[2024] FWC 2417 [Note: An appeal pursuant to s.604 (C2024/6779) was lodged against this decision.]

# DECISION

*Fair Work Act 2009*
s.739—Dispute resolution

**Community and Public Sector Union (SPSF Group)**
**v**
**The Victorian Fisheries Authority**
(C2024/4005)

DEPUTY PRESIDENT O'NEILL MELBOURNE, 6 SEPTEMBER 2024

*Alleged dispute about any matters arising under the Victorian Public Sector Enterprise Agreement 2000 – reasonable expenses – application granted in part.*

**Introduction**

**[1]** The Community and Public Sector Union (CPSU) has applied to the Commission to deal with a dispute in accordance with the dispute settlement procedure in the Victorian Public Sector Enterprise Agreement 2000 (the Agreement).

**[2]** The dispute concerns two CPSU members, Ben Amey and Daniel Steel, who transferred to locations in Victoria some distance from their previous work location. As part of the transfer, they have claimed the expenses associated with selling their existing homes and purchasing new homes. The Victorian Fisheries Authority (VFA) has not reimbursed the two members for all the costs incurred, and the CPSU contends that it is required to do so pursuant to clause 19.7 of the Agreement.

**[3]** The parties agreed on the following questions to be arbitrated.

A. Do Ben Amey's relocation from Mornington to Cowes Fisheries Station and Dan Steel's relocation from Snobs Creek to Wodonga Fisheries Station amount to relocations arising from "promotion or transfer as a result of an advertised vacancy" within the meaning of 19.7(a) of the Victorian Public Service Agreement 2020?

B. If "yes", are Ben Amey's and Dan Steel's relocation expenses "reasonable expenses" as referred to in clause 19.7(a) and (b) of the Victorian Public Service Agreement 2020 including in circumstances where:

   i. these expenses exceed the maximum allowable amounts specified in the Victorian Fisheries Authority Relocation Expense Reimbursement Policy; and

ii. prior approval from the VFA CEO was not obtained before incurring those expense.

**[4]** The parties agreed that the dispute could be determined on the submissions and evidence filed.

**Factual background**

**[5]** In February 2022, the VFA sent a State-wide email addressed to Fisheries Officers calling for expressions of interest for a transfer at level to vacant positions in several locations around the State which was open to all grade 3 and 4 Fisheries Officers. The email advised staff that the VFA was "commencing *a transfer-at-level (TAL) expression of interest process for current Fisheries Officer vacancies*." Staff were advised to read the VFA's Internal Transfer at Level Guidelines (a copy of which was attached) which 'explains the process and the criteria involved in greater detail.'

***Mr Daniel Steel***

**[6]** Mr Steel submitted an expression of interest for a vacant position as Fisheries Officer at Wodonga. After being advised he was successful in obtaining the Wodonga position, he relocated and subsequently submitted claims for reimbursement of costs totalling $70,382.85 comprising:

- Real estate fees $ 16,562.00
- Conveyancing $ 1,032.85
- Removalists $ 2,990.00
- Stamp duty $ 48,470.00
- Conveyancing $ 1,328.00

**[7]** Mr Steel has been reimbursed the sum of $20,441.52, leaving a balance of $49,941.33.[1]

***Mr Benjamin Amey***

**[8]** Mr Amey submitted an expression of interest for a vacant position at Cowes.

**[9]** Shortly after he was advised he had been successful, he raised concerns about the cap on relocation expenses under the VFA relocation policy which he considered inconsistent with clause 19.7 of the Agreement. On 18 May 2022, the CEO informed him that any relocation costs above the cap in the policy would not be approved, and that the CEO was "*prepared to approve [his] relocation request on the basis that any expenses will be within the limits of the VFA Relocation Expense Reimbursement Policy (clause 5.5). If [he] still wish[ed] to proceed with [his] expression of interest to relocate to Cowes [Mr Dowling] will leave it to Paul Shea to discuss a suitable start date*."[2]. Mr Amey went ahead and accepted the position and commenced at Cowes in December 2022.

**[10]** After relocating to accept the position in Cowes, he subsequently submitted claims for reimbursement of costs totalling $80,206.43 comprising:

- Real estate agent fees – sale of home $ 2,500.00
- Storage fees $ 390.00
- Conveyancing costs – sale of home $ 120.94
- Removalist costs $ 2,244.00
- Building inspection costs $ 520.00
- Conveyancing costs – purchase of home at Cowes $ 474.34
- Campaign fees $ 3,517.33
- Commission fees – sale of home $18,336.50
- Conveyancing costs – sale of home $ 880.00
- Conveyancing costs – purchase $ 1,253.32
- Stamp duty costs $ 49,970.00

**[11]** Mr Amey has been reimbursed the sum of $26,177.28, leaving a balance of $54,029.15.[3]

**Relevant provisions in the Agreement**

**[12]** Clause 19 of the Agreement provides:

> **19.1 Usual Place or Places of Work**
>
> 19.1 The Employer must determine a usual place or places of work for an Employee.
>
> 19.2 The Employer may change an Employee's usual place or places of work, on either a temporary or permanent basis, in accordance with this clause.
>
> …
>
> **19.7 Permanent relocation of the usual place of work requiring residential relocation**
>
> **(a) Residential Relocation principles**
>
> If the Employer considers that it is reasonable and necessary for an Employee to move residence as a result of relocation from one work location to another, and the relocation arises from promotion or transfer as a result of an advertised vacancy, or redeployment, the Employee will be entitled to:
>
> (i) up to three days' paid leave associated with the relocation; and
>
> (ii) reimbursement of reasonable expenses associated with the relocation as per **clause 19.7(b).**
>
> **(b) Reasonable relocation expenses**
>
> Relocation expenses include reasonable expenses directly incurred by the Employee and their family as a result of:

(i) the journey to the new location, including meals and accommodation;

(ii) removal, storage and insurance; and

(iii) selling and purchasing of a comparable residence.

**Approach to construing the Agreement**

**[13]** The principles to be applied in construing an enterprise agreement are well-settled. As set out by the Full Court in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197]:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation "turns on the language of the particular agreement, understood in the light of its industrial context and purpose". The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced (*references omitted*).

**[14]** In *AMWU v Berri Pty Ltd*,[4] a Full Bench of the Commission relevantly held that:

> …..
>
> 2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
>
> 3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.
>
> …..
>
> 7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.
>
> 8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstances will be admissible to aide the interpretation of the agreement.

**Consideration**

**[15]** The first question is whether the relocations arose from a transfer "*as a result of an advertised vacancy, or redeployment*". If they did, then it will be necessary to consider whether the expenses claimed are '*reasonable expenses associated with the relocation'*.

**[16]** The VFA does not dispute that it considered it reasonable and necessary for Mr Amey and Mr Steel to move their residence from one work location to another. However, it submits that an internal transfer at level is not a transfer resulting from an 'advertised vacancy.'

**[17]** In my view, that contention cannot be made out.

**[18]** Clause 19 of the Agreement sets out the circumstances in which the VFA may change an employee's usual place of work on either a temporary or permanent basis. The clause comprehensively deals with both temporary and permanent changes and those that do and do not involve residential relocation. The clause does not provide for any separate or alternative power for the employer to change an employee's usual place of work. Yet, the VFA's contention that relocations arising from internal transfers at level are not dealt with in clause 19.7, necessarily means that there is some alternative power to permanently change the usual place. However, subclause 19.7 is the <u>only</u> provision dealing with a permanent relocation of the usual place of work requiring residential relocation and, as set out above, provides an entitlement to reimbursement of reasonable expenses associated with the relocation. It is clear, therefore, that the relocation of Mr Amey and Mr Steel through an internal transfer at level process, is captured by subclause 19.7. Otherwise, the employer would not be permitted under the Agreement to permanently change their usual place of work.

**[19]** The VFA focuses on a claimed distinction between internal or external 'advertisements' for vacant roles and an 'expression of interest' in internal transfers. It submits that the relocations occurred "through an internal process without the vacancy being advertised."[5] Put another way, they say that the email calling for expressions of interest for vacant positions was not an internal advertisement for the positions. It points to the omission of the word 'advertisement' in the supporting policies and guidelines dealing with recruitment and internal transfers at level. It submits that the distinction is real, intentional and facilitates a quick, cost effective and preferential internal transfer process which may be of benefit to both employees and the VFA, and is an initial alternative process to the advertising of vacancies.

**[20]** However, this is a distinction without substance. Firstly, the Macquarie dictionary defines 'advertised' as:

–*verb* (*t*)

> **1.** to give information to the public concerning; make public announcement of, by publication in periodicals, by printed posters, by broadcasting over the radio, television, etc.: *to advertise a reward.*
>
> **2.** to offer (an article) for sale or (a vacancy) to applicants, etc., by placing an advertisement in a newspaper, magazine, etc.: *she advertised the post of private secretary.*
>
> **3.** *Obsolete* to praise the good qualities of, in order to induce the public to buy or invest in.
>
> **4.** *Obsolete* to admonish; warn.
>
> –*verb* (*i*)
> **5.** to place an advertisement in a newspaper, magazine, etc.: *to advertise for a house to rent.*

**[21]** The email sent State-wide to all Fisheries Officers seeking expressions of interest for several vacant positions was, in substance, an internal advertisement. It 'advertised' the fact of the particular vacancies and invited eligible grade 3 and 4 officers to apply for them. Undertaking this internal process prior to an external recruitment exercise, as noted by the VFA, provides benefits to both existing employees and the VFA. For the VFA it is a means to appoint known and experienced officers to vacant roles through a quicker and more efficient process than external recruitment. Viewed in this industrial context, it makes no sense that the Agreement would confer a significant entitlement to externally-recruited persons and none to internally-recruited officers. The VFA's construction is a narrow and pedantic interpretation of clause 19.7, and one which is inconsistent with the purpose of clause 19 - to set out the circumstances and associated obligations and entitlements where an employer changes the usual workplace of its employees.

**[22]** Consistent with the *Berri* principles,[6] I have also considered the supporting policies and guidelines to aide interpretation of the Agreement. They do not support the VFA's construction of the Agreement. For example, the VFA's Internal Transfer at Level Guideline (ITAL Guidelines) are intended for use to guide the circumstances in which a fisheries officer may transfer at level to a vacant position by an internal expression of interest process.[7] They do not use the language of an advertised vacancy nor distinguish transfers at level from 'an external recruitment process.' However, they provide that where there is more than one applicant from the EOI process that matches the business needs "a competitive selection process (ie interviews) will be held." That is, relevantly indistinguishable from a recruitment exercise following internal or external advertising of a vacancy. Further, in considering whether to recommend an internal transfer, relocation costs arising out of the proposed transfer are relevant considerations. The capacity for the VFA to take relocation costs into consideration in deciding whether to transfer an existing employee is most consistent with the existence of an entitlement to relocation expenses under the Agreement in those circumstances.

**[23]** The ITAL Guidelines identifies the VFA Recruitment Policy and the VFA Relocation Expenses Policy as related procedures and policies.

**[24]** The VFA Recruitment Policy also does not assist the VFA's preferred construction. The Policy details requirements for filling various types of vacancies. The VFA focuses on the specific description in section 5.4 of the internal transfer at level process for fisheries officers, which is outside the requirements for advertising for other vacancies, including the requirement that all vacancies over six months duration are required to be advertised via the Jobs and Skills Exchange. However, the Recruitment Policy elsewhere refers to 'advertising vacancies through a local Expression of Interest" and "an EOI internal advertisement" for other roles. It does not support a contention that an expression of interest for an internal transfer at level is not an advertised vacancy within the meaning of clause 19.7 of the Agreement.

**[25]** The VFA Relocation Expense Reimbursement Policy (RER Policy)[8] "*establishes the VFA's position in accordance with clause 19.7 of the Agreement*" in respect of reasonable relocation expenses. It applies to all VFA employees and appointees who, relevantly, are required to move from their primary place of residence to perform their duties for a period of not less than one year, where the relocation arises from promotion or transfer as a result of an advertised vacancy or redeployment. It requires employees to have obtained prior approval for reimbursement of relocation expenses through negotiation within the appointment process from the CEO or their delegate. It also imposes a limit on relocation expenses "*to ensure that claims are reasonable in accordance with the VPS Agreement".* The cap on total relocation expenses under the Policy involving selling and purchasing of a comparable residence is $26,177.28. The VFA applied this cap in only partially reimbursing Mr Steel and Mr Amey's costs.

**[26]** The VFA submits that the RER Policy does not apply to employees who relocate as a result of an internal transfer at level process, and that such employees have "*no entitlement …* to reimbursement *"of any relocation expenses,"*[9] although VPA has seen fit to pay them up to the 'maximum limit' under the RER Policy. Such a submission is not consistent with the communications to Mr Amey which explicitly reference the RER Policy as the reference for managing reimbursement of relocation expenses and determining what are 'reasonable expenses' under clause 19.7 of the Agreement.[10]

**[27]** The RER Policy expressly provides detail and guidance on the application of clause 19.7 of the Agreement. It applies in the same circumstances as the Agreement: where the relocation arises from promotion or transfer as a result of an advertised vacancy. It makes no distinction or reference of any kind to any other transfer and does not distinguish or exclude transfers at level in the manner now sought by VFA. By providing a cap on relocation expenses, the VFA in essence, is attempting to define or codify the meaning of '*reasonable expenses'* in clause 19.7 of the Agreement.

**[28]** In my view, the VFA considered that the RER Policy applied to internal transfers at level but believed that it was able to set a maximum cap on the relocation expenses that could be claimed.

**Are the costs claimed by Mr Amey and Mr Steel 'reasonable' relocation costs?**

**[29]** The second question is whether the costs claimed by Mr Amey and Mr Steel are 'reasonable' relocation costs in circumstances where the VFA Recruitment Policy attempts to provide for a maximum reimbursement amount.

**[30]** As noted above, the VFA has sought to define 'reasonable' by an upper limit on the relocation costs that may be claimed. However, it is not open to the VFA to simply determine what it considers reasonable. It is a question of what the Agreement provides and is answered by an objective assessment, considering all the relevant circumstances.

**[31]** The Macquarie Dictionary defines 'reasonable' as:

> *adjective*
> **1.** endowed with reason.
> **2.** agreeable to reason or sound judgement: *a reasonable choice.*
> **3.** not exceeding the limit prescribed by reason; not excessive: *reasonable terms.*
> **4.** moderate, or moderate in price: *the coat was reasonable but not cheap.*

**[32]** I am satisfied that the nature of the expenses claimed by Mr Amey and Mr Steel are appropriately described as reasonable within the ordinary meaning of the word. They are expenses necessarily incurred in the sale and purchase of property, and the largest expense, stamp duty, involves no discretionary element and is unavoidable. Such expenses are '*endowed with reason',* and do not exceed the limit prescribed by reason.

**[33]** I note that the Agreement has been replaced by the Victorian Public Service Enterprise Agreement 2024. A new provision has been added to the equivalent clause to 19.7(a) in the Agreement that "*The types of expenses agreed to be reimbursed are to be agreed in-principle between the Employer and Employee prior to the relocation of the usual place or places of work.*" (clause 21.7(a)).[11] The inclusion of this provision would likely avoid the current dispute, introducing a requirement for agreement in advance of the relocation.

**[34]** I am satisfied in relation to Mr Steel that the full amount of the relocation expenses claimed are reasonable relocation expenses, which he is entitled to be reimbursed for.

**[35]** In relation to Mr Amey, the situation is different. In my view, in assessing the reasonableness of the costs claimed, it is relevant that before accepting the transfer he was unequivocally told by the CEO that any costs above the cap in the RER Policy would not be approved, and that the CEO was only prepared to approve the transfer on that basis. As noted in paragraph 9, the CEO said "*if you still wish to proceed with your expression of interest to relocate to Cowes I will leave it to Paul Shea to discuss a suitable start date*." In light of this clear advice, Mr Amey knowingly chose to proceed with the transfer. There is no evidence that he took any steps to dispute the position, such as by bringing a dispute about the legitimacy of the CEO's position. In those circumstances, the expenses beyond the cap in the RER Policy are not reasonable relocation expenses.

**Conclusion**

**[36]** For the reasons set out above, the answer to the questions for determination are:

A. Do Ben Amey's relocation from Mornington to Cowes Fisheries Station and Dan Steel's relocation from Snobs Creek to Wodonga Fisheries Station amount to relocations arising from "promotion or transfer as a result of an advertised vacancy" within the meaning of 19.7(a) of the Victorian Public Service Agreement 2020?

Answer: Yes

B. If "yes", are Ben Amey's and Dan Steel's relocation expenses "reasonable expenses" as referred to in clause 19.7(a) and (b) of the Victorian Public Service Agreement 2020 including in circumstances where:

iii. these expenses exceed the maximum allowable amounts specified in the Victorian Fisheries Authority Relocation Expense Reimbursement Policy; and

iv. prior approval from the VFA CEO was not obtained before incurring those expense.

Answer: Yes, in respect of Mr Steel. No, in respect of Mr Amey.


DEPUTY PRESIDENT

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[1] Applicant's Outline of Submissions at [32].

[2] Witness Statement of Benjamin Amey, Attachment email 23 May 2022.

[3] Applicant's Outline of Submissions at [31].

[4] [2017] FWCFB 3005 at [114].

[5] Respondent's Outline of Submissions at [7].

[6] *AMWU v Berri Pty Ltd* [2017] FWCFB 3005.

[7] Witness Statement of Daniel Steel, Attached Internal Transfer at Level Guideline.

[8] Witness Statement of Daniel Steel, Attached Relocation Expense Reimbursement Policy.

[9] Respondent's Outline of Submissions at [17].

[10] Witness Statement of Benjamin Stewart Amey, Attachment email dated 23 May 2022.

[11] [2024] FWCA 2944, AE525755.