



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT GOSTENCNIK  
DEPUTY PRESIDENT MASSON  
DEPUTY PRESIDENT HAMPTON**

**C2023/6756**

**s 604 - Appeal against decision [2023] FWC 2557 of Commissioner Bissett at Melbourne  
on 13 October 2023 in matter number C2023/3219**

**Melbourne**

**8.30 AM, THURSDAY, 14 DECEMBER 2023**

PN1

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Ms Kelly, you're seeking permission to appear for the appellant.

PN2

MS S KELLY: Indeed I am, Deputy President.

PN3

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

PN4

And Mr Kiessling, you're seeking - you're appearing for yourself.

PN5

MR R KIESSLING: Yes. Thank you.

PN6

DEPUTY PRESIDENT GOSTENCNIK: Apologies. Yes. Good morning.

PN7

And Mr Langmead, you're appearing for the - or seeking permission to appear for the UFU. Mr Langmead, for the UFU.

PN8

MR D LANGMEAD: I seek permission to appear for the UFU.

PN9

DEPUTY PRESIDENT GOSTENCNIK: Yes. Yes, good morning.

PN10

Is there any objection to that application before the Commission?

PN11

MR KIESSLING: No.

PN12

DEPUTY PRESIDENT GOSTENCNIK: Permission to be represented by lawyers in each case is granted.

PN13

Firstly, can I thank the parties for accommodating the earlier start. I have a pretty important matter later on this morning, so I appreciate your cooperation. Secondly, can I indicate that we have had the opportunity of reading the submissions so we don't need those repeated. This is an opportunity to elaborate or clarify any matters that arise in this appeal. So with that - yes, Ms Kelly.

PN14

MS KELLY: Thank you. Can I indicate for the record, Deputy President, that I do appear with Mr Carrick.

PN15

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you.

PN16

MS KELLY: Thank you. With the indication that you've just given, can I proceed the following way. Grounds 1 and ground 7 stand alone. I'll deal with them last. Grounds 2 and 6 are all aspects of the same contention which is that something went wrong either in the construction of the relevant Enterprise Agreement or in its application.

PN17

They can essentially be dealt with as a group. I propose to deal with those first before turning to ground 1 and ground 7 and then I wish to address the new contentions that arise in Commander Kiessling's submissions and - - -

PN18

DEPUTY PRESIDENT GOSTENCNIK: Indeed it's the case, is it not, Ms Kelly, that if you are successful in relation to the grounds that you're going to address initially, ground 1, at least, is irrelevant in that sense.

PN19

MS KELLY: Indeed. That's so, Deputy President.

PN20

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN21

MS KELLY: The final thing I will deal with is the new contentions that are raised by Commander Kiessling and the submission of FRV will be that they are not matters that were before the Commission below and they ought properly go back to FRV and for the internal processes to be followed.

PN22

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right.

PN23

MS KELLY: I anticipate that all of that will take not more than 30 to 40 minutes.

PN24

DEPUTY PRESIDENT GOSTENCNIK: We'll see.

PN25

MS KELLY: I beg your pardon.

PN26

DEPUTY PRESIDENT GOSTENCNIK: We'll see.

PN27

MS KELLY: I think on the last occasion, Deputy President, I almost met my time indication so there's hope.

PN28

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN29

MS KELLY: Can I deal briefly with some of the essential facts? These are dealt with in the material but there is a number of aspects that I wish to emphasise. The first is this; it is not in dispute that when Commander Kiessling came into FRV he did so by what's called a lateral transfer process and that what you are asked to do when you come in through the lateral transfer process is to commit to remaining in the place to which you are appointed for a minimum period of three years.

PN30

That's the reciprocity of those types of arrangements and the location to which Commander Kiessling was appointed was Hamilton and his commitment was to remain there for that three-year period. What then happened was that a dispute arose between Commander Kiessling and his commanding officer, ACFO Bourke. We don't need to be concerned with how that happened or why it happened, but it happened.

PN31

One of the ways in which FRV responded to that circumstance was to direct Commander Kiessling to work at Casterton which is 57 kilometres up the road from Hamilton. After that transfer took effect, there was then a restorative process engaged in with former Commissioner Julius Roe. One outcome of that process was a recommendation that Commander Kiessling be permanently transferred away from Hamilton.

PN32

I would like to hand up, at this point, one page of the record below that escaped the appeal book, for which I apologise. It is the recommendation of the grievance process and there's a short point to be made on it.

PN33

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN34

MS KELLY: It's short and to the point, commendably and what we see here is in recommendation 1, a satisfaction on the part of Mr Roe that the relationship between Commander Kiessling and ACFO Bourke couldn't be repaired in the medium term. In 2, a recommendation that it's essential that Commander Kiessling be transferred out of District 5.

PN35

So that's where Hamilton is, and of ACFO Bourke's management along with the notation and this is important, that ACFO Bourke is incapable of managing Commander Kiessling and it would be unreasonable to expect him to do so in the circumstances.

PN36

And then importantly for my purposes today, in recommendations 3 and 5, you will see a recommendation that Commander Kiessling be counselled about a range of important matters including strengthening collaborative relationships within the

work unit, how to escalate matters, not doing so prematurely, avoiding negative comments about colleagues or endorsing such comment by others and various other things.

PN37

What's important about this is that the recommendations made by Mr Roe didn't attribute blame to one side or the other. They identify issues on both sides and a series of recommendations directed to both parties to the dispute about how it ought to have been resolved and some of those recommendations went to Commander Kiessling and the way in which he engaged in the workplace.

PN38

What then occurred was this; FRV sought to make the temporary transfer to Casterton permanent in accordance with this recommendation. Commander Kiessling resisted that. Under the agreement a transfer can only be by mutual agreement. He withheld his agreement as he was entitled to do.

PN39

The temporary transfer, therefore remained in place for a period of time before he eventually returned to Hamilton when ACFO Bourke moved on or I think has taken long service leave. Temporary transfer takes effect in November. Former Commissioner Roe's process unfolds in January. In April, so six months after the temporary transfer takes effect, Commander Kiessling moves his family from Hamilton to Ballarat.

PN40

In that period, November to April, no expenses for the temporary transfer to Casterton were claimed or paid. In my client's view, none were claimable nor payable. That's disputed but it's not relevant for today's purposes. It was in April, so six months after the temporary transfer has taken effect, that the move to Ballarat happens and it's at that point and from that point forward that expenses are claimed.

PN41

DEPUTY PRESIDENT GOSTENCNIK: Ms Kelly, do you seek to have this document added to the appeal book?

PN42

MS KELLY: Indeed I do, Deputy President. Thank you.

PN43

DEPUTY PRESIDENT GOSTENCNIK: Commander Kiessling, is there any objection?

PN44

MR KIESSLING: No.

PN45

DEPUTY PRESIDENT GOSTENCNIK: Mr Langmead, any objection to adding this document to the appeal book?

PN46

MR LANGMEAD: (No audible reply).

PN47

DEPUTY PRESIDENT GOSTENCNIK: No. Thank you.

PN48

I will - we will add this document as numbered, page 117 to the digital appeal book and amend the index to the appeal book adding item 7 that will be titled Recommendation of Grievance of Commander Kiessling dated 20 January 2023, page number 117.

**EXHIBIT #? DOCUMENT TITLED RECOMMENDATION OF  
GRIEVANCE OF COMMANDER KIESSLING DATED 20/01/2023  
AT PAGE NUMBER 117**

PN49

Sorry, Ms Kelly. Continue.

PN50

MS KELLY: Not at all. I'm grateful, Deputy President.

PN51

They are the facts that matter for the disposition of this appeal. Can I say there are a great number of other factual matters that sit behind all of this but for today's purposes, they are the facts within which this appeal can be resolved.

PN52

We then come to the agreement and the relevant passages have been extracted at the appeal book at pages 101 and following. There are two relevant parts of the agreement, on my client's case. The first is that found at page 102 under the heading Temporary Transfer, clause 155 of the agreement. This is not controversial. It says what it says and it means what it says:

PN53

*An employee covered by this division, which is Commander Kiessling, who agrees to be temporarily transferred, shall be paid such salary and terms and conditions of employment in accordance with this division.*

PN54

It's not controversial. It is simply the facultative clause that creates the entitlement. What then can be claimed and the circumstances in which it will be payable are for the purposes of this appeal regulated by schedules 4 and 4A which we find on pages 104 and following of the appeal book and relevant for our purposes is the document at page 108 of the appeal book.

PN55

DEPUTY PRESIDENT GOSTENCNIK: So just on that, Ms Kelly, on page 104 is the temporary work location allowance.

PN56

MS KELLY: Yes.

PN57

DEPUTY PRESIDENT GOSTENCNIK: I take it that that's not what the dispute's about.

PN58

MS KELLY: No.

PN59

DEPUTY PRESIDENT GOSTENCNIK: All right. Thank you.

PN60

MS KELLY: The dispute is about what we see at page 108. So there's something called the Personal Expenses and Accommodation Agreement 2015. It's schedule 4A to the agreement.

PN61

DEPUTY PRESIDENT GOSTENCNIK: Yes. The only reason I ask is the dispute is originally framed referred to an allowance as if there was some specified allowance which certainly I haven't been able to find so - - -

PN62

MS KELLY: Indeed. The agreement is quite difficult to follow in that sense and I went through the same process myself when I was engaged. The way it was put below and for our purposes today, it was put that the entitlement arises under this agreement at page 108.

PN63

DEPUTY PRESIDENT GOSTENCNIK: So the general principles.

PN64

MS KELLY: Indeed.

PN65

DEPUTY PRESIDENT GOSTENCNIK: All right.

PN66

MS KELLY: And I'll say something in a moment about the alternative way in which it's now but put it was accepted before the commissioner below by the parties and then by the commissioner, that this is the document with which the dispute is concerned.

PN67

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN68

MS KELLY: The heart of this dispute is the general principles. They govern the entitlement to what was claimed and what was claimed was a meal allowance and an accommodation allowance for staying overnight in Casterton.

PN69

On the proper construction of this part of the agreement, we see that there are six criteria that must be met in order for expenses to be payable. The first is found in

clause 2.1 and that that criteria is that employees are required to work away from their normal work location. Find that in the - towards the end of that clause. That's the relevant criterion.

PN70

In clause 2.2, there are three criteria embedded. The first is that the expenses be incurred by the employee in the course of his or her authorised duties. The second is that the expenses be actual expenses. You'll find that in the first line and the third is that they be reasonable expenses, out of pocket expenses. That's the first four criteria.

PN71

Next in clause 2.3 we see a deeming clause about when an expense will be necessary and that's got two - a subset of two criteria. Incurred in the course of authorised duties which calls back to clause 2.2 and critically for this case, would not have been incurred in the ordinary circumstances of travel to and from the employee's home and normal duty location. The normal duty location of course, being Hamilton. That's the fifth criterion, the requirement of necessity.

PN72

The sixth criterion is that wherever practical, employees are required to obtain approval before incurring the expenses. That is the criterion that appears in clause 2.4.

PN73

So they are the six criteria that must be satisfied before a claimed expense is payable on the proper construction of this agreement. We can apply those quickly to the present case though not without controversy. In turn, was Commander Kiessling required to work away from his home location of Hamilton? Yes. That criterion is satisfied.

PN74

Criterion 2. Were the expenses incurred in the course of authorised duties? And in my submission, that question is answered in the negative. It was not the duty of travelling from Hamilton to Casterton to perform work that resulted in the expenses being incurred. It was the relocation of a home residence from Hamilton to Ballarat, some 158 or 178, I would say, kilometres away.

PN75

The authorised duties was the performance of his work in the role of commander at Casterton on temporary transfer. As my client puts this aspect of the case, it's in effect, a causal connection why were these expenses incurred and was it in the course of authorised duties and the answer to that is, 'No. It was in the course of travelling from a home location to a work location', and that is not authorised duties.

PN76

So for that reason, the second criteria is not met. That is not why the expenses were incurred. Expenses between Hamilton and Casterton, yes, because there was a direction to work at a different location from the ordinary location. That is in



the course of authorised duties but simply travelling from home to your base location is not. In my submission, criteria 2 has to be answered in the negative.

PN77

Criteria 3 is that the expenses be actual. That's not in issue for today's purposes. Criterion 4 is that the expenses be reasonable and in my submission again and for similar reasons, the answer to the question of reasonableness is that they were not.

PN78

There was an agreement by Commander Kiessling to work in Hamilton for at least a period of three years. That was the condition of the lateral entry. Yes, there was a dispute. We needn't be concerned with how that arose or where responsibility for that dispute rose, it's not in contest and there was a recommendation that he be transferred elsewhere.

PN79

But what, in fact, happened is that outside of that transfer process, with no indication from my client that there would be a transfer somewhere closer to Ballarat, in circumstances where my client says, 'We have a permanent spot for you and it's 57 Ks up the road at Casterton, Commander Kiessling makes a choice which he's entitled to make.

PN80

It's for him to decide where he and his family lives. That's not in issue. But he makes the decision to relocate his family 178 kilometres away from his home location and then says to my client, 'You are now responsible for the consequences of that which is that I can no longer commute back and forth to Casterton in a day, the distance is such that I have to stay overnight and I will put the cost of that accommodation and my meals while I am there onto you, FRV.'

PN81

And that fails the test of reasonableness which is to be assessed objectively. It was a private decision made by Commander Kiessling and his family, not caused or occasioned by any conduct on the part of my client and in those circumstances, is it reasonable that FRV should use taxpayer funds to meet the consequences of that private decision made by Commander Kiessling and his family.

PN82

And in my submission, the answer to that is 'No, it was not reasonable for Commander Kiessling or the incurring of those expenses was not reasonable.'

PN83

The next criterion is that of necessity and this is the criterion found in clause 2.3. Now, can I say this, the clause says:

PN84

*A expense will be deemed necessary if it was incurred in -*

PN85

- and it goes on to identify the two sub-criterion I've identified. There are two ways we can read that clause. One is to say this is a deeming clause so certain circumstances are deemed necessary without any further inquiry but it holds open that there's another category of necessary that will be decided on all the facts of the particular case.

PN86

In my submission, it's the earlier construction that is preferable. Despite the use of the word 'Deemed', this is, in fact, a definitional clause. Something is necessary if it meets these two criteria and the reason I say that is because we don't see the word, 'Necessary', used elsewhere in this clause.

PN87

This isn't picking up a different criterion somewhere and giving it some content, this is a substantive criterion of itself and so it has to meet both limbs in order to be necessary for the purposes of this clause. 'Incurred in the course of authorised duties.' I've dealt with that, it was not and then, 'Would not have been incurred in the ordinary circumstances of travel to and from the employee's home and normal duty location.'

PN88

And in my submission, that second - what I'm calling a sub-criterion is fatal to Commander Kiessling's application because these expenses would have been incurred in the course of travel between Ballarat and Hamilton because it is 178 kilometres each way and a drive of several hours in each direction.

PN89

It was not the additional 57 Ks to Casterton that resulted in the overnight stay and the meal allowances being incurred. It was the anterior part of that journey, the 178 in each direction. So in my submission, we read 2.3 in the way that I've just described and Commander Kiessling fails both limbs of that criterion.

PN90

Finally, there is the criterion of approval in advance and that's a wherever practical test. The Commissioner below found at paragraph 47 that there was, as a matter of fact, no advance approval and found also that it wasn't practical to obtain the approval because Commander Kiessling believed that he had obtained it even though he, in fact, as a matter of fact, had not.

PN91

And in my submission, for reasons I'll come to in a moment, that itself is an error. It's to be approached this way. Was it practical for Commander Kiessling to obtain approval in advance and if the answer to that is, 'Yes', the question is, 'Did he obtain that approval in advance?'

PN92

Commander Kiessling held a senior position in this organisation. He ought to be taken to be familiar with its processes or at least how to identify what those processes are as and when he needs to. There is absolutely no doubt that he was in regular contact with FRV because this dispute was lengthy and ongoing and involved significant communications between the parties.

PN93

On no view could it be said that it was not practical for Commander Kiessling to obtain the approval in advance. It's found below and we accept, that he did not obtain that approval and therefore that criterion also is not met.

PN94

The Commissioner dealt with all of this at paragraphs 39 to 49 of the decision and in the written materials we set out the path of reasoning and I won't recapitulate that now but instead will turn to how the error manifests in light of what I've said about the proper construction of the agreement and the facts of this case.

PN95

Starting, as I've indicated I will, with ground 2, this is, if you like, the central ground. It's an allegation of error on the basis that on its proper construction, the applicant below, the respondent here, was not entitled to the allowances.

PN96

So we construe in the agreement in the way that I've just described and then apply that to the facts, the only available conclusion is that Commander Kiessling wasn't entitled to the allowances but there are three ways in which - three aspects of this that I want to emphasise in addition to what I have said which is this.

PN97

You will not find in these 10 paragraphs any consideration of whether or not the expenses were incurred of the applicant's authorised duties. You won't find any consideration of whether the expenses were necessary and you won't find any analysis of that criterion in clause 2.3 about whether or not the expenses would have been incurred in the ordinary circumstances of travel to and from the employee's home and normal duty location.

PN98

Those three criterion or sub-criterion in one case, are just not dealt with in those paragraphs and that might manifest either as a failure to properly construe the agreement or a failure to properly apply it but on either analysis, the same conclusion is reached that there is an error, these matters not having been dealt with, the correct conclusion was not reached and if that's accepted then the other grounds fall away.

PN99

Then grounds 3 and 4 are concerned with this question of approval. So the sixth criteria that I identified. Ground 3 is concerned - and I ought to say that the relevant passages of the decision are paragraphs 43, 46 and 47. It wasn't contended below that it wasn't practical for Commander Kiessling to obtain approval and for the reasons I described earlier, it obviously was, having regard to his rank, his seniority and what ought to be accepted as his ability to obtain information as and when he required it.

PN100

The Commissioner's path of reasoning was to find that an email relied on him to establish approval didn't constitute such approval and then to speculate - - -

PN101

DEPUTY PRESIDENT GOSTENCNIK: Late attempt at intervention, I think, Ms Kelly.

PN102

MS KELLY: Indeed. I assumed it was just the warning bell that my time is approaching, Deputy President, and I was in the finest tradition, ignoring it.

PN103

DEPUTY PRESIDENT GOSTENCNIK: That would be right.

PN104

MS KELLY: There is, as I say, then a passage in which the commissioner speculates about what might have been in Commander Kiessling's mind and what is said is that it may be that having advised ACFO (indistinct) and I might be mispronouncing that and if so, I apologise.

PN105

That's the ACFO in Casterton, that the cost would be incurred and not having been advised otherwise that the applicant assumed there was no barrier to claiming the allowances. No evidence was before the commissioner about those matters.

PN106

They are an assumption and it's on that basis that the commissioner then goes on to find that it wasn't practical for the applicant to obtain approval because he believed he already had it.

PN107

And that, in my submission, is an error because it either misconstrues the requirement for approval or a practical or because it effectively says, 'If you have notified that you intend to claim these expenses, that will suffice as approval.'

PN108

And either way, however we read those passages, that is to apply the wrong test which was to ask first whether as, objectively assessed, it was practical to obtain the approval and if the answer to that is, 'Yes', then to ask whether that approval was in fact, obtained and on the findings below, that approval was not obtained.

PN109

The other way in which that reasoning manifests as error is to substitute a subjective test, what the applicant believed, the applicant below believed, in place of what is an objective test which is whether it's practical to obtain the approval and that is, for the reasons I've already identified, the commissioner says, 'The applicant did not unequivocally seek prior approval.'

PN110

She then goes on to say, 'But it wasn't practical for him to do so because he believed he already had it.' That is, in my submission, an error because it imposes or it imports a subjective element to what is a subjective - a subjective element into what is an objective test.

PN111

Grounds 5 and 6 are concerned with the reasonableness criteria and this is dealt with in two places. It's dealt with in paragraphs 45 and in paragraph 48 of the decision and those paragraphs do different things. Paragraph 48 simply looks at the nature of the allowances. They were for meals and accommodation and therefore they are reasonable.

PN112

Paragraph 45 does something different. It engages, to some degree, with what we say the test is here which is not just the nature of the expenses but the circumstances in which they were incurred. So this is the analysis of all the facts and circumstances of the case and here too - there are two errors manifest in paragraph 45.

PN113

The first is evident from the first paragraph. On the evidence before me it is not possible to conclude that the expenses incurred were not reasonable in the circumstances. That is not the test. The test was, 'Are the expenses reasonable?'

PN114

To invert it is to ask a different question altogether which is, 'Can I be satisfied that they were not reasonable', and those two things are very different. Among other things, they invert the burden of proof. It was for Commander Kiessling to demonstrate that his expenses were reasonable.

PN115

So finding that there's not enough evidence to say they are not reasonable is not answering what the question is which is, 'Were they, as a matter of fact, reasonable?' That's the first error that manifests in paragraph 45. The second error is that there are a number of considerations that bore on the question of reasonableness.

PN116

There were some on FRVs side of the ledger and there were some on Commander Kiessling's side of the ledger. What we see in paragraph 45 is an assessment of Commander Kiessling's side of the ledger. Whether it was reasonable for him to have moved from Hamilton, the needs of his family. They are the two things that I looked at.

PN117

But here the question of reasonableness have to be assessed in accordance with all of the circumstances that pertained, all of which were pointed to by my client below that included the lateral entry, the requirement to stay for three years, the dispute, the process engaged with before former Commissioner Roe, the recommendations that came out of that and the conduct of the various parties in response to those recommendations including the decision of Commander Kiessling to move a great distance away for his own private, personal reasons, unconnected to any conduct or action on the part of FRV.

PN118

All of those things were put below in support of the contention that the expenses were not reasonable in this broader sense and none of them are considered in paragraph 45. That manifests the two errors that I've described in grounds 5 and ground 6.

PN119

One is applying an incorrect test. There had to be a positive finding about reasonableness, not a negative finding about a failure to establish it. And then (2) there's a failure to take into account relevant considerations being the matters adverted to by my client.

PN120

Finally, ground 6 is also concerned with this question of reasonableness and we see in paragraph 48 this aspect of the reasonableness inquiry was about the nature of the allowances, meals and accommodation. Not an irrelevant thing to look at in terms of assessing reasonableness but not the whole of the inquiry.

PN121

It's the phrase, 'In relation to the transfer' with which I take issue and this goes back to a point that I've made already which is that the meals and accommodation claimed - - -

PN122

DEPUTY PRESIDENT GOSTENCNIK: In relation to the temporary transfer you mean, those - - -

PN123

MS KELLY: Yes, but indeed they weren't in relation to the transfer at all, Deputy President.

PN124

DEPUTY PRESIDENT GOSTENCNIK: I understand that but the words with which you take issue are in relation to the temporary transfer.

PN125

MS KELLY: Indeed. That's so.

PN126

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN127

MS KELLY: That's so. I take broader issue with them for the reason I've described.

PN128

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN129

MS KELLY: They were not expenses incurred by reason of the temporary transfer. They were expenses incurred by reason of an anterior or a separate decision to relocate to Ballarat. That - at one level, it might be an ambiguity in the wording that wasn't intended.

PN130

If all the commissioner was doing was saying, 'The expenses were for meals and accommodation and if you have to stay overnight somewhere, that looks reasonable', then the passage is unobjectionable.

PN131

But if it is intended to mean what it literally says, 'These were incurred by reason of the temporary transfer', then it is in error as a matter of fact because they were not incurred by reason of the transfer, they were incurred by reason of this anterior decision to relocate to Ballarat.

PN132

When we put all of that together, as I've said, something has gone wrong in the reasoning. It's either in the - at the stage of construing the agreement or it's at the stage of applying it but one way or another, there's six clear criteria, at least three and on my submission, four of them are not met and the only available conclusion is that Commander Kiessling was not entitled to the allowances.

PN133

Can I then turn briefly to the two outstanding grounds? I will deal first with ground 7. This is, in some ways, a small matter but, in my submission, it gives some colour to the other more substantive errors that I've identified. At paragraph 46 of the decision, the commissioner finds that, 'It appears', I'm quoting, 'That FRV gave little thought to any accommodation requirements of the applicant while that matter was being resolved, all on having been advised that he had relocated his family to Ballarat.'

PN134

The reference to 'While that matter was being resolved', has to, I think, be a reference to the underlying dispute and the issue I take with this paragraph is that the direction to transfer and the transfer happened in November of 2022, Commander Kiessling moved in April of 2023, six months later.

PN135

It can't have been the case then that FRV needed to give any thought at all to the accommodation requirements of Commander Kiessling while the matter was originally being dealt with because he lived in Hamilton and Casterton's 57 kilometres up the road, a country drive as my instructing solicitor likes to say.

PN136

So it's not clear what is meant by that but it appears to be critical of my client and that's why I take it up because it is suggestive that the commissioner formed a view that my client had done something wrong or had failed to do something that it ought to have done such as give thought to Commander Kiessling's accommodation requirements.

PN137

When the dispute arose and as it was being dealt with, he had none. What my client was supposed to have taken account of is absolutely not clear and then the commissioner goes on to say, in effect, this persisted after FRV was advised that he had moved to Ballarat.

PN138

There's a difficulty with that which I've already canvassed, which is that that was not at my client's direction. It wasn't done for any reason induced by my client. It was a personal and private decision so it's not clear what it was that my client was supposed to do or to take into account in terms of accommodation requirements.

PN139

Of itself not particularly significant, but as I say, it suggests that the commissioner below had formed a view that my client had done something wrong or had not done something it ought to have done and that may well have infected the analysis of whether or not Commander Kiessling was entitled to the expenses that he claimed.

PN140

DEPUTY PRESIDENT GOSTENCNIK: Well, on my reading of those passages in paragraph 46, the commissioner was concerned that FRV ought to have treated the accommodation requirements as a temporary transfer in circumstances where a permanent transfer was in dispute. That is, it gave no thought to (indistinct). I think that's what she might have been getting at but it's not correct.

PN141

MS KELLY: It may - that may be so, Deputy President, but of course, there were no accommodation requirements on the temporary transfer because Hamilton and Casterton are 57 kilometres apart and Commander Kiessling was given an FRV vehicles and a fuel card to enable him to travel back and forth at no cost to him.

PN142

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN143

MS KELLY: On no view would you stay overnight if you are commuting 57 kilometres down the road. He would return home at the end of the day.

PN144

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN145

MS KELLY: Finally, there is the curio ground, ground 1 which is that - - -

PN146

DEPUTY PRESIDENT GOSTENCNIK: Can you explain to me what the question means?

PN147

MS KELLY: I think I can.

PN148

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN149

MS KELLY: as I understand it, Commander Kiessling was contending that something had happened in the course of the dispute that meant he had been



conferred an entitlement to these expenses and that the status quo clause therefore had the effect that he was continued - he continued to get that benefit for so long as the dispute was on foot. As distinct from an underlying entitlement.

PN150

DEPUTY PRESIDENT GOSTENCNIK: Well, yes. That is that because the issue of a permanent transfer was in dispute, the default position is that it must be temporary and that's the status quo provision. Is that how it was put?

PN151

MS KELLY: Yes. I think it has to go further than that, that as I understand it, that there was something about what had happened in the course of the dispute unfolding that FRV had conferred an entitlement to the temporary transfer expenses separate to whether or not they were payable on the proper construction of the agreement and the status quo provision then applied to say that that ought to continue irrespective of an underlying entitlement.

PN152

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN153

MS KELLY: Now, that's - - -

PN154

DEPUTY PRESIDENT GOSTENCNIK: Why didn't the parties just ask the follow-up question given that that was central to the dispute?

PN155

MS KELLY: I can't answer that. I don't know the answer.

PN156

DEPUTY PRESIDENT GOSTENCNIK: It's rather confusing when one looks at it, given it's a central dispute, there's no direct question going to whether - - -

PN157

MS KELLY: Indeed.

PN158

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN159

MS KELLY: I accept that. And as I understand it, it was because it was there was this very specific allegation being put that there'd been some conferral of a right and the status quo clause kicked in.

PN160

DEPUTY PRESIDENT GOSTENCNIK: But FRV never accepted there was an entitlement, did it?

PN161

MS KELLY: It did not ever accept there was an entitlement, no.

PN162

DEPUTY PRESIDENT GOSTENCNIK: No.

PN163

MS KELLY: And it was argued below, Commissioner, I can't say otherwise.

PN164

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN165

MS KELLY: It was argued below.

PN166

DEPUTY PRESIDENT GOSTENCNIK: And it's clear from 34 and 49 of the submissions.

PN167

MS KELLY: Indeed it was. I'm not suggesting it wasn't fully argued below but it is the case that the commissioner makes a finding about the status quo clause. She says he's not entitled to it under that clause and then goes on to do the next thing which we say she ought not to have done which is engage in a more merits-based assessment of the entitlements.

PN168

DEPUTY PRESIDENT GOSTENCNIK: Even though the issue was addressed.

PN169

MS KELLY: That's so.

PN170

DEPUTY PRESIDENT GOSTENCNIK: And was in dispute.

PN171

MS KELLY: And isn't challenged before this appeal court. Now, can I say one final thing and I'm only two minutes over my time which for me is quite impressive, I think, which is this. Commander Kiessling raises in his submissions what he now says is an entitlement - - -

PN172

DEPUTY PRESIDENT GOSTENCNIK: Two minutes now, three minutes last time, it all accumulates, Ms Kelly.

PN173

MS KELLY: Well, if I'm entitled to the allowance, I think I get overtime rates for every three minutes, Deputy President, or part thereof.

PN174

The - Commander Kiessling says now that he thinks he's entitled to other things and he points to clauses 92.9, 92.12 and 92.22 of the agreement not argued below and Commander Kiessling hasn't, in fact, made a claim for those entitlements. I haven't addressed them. I don't propose to.

PN175

The proper course is for Commander Kiessling to make that claim to my client. My client will assess it and it will follow the ordinary course but it wouldn't be appropriate for an appeal's bench to engage in that question when it hasn't been through FRV's internal processes, it hasn't been through the dispute resolution procedure and it wasn't argued below.

PN176

DEPUTY PRESIDENT GOSTENCNIK: Right. So what should happen if we are with you on the substantive grounds of appeal having decided the procedural fairness issue.

PN177

MS KELLY: The decision below to the extent it deals with question 1 should be set aside and that part of - and answered in the negative that there isn't an entitlement to those allowances.

PN178

DEPUTY PRESIDENT GOSTENCNIK: But didn't you just say that the commissioner did that, answered that question in the negative?

PN179

MS KELLY: Yes. Let me put it differently. If the Bench is with me on ground 1, then everything else falls away.

PN180

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN181

MS KELLY: If the - sorry, I've misspoken there. If the Bench is with me on ground 1, it would need to set aside that part of the decision as went on to make findings that were outside the scope of the arbitration. If the Bench is not with me on ground 1 but is with me on grounds 2 to 6 or some combination thereof, the finding in relation to ground 1 would be set aside but it would still be answered in the negative but for different reasons.

PN182

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right.

PN183

MS KELLY: Unless I can assist further.

PN184

DEPUTY PRESIDENT GOSTENCNIK: Yes. Just to be clear, Ms Kelly, you're asking us to redetermine the matter if we're with you on the - - -

PN185

MS KELLY: Indeed I am.

PN186

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you.

PN187

MS KELLY: Thank you.

PN188

DEPUTY PRESIDENT GOSTENCNIK: Mr Langmead, you seem itching to go next. Don't let me stand in the way.

PN189

MR LANGMEAD: Your Honour, with (indistinct) what to say apart from what's in our written submissions. As to ground 1, we say that the commissioner was properly entitled to look at the underlying dispute and resolve it. There was no error and where we differ from FRV is on the interpretation of clause 2.3, the deem necessary.

PN190

And the expression of 'Deeming' under the (indistinct) something which wouldn't otherwise be characterised as a character, is thereby deemed to do it which suggests that there might be other factors outside of it and the commissioner there was entitled to look at other circumstances as well. Beyond that, I don't think I'll further assist the Commission. If it pleases.

PN191

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Langmead.

PN192

MR LANGMEAD: Thank you.

PN193

DEPUTY PRESIDENT GOSTENCNIK: Commander Kiessling?

PN194

MR KIESSLING: Thank you, Deputy President.

PN195

DEPUTY PRESIDENT GOSTENCNIK: Do you want to use the lectern?

PN196

MR KIESSLING: No, that's all right.

PN197

DEPUTY PRESIDENT GOSTENCNIK: Rather than - seem to be hogging the - - -

PN198

MR KIESSLING: Look, I apologise, I haven't prepared a formal speech or anything and I should stress that I don't have any legal background or training. With regard to - - -

PN199

DEPUTY PRESIDENT GOSTENCNIK: Well, you're doing all right so far, commander.

PN200

UNIDENTIFIED SPEAKER: That's my understanding of favour.

PN201

MR KIESSLING: With regard to - - -

PN202

DEPUTY PRESIDENT GOSTENCNIK: The thing about lawyers is often, you know, two or three walk in the courtroom and more than one is usually wrong, so (indistinct).

PN203

MR KIESSLING: Well, as I said, all I can tell the Bench and yourself is I see them. I'm German by heritage so I tend to cut through the perceived ambiguity pretty well.

PN204

DEPUTY PRESIDENT GOSTENCNIK: Yes, my mother was German. I know the feeling.

PN205

MR KIESSLING: So with regard to the facts, I just wanted to say setting the record straight that, yes, in November, I was offered a temporary transfer by Deputy Commissioner Bruce who's since retired to Casterton whilst the business with Richard Bourke was being resolved, all right. So I'd made some contemporaneous notes about a meeting that we'd had.

PN206

There was a witness to that meeting and the result of that action that I took and by, 'Action' I submitted it to Deputy Commissioner Bruce. They said, 'Look, we're going to investigate and we're going to offer you a temporary transfer to Casterton for the duration of the period that that investigation was ongoing.

PN207

And I said, 'That's fine.' I did confirm, 'Will I be entitled to the provisions of the award', or the agreement. I think the commissioner in his correspondence uses the term, 'Award', but that falls by the wayside anyway because we're covered by an Enterprise Bargaining Agreement, not an award.

PN208

So - and he said, 'Yes, you'll be entitled to' - and I think I've quoted it in my correspondence anyway, that I would be entitled to the conditions of provisions of the award - of the agreement.

PN209

So the agreement is by specific terms of clause 155 where it says that you'll be entitled to any entitlement, paid such salary and wages and entitlements as covered by the division which is why I went to clause 92.9 and the subsequent clauses there because it's quite clear that when you're working away from your normal home location which is correct that it was Hamilton, but it also makes

reference to the over 50 kilometres, less than 100 kilometres from your normal duty location.

PN210

And as I was relieving in a temporary transfer position in Casterton, I was entitled at all material times during the temporary transfer to, at the very least, the part day absence or meal allowances as specified in schedule 4.

PN211

DEPUTY PRESIDENT GOSTENCNIK: Just to be clear, you're now claiming those entitlements and they weren't ventilated before the commissioner at first instance, were they?

PN212

MR KIESSLING: No. So I never claimed those entitlements.

PN213

DEPUTY PRESIDENT GOSTENCNIK: No.

PN214

MR KIESSLING: And partially because I just don't like doing the paperwork and partially because I thought I'll do the right thing by FRV. I'm not going to make them put their hand - - -

PN215

DEPUTY PRESIDENT GOSTENCNIK: And your entitlement to those claims was not in dispute before Commissioner Bissett.

PN216

MR KIESSLING: No. It was a continuation of those claims to which I maybe or maybe not mistakenly thought that I was entitled.

PN217

DEPUTY PRESIDENT GOSTENCNIK: No. Yes.

PN218

MR KIESSLING: But certainly in my mind, there was no - I think the central question to this is, 'Was I on a temporary transfer?' The answer is, 'Absolutely, yes.' And I think then when you go to all the other things, authorised duties and I'll come to that in a minute, whether it was necessary, reasonable, actual, will be answered as a result of that.

PN219

So in April - sorry, in January, ex-Commissioner Roe made some recommendations and as you can see from my original case, there was a fair bit of back and forth around that where I actually said at the first conciliation hearing that I would be prepared to move my family to District 10 because I had significant issues, at that stage with both Richard Bourke and the CFA, Deputy Chief Officer Rohan Luke.

PN220

Both gentlemen have now been moved on into other roles. When that happened, we had another meeting with Commissioner Bissett and FRV basically said, 'Look, we'd like you to go back to District 5', but obviously I'd already moved my family to Ballarat.

PN221

Now, moving to Ballarat I notified FRV on numerous occasions in the lead-up to that April date where I wrote the email, I said, 'Look, I'm now living in Ballarat and I have to claim now the meal allowances and the overnight accommodation for those nights where I was working in Casterton.'

PN222

But the point I'm making there is that I think - I believe that I was entitled to those meal allowance and accommodation by virtue of the specifics in clause 92.9 and the subclauses thereof and of course, by the covering clause which is 155, the fact that I was on a temporary transfer at Casterton, over 50 kilometres.

PN223

And 57 kilometres, 65 kilometres, I know but FRV have made various references to various different kilometrages between Hamilton, Casterton and so on, and of course, the whole time they were trying to force me to accept this permanent transfer to Casterton which I wasn't prepared to do.

PN224

Now, at the time, our tenancy in Hamilton was running out and we were obligated to find another house somewhere. At the time, there were no houses for rent. There was a rental crisis in Regional Victoria. I've got - my family there's six people. We've got a dog, we've got two cars and we've got two trailers.

PN225

It was difficult to find suitable accommodation in Casterton, Portland, Warrnambool or Hamilton at the time and that necessitated the move to Ballarat where we were able to secure short-term accommodation. Now, it was short-term and I say that because I still had hopes in the back of my mind that FRV would eventually come to their senses and say, 'Yes. Sure. You can move to District 10.'

PN226

There's a hard to fill position down there which meets the requirements of my tenure agreement notwithstanding that my tenure agreement doesn't mean anything anyway because there's no tenure requirement detailed in the Enterprise Bargaining Agreement. Those indications have already been made by Commissioner Bissett as well.

PN227

I don't think that clause 155 is ambiguous. It refers quite clearly that I'll be covered by the rest of the division which is Division B of the agreement and clause 92.9, schedule 4, are all subsets of that.

PN228

DEPUTY PRESIDENT GOSTENCNIK: I don't think that's in dispute, commander.

PN229

MR KIESSLING: Yes. All right. I'm just - because - - -

PN230

DEPUTY PRESIDENT GOSTENCNIK: You're all right.

PN231

MR KIESSLING: Yes. So authorised duties. If FRV is suggesting that I wasn't performing my authorised duties in Casterton, well, I would ask for, 'What are my authorised duties?' noting - and I think I should say at this point that I never claimed any travel kilometres, that wasn't the issue.

PN232

The issue was that because of the extended travel time, I was now required on some nights, especially when we had night meetings or I was just simply too tired to drive home, to stay in Casterton and I make a claim in accordance with the schedules. That's - and the meals, of course.

PN233

I'm happy to receive a definition of what is authorised duties. It's certainly not in schedule 4 of the - what do we call it, the Personal Expenses and Accommodation Agreement but I would say that it's pretty unambiguous that authorised duties is when I put the uniform on and I'm working for FRV as a commander.

PN234

Were they reasonable? Again, I've just made some notes with regard to FRVs comments. There was a time limit in my letter of engagement, however, there's no time limit of me required to stay in Hamilton for any period of time under the Enterprise Bargaining Agreement. I believe that that's probably flawed but probably not a matter for the Full Bench anyway, I just wanted to say that.

PN235

Reasonable costs were meals and accommodation. It's not like I made claims for anything that I didn't eat or when I didn't sleep in Casterton. So I think it perfectly reasonable in the context of a temporary transfer by virtue of the fact that I was more than 50 kilometres from my home location.

PN236

Were they necessary? Now, yes, I will say that there's probably some ambiguity around that clause. I say were they deemed necessary in the course of my authorised duties? I would say, 'Yes. I was authorised to work in Casterton', or the other clauses that fall under that.

PN237

And no, they wouldn't have occurred in the ordinary course of my duties because I was working from my home location and therefore I don't have any claim to any temporary transfer allowances or the PEAA save for clause 92.22 which is, of course, where some subjectivity is introduced on behalf of the applicant making a



claim for overnight accommodation where he has worked long hours and is a long way from his residence.

PN238

Noting that the personal expenses agreement is blind to where your home residence is anyway and I think I've said that in my submission. It's immaterial as to where I live. Was I on a temporary transfer? Yes or no. If I'm on a temporary transfer then I think - I believe the agreement is quite clear in detailing the allowances that I'm told to.

PN239

Approval. FRV make some song and dance about my rank and seniority but it's important to note that in November - I only got to FRV in April. If there was a separate approval process that I should have gone through other than asking the Deputy Commissioner and putting my variation vouchers into my senior officer, I'm yet to locate it on the FRV Intranet.

PN240

I'm certainly not aware that there is a separate approval process to any of these claims because, as I read the Enterprise Bargaining Agreement, it's implied that when you're on a temporary transfer you're entitled to schedule 4 allowances.

PN241

So in closing, I think with my submission, it's - I'll just go back to it. I think that if I have an indication and whilst I note that Commissioner Bissett makes a comment that it's - you know, that the email from Commissioner Bruce doesn't indicate approval, when I read that as a new employee to the organisation, that I'll be entitled to all conditions of the award and agreement, then I take that as I'm entitled to the conditions of the award and agreement.

PN242

Now, we can argue about the semantics of the Personal Expenses and Accommodation Agreement as to what everything means but I don't actually see any value in that because the Enterprise Bargaining Agreement is quite clear.

PN243

FRV earlier on in their submission when we were in the other matter, make reference to the Berry principles. Now I've read through the Berry principles and it talks about, you know, where there's ambiguity in the clause. The Berry principles - and I think I saw some of your gentlemen's name as having dealt with that were about some people getting a laundry allowance and others not.

PN244

That's not the case here. Everyone in FRV gets a temporary transfer allowance. It's an accepted fact. The fact that FRV are saying that, no, I don't get the temporary transfer allowance baffles me and for the sake of 1,600 bucks, I feel that, you know, we talk about wasting taxpayer dollars, have a look at all of our wages here right now for the sake of \$1,600 which I consider that I'm entitled to.

PN245

I'm happy to take any questions.

PN246

DEPUTY PRESIDENT GOSTENCNIK: Commander Kiessling, thank you.

PN247

MR KIESSLING: Thank you.

PN248

DEPUTY PRESIDENT GOSTENCNIK: Ms Kelly, anything in reply?

PN249

MS KELLY: Can I just direct the Bench's attention to two paragraphs of the decision below which are relevant to the submissions Commander Kiessling just made and the first goes back to the controversy perhaps about ground

1. Paragraph 34 of the decision below:

PN250

*The applicant submits that his expenses were approved by an authorised officer by way of an email that read award conditions will apply while you are working in District 4.*

PN251

And what Commander Kiessling just said now was he says, 'I'm entitled to them. I'm entitled to them', and I think that is the factual matrix that says below why the contention was made that the status quo provisions had the effect that there was this entitlement because as Commander Kiessling sees things, the entitlement was confirmed or conferred by this email as distinct from the underlying entitlements.

PN252

DEPUTY PRESIDENT GOSTENCNIK: Ms Kelly, I apologise to interrupt.

PN253

MS KELLY: Yes.

PN254

DEPUTY PRESIDENT GOSTENCNIK: Can I - do you accept that that's the basis of the argument about the status quo?

PN255

MR KIESSLING: That's correct. So my understanding was and I guess the biggest mistake I've probably made is not making a claim prior to the April date where I was - well, I consider I was entitled to and if I've made those claims for the meal allowance, noting that I was not staying in Casterton overnight when I was living in Hamilton and I wouldn't have, and the agreement is quite clear that I couldn't make a claim if I'm returning to my residence perhaps none of this would be an issue.

PN256

But I didn't make those claims. Maybe mistakenly on my behalf, but as I said, I'm basically lazy when it comes to paperwork and I didn't want to do - or I wanted to do the right thing by FRV. That was the nature of that.

PN257

DEPUTY PRESIDENT GOSTENCNIK: All right. But I think importantly from our perspective, you're - the status quo argument you advanced is based on the fact you say the email established the entitlement.

PN258

MR KIESSLING: Yes.

PN259

DEPUTY PRESIDENT GOSTENCNIK: And therefore that should have been paid, effectively, while the dispute was - the broader dispute was - - -

PN260

MR KIESSLING: Yes. Whether I claimed it or not.

PN261

DEPUTY PRESIDENT GOSTENCNIK: All right. Thank you very much.

PN262

MR KIESSLING: Yes.

PN263

DEPUTY PRESIDENT GOSTENCNIK: Apologies.

PN264

MS KELLY: Thank you, Commissioner, that was very helpful if I might say so.

PN265

The second paragraph I wanted to direct attention to is paragraph 40:

PN266

*Both parties agree that the allowance is relevant to a temporary transfer are found in schedule 4.*

PN267

And that's how the case below was run and determined the schedule 4 allowances. 92.9, 92.12, 92.22 referred to in Commander Kiessling's written submissions and 92.9 referred to orally sit outside schedule 4. They sit elsewhere. They are the allowances that I say if Commander Kiessling wishes to claim them, he can. My client will deal with them but this Bench ought not to.

PN268

The final thing is \$1,600 is what's in issue as Commander Kiessling sees it but for my client, there are obvious flow-on effects from the proper construction and application of these clauses. It is not concerned with the dollar amount.

PN269

If entitlements are owed, they will be paid but it looks to the consequences of this decision for its operations more broadly and says the error needs to be corrected. Unless I can assist further, nothing further in reply.

PN270

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Ms Kelly.

PN271

May we thank all the parties for their helpful written and oral submissions, again for their cooperation in having this matter dealt with at an earlier time. We will reserve our decision and wish you all a good day.

PN272

We're adjourned.

**ADJOURNED INDEFINITELY**

**[9.34 AM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #? DOCUMENT TITLED RECOMMENDATION OF  
GRIEVANCE OF COMMANDER KIESSLING DATED 20/01/2023 AT  
PAGE NUMBER 117.....PN48**