November 2014, entirely avoidable with even a modicum of effective management; and

(6) the applicant has failed to demonstrate how the terms of cl 9.8.1 could possibly give effect to either of its interpretations.

Applicable law and principle

18 The Commission may, for the purpose of exercising its functions in connection with a matter before it, determine any question concerning the interpretation, application or operation of any relevant industrial instrument: s 175 *Industrial Relations Act 1996* (NSW) ("Act").

19 The parties referred me to various authorities on the principles to be applied when interpreting industrial instruments such as the Award. I have considered those authorities. The principles of interpretation they set forth are well-established.

20 In *State Transit Authority of New South Wales v Australian Rail, Tram and Bus Industry Union, New South Wales Branch, Bus and Tram Division* [2014] 247 IR 129 the Full Bench of the Commission (Walton J, President, Boland AJ and Tabbaa C) cited with approval the judgement of Walton J in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] 87 NSWLR 41. The Full Bench stated as follows:

> **Award interpretation**
>
> 26 This appeal falls mainly to be determined by the application of principles governing the interpretation of awards. In *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWIRComm 23, Walton J, President gave detailed consideration to the principles by reference to relevant authorities including the latest High Court authorities.
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> 27 His Honour was able to distil from the authorities the following statement of principles at [115]:
>
> > (1) The legal meaning of 'a provision of an award' is to be ascertained through a process of construction by which the intention of the provision is deduced. It is the duty of the court to give the words of the award a meaning that the authors of the award are taken to have intended them to have;

> (2) The process of construction must begin with a textual analysis of the words of the provision, that is, a consideration of the ordinary and grammatical meaning of the words;
>
> (3) Whilst the surest guide to the meaning of an award provision is language used in a provision of an award, the meaning of the text may require consideration of the context (which includes, inter alia, consideration being given to the instrument as a whole). Thus, the initial step to construction may involve construing the words of an award provision in context;
>
> (4) The consideration of the words of the provision of an award in context includes examining the general purposes and the policy of the provision derived from a statement of policy in the award or from the terms of the award. Thus, the legal meaning may be ascertained by reference to general purpose, consistency and fairness, although, again, the purpose of a provision derives in its text and structure. A relevant consideration in this respect is the mischief remedied by a provision. (See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47].);
>
> (5) An examination of the purpose of an instrument is very much part of the traditional approach to award interpretation. It was accepted 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 that it is proper to pay regard to "the purposes for which a provision is intended" (as quoted in *Bryce v Apperley* at 452 and *Kingmill* at [63]). An application of this approach may be found in the judgment of Hill J in *Australian Workers Union (NSW) v Pioneer Concrete (NSW) Pty Ltd* (1991) 38 IR 365 at 380, where it was stated that provisions in awards must be construed reasonably and realistically, "having regard to their purposes and objectives". I will add further to this consideration when returning to the notion, developed in the dicta of Street and French JJ, that a generous construction should be adopted in the interpretation of awards;
>
> (6) The determination of the purpose or intention of a provision of an award neither permits nor requires a search for what those who drafted or made the award had in mind when the award was made: see *Construction, Forestry, Mining and Energy Union (NSW Branch) v Delta Electricity* [2003] NSWIRComm 135; (2003) 146 IR 360 at [44] and NSW Fire Brigades at [47]. Further, it is not for the court to construct its own idea of a desirable policy, import it to the award maker and then characterise it as the purpose of the provision: see *Brown* at [40] (Bathurst CJ).

28 His Honour also addressed the question of the extent to which extrinsic material may be employed in award interpretation. In that respect, Walton J concluded:

> [127] Understanding context will have utility if, and in so far as, it assists in establishing the meaning of an award provision. The context includes recourse to extrinsic materials but such considerations cannot displace the meaning of the text of a clause of an award or become an end in itself.
>
> [128] In order to ascertain the meaning of a provision of an award which is susceptible to more than one meaning, even after the consideration of the immediate context of a provision, recourse may be had to the circumstances surrounding the making of an award in order to see what the circumstances were with reference to which the words of the award provision were used. Within those parameters, reference may be had to a mutually known factual matrix present at the making of the award, including the conduct of prior

> negotiations, the forming of an agreement and, more generally, the history of the provision. Evidence is not admissible to ascertain the subjective intentions of the parties. Nor is evidence of their conduct subsequent to the commencement of the instrument admissible.

29 His Honour considered that the history of a provision of an award may form part of the consideration of context. In that respect, Walton J referred approvingly to what Burchett J (with whom Drummond J agreed) said in *Short v F W Hercus Pty Ltd* (1993) 40 FCR 511 at 517-518 of the use of history in the interpretation of awards:

> No one doubts you must read any expression in its context. And if, for example, an expression was first created by a particularly respected draftsman for the purpose of stating the substance of a suggested term of an award, was then adopted in a number of subsequent clauses of awards dealing with the same general subject, and finally was adopted as a clause dealing with that same general subject in the award to be construed, the circumstances of the origin and use of the clause are plainly relevant to an understanding of what is likely to have been intended by its use. It is in those circumstances that the author of the award has inserted this particular clause into it, and they may fairly be regarded as having shaped his decision to do so. The rules of construction, Mason and Wilson JJ said in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (Cth) (1981) 147 CLR 297 at 320, are really rules of common sense. Common sense would be much offended by a refusal to look at the facts I have summarised. As Isaacs J said in *Australian Agricultural Co Ltd v Federated Engine-drivers' and Firemen's Association of Australasia* (1913) 17 CLR 261 at 272, citing Lord Halsbury LC: "The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it."
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> ...
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> True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed.

30 Walton J cited with approval authorities to the effect that awards should receive a generous construction: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504; *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362 at [57]; *Kucks v CSR Ltd* (1996) 66 IR 182 at 184; *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [94] and [96] per Kirby J; *Director of Public Employment (by her Agent the Commissioner of New South Wales Fire Brigades) v New South Wales Fire Brigades Employees' Union* [2008] NSWIRComm 158; (2008) 180 IR 170 at [45]-[46]. The passage in *Kucks* cited by his Honour makes the point:

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading.

31 Walton J completed his examination of the relevant authorities by stating the following conclusions:

> [142] Of course, a difference in the relative bargaining power of the parties is not relevant to the present matter but the requirement to have regard to all the circumstances of the case in which the actual words used are in harmony with the jurisprudence which I have reviewed above. In short, in the construction of an award, this methodology requires the Court to utilise a broad approach to the relevant words in their context, particularly their industrial context (and this may include relevant permissible extrinsic evidence but must disregard impermissible extrinsic evidence) in order to discern the meaning of those words which the drafters are properly taken to have intended.
>
> [143] The adoption of these principles will result, in my view, in avoidance, in the construction of awards, of a strict but unintended technical meaning being attributed to the particular words of an award or too much attention being given to mere infelicitous expression or inconsistencies. The Court should not strive for the discernment of an absurdity. The Court should endeavour to give a provision of an award a meaning consistent with the intention of the parties gathered from the words of the provision and from the whole award, having regard to the industry and industrial relations environment in which the award came to be made. As Kirby J put it, the construction should be one which contributes to a sensible industrial outcome, provided... such an interpretation may reasonably be available from the language used in the provision (that is, from the text of an award).
>
> [144] Ultimately, the adoption of such an approach to the construction of awards has limits. As I have mentioned, the principles of award interpretation cannot lead to an attempt to construe the terms of an award according to the subjective intention of the parties or result in an unreasonable or unnatural construction being placed on the words of an award. Attention must be fixed upon the ordinary meaning of the words used when read in context. As French J stated in *City of Wanneroo* at [57]:
>
> > ...while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):
>
> Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language.

We adopt his Honour's analysis and the principles and conclusions he draws from the authorities.

21 The passages referred to above were recently cited and applied by the Full Bench in *The Secretary of the Department of Transport (in respect of Roads and Maritime Services) v Construction, Forestry, Mining, and Energy Union, New South Wales Branch* [2018] NSWIRComm 1038. I will apply the same principles.

Consideration

22 The entitlement to a Kilometre Allowance under cl 9.8.1 of the Award is subject to two conditions precedent. The first condition is that the employee be recalled pursuant to either cl 9.6.2 or 9.7.1 of the Award. Those clauses relate respectively to the recall of

employees off duty in the case of an incident, and employees off duty recalled to report for duty for the purpose of maintaining required staffing levels. This condition is not in dispute and is not relevant for present purposes.

23 The second condition is that the employee be "required to transport the employee's gear from the station/location at which the gear is located to another station/location in order to perform the duties of the recall".

24 Relevant to the second condition, Mr King accepted in cross-examination that to perform recall work an employee would need to have their gear with them. They could not use somebody else's gear: see [33] below.

25 During the hearing I had the following exchange with Mr Britt (Tcpt, 7 November 2018, pp 34 (9) – 35 (21)):

> COMMISSIONER: I understand that's your contention but if they've got their gear with them to start work, it has been transported. Correct?
>
> BRITT: When you say "start work", start work on the--
>
> COMMISSIONER: Sorry, on the recall work.
>
> BRITT: Yes, yes.
>
> COMMISSIONER: And absent the department having done that--
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> BRITT: They've transported it.
>
> COMMISSIONER: --they have transported it. That's a safe assumption to draw, isn't it?
>
> BRITT: It is, but one has to look at where you transported it from.
>
> COMMISSIONER: That's not my question. You've raised the condition is they have to transport it.
>
> BRITT: Yes.
>
> COMMISSIONER: My point is, in the absence of the department proving that they've done that for the worker, it must be assumed that the worker has transported their gear in order to start the recall work.
>
> BRITT: Yes, but, again, one looks at the distance of the transport.
>
> COMMISSIONER: That's not my question.
>
> BRITT: No, I understand.
>
> COMMISSIONER: And please focus on what I'm trying to deal with here. You've raised a condition precedent, being they've got to transport the gear.
>
> BRITT: Yes.
>
> COMMISSIONER: My point is in the absence of the department demonstrating that they have done it in a particular instance, it can be assumed that the worker has done that.
>
> BRITT: Yes. The alternative is someone on behalf of the worker--

> COMMISSIONER: Or someone on behalf of the worker. Are you saying that if someone has done it for them, that they don't get it?
>
> BRITT: They haven't transported the gear. I'm not suggesting that happens a lot but from the wording of the clause--
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> COMMISSIONER: How does that - if you look at the language of 9.7.1, "where an employee recalled" blah blah blah "is required to transport the employee's gear". Then you look at 9.7.2, "where the employee is required to transport the employee's gear back because the department is unable to do so". Doesn't that lead to an argument that if the department doesn't transport the gear there or back, then--
>
> BRITT: The employee must have done it.
>
> COMMISSIONER: --the employee must have done it. Whether they've done it personally or not, they get the benefit of the provision.
>
> BRITT: Yes, I accept that, yes. That's the effect of those two clauses.

26 Based on this exchange and Mr King's evidence, it can be accepted that an employee must have their gear with them "in order to perform the duties of the recall". If an employee attends to perform recall work, their gear will have to have been transported "from the station/location at which the gear [was] located to another station/location". It follows that for the purposes of cl 9.8.1, in the absence of the applicant having transported the gear it must be assumed that the employee was required to do so, and the condition precedent will be satisfied.

27 To the extent that the applicant's submissions pressed a construction of cl 9.8.1 which requires employees to submit a claim or verify if and how their gear was transported, I reject them.

28 Once the conditions precedent have been met, cl 9.8.1 delineates between Relevant Employees and other employees. Employees other than Relevant Employees are entitled to be paid a Kilometre Allowance for the "distance travelled" between the station/location at which the gear is located and the Recall Location. Relevant Employees will "instead" be paid a Kilometre Allowance for the "distance between" the Local Station and the Recall Location.

29 The use of the word "instead" demonstrates an intention that Relevant Employees will have their Kilometre Allowance calculated on a different basis to that which applies to other employees. It has to be assumed that there was a reason for the parties using the term "distance between", as opposed to "distance travelled", for the purposes of calculating the Kilometre Allowance for Relevant Employees. The distinction suggests Relevant Employees, as opposed to other employees, need not have "travelled". It follows that on the terms of the clause a Relevant Employee need not actually transport their gear over the claimed distance to qualify for a Kilometre Allowance calculated on that distance.

30

On the basis of this analysis I do not accept the alternative construction of cl 9.8.1 suggested in [22] of the applicant's submissions, reproduced at [13] above.

31 Further, cl 9.8.1 does not permit the construction proposed by the applicant at [21] of its submissions, also reproduced at [13] above. The clause makes no reference to the area in which an employee "normally works" or their "normal work location". I accept the respondent's submissions that to adopt the construction proposed by the applicant would be to interpret the clause by reference to terms and words that "simply are not there".

32 During the course of the hearing it became apparent that the primary area of contention between the parties was the calculation of the Kilometre Allowance for a Relevant Employee who is recalled to work overtime in the area in which he normally works, *not* having returned to his primary residence in an area other than that in which he normally works.

33 This is borne out in the following exchange between Mr Nolan and Mr King in cross-examination:

> Q. Mr King, your understanding was, was it not, that there were - that if you were based in Regentsville, as Mr Ridding was, and you were given - you were allocated a recall, you'd be paid according to the local - what previously used to be the position with respect to working in your usual or regular place of work and that was one situation, but Mr Ridding, because he was on the priority list up at Tweed Heads, could also do recalls at Tweed Heads and be paid according to the second part of clause 9.8.1. Is that right?
>
> A. I've lost you there. If you want to know what, in essence, my complaint is--
>
> Q. Yes?
>
> A. --it's that the clause is designed to compensate you for the number of kilometres you tramp your gear around, and if you didn't tramp your gear from Tweed Heads you didn't qualify in the preamble for the transporting your gear from a station location to another - to the overtime recall station location and you shouldn't be making a claim or being paid for kilometres not travelled with your gear. That's my essential complaint.
>
> Q. But don't you agree that the common assumption was that the firefighter would turn up to the recall with his gear?
>
> A. Yes.
>
> Q. And if Mr Ridding was up at Tweed Heads and recalled to Tweed Heads, the expectation would be that he'd have his gear with him to attend a recall at or around Tweed Heads?
>
> A. Yes.
>
> Q. And that would be a given. That would be understood?
>
> A. Yep.

Q. And so that if he was living at - if he was up at Tweed Heads for the weekend and he was called back at Regentsville, it was up to him whether he made his way to Regentsville and turned out in his gear, wasn't it?

A. He can't possibly get there.

Q. Well--

A. So it's kilometres not travelled and gear not travelled by a number of kilometres.

Q. Then you don't - he can't possibly do the job?

A. Yes, and the union's construction and argument is that he should be auto-paid for an amount of kilometres he didn't travel with his gear, and that's what my main complaint is.

Q. But he'd only be paid if he did the recall, wouldn't he?

A. Well, he stayed in Sydney to do the recall because he couldn't have--

Q. And he can't turn out to the recall in somebody else's gear, can he?

A. No, he can't.

Q. He's got to wear his own. He's got to bring his own gear?

A. Yes, but he stayed in Sydney and he--

Q. And it'd be the same if he went up to Tweed Heads--

A. --didn't travel the kilometres.

Q. And if he went up to Tweed Heads and took his gear with him up to Tweed Heads and he was recalled in Tweed Heads, he'd be expected to turn out with his gear, wouldn't he?

A. And he'd truly qualify for the second part of that one long paragraph.

Q. But the second part of that one long paragraph says, after the word "instead":

> "be paid the kilometre allowance for the distance between the permanently staffed station closest to the primary residence and the station location where the duties of the recall are to be performed"?

A. Yeah.

Q. That's right. There's no additional qualification on that, is there?

A. Excepting in the preamble to one long paragraph that requires transport of gear from a station location to another station location, and in the case of him being in Tweed Heads, well, I imagine he was at home and went to a recall locally. But in the case of Sydney, he didn't go home and he didn't travel from Tweed Heads, so why would we compensate per kilometre for kilometres gear was not transported? That's the problem we have with your construction of the clause.

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construction/interpretation of the c lause strongly suggests ambiguity.

34 On my analysis of cl 9.8.1 as set out above, I do not discern anything in the clause that permits a different approach to be taken for those Relevant Employees who return to their primary residence and those who do not.

35

Having carefully reviewed the terms of cl 9.8.1 I do not consider that it contains any ambiguity. I do not accept the applicant's submissions that the fact that the evidence may demonstrate conflicting and possibly changing views as to the

36 An ambiguity also does not arise simply as a consequence of an unforeseen, and possibly unwelcome, interpretation being placed on the words the parties have used.

37 Consistent with the authorities referred to above, whether ambiguity exists is to be derived from the terms of the clause itself, in the textual context in which it appears. The Commission's task is not to ascertain the subjective intention of the parties when drafting cl 9.8.1 (or its predecessor in the 2014 Award), but to interpret the provision in accordance with the ordinary and grammatical meaning of the words contained in it.

38 In the absence of ambiguity, I am unable to have regard to the extrinsic evidence adduced by the parties as to the circumstances leading to the creation of the 2014 Award, and in particular clause 9.7.1 of the 2014 Award.

39 Even if I were able to consider that evidence I do not accept the applicant's submission that the evidence demonstrates a "mutual intention of the parties", at the time either the 2014 Award or the Award were created, which is consistent with the interpretation of cl 9.8.1 proffered by the applicant. In any event, for the reasons set out above, it would not be possible to give effect to such an intention within the language of cl 9.8.1.

40 Mr Britt submitted that the Commission was faced with two interpretations of clause 9.8.1, "one that is within jurisdiction and one that is outside jurisdiction", by reference to "the Act and the regulations dealing with increasing costs in the award" (Tcpt, 7 November 2018, p 30 (15-20)). This submission was apparently based on the evidence in Mr King's affidavit regarding the costs that the applicant will incur if the respondent's construction of cl 9.8.1 is accepted, noting that the 2014 version of the provision "did not attract any costings work" by the applicant for the purposes of the NSW Public Sector Wages Policy 2011.

41 The submission is misguided. Any question as to whether a proposed award is compliant with any relevant legislative and regulatory requirements is a matter to be determined at the time of its approval. The Commission in these proceedings is interpreting the Award as already made. It is not a question of the Commission imposing new obligations but clarifying those which already exist. That the applicant may not have done "any costings work" is ultimately irrelevant to the interpretation of the Award.

42 Finally, I turn to the applicant's submission that the construction proposed by the respondent, which I have accepted, would result in an outcome which would be "absurd", "extraordinary", "capricious", "irrational" or "obscure". The short answer to this

submission is that there is nothing in the Award that compels the applicant to recall a Relevant Employee to work overtime in an area other than that in which their primary residence is located. To the extent that the outcome is "absurd" (or any of the other adjectives used by the applicant), this is as a result of the application of cl 9.8.1, rather than its interpretation. It is within the applicant's power to manage the way in which the clause is applied.

43 In its outline of submissions the respondent sought a recommendation pursuant to s.136(1)(a) of the Act to the effect that:

(1) cl 9.8 of the Award be interpreted and the Kilometre Allowance paid in accordance with the construction advanced by the respondent without requiring employees to submit a claim or verify if and how their gear was transported, provided that if the applicant actually transported an employee's gear then no kilometres should be paid; and

(2) this interpretation be applied on and from 14 November 2014 and that the applicant should make all outstanding Kilometre Allowance payments as soon as practicable, but in any event by 20 December 2018.

44 I do not propose to make such a recommendation. The parties should confer with a view to quantifying any Kilometre Allowance payments the applicant is required to make, and agreeing on the process by which and time within which such payments will be made. In the event that the parties are unable to resolve these issues I will grant liberty to apply.

Conclusions

45 There is no ambiguity on the face of cl 9.8.1 of the Award. It follows that I am unable to have, and have had no, regard to the extrinsic evidence adduced by the parties as to the circumstances leading to the creation of the 2014 Award and cl 9.7.1 of that Award (the predecessor to cl 9.8.1 of the Award).

46 The language of cl 9.8.1 of the Award does not permit the constructions of the clause, both primary and alternative, advanced by the applicant.

47 Rather, on its terms, cl 9.8.1 requires the construction advanced by the respondent as outlined at [6] above.

Orders

48 I make the following orders:

(1) The parties are to confer with a view to quantifying any Kilometre Allowance payments the applicant is required to make for any period prior to the date of this judgment, and agreeing on the process by which and time within which any such payments will be made.

(2) The matter is adjourned to 25 January 2019.

(3) Liberty is reserved to the parties to have the matter re-listed on reasonable notice.

(4) If that liberty is not exercised by 25 January 2019 the matter will be closed administratively.

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Decision last updated: 30 November 2018