DEFENCE FORCE REMUNERATION TRIBUNAL

MATTER 2 OF 2011

RAAF GROUND SUPPORT EQUIPMENT TECHNICIANS AND RETROSPECTIVITY

REASONS FOR DECISION

The Tribunal has approved the application for the introduction of a proposed new pay group for the Ground Support Equipment Technician Supervisor (GSETCH SPVR) category.

On 28 October 2010, the Tribunal approved the application, which was agreed between the Parties and supported by the Defence Force Welfare Association, following inspections at RAAF Williamtown on 1 September 2010 and comprehensive written submissions provided by the Parties.

In approving the application the Tribunal sought further written submissions in respect to the operative date.

The issue to be determined by the Tribunal is the operative date of effect for the GSETECH SPVR category placement which we now address.

Background

In a Statement issued on 20 October 2010, the Tribunal said:

> *"On 1 September 2010 the Tribunal conducted an inspection of Air Force Ground Support Equipment Technicians (GSETECH) at RAAF Williamtown in relation to a pay group placement anomaly for this employment category.*
>
> *We are satisfied that an anomaly has been identified and this has been supported by the submissions and presentations of the Parties. Further, we are satisfied that the Pay Group placement proposed maintains relativities and is appropriate and consistent with previous placements.*
>
> *The Commonwealth submitted that as the placement for GSETECH is the resolution of an anomaly the new Pay Group should be implemented to take effect from the date of the establishment of the Graded Other Ranks Pay Structure (GORPS) being 4 September 2008.*
>
> *The ADF submitted that the date of effect for the Air Force GSETECH placements should be on and from 28 October 2010.*
>
> *The Tribunal notes the proposal of the Commonwealth in respect to the effective date and seeks further information and submissions from the Parties in regarding the date of effect for the GSETECH category. Those submissions should consider precedent, flow on and any special circumstances surrounding this particular pay group anomaly and whether there are similar circumstances likely to arise in the future and if so, how they will be addressed."*

The Parties were directed to provide written submissions in respect to the operative date.

The ADF submitted that the issue which *"gave rise to the proceeding"* in respect to the GSETECH category *"had been identified by GSE people who became GSETECH Supervisors back at the time of GORPS."*

The claim by GSETECHs had been identified as an 'anomaly' by the Parties and the appropriate operative date had been raised at the time of the inspection on 1 September 2010.

Retrospectivity is not a feature of category classification in the ADF, likewise the identification of an anomaly is rare, so the issues addressed in this decision have not been considered by the Tribunal previously.

The Parties submitted that when determining the operative date for an anomaly there needs to be exceptional or special circumstances existing before any consideration of retrospectivity could be contemplated.

The ADF submitted that there were no exceptional or special circumstances applicable to this application and therefore the suggested date of the first pay period on or after 28 October 2010 was the appropriate date.

It was noted by the ADF that the GSETECHs had indicated at the time of the inspections that they had raised with the Air Force Industrial Cell and with the Category Sponsor their concerns about their pay group placement shortly after the 2008 GORPS placements for the GSE workforce became known.

The Commonwealth had submitted that as the claim by the GSETECHs was the resolution of an anomaly the effective operative date should reflect the date of establishment of GORPS being 4 September 2008. The ADF opposed that submission arguing that the scope and nature of the 2008 GORPS matter and the possible unintended consequences would set a precedent for other transition cases. [Exhibit ADF1, para 9]

What is an anomaly?

In 1974 the then Australian Conciliation and Arbitration Commission (AIRC), now Fair Work Australia (FWA) determined a set of wage fixing principles which included an Anomaly or Inequity Principle which stated:

> *"(a) Anomalies:*
>
> *(i) In the resolution of anomalies, the overriding concept is that the Commission must be satisfied that any claim under this principle will not be a vehicle for general improvements in pay and conditions and that the circumstances warranting the improvement are of a special and isolated nature.*
> *(ii) Decisions which are inconsistent with the principles of the Commission applicable at the relevant time should not be followed.*
> *(iii) The doctrine of comparative wage justice and maintenance of relativities should not be relied upon to establish an anomaly because there is nothing rare or special in such situations and because to*

resort to these concepts would destroy the overriding concept of this principle.

(b) Inequities:

(1) The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason, shall be processed through the Anomalies Conference and not otherwise, and shall be subject to the following conditions:

(i) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.

(ii) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay.

(iii) In addition to similarity of work, there exists some other significant factor which makes the situation inequitable. An historical or geographical nexus between similar classes of work may not of itself be such a factor.

(iv) The rate of pay fixed for the class or classes of work being compared with the work in issue is a reasonable and proper rate of pay for the work and is not vitiated by any reason such as an increase obtained for the reasons inconsistent with the principles of the Commission applicable at the relevant time.

(v) Rates of pay in minimum rates awards are not to be compared with those in paid rates awards.

(2) In dealing with inequities, the following overriding considerations shall apply:

(i) The pay increase sought must be justified on the merits.

(ii) There must be no likelihood of flow-on.

(iii) The economic cost must be negligible.

(iv) The increase must be a once only matter.

(3) Procedure:

Any claim made on the grounds of this principle shall be progressed as a special case."

Section 58.K of the *Defence Act 1903* provides:

> *"The Tribunal shall, in making a determination, have regard to:*
>
> *(a) any decision of, or principles established by, FWA that is or are relevant to the making of the determination; or*
>
> *(b) if FWA has not yet made any such decision or established any such principles, any decision of, or principles established by, the Commission that is or are relevant to the making of the determination.*"

The Anomaly or Inequity principle was adopted by the DFRT by decision in Matter 1 of 1991. The AIRC removed the Anomaly or Inequity Principle in its National Wage Case Decision of 1991 (PrintJ7400). This Tribunal adopted the principles as promulgated by the AIRC in its 1991 decision and also removed the Anomaly or Inequity Principle.

Accordingly there no longer exists a principle dealing with anomalies or inequities, therefore any reference to an anomaly or inequity must be considered on its own particular circumstances.

In fact there are no longer any wage fixing principles in place or relied upon by FWA.

The ADF submissions in GORPS (Matter 3 of 2008) said:

> *"Central to the ADF approach to the present reform exercise is the identification and treatment of two distinct groups of the other rank population, as follows:*
>
> *a. The 'Simple Transition' group. That is movement of this group from the 16-group structure to the proposed 10-grade structure relies on the acceptance of the proposed structure, and the proposed ADF methodology for movement of the category from one structure to the other.*
> *b. The 'value added' group. That is placement within the structure goes beyond the 'simple transition' methodology and relies on additional factors to influence a more beneficial placement."*

In this matter, it is the simple transition method which is relevant to the GSETECH category as there is no reliance on 'additional factors to influence a more beneficial placement'.

The ADF submissions in GORPS (Matter 3 of 2008) further noted that:

> *"Immediately following this 'simple transition' process utilising the Transition Formula, the ADF Working Group considered which categories then required additional adjustment. These categories were placed in the new structure (within the Family construct) and a process of tri-Service validation then occurred which:*
> *a. Examined the proposed placements and validated their positions according to the reasons for their movement (work value, internal relativity and so forth); and*
> *b. Considered the impact of the changes in terms of internal relativity both within Families and across the totality of the structure, having regard to like employment groups and in terms of relativity more generally."*

In Matter 3 of 2008 the '*simple transition'* employment categories were defined *"as those ADF employment categories whose placement onto the new structure results only from the strict application of the transition formula, with no other pay grade adjustment at any part of their placement due to a work value change or for any other reason."* [Exhibit ADF2, page 16, para 3.1]

The ADF in discussing the history of the category submitted:

> *"We identify in the 2010 case what our Submissions were……. we look at GORPS more generally, the 2008 Proceeding, and we identify in that Submission that in the 2008 Proceeding, in relation to the GSE Category, we were establishing a Managerial Skill Grade for the Tech Trade personnel and we were addressing a disparity between the Tech Managers and the Army equivalent skill grades which had received benefits under the RAEME trades case of 2006. So, the RAEME case was out in front, the GSE Category we looked at in 2008 and we sought to get equivalency there or response to the RAEME case. That was achieved in 2008 and, of course, you will note there was no*

> *retrospectivity given to people in 2008. We got them equality but it was a recognition that they were looked at in 2008 whereas the RAEME people had been looked at in 2006. That was the way of the world, that's the way these cases developed over the years. Cases come before the Tribunal. Category X gets looked at, Category Y gets looked at two years later. As a matter of course you don't say, "Because we think that these people have now been recognised as having the relevant and equivalent Skill Grades as Category X that we want retrospectivity". The normal response from Mr O'Neill [Commonwealth Advocate] would be to hold up the parameters and say, "That's not the way the world works", and that's what happened in 2008."* [Transcript 24 February 2011, Matter 2 of 2011, page 4 line 36 onwards]

We agree with that submission and our determination in this matter will not change the long term practice adopted in respect to operative date for category reviews.

The matter we are considering here is in respect to an operative date related to the *transition* of categories into GORPS, not a category review.

Both the ADF and Commonwealth relied on *'exceptional or special circumstances'* as the criteria to be considered.

What are exceptional or special circumstances?

The Parties submitted, and the Tribunal agrees, that there is no precise definition for *exceptional* or *special circumstances* and that each case should be considered on its merits and its own particular circumstances. Accordingly we are of the view that any consideration of the issue of restrospectivity should have regard to the concept of 'exceptional or special circumstances'.

In this case we are satisfied that the claim for an operative date being consistent with the date of establishment of GORPS, is fair and reasonable and can be justified.

We are of the view that the circumstances surrounding the claim for retrospectivity for the GSETECH category are exceptional, special and unique.

The matters we have considered in coming to this conclusion are:

The agreement of the Parties, supported by the DFWA, for the new pay group placement; the submissions which reveal that the GSETECHs raised the issue of category placement with their Category Sponsor at the time of the implementation of GORPS. Any delay in processing the claim was not due to any action, or inaction, on the part of the GSETECHs but was due to the lengthy process required to progress the issue through the system. We make no criticism of the time or process and understand very well the requirements of the ADF to pursue these sorts of claims, however in this case we think that in fairness to the GSETECHs we should break with the normal practice and award what is a retrospective application to the claim.

The GSETECHs are performing the same work today as they were performing when the transition to GORPS was processed, there is no question of any consideration of *'additional factors'* such as work value etc which would have required their transition to be considered under the *'value added'* method.

Accordingly the operative date for the classification placement for GSETECHs will be the first pay period on or after 4 September 2008.

Appearances

R. Kenzie QC, Defence Force Advocate, with Ms S. Robertson for the Australian Defence Force.

M. O'Neill, Commonwealth Advocate, with Mr J. O'Reilly for the Commonwealth.

Date and Place of Hearings:

24 February 2011, Canberra.

Written submissions.