The NT Police Association Inc v The Police Arbitral Tribunal & The Commissioner of Police [2000] NTSC 32

PARTIES:	THE NORTHERN TERRITORY POLICE ASSOCIATION INCORPORATED v THE POLICE ARBITRAL TRIBUNAL and THE COMMISSIONER OF POLICE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	180 of 1999 (9925801)
DELIVERED:	2 June 2000
HEARING DATES:	6, 7 March 2000
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Plaintiff:	C McDonald QC & M Grove
1st Defendant:	P Ward
2nd Defendant:	R Perry

Solicitors:

Plaintiff:	Ward Keller
1st Defendant:	Northern Territory Attorney-General's Department
2nd Defendant:	Clayton Utz

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Northern Territory Police Association Inc v The Police Arbitral Tribunal and The Commissioner of Police [2000] NTSC 32
No. 180/99

BETWEEN:

THE NORTHERN TERRITORY POLICE ASSOCIATION INC
Plaintiff

AND:

THE POLICE ARBITRAL TRIBUNAL
First Defendant

and:

THE COMMISSIONER OF POLICE
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 2 June 2000)

[1] This is an application pursuant to an originating motion dated 12 November 1999.

[2] This originating motion which was amended on 6 March 2000 and again on 7 March 2000, seeks relief by way of certiorari seeking to have quashed a decision of the first defendant, the Police Arbitral Tribunal (hereinafter referred to as "the Tribunal") dated 14 September 1999.

[3] At the outset of the proceedings before this Court, Mr Ward on behalf of the first defendant, advised that the first defendant submitted to the jurisdiction and did not seek to be heard save as to costs and sought leave to withdraw. Leave to withdraw was granted.

[4] Proceedings were brought in the Supreme Court in action number 47 of 1999 by way of originating motion dated 16 April 1999 seeking declaratory and other relief as to the proper interpretation of two determinations of the Tribunal.

[5] On 22 April 1999, the matter came before Riley J. The parties agreed that those proceedings should be adjourned and the task of interpretation undertaken by the Tribunal. The Commissioner of Police sought an interpretation from the Tribunal in an application made by letter dated 4 May 1999 which omitting formal parts states as follows (AB 1):

> "I refer to my application of 31 March 1999 to vary Determination No. 2 of 1982 and No. T11 of 1991, now listed for hearing on 17 May 1999.
>
> I have reconsidered the proposed clauses sought in my application and wish to amend my application by withdrawing the original Attachment A enclosed with my application. I now enclose an amended Attachment A which contains the changes I now seek to the relevant clauses.
>
> There is currently a dispute between my Department and the Police Association as to the interpretation of the existing clauses following changes to public housing rents made by the Department of Housing. As a result I seek an interpretation of the existing clauses under section 46 of the Police Administration Act. I ask that the application for interpretation be joined with the application to vary the determination and heard on 17 May 1999. You will note from section 46 that an interpretation can only be made in respect of an

> ‘existing’ determination. Therefore it is essential that an interpretation be made before a new determination.”

[6] The letter refers to s 46 of the *Police Administration Act 1978* (NT) which I have taken to be a reference to s 44 of the *Police Administration Act* (see Annexure “C” to the affidavit of Norman Brooks sworn 6 May 1999 AB301). Section 44 *Police Administration Act* provides as follows:

> “(1) Notwithstanding anything contained in this Act, the Tribunal may, on its own motion or on the submission of any person or organization interested in any determination, give an interpretation of any term of an existing determination, and the provisions of this Act shall apply to any such interpretation in like manner as they apply to a determination.
>
> (2) Before giving any such interpretation on its own motion, the Tribunal shall hear argument on behalf of any person or organization who or which is interested in the determination and is desirous of being heard.”

[7] The two clauses of the Determination which are set out hereunder are materially the same. The first applies to members up to and including the rank of Senior Sergeant. The second clause refers to commissioned officers.

> “**Clause 33(2) of Determination T11 of 1991**
>
> Members who provide their own accommodation shall be entitled to an allowance in respect of that accommodation at a rate equivalent to 75% of the weekly rental charged by the Department of Lands and Housing for a 3 bedroom house in the Darwin area, as varied from time to time.
>
> **Clause 22(2) of Determination 2 of 1982**
>
> An Officer who provides his own accommodation shall be entitled to an allowance in respect of that accommodation at a rate equivalent to 75% of the weekly rental charged by the Department of Lands and Housing for a 3 bedroomed house in the Darwin area, as varied from time to time.”

[8] There were two different interpretations put before the Tribunal. The plaintiff Association submitted to the Tribunal that the proper interpretation of the Clause was as follows:

> "The words 'weekly rental' where appearing in clause 33(2) of Determination T11 of 1991 and Clause 22(2) of Determination T2 of 1992 means the average weekly rental inclusive of amenity charges charged by the Department of Housing and Local Government for three bedroom public housing in Darwin."

[9] The essential word the plaintiff Association sought to be inserted to give meaning to the two relevant clauses was the word "public". The interpretation sought by the Commissioner of Police was:

> "The Applicant seeks an interpretation under s 44 of the *Police Administration Act* to the effect that the weekly rate referred to in Clause 33(2) of Determination T11 of 1991 is the weekly rent charged by the Department of Housing to the Department of Police Fire and Emergency Services for a 3 bedroom house in the Darwin area."

[10] The words the Commissioner of Police sought to have inserted to give meaning to the two relevant clauses was "to the Department of Police Fire and Emergency Services."

[11] Order 56 of the Supreme Court Rules deals with Judicial Review. Rule 56.01(1) states as follows:

> "Subject to any Act, the jurisdiction of the Court to grant relief or a remedy in the nature of *certiorari,* mandamus, prohibition or *quo warranto* shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with this Chapter."

[12] In its Amended Originating Motion dated 6 March 2000 with further amendments filed 7 March 2000, the plaintiff sought a remedy in the nature of certiorari seeking to have the decision called up and quashed on the grounds that:

> "8. The Plaintiff seeks a remedy in the nature of certoirari seeking to have the decision called up and quashed on the grounds that:
>
> (a) the decision failed to take into account a relevant consideration namely, the history, purpose and context of the determinations;
>
> (b) the decision failed to take into account a relevant consideration namely, the evidence of the former negotiators for both the Plaintiff and the Second Defendant, Mr McAdie and Mr Wyatt respectively, in the interpretation of the determinations;
>
> (c) the decision was unreasonable;
>
> (d) the decision denied the Plaintiff procedural fairness in that the course of reasoning was illogical and/or inconsistent;
>
> (e) the decision at page 16 thereof involved a jurisdictional error in that there was an absence or want of jurisdiction in the First Defendant to make the statement and give the directions the First Defendant purported to make where it said:
>
> > 'There is a need for the provisions of the Determinations to be updated and consolidated consistent with the relevant principles of the Award Simplification process currently being undertaken by the Australian Industrial Relations Commission (Print P7500). The parties are directed to confer and produce a current consolidated Determination to the Tribunal for its consideration by 29 November 1999. If the parties cannot agree on a consolidated Determination they are to submit a document comparing each clause and their respective positions by the same date.'

(f) The decision took into account irrelevant considerations being conduct after the date of the Determinations and more specifically referred to in the affidavit of Janet Mary Totten.

Particulars.

Reference is made to pages 10 and 11 of the decision.

(g) The decision reached a mistaken conclusion in that the First Defendant found the plain words or phrases in the relevant clauses in question were clear and unambiguous. Refer page 546 AB.

(h) The decision reached that the words 'weekly rental charged/set by the Department' are clear on their face at p 548 AB, (p 15.7 Decision) and then for the first defendant to proceed to read words into the Determinations as sought by the Commissioner without explanation was unreasonable.

(i) The first defendant in finding that the phrases 'weekly rental charged/set by the Department' were clear on their face and in selectively purporting to apply the test in *Mills v Meeking* (1990) 169 CLR 214, 243 – 244 formulated by McHugh J for reading words into a provision came to a decision which was unreasonable.

(j) The decision that the evidence of history given by Mr McAdie was merely reflective of actual intentions and expectations was unreasonable. Refer p 547.3 AB, (p 14.3 Decision).

(k) The Tribunal did not, in the result, perform the task of interpretation at all and failed to exercise its jurisdiction in accordance with law."

[13] Before the Tribunal at the hearing on 17 May 1999, the Commissioner of Police who was the applicant, put forward the orders as sought by the applicant (Exhibit P1), an affidavit of Norman Brooks sworn 6 May 1999 (Exhibit P2), an affidavit of Jennifer De Ruyter sworn 30 April 1999 (Exhibit P3), affidavit of Janet Totten sworn 4 May 1999 (Exhibit P4).

[14] The Association called evidence from three witnesses, Mr Bruce Wyatt a former Assistant Commissioner of Police, Mr Mark McAdie a Commander in the Northern Territory Police Force and Mr Peter Thomas a Senior Sergeant with the NT Police Force and President of the Northern Territory Police Association.

[15] The ultimate order sought on behalf of the plaintiff as at the date of the hearing of the application is as follows:

1. The decision of the first defendant dated 14 September 1999 be quashed and the direction given on 14 September 1999 as set out on AB 549 be quashed.

2. The matter is remitted to the first defendant for reconsideration in light of the reasons of the Court.

3. The second defendant pay the plaintiff's costs to be taxed or agreed.

[16] Counsel for the plaintiff submitted that the grounds set out in Originating Motion (a) to (k) inclusive, are all grounds that go to jurisdictional error The grounds set out in 8(c), (d), (e), (g), (h) and (i) also go to an error on the face of the record. Before addressing these grounds in detail Mr McDonald QC made submissions relevant to the interpretation of Industrial Awards.

[17] In his reasons for decision dated 14 September 1999, the Commissioner stated at AB 536.3:

> "… The Tribunal agrees with the applicant's submissions that its Determinations are analogous to awards of the Australian Industrial Relations Commission and like Commissions in that they govern the terms and conditions of employment of particular persons."

[18] The task for the Commissioner was one of interpretation. Counsel for the plaintiff submitted that the starting point in relation to the task of interpreting is to be found in the dissenting judgment of Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315.3:

> "….. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise. ….."

[19] In *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 519.7, Burchell J with whom Drummond J agreed at 522, said after quoting the extract of the judgment of Mason J as set out above:

> "This is a broad proposition, applicable to problems of construction generally, although it was put forward in the context of statutory interpretation. …."

[20] In *NV Philips Gloeilampenfabrieken v Mirabella International Pty Ltd* (1993) 44 FCR 239 Burchett J at 286.7:

> "Although, in patent law, the rules of construction of documents are applied to a distinctive category of document, with very special characteristics, which may influence the result of their application, the rules of construction themselves do not change because they are applied to specifications or claims. Those rules relate to the use of

> language, and to the laws of thought and its expression, which have the same general application in patent law as in other areas of the law. While suggestions have been made that an unambiguous statement in a part of a document, such as a claim, may preclude resort to a wider context, the modern view is that whether a statement *is* unambiguous should only be decided after the context has been taken into account. ….."

[21] Mr McDonald QC submits that from the cases there should not be a narrow or pedantic approach taken in the interpretation of Industrial Awards. The task is to find out what the framers of the award meant. In *Kucks v CSR Limited* (1996) 66 IR 182 Madgwick J at 184:

> "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. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.
>
> But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."

[22] I agree with the submission made by Mr McDonald QC that in the interpretation of Industrial Awards there should not be a narrow or pedantic

approach. I apply the principles expressed in the authorities referred to me and set out above. I accept that the task of the Tribunal was to search "for the meaning intended by the framers of the document".

Summary of submissions on behalf of the plaintiff

[23] I now summarise the arguments advanced by Mr McDonald QC on behalf of the plaintiff relating to the grounds set out in the (Further Amended) Originating Motion in paragraphs 8(a) to (k) inclusive.

[24] Mr McDonald QC submits the Tribunal refused to read in the word "public" by reference to the law on interpretation of awards. However, the Tribunal was inconsistent in its application of this principle by reading into the determination the words "to the Department of Police Fire and Emergency Services" as suggested by the Commissioner of Police.

[25] On behalf of the plaintiff it was submitted that the context of expression used in the determination is important – in particular "the weekly rental charged by the department".

[26] In *Short v FW Hercus* (supra) Burchett J at 518:

> "The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that give rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. 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. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read."

[27] It is the submission for the plaintiff that the Tribunal ends up with a construction that was clearly unintended, having regard to those legitimate aids to construction and extrinsic materials which are valid in the interpretation of determinations.

[28] The plaintiff asserts that at the time the instrument was made it was the subject of a number of open discussions and negotiations. The time when the determination was made by Commissioner Connell is the time when the context of the making of the determination should be looked at bearing in mind that the aim and purpose is to find out what the framers meant. Counsel for the plaintiff submits that the evidence of Mr Wyatt, who was the Assistant Commissioner who represented the Commissioner and the evidence of Police Association representative Commander McAdie was very relevant, it was not as the Tribunal described a mere expression of intentions or expectations, it was much more than that. It provided those surrounding circumstances, the background objective facts as to what the framers intended to mean. Their intention as to meaning accords with the insertion of the word "public" in the determination. The history of the matter is relevant. In *Short v FW Hercus* (supra) at 518 Burchett J:

> "….. Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form, only a kind of wilful judicial blindness could lead the court to deny itself the light of that history, and to prefer to peer unaided at some obscurity in the language. "Sometimes", McHugh J said in *Saraswati v The Queen* (1991) 172 CLR 1 at 21, the purpose of legislation 'can be discerned only by reference to the history of the legislation and the state of the law when it was enacted'. Awards must be in the same position."

[29] In *Saraswati v The Queen* (1991) 172 CLR 1 McHugh J at 21:

> "….. Sometimes the purpose of the legislation is expressly stated; sometimes it can be discerned only by inference after an examination of the legislation as a whole; and sometimes it can be discerned only by reference to the history of the legislation and the state of the law when it was enacted. ….."

[30] It is the submission made on behalf of the plaintiff that even if the language of the award was clear the Tribunal should still look at the full context and only then can any nuances of the language be perceived (see *Short v FW Hercus* (supra) at 518 – 519 and *Australian Municipal, Administrative Clerical and Services Union v Treasurer of the Commonwealth* (1998) 82 FCR 175 at 177 – 178).

[31] The plaintiff's submission is that the Tribunal did not take into account the full context of the matter, including the history and surrounding circumstances.

[32] In *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 Mason J at 352:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the

language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parole evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.

Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."

[33] It is the plaintiff's submission that the context of surrounding circumstances provided by Mr Wyatt, Commander McAdie and Mr Thomas went beyond just a reflection of actual intentions or expectations. Their evidence when read with the proceedings before Commissioner Connell gave objective background facts which were known to both of the parties in relation to the framers of these determinations, and that the Tribunal ignored this or failed

to take it into account as a relevant consideration. None of the three witnesses called for the plaintiff were cross examined before the Tribunal.

[34] In this case there were two interpretations put to the Tribunal which on the plaintiff's argument is an indication that the passage is susceptible of more than one meaning.

[35] It is the plaintiff's submission that when you look at the evidence of Mr Wyatt, Commander McAdie and Mr Thomas, evidence combined with the documents that were tendered, it is clear what was meant and that is in accordance with the interpretation submitted by the Association.

[36] It is the plaintiff's submission that the context includes the object and purpose of the award as can be deduced from the history which gave rise to it as appears from the objective facts that led up to the determination in June 1991. The conduct of the parties after the entry into industrial award is not capable of assisting in the interpretation of determination (*Seamen's Union of Australia v Adelaide Steamship Co* (1976) 46 FLR 444, *Short v FW Hercus* (supra) at 517.6 and *Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth* (supra) Marshall J at 178 – 179).

[37] Counsel for the plaintiff submitted that the Tribunal did take into account the conduct of the parties after the making of the award and this was impermissible. In particular, counsel referred to the decision of the Tribunal AB 544 where the Tribunal refers to the evidence on affidavit of Ms Janet

Totten given on behalf of the Commissioner of Police. This is set out in AB 543.6 to 544.4 and includes reference to conduct of the parties since the agreement. The Tribunal in reviewing Ms Totten's evidence states:

> "… the Department decided to significantly increase rents to ineligible Tenants and provide other housing Incentives aimed at facilitating home ownership and encouraging them to vacate or purchase Department housing or rent in the private market;"

[38] The plaintiff submits the Tribunal should not have taken into account the material conduct of the parties subsequent to the agreement as this was impermissible. This submission is relevant to Ground 8(f).

[39] Counsel for the plaintiff then turned to the grounds for judicial review and acknowledged the limits of judicial review. The submission is that this is a case where the Tribunal was required to interpret near identical words in two Determinations concerning housing entitlements for many police officers. It is submitted that the errors made by the Tribunal in the interpretative task it undertook discloses jurisdictional error of such a serious kind as to be judicially reviewable.

[40] Counsel for the plaintiff maintains that the first error made by the Tribunal is that it failed to take into account the history of the clauses and certain background objective facts which were relevant to interpretation of the clauses. This is relevant to Ground 8(a) and 8(b) in the Originating Motion. The Tribunal acknowledged that it should look at the surrounding

circumstances including the history. In the Reasons for Decision the Tribunal acknowledged at AB 538.7:

> "It is therefore reasonable and necessary to examine in the first instance not only the words used in the clauses, but also the surrounding context, including their history. That history was provided in the Association's evidence by Messrs Wyatt and McAdie which shall be considered later under the heading 'The Association's interpretation' and 'Re parties intentions and expectations'".

[41] This history was provided in the Association's evidence by Mr Wyatt and Commander McAdie. It is the plaintiff's submission that the Tribunal wrongly read that history down and ascribed to the history and certain background facts the status of mere expectations and intentions. In the Reason for Decision at AB 547.3 the Tribunal stated:

> "The Tribunal has determined that, in an appropriate interpretation of Clauses 33(2) and 22(2), the Association's evidence of prior open discussions and negotiations in 1990/91, with respect to statements about a new housing package being reflective of actual intentions and expectations, are not afforded significant weight. The terms of the contract intended or hoped to be made were revealed in the course of that evidence. Their admissibility, however, in an action for rectification, subject to the provisions of the Act and any consent agreement, should be noted."

[42] The plaintiff's submission is that the evidence of Mr Wyatt and Commander McAdie reflected much more than expectations and intentions and their evidence was not given sufficient weight. The failure to take into account the purpose context and history of the determinations is a reviewable error.

[43] In ascertaining the extent of the jurisdictional error, counsel for the plaintiff referred the Court to the proceedings before Commissioner Connell on

18 June 1991 set out in AB 410 to 420. There is no reference in these proceedings to the constructional mechanism that the Commissioner of Police sought to have the Tribunal accept. There is no reference to what the Commissioner of Police has been charged by the Department of Housing.

[44] However, there is reference to certain objective background facts and history that was also the subject of evidence by Mr Wyatt and Commander McAdie. This was relevant context not taken into account by the Tribunal. The Tribunal held that no interpretative assistance could be gained from Commissioner Connell's decision (AB 540.6).

[45] This Court was referred to the evidence of Mr Moseley to Commissioner Connell (AB 411 – 412):

> "The proposed amendment will vary the allowance to be 75 per cent of the Housing Commission rental for a three bedroom residence in Darwin. Current rental for those premises is $113 per week and 75 per cent equates to $85 per week. The rationale of setting the allowance to reflect Housing Commission rent is that it is the only stable and reasonable method of reflecting the true value of reimbursement and is not subject to wild market fluctuations, but protects both the department and our members.
>
> We believe that the adjustment reflects the relevant change in expenses in providing one's own accommodation. The figure achieved is not a direct mathematical computation but rather a position negotiated between the parties and has government agreement. This method was necessary to allow for, in the current economic climate, the government to cost the proposal with a view to the adjustment being in the medium term cost neutral and in the long term of cost benefit to government.
>
> At present approximately 200 of our members provide their own accommodation. This figure was stagnant for some years and we believe this is due to the unattractive – unattractiveness in taking the allowance and provide one's own accommodation. Recently the

figure has increased but we believe this has been due to the fact that negotiations were being conducted and members purchased their own residence in anticipation of an increase.

This proposal becomes cost neutral when a further 112 persons provide their own accommodation. A survey was conducted by the department and it is probable that this figure is reasonably achievable in the medium term. In line with award restructuring and pressure from the government to minimise the cost of the allowance, and as a sign of good faith by the Northern Territory Police Association, the clauses which have allowed for reimbursement of water, sewerage and garbage rates are removed and subsumed into the housing allowance.

This has significant administrative savings to the department. …"

[46] At AB 413 - 414 is the evidence of Mr Taylor before Commissioner Connell:

These charges at that time were valued at $90. During negotiations which occurred in 1980 between the Public Service Commissioner, the police commissioner and the Northern Territory Police Association, the formula which was seen as unduly complex was replaced by an allowance calculated at the rate of 75 per cent of the Housing Commission rental cost for a three bedroom house at the standard that was provided for public servants at that time.

This was chosen as a benchmark because of the difficulty in assessing the other variable factors from one centre to another and the fact that the allowance was paid in some instances not for home ownership but for providing your own accommodation, ie rented accommodation. In a case such as this it became a partial rent reimbursement."

and Mr Miller who represented the Commissioner at AB 417:

"It is not my intention to cover all of the points raised by the associations, however I would like to reinforce some of the aspects put forward and place some additional information on record in support of the applications. It would appear that historically there was a relativity established with Northern Territory Housing Commission rentals in 1980 and the government has accepted this.

> Other benchmarks such as CPI increases or wage movements, etcetera, are not seen as being relevant for those officers who choose to provide their own accommodation in lieu of government provided accommodation and there is the need to ensure that the level of reimbursement is both adequate and equitable across the police force."

and at AB 418:

> "It is concede[d] that in the short term there will be an additional cost to the department. However, it only requires an additional 112 officers to provide their own accommodation to yield a cost neutral scenario. Since 45 officers have moved to purchase their own accommodation in the last 12 months, many in anticipation of an increase in the rate of reimbursement, it is not unreasonable to suggest that the 112 needed to make the transaction cost neutral is an achievable prospect, although it is impossible to predict this outcome with certainty or how long it would take."

[47] Counsel for the plaintiff argues that the submissions of Mr Miller are important because at that stage there was only one rate and that was a public rate. If it was intended and accepted by government that it could lose control of the rate reimbursement then this is inconsistent with the special deal or special rate being charged to the Commissioner of Police.

[48] This evidence and the submissions were not mere reflections of intent or expectation, but were truly objective background facts and history for the purpose of interpretation.

[49] Counsel for the plaintiff then submitted a document headed Objective Background Facts and History setting out the facts which were established on the evidence and providing appeal book page references. The plaintiff says these objective facts, background and history are as follows:

“	Facts
1.	There had been a static position in the amount received by married members who opted to purchase their own homes.
2.	The parties were represented by Mr Wyatt and Mr McHattie for the Commissioner and the Association was represented by Mr Moseley, Mr McAdie and Mr Thomas.
3.	Open negotiations took place between the representatives on behalf of the parties.
4.	The parties sought to develop a formula which was transparent and which provided a benchmark which precluded the need to come back before the Tribunal.
5.	The parties could not find a reliable mechanism in the private sector.
6.	The parties as a result sought a bench mark in the Housing Commission rents.
7.	The parties did not negotiate on the basis that the benchmark would be referable to the charge to the police Commissioner.
8.	The benchmark was an average arrived at of the Housing Commission rent payable by a tenant who could pay for a Housing Commission three bedroom house in Darwin.
9.	The Commissioner and the department no-longer wished to be landlords and were trying to reduce their obligations to provide public housing and housing to their employees.
10.	There was a prevailing Government policy to encourage people (including members of the police force) to buy homes in the Northern Territory.
11.	There was a Commonwealth State Housing agreement, which encouraged the States to pursue cost recovery.
12.	There was difficulty in providing free accommodation to members of the police force.
13.	Members of the police force were entitled to free accommodation as a recruitment incentive.”

[50] It is the submission on behalf of the plaintiff that at the time of the determination there were certain background facts which were known mutually to the parties and at that time the object and purpose was clear and agreed upon by both parties and that was to strike the public rate charged by the Department of Lands and Housing.

[51] Mr McDonald QC then took the Court to excerpts of the evidence given to the Tribunal by Mr Wyatt and Commander McAdie examples of which are as follows: Mr Wyatt AB 232 line 13:

> "…. I think it was clause 29, was it not, of the original determination allowed for $30 which was seen as not encouraging anybody into home ownership when the prevailing government rents of the day were over $100 and private sector rents in excess of that.
>
> But $30 would simply become totally unattractive to achieve - - -?--- Absolutely - - -
>
> --- government policy?---Out of date."

and at AB 234 line 1:

> "… Given the recognition by all of the parties to the negotiation that the $30 – the prevailing $30 was well and truly out of date and even if one were to have left aside those other matters I've just mentioned to you, it needed review in its own right."

and Commander McAdie AB 243 at line 1:

> "… Well, the allowance at that point in time was $30 a week. It was the view of the executive and indeed the membership of the Association that that allowance was not longer at a rate which made it an attractive proposition for members to give up their fundamental entitlement which was an entitlement to free housing. …"

and at AB 254 line 26:

> "… Well, firstly, we knew we – we knew that the members had a free house and that was a matter that we – as a base entitlement. That was a matter that we weren't discussing or dealing with beyond the fact that it existed. Secondly, we had an allowance that existed at the time, that was $30 a week, and that that allowance – that amount of money was not attractive to members because members were not in large numbers transferring from the free housing into the allowance. We also knew that the $30 didn't represent anything like the true costs of home ownership. And therefore it just simply wasn't an attractive allowance. We knew that we had a policy to move members from the free housing into housing, for the reasons I explained. We knew that the Government had a policy to get people to settle in the Northern Territory, and one of the means by which they measured that was the number of people who bought houses. Because that's a clear indicator of people settling here."

[52] After making submissions on all of the facts that emerged from the evidence of the witnesses called for the Association it is the plaintiff's submission that the interpretation found by the Tribunal achieved the opposite of what was intended.

[53] Counsel for the plaintiff asserts that the decision of the Tribunal to accord little weight to the background facts and history of the determination constitute a failure to take into account relevant considerations and disclosed jurisdictional error (*Craig v State of South Australia* (1995) 184 CLR 163). Accordingly, grounds 8(a) and (b) of the Originating Motion are made out.

[54] The Court was referred to the *Minister for Aboriginal Affairs & Anor v Peko Wallsend Limited & Ors* (1986) 162 CLR 24 at 39 and 40 to 41, Mason J under the heading "Failure to take into account a relevant consideration".

[55] Mr McDonald QC distinguished that case which dealt with a discretionary decision from the matter before this Court which was an exercise in interpretation under s44 of the *Police Administration Act*. However, the submission is that in seeking judicial review under Order 56 then akin to a discretionary power if the Tribunal failed to take into account matters that it was bound to take into account then the ground for judicial review is made out in accordance with the principles set out in *Craig v State of South Australia* (supra).

[56] It is the plaintiff's submission that the history and circumstances of the initial determination were matters that the Tribunal was bound to take into account if it was going to come to the current interpretation of the determinations that were before it. To devalue the evidence as to this history and context of the determination in the way the Tribunal did amounted to the same thing as failing to take it into account and is reviewable.

[57] In devaluing the evidence in the way described the plaintiff further submits the decision of the Tribunal was so unreasonable that no reasonable tribunal could have come to that view (*Minister for Aboriginal Affairs & Anor v Peko Wallsend Limited & Ors* (supra), *Chan Yee Kin v The Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 at 388).

[58] If the Tribunal had taken into account relevant matters and discounted irrelevant matters then no reasonable tribunal could have come to the

interpretation this Tribunal did, given the relative history and objective facts. Accordingly, the plaintiff submits that Ground 8(c) of the Originating Motion is made out.

[59] At AB 548.8 the Tribunal held that "the ordinary and plain meaning of the phrases "weekly rental charged/set by the Department are clear on their face and the Tribunal in an interpretation of the Determinations is not prepared to imply the word 'public' before the phrases in the Clauses under consideration." The Tribunal went on at AB 548.9 – 549:

> "*Mere inconvenience of result in itself* is not a ground for departing from the *natural and ordinary sense of the language read in its context* (Mason and Wilson JJ in *Cooper Brookes*). Here the phrases do not have a sufficient degree of ambiguity and were not used inconsistently with other provisions of the Determination in 1991. Some inconsistency has existed since Determination T1 of 1993 was certified as a Consent Agreement. Further, the phrases can be intelligibly applied to the subject matter of housing allowance with which it deals. There is no likely risk of inconvenience or injustice to Police as a result of this interpretation. There is no reduction in their housing allowance; however, the (more than $40 per week) increase which would otherwise have resulted does not occur. The applications before the Tribunal do not go to issues of merit.
>
> Even though a literal interpretation of Clauses 33(2) and 22(2) (Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129) is not in accord with some of the parties' intention or purpose, the operation of the Clauses is not "absurd", "extraordinary", "capricious", "irrational" or "obscure" (Mason and Wilson JJ in *Cooper Brookes*). There is no reasonable basis to justify the Association's alternative interpretation on a plain reading which adds to the provisions of the Clauses."

[60] The Tribunal applied the principles of interpretation encapsulated in the decision of *Mills v Meeking* (1990) 169 CLR 214 McHugh J at 243.3:

> "Moreover, once it is apparent that the literal or grammatical meaning of a provision does not conform to the legislative purpose as ascertained from the statute as a whole, the court is entitled to give effect to that purpose by addition to, omission from, or clarification of the particular provision: …"

and at 243.9 - 244:

> "However, as Lord Diplock pointed out in *Jones v. Wrotham Park Estates* 'the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it'. His Lordship said that words could only be read into a statute if three conditions were fulfilled. First, the court must know, from a consideration of the legislation read as a whole, precisely what the mischief was that it was the purpose of the legislation to remedy. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect."

[61] The complaint made by the plaintiff is that the Tribunal did not apply this test to the words the second defendant sought to have inserted into the Determination.

[62] After rejecting the plaintiff's interpretation the Tribunal proceeded to adopt the Commissioner's interpretation and to insert the words as suggested by the Commissioner without subjecting it to the same test formulated by McHugh J in *Mills v Meeking* (supra). If the Tribunal had subjected the Commissioner's suggested insertion of words to the same test then it would have failed.

[63] The plaintiff also made submissions that the Tribunal in addition to the jurisdictional errors made errors on the face of the record. It is the

plaintiff's submission that the 17 page document titled "Decision" is part of the record.

[64] *Craig v State of South Australia* (supra) deals with what is the record for the purpose of judicial review on the basis of error of law on the face of the record. The High Court deals with the "Scope of certiorari" and "Jurisdictional error" at 173 – 180 and "The face of the record" at 180 – 183.

[65] Mr McDonald QC maintains that the 16 pages of the decision form part of the record. It is Mr McDonald's submission the Reasons for Decision are incorporated in that adjudication. The Decision is not divided or separated from what may be termed the reasons and the reasons are incorporated in this particular case in the decision. It is the whole decision which is the interpretation exercise and adjudication.

[66] It is the assertion on behalf of the plaintiff that the Tribunal here has chosen to incorporate the reasons for decision into the decision and thus it forms part of the record.

[67] The plaintiff complains that the Tribunal subjected the plaintiff Association's interpretation to the *Mills & Meeking* (supra) test but did not submit the Commission's interpretation to the same analysis. This amounts to an error of law on the face of the record. The decision was unreasonable in accordance with the test that is laid down. It reached a decision that no reasonable tribunal could have come to.

[68] The plaintiff maintains that the Amended Grounds 8(g), (h) & (i) are errors on the face of the record. The Tribunal found the words "weekly rental charged/set by the department" are clear on their face. The Tribunal then proceeds to read words into the determination as sought by the Commissioner without explanation. This is also unreasonable and an error on the face of the record confined as that term is by *Craig v State of South Australia* (supra) is the plaintiff's argument.

[69] Similarly, counsel for the plaintiff states that the Tribunal's selective application of the test in *Miles v Meeking* (supra) was unreasonable and constitutes an error of law on the face of the record.

[70] Mr McDonald QC conceded that if the Tribunal had chosen to confine the decision to the actual words of the Determination as found on AB 549 and published separately the reasons for decision, then the plaintiff would not be on such strong ground.

[71] Mr McDonald QC on behalf of the plaintiff maintains that the Tribunal came to a decision which was in defiance of the evidence for both parties as to what was intended at the time of the determination reinforced by the submission before Commissioner Connell. The purpose of the determination and the object of the framers of that determination was given in evidence to the Tribunal by Mr Wyatt and Commander McAdie. Their evidence representing as it did the view of both parties to the determination should have been relied upon.

[72] Counsel for the plaintiff submitted the Tribunal took into account conduct of the parties after the determination was made and that was wrong. In doing this the Tribunal was proceeding on a wrong principle.

[73] The plaintiff was denied procedural fairness because of the illogical reasoning processes. There was no rationally probative material in the surrounding circumstances to lead to the interpretation arrived at. There were no findings made as to facts from which the interpretive construction was arrived at and nothing in the background material to indicate where it came from (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 Mason CJ at 355 - 356):

> "The question whether there is any evidence of a particular fact is a question of law: *McPhee v. S. Bennett Ltd.; Australian Gas Light Co. v. Valuer-General*. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light*; *Hope v. Bathurst City Council*. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v. Broken Hill South Ltd*. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v. Maryborough Mining Warden*.
>
> But it is said that '[t]here is no error of law simply in making a wrong finding of fact': *Waterford v. The Commonwealth*, per Brennan J. Similarly, Menzies J. observed in *Reg. v. District Court; Ex parte White*:
>
> > 'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.'

> Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

[74] Finally, counsel for the plaintiff addressed on Ground 8(e) of the Originating Motion on the basis that it is both jurisdictional error and error on the face of the record. This is in respect of the final statement by the Tribunal in its decision as set out in AB 549:

> "There is a need for the provisions of the Determinations to be updated and consolidated consistent with the relevant principles of the Award Simplification process currently being undertaken by the Australian Industrial Relations Commission (Print P7500). The parties are directed to confer and produce a current consolidated Determination to the Tribunal for its consideration by 29 November 1999. If the parties cannot agree on a consolidated Determination they are to submit a document comparing each clause and their respective positions by the same date."

[75] It is submitted this is a jurisdictional error because the *Police Administration Act* precludes such a direction. The direction is outside the scope of the procedures as to how hearings are to be conducted.

[76] The power accorded to the Tribunal is in Division 1 of Part 3 of the Act. The powers are in three main categories. The first is the power to make determinations. The second is a power to interpret determinations in s 44 and then a power to consent to agreements under s 53. There was no power in the Tribunal to issue the direction set out above. There was no power in

the *Police Administration Act* to issue a direction under the *Work Place Relations Act 1996* (Cth).

[77] Counsel for the plaintiff was aware that the direction had in fact been carried out on 7 February 2000 (Exhibit 1) the parties came before the Tribunal and agreement was reached as set out in a letter from the Police Arbitral Tribunal dated 7 February 2000 (Exhibit 1).

[78] However, the plaintiff maintains its submission that this direction was made without power and shows jurisdictional error.

[79] This concludes my summary of submissions made on behalf of the plaintiff.

[80] The following is a summary of submissions made on behalf of the second defendant.

Summary of submissions made on behalf of the second defendant

[81] The submissions made by Mr Perry on behalf of the second defendant are summarised as follows:

[82] Counsel for the second defendant referred to *Craig v State of South Australia* (supra) which represents the seminal decision in the last 10 years on the nature of certiorari and what constitutes the record for the purpose of error of law and what constitutes jurisdictional error. Mr Perry referred to the passages under the heading “Scope of certiorari” and “Jurisdictional error” on pp 175 – 176.

[83] It is Mr Perry's submission that the argument raised on behalf of the plaintiff are referable to an appeal on the merits but not to judicial review and the plaintiff is asking that this Court do that which the High Court prohibited a court from doing, that is, undertaking a general review of the order or decision in an appellate sense.

[84] Mr Perry also referred to the passages under the heading "The face of the record" on p 180 and submitted the underlying policy consideration determined by the High Court in *Craig v State of South Australia* (supra) is an extremely narrow and confined interpretation of what constitutes the record. It precludes this Court from undertaking a general review of what occurred before the Tribunal. What is constituted by certiorari and consistently with that a confining of the record in a narrow way are complimentary. Mr Perry referred in particular to the passages from *Craig v State of South Australia* (supra) under the heading "The face of the record" at 180:

> "One finds in some recent cases in this country support for the adoption of an expansive approach to certiorari which would include both the reasons for decision and the complete transcript of proceedings in the 'modern record' of an inferior court. As Priestley JA pointed out in *Commissioner for Motor Transport v Kirkpatrick*, that approach is not precluded by any direct decision of this Court. Nonetheless, it should, on balance, be rejected. For one thing, it is inconsistent with the weight of authority in this Court which supports the conclusion that, in the absence of some statutory provision to the contrary, the record of an inferior court for the purposes of certiorari does not ordinarily include the transcript, the exhibits or the reasons for decision. More importantly, the approach that the transcript of proceedings and the reasons for decision constitute part of 'the record' would, if accepted, go a long way towards transforming certiorari into a discretionary general appeal for error of law upon

> which the transcript of proceedings and the reasons for decision could be scoured and analysed in a search for some internal error. It is far from clear that policy considerations favour such an increase in the availability of certiorari to correct non-jurisdictional error of law. In particular, a situation in which any proceeding in an inferior court which involved a disputed question of law could be transformed into superior court proceedings notwithstanding immunity from ordinary appellant procedures would represent a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed. On balance, it appears to us that the question whether there should be such an increase in the availability of certiorari, or of orders in the nature of certiorari, is one that is best left to the responsible legislature."

[85] Order 56 in the Northern Territory Supreme Court does not give that imprimatur to extend the notion of what the record constitutes or to engage in appellate review.

[86] Counsel on behalf of the second defendant asserts that the submission on behalf of the plaintiff that the whole 16 written pages of the decision of the Tribunal forms the whole of the decision and is part of the record is wrong and contrary to the principle established in *Craig v State of South Australia* (supra).

[87] In *Kriticos v State of New South Wales* (1996) 40 NSWLR 297 the Court of Appeal in New South Wales held by a majority of two to one that the decision in *Craig v State of South Australia* (supra) meant that the Court of Appeal in NSW could not have reference to the reasons or the transcript in the Industrial Court for the purpose of determining error of law on the face of the record. Notwithstanding that those reasons in particular revealed a patent error of law.

[88] This is not a Court engaging in an appellate exercise. The Court is involved in a closely confined process where its ability to quash an order by way of prerogative relief is confined to particular circumstances and to particular information.

[89] In terms of error of law on the face of the record the record is confined to the Amended Originating Motion, the actual determination as it appears on the final page of the 16 page document headed "decision" and set out at AB 549. It does not include the transcript or the remainder of the decision which is in fact reasons for decision.

[90] Counsel for the second defendant then turned to the third element established in the decision of *Craig v State of South Australia* (supra) that is what constitutes jurisdictional error. Jurisdictional error is a matter which goes to the existence of jurisdiction not to the exercise of such jurisdiction. Submissions on behalf of the plaintiff were directed to the exercise of the jurisdiction not the fact of it or its ambit. For this reason those submissions must fail.

[91] Counsel for the second defendant referred to the decision of *Returned & Services League of Australia (Victoria Branch) Inc. v Liquor Licensing Commission & Anor* [1999] 2 VR 203.

[92] The jurisdiction of the Police Arbitral Tribunal is that which the *Police Administration Act* requires it to do.

[93] Jurisdictional error under s 56 is confined to a consideration of whether or not that jurisdiction has been exceeded or not discharged (*RSL v Liquor Commission* at 210:

> "… Ultimately, at all events when what is in question is error in the course of decision-making (as was the case here), the task for the court from which certiorari is sought must be to distinguish between, on the one hand, those matters which the tribunal is given the jurisdiction to decide, and even to decide wrongly (so that error does *not* go to jurisdiction), and on the other hand those in respect of which, while it may have the power to inquire into them, it does not have the jurisdiction to decide wrongly (so that error *does* go to jurisdiction)."

[94] Section 44 of the *Police Administration Act* gave the Tribunal the power to interpret a determination. The complaint by the plaintiff is that the Tribunal did not give sufficient weight to some evidence, misapplied some of the authorities relevant to statutory interpretation and came to a decision contrary to the submissions of the Association. These are all circumstances adverted to in *Craig v State of South Australia* (supra) they may justify an appellate finding but they do not justify judicial review.

[95] What is meant by jurisdiction is discussed in the text "D'Smith Judicial Review of Administrative Action" fourth edition at 110:

> "… Jurisdiction means authority to decide. Whenever a judicial tribunal is empowered or required to inquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. 'Where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact.' It does not lose its jurisdiction even if its conclusion on any aspect of its proper field of inquiry is entirely

> without evidential support. The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to inquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable 'at the commencement, not at the conclusion, of the inquiry.' Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly; but it has no implied jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction of it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may also lack jurisdiction if it is improperly constituted, or (possibly) if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. has jurisdiction) to determine."

[96] The plaintiff made a submission that the Tribunal took into account irrelevant considerations or failed to take into account relevant considerations. Counsel for the second defendant submits that is not a question of law as was adverted to in *Craig v State of South Australia* (supra), that is a question of construction of the statute.

[97] In deciding what is jurisdictional error it is necessary to determine what constitutes the parameters of the jurisdiction and that is done by reference to the statute not by reference to simple propositions of law which govern relevance and admissibility of evidence or the application of any particular legal principles to those facts.

[98] In *Construction, Forestry, Mining & Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 96 Wilcox and Madgwick JJ

indicate that in Australia there is a clear distinction between intra vires errors of law and errors of jurisdiction:

> "This leaves the question: what are the circumstances in which an error of law leading to an erroneous finding or mistaken conclusion will open the way to prerogative relief? The High Court did not indicate this in terms, but we think the clue lies in its apparent approval of the application to tribunals (as distinct from inferior courts) of the cited passage in Lord Reid's *Anisminic* speech. Lord Reid spoke of the tribunal having done, or failed to do, something "which is of such a nature that its decision is a *nullity*". Mere error is not enough. Lord Reid gave examples of what he meant: bad faith, lack of power, failure to accord natural justice, mistake as to the nature of the tribunal's jurisdiction, failure to take into account a relevant matter, reliance on an extraneous consideration. These are all defects in the inquiry *process*, as distinct from erroneous conclusions. Unlike Lord Pearce in the same case (see at 195), Lord Reid gave no support to the view that *any* error of law, affecting the tribunal's decision, would justify prerogative relief."

[99] Mr Perry submits that in respect of jurisdictional error, if a tribunal by reason of failure to take into account a material consideration, which is itself determined by reference to the statute which enlivens the jurisdiction, or by taking into account an irrelevant consideration and the similar tests apply, or by reference to some other question erroneously ascribes to itself jurisdiction which it does not have under the statute which empowered it to undertake the task that it was undertaking, that process will amount to jurisdictional error, but if and only if it goes to the question of jurisdiction itself rather than the process which it is entitled to take in exercising that jurisdiction.

[100] The submission on behalf of the second defendant is that in judicial review the reviewing court must only concern itself with whether the tribunal had the jurisdiction to do that which it did, right or wrong.

[101] The Court of Appeal in New South Wales has held that there was a non-jurisdictional error of law in dealing with an appeal from a District Court Judge who had misconstrued the onus of proof (*Anderson v Judges of the District Court (NSW)* (1992) 27 NSWLR 701).

[102] With respect to the plaintiff's submission on the issue of unreasonableness, Mr Perry referred to the decision of the High Court in *Re Moore; Ex parte Co-operative Bulk Handling Ltd* (1982) 56 ALJR 697:

> "… However, as Mr. Justice Dixon pointed out in *Rex v. Taylor; Ex parte Professional Officers' Association, Commonwealth Public Service* (1951), 82 C.L.R. 177, at p. 186, we should be very careful in a matter of this kind to maintain the distinction between error in deciding a matter and excess of power. The weight to be given to a relevant consideration is a matter for the Commission to consider. If it were to be established that undue weight had been given to a particular matter, that might show that there had been an erroneous determination, but it would not show a want or excess of jurisdiction, unless the conclusion reached was so unreasonable that no reasonable tribunal could have reached it."

[103] If it were established that undue weight had been given to a particular matter that might show that there had been an erroneous determination. But it would not show a want or excess of jurisdiction unless the conclusion reached was so unreasonable that no reasonable tribunal could have recorded it.

[104] There has been no misapprehension of jurisdiction or an attempt to exercise jurisdiction not provided for by the statute. In *Taveli v Minister for Immigration, Local Government & Ethnic Affairs* (1989) 86 ALR 435 at 453:

> "In numerous cases the comment has been made that unreasonableness, in this sense, is a difficult ground to establish. Probably the ground has its most frequent application in cases in which the challenger can demonstrate an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so that the factual result is perverse, by the decision-maker's own criteria. *Paramatta City Council v Pestell* (1972) 128 CLR 305 and *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; 65 ALR 549 constitute examples of this type of case. There may be cases – although I think that they are likely to be rare – in which all of the factors germane to a particular decision point in one direction. If such a case arose, it would seem proper to brand as unreasonable a decision to the contrary effect. But ordinarily there will be factors pointing in each direction. Where that is the situation, the weight of those factors is a matter for evaluation by the decision-maker. In such a case, even though a particular judge might feel that the preferable decision would have been otherwise, that feeling would not be sufficient to justify the condemnation of the decision as unreasonable, in the relevant sense. As Menzies J said in *Pestell* (at 323):
>
> > There is, however, a world of difference between justifiable opinion and sound opinion. The former is one open to a reasonable man; the latter is one that is not merely defensible – it is right. The validity of a local rule does not depend upon the soundness of a council's opinion; it is sufficient if the opinion expressed is one reasonably open to a council. Whether it is sound or not is not a question for decision by a court.'"

[105] A reading of the reasons for decision does not disclose unreasonableness.

[106] There was no statutory requirement express or implied upon the Tribunal to advert to a particular matter which the Tribunal then fails to follow through.

[107] Mr Perry submits that there was no breach of procedural fairness (*Roads Corporation v Dacakis* [1995] 2 VR 508 at 520):

> "Now it is significant for present purposes that in *Bond* at 356 Mason CJ (with whom on this point Brennan, Toohey and Gaudron JJ agreed) stated:
>
> > But it is said that "[t]here is no error of law simply in making a wrong finding of fact"; *Waterford v Commonwealth* (1987) 163 CLR 54 at 77, per Brennan J. Similarly, Menzies J observed in *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654:
> >
> > > "Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law."
> >
> > Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error at law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

[108] Mr Perry then addressed the Court with respect to the reasons for decision given by the Tribunal and submitted in summary:

- The Tribunal adverted to the decision of *Short v FW Hercus Pty Ltd* (supra) and *Kucks v CSR Limited* (supra) and applied the test which the Association submitted it ought to. The complaint is it applied it wrongly. Even if that were right, that error is not susceptible to judicial review.

- The Tribunal took into account the context in which the determination was made by referring inter alia, to the submissions made before the Tribunal in 1991.

- The Tribunal took into account the evidence of Mr Wyatt and Commander McAdie and gave little weight to that evidence. An examination of the submissions to Commissioner Connell show significant divergences from the evidence of then Assistant Commissioner Wyatt.

- That the Tribunal gave little weight to that evidence is not a ground of challenge by way of judicial review.

- Commissioner Connell's determination was by consent so that no interpretative assistance can be obtained from this determination as it was not a personal determination rather a determination by consent between the parties.

- Mr Wyatt and Commander McAdie did not give evidence before Commissioner Connell. Accordingly, it is of little assistance in interpreting Commissioner Connell's determination.

- The submission made on behalf of the parties to Commissioner Connell do not reflect the evidence of Mr Wyatt.

- Affidavit of Ms Totten is there was one rate in June 1991 when the determination was made. To describe it as public or transparently public is to misconceive the application.

- The Tribunal considered the Association's submission and accorded the Association procedural fairness.

- In considering the Association's submissions the Tribunal made references to the original connection between the $30 figure and the rates which the police department paid to the housing department. That connection was valid and was consistent with the submissions made by the Commissioner's representative.

- Mr Moseley's submission to Commissioner Connell did not include matters raised by Mr Wyatt in his evidence to the Tribunal. In particular, the matters on which the Association says it relies upon as fixing "a public" rate was not adverted to in the submissions made by Mr Moseley to Commissioner Connell in 1991.

- Commissioner Connell made a determination tying rent to what was being paid by the Commissioner of Police to the Housing Commission. Mr Moseley observed that the original rate of $30 was fixed by reference to standard accommodation which the Commissioner for Housing was charging the Commissioner of Police.

- Apart from the evidence of Mr Wyatt, the understanding on behalf of everyone was that the referable rate was that charged by the Housing Commission to the Commissioner of Police.

- Ms Totten's evidence is not evidence of the party's conduct since the determination. It is evidence of what a non party did in respect of the rates charged to the department.

This concludes my summary of the submissions made by Mr Perry.

[109] In his submissions in reply, Mr McDonald QC emphasised that the Association does not seek to review the decision of Commissioner Hoffman on the merits nor is this application in the nature of an appeal.

[110] The submission on behalf of the plaintiff is that they only seek judicial review in accordance with the principles set out in *Craig v State of South Australia* (supra).

[111] It is the submission for the plaintiff that the Tribunal did not have the jurisdiction to conclusively decide the matter wrongly.

[112] Counsel for the plaintiff emphasised that the Tribunal did not accord the proper status to the evidence of Mr Wyatt and Commander McAdie.

Conclusion

[113] I accept the submission made by Mr McDonald QC on behalf of the plaintiff that the time when the determination was made by Commissioner Connell is the time when the context of the making of the determination should be looked at bearing in mind that the aim and purpose is to find out what the framers meant. In accordance with the principle established in *Short v FW Hercus Pty Ltd* (supra) the context includes the history of the determination. The Chairman of the Tribunal did approach his task in this way.

[114] At p 5 of his decision (AB 538), Commissioner Hoffman stated:

> "It is therefore reasonable and necessary to examine in the first instance not only the words used in the clauses, but also the surrounding context, including their history. That history was provided in the Association's evidence by Messrs Wyatt and McAdie which shall be considered later under the heading 'The Association's interpretation' and 'Re parties intentions and expectations'."

On p 14 of his decision (AB 547), the Chairman of the Tribunal stated as follows:

> "The Tribunal has determined that, in an appropriate interpretation of Clauses 33(2) and 22(2), the Association's evidence of prior open discussions and negotiations in 1990/91, with respect to statements about a new housing package being reflective of actual intentions and expectations, are not afforded significant weight. The terms of the contract intended or hoped to be made were revealed in the course of that evidence. Their admissibility, however, in an action for rectification, subject to the provisions of the Act and any consent agreement, should be noted."

[115] The Chairman of the Tribunal did consider the evidence put forward on behalf of the Association and came to the conclusion that it was evidence "… being reflective of actual intentions and expectations, are not afforded significant weight." This does not amount to an error of jurisdiction.

[116] I agree with the submissions made by Mr Perry which are summarised in paragraph 108 of these Reasons for Judgment.

[117] I agree with the submissions made by Mr Perry on behalf of the second defendant that a great deal of the submissions made by counsel for the plaintiff were directed towards matters that would be relevant to an appeal but are not relevant on an application for judicial review.

[118] An example of a submission which would be relevant to an appeal on the merits rather than on judicial review is the complaint made by counsel for the plaintiff that the Chairman of the Tribunal accepted evidence on affidavit of Ms Janet Totten given on behalf of the Commissioner of Police and that such evidence includes reference to the conduct of the parties since the agreement. Firstly, I do not accept this goes to error of jurisdiction or error on the face of the record. Secondly, I accept the submission made by Mr Perry that the evidence in the affidavit of Ms Totten relating to events after the date of the determination is referable to other persons or organisations and is not addressing the conduct of the parties themselves in respect of the determination. I do not accept that in referring to the affidavit evidence of Ms Totten, the Chairman took into account an irrelevant matter.

[119] I do not accept the submission of Mr McDonald QC that the way in which the Chairman of the Tribunal dealt with the evidence presented on behalf of the Association calls for judicial review in accordance with the principles set out in *Craig v State of South Australia* (supra). It may well be a matter to be looked at on an appeal on the merits but not on an application for judicial review.

[120] Counsel for the plaintiff does not complain about the application of the principles of interpretation encapsulated in the decision of *Mills v Meeking* (supra) as applied to the interpretation proposed by the plaintiff. The complaint is that these principles were not applied to the interpretation sought by the second defendant.

[121] I do not accept this argument. The Chairman canvasses the case put forward by both the plaintiff and the defendant. The clear inference is the Chairman applies the test in *Mills v Meeking* (supra) to both interpretations of the Determination that he was asked to consider. There is no error of jurisdiction shown in respect of the application of the principles of interpretation.

[122] I do not accept the submission made by counsel for the plaintiff that the 16 page Reasons for Decision delivered by the Chairman of the Tribunal forms part of the record. I accept the submission made by Mr Perry at paragraph 84 as to the application of the quote from *Craig v State of South Australia* (supra) at 180 – 181 set out in that paragraph.

[123] In accordance with the principle enunciated in *Craig v State of South Australia* (supra) it is not appropriate in this application that the Reasons for Decision be "scoured and analysed in a search for some internal error."

[124] I do not consider that in this instance the Chairman of the Tribunal chose to incorporate the Reasons for Decision into the decision. The actual decision itself is set out on p 16 (AB 549) stands alone and does not include the Reasons for Decision for the purpose of forming the record.

[125] There is no statutory provision in the *Police Administration Act* as to what forms "the record" in respect of any determination or interpretation made by the Police Arbitral Tribunal under s 44 of the *Police Administration Act*.

[126] Applying the principles set out in *Craig v State of South Australia* (supra) the record in the matter before this Court consists of the Further Amended Originating Motion, the actual interpretation determined by the Chairman and the subsequent Direction both set out on p 16 of the document titled Decision (AB 549).

[127] The plaintiff further submits that the selective application of the test applied in *Mills v Meeking* (supra) that is applying it to the interpretation sought by the plaintiff and not to the interpretation sought by the second defendant is unreasonable and constitutes an error of law on the face of the record. I do not accept the argument that the Tribunal was selective in its application of the test in *Mills v Meeking* (supra). Commissioner Hoffman applied the test to both interpretations placed before him.

[128] Having read through the transcript of proceedings before the Chairman of the Tribunal and his Reasons for Decision, I am not able to conclude that his decision was so unreasonable that no reasonable Tribunal could have come to this decision.

[129] The Tribunal did consider the context including the history in which the award was made. It is not for this Court to state whether or not it agrees with the Chairman's ultimate decision. All this Court must decide is whether the decision was so unreasonable that no reasonable tribunal could have come to the conclusion it did and I cannot so find.

[130] Counsel for the plaintiff maintains that the evidence of Mr Wyatt and Commander McAdie to the Tribunal should have been relied upon. The Chairman considered their evidence and decided their evidence was not of significant weight because it being "reflective of actual intentions and expectations are not accorded significant weight". The Chairman also considered the evidence of Ms Totten which is set out at AB 543 and AB 544 in the Reasons for Decision and the submissions made on behalf of the second defendant by Mr Martin and at AB 547 summarise the submissions made on behalf of the Commissioner for Police (the second defendant). The concluding paragraph of this summary is at AB 547:

> "Finally, the Commissioner submitted that the Tribunal fixed the figure in June 1991 by reference to what the Commissioner was paying for accommodation, and that there was no reason to interpret the Determination differently today. Further, to approve the Association's interpretation would result in the allowance paid to Police being more than the amount paid by the Commissioner to the Department for the provision of rent free accommodation."

[131] There was some evidence before the Chairman on which he could draw the inferences that he did and the findings that he came to (*Australian Broadcasting Tribunal v Bond* (supra)). The plaintiff has not satisfied me that there was no rationally probative material in the surrounding circumstances to lead to the interpretation arrived at or that the plaintiff was denied procedural fairness because of the illogical reasoning process.

[132] I agree with the submission made by Mr Perry that jurisdictional error is a matter which goes to the existence of jurisdiction not to the exercise of such

jurisdiction. I also agree with the submission made on behalf of the second defendant that jurisdictional error under Order 56 of the Supreme Court Rules is confined to a consideration of whether or not that jurisdiction has been exceeded or discharged. I adopt with respect the principle expressed in *RSL v Liquor Commission* (supra) at 210 and already set out in paragraph 93 of these Reasons for Judgment.

[133] The issue of jurisdictional error and its confines are discussed in the decision of *Craig v State of South Australia* (supra) a decision on which both parties rely. What is meant by jurisdictional error is narrowly confined and is expressed by the High Court in *Craig v The State of South Australia* (supra) at 177:

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction."

and with respect to tribunals at 179:

> "The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to

> ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

[134] Apart from the matter to which I refer in the succeeding paragraphs I agree with the submissions made by Mr Perry that the plaintiff in these proceedings has not demonstrated that the Chairman of the Tribunal fell into jurisdictional error.

[135] Finally, Mr McDonald QC submitted that under Ground 8(e) of the Amended Originating Motion that the subsequent direction given by the Chairman of the Tribunal which was as follows:

> 'There is a need for the provisions of the Determinations to be updated and consolidated consistent with the relevant principles of the Award Simplification process currently being undertaken by the Australian Industrial Relations Commission (Print P7500). The parties are directed to confer and produce a current consolidated Determination to the Tribunal for its consideration by 29 November 1999. If the parties cannot agree on a consolidated Determination they are to submit a document comparing each clause and their respective positions by the same date.'

is a jurisdictional error.

[136] I accept there is no power under the provisions of the *Police Administration Act* to make such a direction.

[137] I accept Mr McDonald QC's submission that the making of such a direction discloses both jurisdictional error and error on the face of the record.

[138] I have been informed that the direction has in fact been complied with by both parties.

[139] In the circumstances of this case I would not exercise the discretion the Court has under Order 56 of the Supreme Court Rules to quash this direction.

[140] The direction was made to give effect to a requirement of the Australian Industrial Relations Commission to update and consolidate the award which was the subject of the application for determination.

[141] I do not propose to quash this direction even though it was made without jurisdiction. It is a direction given to facilitate the effect of the interpretation which was the subject of the substantive application and on which the plaintiff's have failed in their application for certiorari.

[142] Apart from ground of appeal 8(e) I am not satisfied the plaintiff has established any of the grounds of appeal accordingly.

[143] The order that I make is that the application be dismissed.

[144] The parties have leave to make application on the question of costs.

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