

**TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T No. 2323 of 1990 and  
T No. 4287 of 1993

**IN THE MATTER OF** applications by  
the Tasmanian Public Service  
Association to vary the General  
Conditions of Service Award

re workplace representatives and  
payment of wages

DEPUTY PRESIDENT

HOBART, 29 July 1993  
continued from 28/7/93

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: Any changes in appearances?

**MRS S. STRUGNELL:** Mr Deputy President, if the commission pleases, MRS SUE STRUGNELL with **MR PAUL MAZENGARB** for the Tasmanian Public Service Association.

DEPUTY PRESIDENT ROBINSON: Right.

**MR D. HOLDEN:** MR D. HOLDEN, appearing on behalf of the Tasmanian TAFE Staff Society.

DEPUTY PRESIDENT ROBINSON: Thank you.

**MR G. PHILP:** I don't think I need to change it, but if the deputy president pleases, GREG PHILP for the Tasmanian Teachers Federation.

DEPUTY PRESIDENT ROBINSON: Right.

**MR J. McCABE:** No changes from this end of the table, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Good, Mr McCabe.

Well I assume that the parties were working astutely yesterday afternoon. I wonder what the result is. Mr McCabe?

MR McCABE: Yes, since we asked for the time for further discussions, Mr Deputy President, I think if I could respond?

We did have some wide-ranging discussions yesterday afternoon on all the aspects that we wished to put to the various organisations, and we parted company - I think it was around about 5 o'clock last evening - and the union parties were going away to consider certain propositions that were put to them.

Now we haven't heard from them over night, so to speak, or this morning, and we haven't - we only just got here and we haven't had time to discuss anything further with them.

I'm just wondering if it wouldn't be prudent to have further time to talk to the other parties to see what their position is now as of this morning.

DEPUTY PRESIDENT ROBINSON: Well, I am in your hands. You know me, I like to accommodate everybody, if I can. Sorry to have brought you back here at this early time of day, but these are busy times.

MRS STRUGNELL: Mr Deputy President, as Mr McCabe said, we haven't had an opportunity to discuss anything this morning. If we could have just an adjournment perhaps until 9.30, we'd appreciate that.

DEPUTY PRESIDENT ROBINSON: Yes, certainly. Just let me know when you are ready and I'll come -

MR MAZENGARB: Bounding backwards.

DEPUTY PRESIDENT ROBINSON: Not bouncing down, no, struggling down the stairs. We'll adjourn.

SHORT ADJOURNMENT

DEPUTY PRESIDENT ROBINSON: Well it is good to see the parties in such a jolly mood. It is a good sign, I hope.

MR HOLDEN: A professional attitude doesn't reflect anything.

DEPUTY PRESIDENT ROBINSON: Mm. Well, first of all, the good news?

MR McCABE: Were you going to give us some good news? I don't think there is a lot to be coming from this side of the table.

DEPUTY PRESIDENT ROBINSON: I don't think we - I had contemplated sitting on Saturday, but there's a big match on I have to go to, so we might forego that.

MR McCABE: Well we've had further discussions, but I don't think that those discussions are going to lead to any substantial agreement. I'll let the TPSA and the others speak for themselves.

DEPUTY PRESIDENT ROBINSON: Thank you. Mrs Strugnell?

MRS STRUGNELL: Mr Deputy President, we have attempted over quite an extended period of time to come to some agreement in relation to the payment of wages clause. Unfortunately we have not succeeded in that, and we would now like to request that you proceed to hear the rest of the claim to vary the General Conditions of Service Award in relation to the payment of wages clause.

We have put our submission -

DEPUTY PRESIDENT ROBINSON: Yes.

MRS STRUGNELL: - we are now waiting for the government submission.

DEPUTY PRESIDENT ROBINSON: Yes, I thought that was the stage we had reached some time back. Mr McCabe, back to you, I think.



MR McCABE: Did you intend to proceed with the matter now? We do envisage quite extensive submissions.

DEPUTY PRESIDENT ROBINSON: Do you? Oh, well, I'm sure I guess commonsense dictates that if we can't utilise the next half an hour to complete something, we might adjourn this matter for a little while.

MR McCABE: I do find myself in a bit of a bind because at the last hearing when Mrs Strugnell put her case in relation to the wage fixing principles I did go away and have a think about the questions that were raised on that day in respect of the conditions of service principle - conditions of employment principle - and it has raised some fairly fundamental submissions as to how the case should proceed in light of the principles.

DEPUTY PRESIDENT ROBINSON: Well I guess the TPSA are entitled to argue from their perspective and you from yours, and -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - if there is no meeting of minds between the parties it will be left to poor old me.

MR McCABE: Yes, and I suppose rather than sort of delay the proceedings, or to facilitate some resolution of this, perhaps I ought to put my position in relation to the principle before we get into the merits of the claim, because I think that has an overriding influence on the way that the case might go.

DEPUTY PRESIDENT ROBINSON: Yes. I would expect that you would comment upon the principles, in any case.

MR McCABE: Yes. Well, if I can do that now, and perhaps that -

DEPUTY PRESIDENT ROBINSON: Certainly, if we can get that part of it out of the way.

MR McCABE: And we say that the TPSA has advanced its case in support of the inclusion of a the payment of wages clause in the GCOS Award.

Now we have a fundamental concern about this clause being inserted in the award in the proposed form.

The submissions put to you by Mrs Strugnell on the last day of hearing before yesterday did nothing to allay the concerns we have about the way that this proposed clause sits in relation to the wage fixing principles which this commission set in place in February 1992, and which still must be complied with in the making of or the variation of an award.

So what we wanted to draw to your attention, Mr Deputy President, is the need for this award variation to be considered in the light of the appropriate principles.

Now we say that the first principle to be considered is the conditions of employment principle.

There is no question I think that the application now before the commission is an application to change conditions of employment for employees subject to the General Conditions of Service Award, and this is by providing conditions which will relate to the payment of wages which currently don't exist.

So I don't think there is any question that the conditions principle is the first principle which needs to be satisfied.

Now, if I could quote that principle. It says that:

Except for the flow on of test case provisions applications for changes in conditions other than those provided elsewhere in the principles will be considered in the light of their cost implication both directly and through flow on.

Now, dealing with the first part of that sentence, there is no evidence of submissions put by the TPSA or any other union that there is a test case provision where this matter has been the subject of a test case in this commission.

Now, if there were, perhaps that would satisfy the principles, but in our view there has not been, and there is no question of relying on that part of the principle.

So if we move to the second part of the sentence, and that says:

In respect of any application where the cost impact either directly or through flow on is, prima facie, not negligible that application must be processed in accordance with the special case principle.

I'm sorry, I quoted the wrong part. I am a little bit ahead of myself. I was really dealing with the second part of the first sentence, which says:

... applications for changes in conditions other than those provided elsewhere in the principles will be considered in the light of their cost implication both directly and through flow on.

I am sorry about that.

DEPUTY PRESIDENT ROBINSON: That's alright.

MR McCABE: If I could refer back to that part again.

It is quite clear that no provision elsewhere in the principles which might cover the subject of the mechanics or the processes attached to the payment of wages, if you take my point.

There is no the payment of wages principle. There is no other principle upon which the unions could rely.

So, what we are left with in this matter, in effect a sentence saying - and I am just constructing a sentence which might cover this particular application - would be, 'This application for changes in conditions will be considered in the light of its cost implications both directly and through flow on'.

And the concern we have in relation to this proposed clause - the payment of wages clause - is that there are most certainly cost implications attached to the penalty provisions in the clause, and other costs which I will go into later.

Now that cost implication arises from the fact that the application by the TPSA - and that's Exhibit TPSA.66 - at clause (e) it seeks to impose a hefty financial penalty on the employer in the event of a late payment, a failure to pay wages.

So there is no question, in our view, that there are substantial and direct cost implications for the employer in the event of the failure of a government pay system to pay employees correctly and at the specified time.

Now to illustrate the sorts of costs which the government might be liable for as a result of that particular penalty clause I would seek to tender an exhibit.

DEPUTY PRESIDENT ROBINSON: Do you have any earlier exhibits in this matter, Mr McCabe? I don't think so.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Do you?

MR McCABE: Yes, I think we are up to at least three.

DEPUTY PRESIDENT ROBINSON: Oh, right. If I looked at the file instead of the principles, it might help. Shall we take a punt and call this MATSSA.4.

MR McCABE: The previous ones I have got marked as 'Government'.



DEPUTY PRESIDENT ROBINSON: Government? Right, that rings a bell - Government 4.

MR McCABE: And in this example, Mr Deputy President, I have attempted to set out what could be a reasonable cost - a reasonable impost on the situation leading to a reasonable impost on -

DEPUTY PRESIDENT ROBINSON: I thought you were saying it would be unreasonable.

MR McCABE: Sorry. A reasonable example of where an impost -

DEPUTY PRESIDENT ROBINSON: A reasonable example, yes. Right.

MR McCABE: Yes. Yes - where this clause might be invoked.

If we could take line 1 of that, it says - if you go to Exhibit Government.2 - there are 37 awards on that list of Government 2 to which the clause would apply if it was to go into the General Conditions of Service Award, and I don't know the exact number of employees under those 37 awards but, say for example it is 5000.

Now if 20% of those employees were kept waiting for payment because of a malfunction in the paystat system, or some other system, the following costs could result.

So it would be 1000 of those employees, and if you say they are on an average salary of \$28,000 each, which wouldn't be too far from the sort of average wages these days, if you make that into an hourly rate, that would work out at about \$14.65 per hour on the standard calculations for this State Government.

Now if those employees were kept waiting for payment for a day because of this pay system malfunction, according to the penalty clause in the TPSA's application that would be 6 hours at time and a half which comes out to 9 hours' penalty for each of those employees.

If you take the 9 hours for each employee, multiplied by their hourly rate, and multiplied by the number of employees, it works out at \$131,850 which the government could be liable for. And that is for 1000 employees kept waiting for 1 day.

DEPUTY PRESIDENT ROBINSON: But is it really likely that the pay system would break down and people would be kept waiting a day for their pay?

MR McCABE: It is a possibility. There were incidents last week, Mr Deputy President, or in the very near past, where the Commonwealth Bank went on strike. Employees of the Commonwealth Bank went on strike and pay wasn't available to those who have their pay directly deposited in that institution.

Now, whether that's a legitimate claim or would be a legitimate claim for an employee to say their pay wasn't available because the Commonwealth Bank -

DEPUTY PRESIDENT ROBINSON: I thought there was an out in circumstances which were beyond the employer's control.

MR McCABE: Yes. I mean, is a computer malfunction beyond the employer's control? I mean, that is the question which we have to look at. I mean, it is not beyond the realms of -

DEPUTY PRESIDENT ROBINSON: I would have thought you'd say that it was.

MR McCABE: Well, I mean -

DEPUTY PRESIDENT ROBINSON: In anticipation that it might.

MR McCABE: It could possibly be held a reasonable assumption that the employer is responsible for their own computer systems, and if they fail then that is a failure on the part of the employer.

DEPUTY PRESIDENT ROBINSON: I wonder whose side you are arguing now. We wouldn't want to hold this against you in the future.

MR McCABE: Well, I mean, yes. So what we - this illustrates what could happen if there was a failure in the pay system - and employees were able to substantiate a case for a penalty payment.

So the government would be up for nearly \$132,000 in penalty payments if this rather conservative example of a pay system failure was to eventuate.

Now that is if only one-fifth of employees in this example were to be affected.

Now if all of 5000 employees could make a claim because of a serious malfunction in the system then the pay out figure would rise to about \$659,000 in one hit.

So the cost implications of the penalty clause in this application are enormous, in anyone's language.



Now what the TPSA have submitted is that the cost impact would be negligible if corrective measures are taken by the government and failures are totally prevented.

Now that of course is possible if we could be absolutely certain that no failures could or would occur in the pay system.

Now, we of course cannot guarantee that failures can be totally prevented.

Now while we say there are very few occasions when failures have occurred and most employees are paid on or before pay day, we do not claim to be infallible and this is not a perfect world, so the potential for large and costly payments in the form of the penalty sought are implied in this application.

So we then move to the next part of the conditions of employment principle which says - and that's the bit I quoted earlier in error. It says:

In respect of any application where the cost impact either directly or through flow on is, prima facie, not negligible that application must be processed in accordance with the special case principle.

Now there is no doubt about what that sentence requires. It makes it quite clear that if the cost impact of a condition is not negligible then it must be processed in accordance with the special case principle.

Now there only needs to be - in the words of the principle - prima facie evidence of cost implications to ensure that the claim is processed via the special case principle, and we say that the prima facie evidence of the cost implications are graphically demonstrated in Exhibit Government.4.

Now the TPSA's submissions on the cost implications, as I said, do nothing to explain what would happen if there was a serious failure in the pay system. They just say that if the systems are made infallible then no costs will eventuate.

Now in our view that's not good enough, and we say that system failures, no matter how good or foolproof the system is, can occur and if they did have the potential to inflict very substantial costs on the employer.

So the essential element which dictates that this application must be dealt with subject to the special case principle is in evidence and that is that the cost impact for the employer is not negligible.

We submit that we have given you prima facie evidence to that effect, which I believe cannot be refuted by the applicants.

As a result of that we have taken the somewhat unusual step in these sort of award variation applications of dealing with the wage fixing principle before dealing with the merits of the claim. However, as we see it, that is the logical way for it to be done, given that the principle dictates that the matter must be considered in line with the special cases principle.

DEPUTY PRESIDENT ROBINSON: Could I interrupt you at this stage?

MR McCABE: Yes, certainly.

DEPUTY PRESIDENT ROBINSON: Wouldn't the government as a prudent employer have such a contractual arrangement with the likes of the Commonwealth Bank or other such institutions, that if it had a failure in - in delivering its service on time, that it would bear the cost which would result rather than the government who - who is allowing such institutions to have - to have a contract with it?

MR McCABE: Yes, there are contractual arrangements for the payment of employees' pay into their nominated accounts.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: It doesn't extend, I believe, beyond the Reserve Bank which has the contract with the government to distribute the pays to the various other financial institutions.

As I say, that's a - it is a moot point as to whether the government is liable once the money has been passed from Treasury to the Reserve Bank for - for on-distribution.

DEPUTY PRESIDENT ROBINSON: Mm. But I'm just raising the question as to whether or not the implication of a cost to the employer would necessarily arise if it had covered itself through contractual arrangements for it not to be made to bear the brunt of the cost for somebody else's -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - error or malfunction or however one might describe it.

MR McCABE: Yes, I see what you're saying, that that is why I confined my example to where a government pay system fails, such as Paystat. If there was a failure at the government end of the - the pay process -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - then it could be - it may be reasonably held were it reasonably proven by the employees in any claim that the government was liable.

DEPUTY PRESIDENT ROBINSON: Mm. But I thought you were saying -

MR McCABE: It was -

DEPUTY PRESIDENT ROBINSON: - it as an example what happened a fortnight ago, I think -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - and you mentioned something that happened with the Commonwealth Bank.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Was that incident a true example? Was it the government's fault or someone else's?

MR McCABE: Well, I don't think the state government could be held responsible for Commonwealth Bank employees going on strike. What happens in that instance -

DEPUTY PRESIDENT ROBINSON: Well, was that - was that a good example -

MR McCABE: - I mean - well -

DEPUTY PRESIDENT ROBINSON: - then -

MR McCABE: - probably - probably it wasn't. Excuse me for a moment.

Perhaps we could, you know, at some later time give you some more -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - information on -

DEPUTY PRESIDENT ROBINSON: Another question which I had - I mean your argument in raising the wage fixing principles - or the raising of the wage fixing principles is a perfectly valid one which I support, but it does presuppose that at the end of the day I would accept the totality of what has been put forward by the TPSA in its application, and that I would not through persuasion, assuming that the government's maintained its line that it's not opposed in principle to a clause going in the award, that I might accept an alternative sort of proposal which wouldn't have the implications - cost implications that you're now putting forward.



MR McCABE: Well certainly. I mean if - I guess this is a - dare I say it - another threshold point before we get into our side of the - as to what we're prepared to put forward on merits in response to the TPSA's claim.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: Now certainly if - if you were to go away today and consider that you could at the - that you're clear to handle this matter, and that it doesn't have to be handled as a special case, then we would be prepared to come back and put forward the documentation and the offers and the various -

DEPUTY PRESIDENT ROBINSON: Yes. I would certainly have full and proper regard for your submission, but I wouldn't see it would be proper or appropriate for me to leap in and make a ruling on that sort of threshold point until we'd gone much farther into the case.

MR McCABE: On the condition - on the question as to whether it's a special case - whether the special case -

DEPUTY PRESIDENT ROBINSON: Well whether - whether or not - yes, it ought to be a matter should go to a special case because of the wording of the conditions of employment principle.

MR McCABE: Yes, well are you suggesting that I now continue with the merits of the - of our -

DEPUTY PRESIDENT ROBINSON: Yes, I think it's - I think it's far too early for me to make an assumption that - that the matter would fall within or without the terms of the conditions of employment principle. But I certainly won't be delivering a - a decision in favour of the TPSA if at the end of the day I believe that it would be inappropriate for me to - to issue such a decision and that in the alternative - or one of the alternatives - that it should go to - for consideration as to whether or not it is a special case.

I mean that - and one of the other possibilities of course are that I might just dismiss the application entirely as not having -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - been sustained. So -

MR McCABE: On the question of -

DEPUTY PRESIDENT ROBINSON: - you never - you never want to overlook that possibility, Mr McCabe.

MR McCABE: Would that be on the question of it's not - it's not a matter for you to consider in that it's - should be processed as a special case?

DEPUTY PRESIDENT ROBINSON: Oh, I can't give you my reasons -

MR McCABE: Or are you talking about -

DEPUTY PRESIDENT ROBINSON: - in advance until I've heard the case.

MR McCABE: No, no, of course.

DEPUTY PRESIDENT ROBINSON: I haven't even made the decision whether it's going to succeed or fail. We've just got to take one step at a time.

MR McCABE: Well, as I say, we'd want to present fairly lengthy submissions on the merits of the claim.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: We would be looking to - in the light of the discussions that have taken place in the last 2 days -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - I'd need to now formulate a case.

DEPUTY PRESIDENT ROBINSON: Yes. Would you be putting forward an alternative proposition?

MR McCABE: Oh, most certainly.

DEPUTY PRESIDENT ROBINSON: Yes, well I would certainly need to properly have - have a look at that before I could form an opinion, obviously.

MR McCABE: Yes, well the reason I put that case - the case in respect of the principle - is that, you know -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - is there any point in me putting my merit revealing our case when, you know, you may have to say because of the special case principle, I can't hear this matter?

DEPUTY PRESIDENT ROBINSON: Well - and I think - I think we do have to proceed further because I mean your argument that there are - there will be cost implications in what I do is premature.

MR McCABE: Well I took it that from the wording of the principle that we only have to present prima facie evidence that there are cost implications.

DEPUTY PRESIDENT ROBINSON: Yes, but I don't have to accept the precise terms of the application. I'm only dealing with the subject matter of a payment of wages clause -

MR McCABE: Yes -

DEPUTY PRESIDENT ROBINSON: - the subject matter, and if you could show me something which has got far more merit, and, at the same time meets the requirements of the wage fixing principles and the act, then obviously I could deal with that without going to a special case on the understanding that it wouldn't have the pitfalls that - that you foresee in the applicant's details.

MR McCABE: Yes - yes, thank you, Mr Deputy President. Could I just finish my -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - my submission on the cost aspects of - as it relates to the principles, in that we've had discussions with the - with the unions about certain requirements in their claim -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - which also would require us to change to - to provide further details to employees on their pay slips.

DEPUTY PRESIDENT ROBINSON: Oh yes.

MR McCABE: We're fully aware of what - what we're talking about. One of the current systems doesn't provide for all the details that the unions are seeking -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and it would incur substantial cost for the government to upgrade that system to be able to. I think we substantially concur with the - with the information that they're seeking -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - they're only very minor things that aren't shown on the pay slip, but it -

DEPUTY PRESIDENT ROBINSON: Right.



MR McCABE: - would cost the government a lot of money to upgrade the system to - to include those on a pay slip.

DEPUTY PRESIDENT ROBINSON: I see.

MR McCABE: So that is one of the other aspects of the cost -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - substantial costs to the government.

DEPUTY PRESIDENT ROBINSON: Yes. Yes. If there was a breakdown in the system which caused a delay in - across the board for payment, there are already I think about 13 awards as detailed in Government.3, which - there are already provisions there and I don't know whether you've included the cost which would be incurred as a result of those existing -

MR McCABE: No, I didn't dissect those.

DEPUTY PRESIDENT ROBINSON: - from awards. Yes, they're dissected, so it will be -

MR McCABE: I'm not sure about the penalty clauses in all of those. They do tend to vary between award - from award to award.

DEPUTY PRESIDENT ROBINSON: Fine. Anyway, I thank you for utilising -

MR McCABE: Thank you, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: - the last half an hour and putting that matter on the principles.

I've got another small matter at half past 10.00. I'm not quite sure how long it will go. I've got a feeling it won't be brief. So we'll need to set - set further dates for you to resume, Mr McCabe, on this matter.

OFF THE RECORD

DEPUTY PRESIDENT ROBINSON: As is customary, we stopped the recording machine and we've decided after that brief adjournment to adjourn these two matters until 10.30 am, Tuesday 10th August. Thank you.

HEARING ADJOURNED