

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Margaret Howell
(T13775 of 2011)

and

The Minister administering the State Service Act 2000 (Department of Health and Human Services)

DEPUTY PRESIDENT TIM ABEY

HOBART, 1 August 2011

Industrial dispute - a dispute in relation to termination of employment – ability to efficiently and effectively perform duties - valid reason for dismissal – likely change in medical circumstances - dismissal found to be unfair - s47 redeployment not applicable - reinstatement - order issued

REASONS FOR DECISION

[1] On 18 May 2011, Margaret Howell, applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA)/Department of Health and Human Services (DHHS). This is an application arising out of the termination of employment of Margaret Howell.

[2] Hearings were conducted in Hobart on 2 June, 9 June, 6 July and 7 July 2011.

[3] At the hearings Ms S Katsin appeared for Mrs Howell with Ms K Tyson. Mr T Witt appeared for DHHS with Mr A Grundy and Ms K Greenhalgh.

Overview

[4] The applicant has been employed in the State Service for 37 years. At the time of termination Mrs Howell was employed as a Finance Services Officer, a position classified at Band 3 (B3) of the Health and Human Services Award (the Award).

[5] In September 2005 Mrs Howell suffered a subarachnoid haemorrhage (stroke). According to her then treating doctor, Mr Hunn, she recovered "*medically very well*" and was cleared for a return to work program in April 2006.¹ For reasons not explained during the hearing (and probably not relevant to the instant matter) her return to work in Housing Tasmania did not happen until August 2006.

[6] Relevantly Mrs Howell commenced in Finance Operations on a part-time basis in May 2008. On 15 October 2008, Mrs Howell, at her request, commenced full-time hours. On 1 February 2010 Mrs Howell, at her request, moved to the accounts payable area of Finance Services.

¹ Exhibits R4 & R5

[7] It is clear that performance issues arose during this period, which, on the medical evidence, were related, in part or in whole, to Mrs Howell's earlier brain injury.

[8] On 11 May 2010 the Secretary, (Mr Roberts) initiated an investigation pursuant to s48(3) of the *State Service Act 2000* (SSA) in accordance with Commissioner's Direction No. 6 (CD6). Mr Roberts identified the following issues as the substance of Mrs Howell's alleged inability:²

"that you are unable to efficiently and effectively perform the duties of a Finance Services Officer on medical and other performance grounds."

[9] Mr Dan Longstaff was authorised to conduct the investigation. Mrs Howell was suspended on full pay.

[10] The Investigation Report³ was completed on 15 November 2010. A copy was forwarded to Mrs Howell with an invitation to respond. The CPSU responded on Mrs Howell's behalf by correspondence received on 15 December 2010.⁴

[11] The Secretary convened a hearing consistent with DHHS Capability Procedure⁵. The CPSU, and on advice, Mrs Howell, declined to participate in this hearing.

[12] Notwithstanding, the hearing proceeded on 20 January 2011. In correspondence dated 3 February 2011, the Secretary advised that he was satisfied that the inability of Mrs Howell to perform her substantive duties had been established. Further, the Department had been requested to undertake a further review of alternative duties, based on medical limitations that had been accepted. Mrs Howell was invited to attend a further meeting *"to obtain her views in relation to the types of reassigned duties she might perform..."*⁶

[13] The meeting took place on 23 February 2011. The outcome was inconclusive. Mrs Howell maintains that the Secretary said there would be a further meeting *"in a couple of weeks,"* a contention disputed by Mr Wright. It was agreed that the CPSU would provide Statements of Duties (SODs) for positions that might be suitable for Mrs Howell.

[14] On 21 March 2011 the CPSU forwarded several SODs that the union felt *"offered more appropriate employment options for Margaret than those previously suggested."* It transpires that these SODs (and one other) were subject to an internal assessment by Ms Jessup, manager Human Resources, who in a minute dated 24 March 2011, found that the positions were unsuitable. This outcome was not conveyed to the CPSU.

[15] On 25 March 2011 the Secretary issued his determination.⁷ Mr Roberts found that Mrs Howell was unable to efficiently and effectively perform the duties of a Finance Services Officer at B3 of the Award. Mr Roberts further found that an inability on other performance grounds had not been established.

[16] The Secretary determined that termination of employment pursuant to s44 of the SSA was the appropriate action arising from the procedure. Mrs Howell was given two weeks' notice plus three months' pay. There was a proviso to effectively extend

² Exhibit R7

³ Supra

⁴ Exhibit A4

⁵ Exhibit R14

⁶ Exhibit A7

⁷ Exhibit A10

the period of notice should Mrs Howell pursue an application for an RBF permanent ill health benefit, an option that Mrs Howell did not pursue.

[17] The CPSU contend that the decision to terminate Mrs Howell's employment contract was harsh, unjust and unreasonable. A lesser sanction should have been applied, specifically the assignment of alternative duties. Further, if no suitable alternative positions were available, then Mrs Howell should be placed on the redeployment list pursuant to s47 of the SSA.

[18] Mr Witt submitted that the medical evidence was largely not in dispute. In addition there is a background of underperformance which adds weight to the medical evidence. Procedural fairness had been afforded. The Secretary had been unable to find suitable alternative duties. Section 47 of the SSA relates to redeployment, which is a different circumstance to that of Mrs Howell.

Evidence

[19] Sworn evidence was taken from the following witnesses:

- Margaret Ann Howell, the applicant.
- Anthony Grundy, Manager Finance Operations.
- Daniel Barnes, Senior Finance Services Officer and supervisor of Mrs Howell from February 2008 to July 2009.
- Daniel Longstaff, Manager Business Services within the Business Support Unit of Primary Health.
- Stuart Wright, Manager Conduct and Review from September 2009 until March 2011.
- Rhy Cullen, Team leader, Finance Services Operations.
- Todd Sales, Human Resource Consultant.
- Elizabeth Jessup, Manager Human Resources, Corporate.

[20] With the consent of the CPSU, a statement from Chris Honner, Senior Finance Services Officer, was tendered into evidence.

Medical Evidence – CD6 Investigation

Dr Tim Stewart, Consultant Occupational Physician

[21] Upon referral from the Department, Mrs Howell met with Dr Stewart on 9 and 10 June 2010. In his reports⁸, Dr Stewart noted that whilst Mrs Howell had physically made a good recovery, the 2005 stroke has had a significant impact on her mental function. Further, associated with this has been a depressive illness that has manifested itself with the development of anxiety and depression symptoms. Dr Stewart concluded:

"Mrs Howell is not fit to perform the duties of a Finance Services Officer. Indeed to attempt to place her in that position would not only be demeaning for her but would also lead to a considerable degree of angst, confusion and uncertainty on her part.

⁸ Exhibits R1 and R2

A less challenging job should be considered for Mrs Howell, one that is likely to allow her to function with the cognitive impairment that she suffers.... An alternative solution is to redeploy Mrs Howell in a lesser position that does not demand organisational skills, creativity and flexibility..."

Dr Clive Skilbeck, Clinical Neuropsychologist.

[22] Upon referral from Dr Stewart, Mrs Howell met with Dr Skilbeck on 27 July, and 3 and 10 August 2010. In his report Dr Skilbeck said:⁹

"from a neuropsychological perspective, I think it might be very difficult for Mrs Howell to return to a demanding job in the organisation. Given that she has built up considerable knowledge during her time in the agency, it may be possible for her to undertake/be trained to undertake a routine job within the DHHS if this does not require higher level organisational skills or significant flexibility."

[23] In the CD6 investigation Mr Longstaff concluded:¹⁰

"The evidence relating to the medical grounds is comprised of reports from two specialist doctors. There is nothing to suggest that the Investigator cannot accept all the evidence on face value."

[24] The medical evidence referred to above is largely uncontested. The CPSU acknowledges that Mrs Howell is unable to return to her substantive role as a Finance Services Officer. The matters subject to debate relate to alternative duties, and whether or not any of the medical circumstances have changed in the period since Dr Stewart's report.

Performance Grounds

[25] Much of the evidence presented by the respondent related to performance issues during the period May 2008 until May 2010. Essentially this evidence fell into two categories.

[26] The first category relates to the capacity to perform the role in a timely manner with an error rate which did not exceed acceptable levels. Whilst I am satisfied that some shortcomings were identified in these respects it seems likely that they were directly related to the medical limitations referred to above. This must be viewed in proper context. The performance shortcomings overwhelmingly relate to a B3 role, specifically Mrs Howell's substantive position as a Finance Services Officer. It is accepted that Mrs Howell is unable to return to this position. It follows that this evidence is of limited relevance to the issues which remain subject to debate.

[27] The second category can best be described as evidence pertaining to alleged emotional instability. In particular, difficulties supervisors had experienced in managing performance feedback for Mrs Howell.

[28] Ms Katsin strongly objected to the admission of this evidence, pointing out that the Secretary had made a positive finding that an inability based on performance grounds, other than those medically based, had not been sustained.

[29] Mr Witt submitted that the Secretary may not have had all the relevant evidence before him when he made the determination, and further, on the balance of probabilities, it is likely that this behavior would still be an issue if Mrs Howell was engaged in alternative duties, even at a lower level.

⁹ Exhibit R7

¹⁰ Exhibit R7

[30] From the evidence it seems likely that the behaviour described as emotional instability was a consequence of the depressive illness suffered by Mrs Howell. There is some evidence, and certainly a strong contention, that this illness had largely resolved itself following a change in medication.

[31] Mr Longstaff dealt with the performance issues through interviews with Mr Grundy, Ms Egan (Chief Financial Officer) and the applicant. When questioned at hearing in relation to Mrs Howell's other supervisors, Mr Longstaff said:¹¹

"I understand you interviewed Mr Grundy, was there a particular reason why you didn't interview any of the other supervisors of Ms Howell? ---Nothing overly particularly, that is to say, but there was so much documentary evidence of all what had transpired on the part of the Department as far as meeting notes, emails. Anthony had a very good grasp of it, I didn't think there was any more going to be added to that side of it by interviewing more people at the Department. I thought I had all that covered by people I had talked to and the documentary evidence."

[32] Mr Longstaff noted that a Performance Development Agreement was drafted but not followed through. Mr Longstaff concluded:¹²

"Evidence provided by Mr Grundy and the Employee demonstrate that performance issues existed, but the absence of a Performance Development Agreement or Performance Improvement Plan endorsed by the Employee indicate that further formal steps could have been taken to assist the Employee. I suggest, however that the Employee's emotional/medical state may have precluded such actions occurring".

CPSU Response to CD6 Report

[33] The CPSU responded to the CD6 Report on behalf of Mrs Howell by correspondence received on 15 December 2010.¹³ In summary the letter:

- Expressed disappointment with the result of the investigation.
- Expressed a desire for Mrs Howell to continue her State Service career.
- Noted that the medical reports all contemplated redeployment into alternative duties.
- Sought maintenance of salary.
- Provided a corrected and agreed version of notes of an earlier meeting with Mr Grundy.
- Pointed to alleged shortcomings in the Departmental handling of the matter.
- Submitted that termination would be manifestly excessive and patently unfair and demotion inappropriate.
- Urged that the appropriate action would be reassignment of duties, training and if relevant, maintenance of salary.

¹¹ Transcript p 81

¹² Exhibit R7

¹³ Exhibit A4

- Acknowledged that a reassignment of duties would need to remove Mrs Howell from Finance Operations.

[34] The CPSU submitted a further report from Dr Philip Reid, Consulting Psychiatrist, dated 24 December 2010. The report reads:¹⁴

"I understand that you are assisting Ms Howell with her employment. I can confirm that I have been her treating psychiatrist since 3rd November 2009. There is no doubt that Ms Howell has found the work situation distressing and there has been significant depressive symptoms and lability of mood. Unfortunately these symptoms were still prominent when she underwent psychological testing by Dr Skilbeck in August 2010. After that time Ms Howell has had a further adjustment of her medication and has improved significantly. Her mood is far more stable and less depressed.

As such I have some concern that she was not at her best when undergoing her psychological assessment. I don't deny there will be some deficits following her sub-arachnoid haemorrhage but her mental state at the time may have coloured the outcome negatively.

In any event Ms Howell has now largely recovered and fit to undertake a return to work in alternative duties. I would be hopeful that her payment structure could be preserved"

Capability Hearing

[35] In late December 2010 the Acting Secretary advised of an intention to conduct a hearing consistent with the DHHS internal policy procedures.

[36] The CPSU, on Mrs Howell's behalf, declined to participate in this hearing. The union's objection was based on a policy position, citing the adversarial nature of the proceeding and the lack of independence of the Secretary.

[37] The Secretary determined to proceed with the hearing notwithstanding the applicant's absence. The hearing took place on 20 January 2011.

[38] As a consequence of this hearing, the Secretary requested the Department to undertake a further investigation and assessment as to possible alternative duties suitable for Mrs Howell.

[39] Mr Sales undertook this investigation. In his report¹⁵ Mr Sales identified the constraints applicable to Mrs Howell as follows:

"According to the medical assessments, a position may be suitable, subject to an appropriate workplace assessment if it involves client contact with less ongoing computer work due to visual deficits associated with Ms Howell's medical condition. The position should not call for much computer work, or use of organisational skills. The role should be in an environment where creativity and flexibility is not necessary. Further the position should be located within an environment where support and supervision is readily available."

[40] This was explained further in his evidence:¹⁶

"Okay. Now, what I would like to ask you about, Todd, is what your recollection is of the constraints that you had to apply in your assessment; so what do you recall your constraints were?---So I was asked to find or

¹⁴ Exhibit A1

¹⁵ Exhibit A8

¹⁶ Transcript p 15

recommend positions that in whole or in part would be more client focused and less computer based due to some eyesight limitations, and the role was required to have little or no requirement for creativity of flexibility, and it needed to have – it needed to be readily available to supervision and support.”

[41] In his evidence Mr Sales said that in his opinion the constraints automatically precluded B3 positions.¹⁷ He said that he had not met Mrs Howell nor was he asked to speak with her or her Doctor about the type of duties that might be suitable.¹⁸

[42] Mr Sales said that his assessment was subject to workplace assessment of the individual (Mrs Howell) and he had no knowledge of actual vacancies.

Meeting 23 February 2011

[43] The Secretary invited Mrs Howell to a further meeting *“to obtain her views in relation to the types of reassigned duties she might perform based upon (Mr Sales’) recommendations.”*

[44] This meeting took place on 23 February 2011. Ms Katsin and Mr Wright were present together with Mrs Howell and Mr Roberts. The outcome of this meeting was inconclusive, although the following can be reasonably concluded from Mr Wright’s contemporaneous handwritten notes¹⁹ and the evidence:

- Mrs Howell did not necessarily accept all the medical evidence. She felt she had made an excellent recovery and still wished to be challenged in employment.
- Mrs Howell would like to continue in a finance role but not debt management.
- Mrs Howell stated the earlier eyesight problem had now been resolved, was no longer a constraint and that she had good computer skills.
- Mrs Howell’s medication for depression had been changed on 30 August 2010, she had improved enormously as a consequence and mood swings were now rare.
- In light of apparent change in medical circumstances, Ms Katsin proposed that Mrs Howell undergo a further medical examination.
- Mrs Howell had no interest in early retirement.
- It was agreed that Ms Katsin would provide details of further positions that might be suitable for Mrs Howell .

[45] There is no doubt that Ms Katsin and Mrs Howell expressed disappointment as to the absence of B3 positions in Mr Sales’ assessment. Mr Wright said:²⁰

“But what was Ms Howell’s attitude to those duties at that meeting?---Well, she wasn’t happy with the prospect of band 2 and they had already stated that band 2 duties wouldn’t fulfil her and so they weren’t happy with that. So their focus was on band 3.”

¹⁷ Transcript p 122

¹⁸ Transcript p 127

¹⁹ Exhibit R13

²⁰ Transcript p 105

[46] It cannot however be said that B2 positions were rejected by the applicant. Mrs Howell's evidence was:²¹

"THE DEPUTY PRESIDENT: ' I mean the nub of the question is that a proposal was advanced as to an alternative position at a lower level. How do you feel about that?"

MS KATSIN: Yes.

So how do you feel about ----?---Yes, the positions that they gave me to look at – this was with Stuart Wright and the secretary. They were totally unsuitable. There was no finance skills involved, and which I have always worked in finance. They were band 2 positions. There were a couple that I could have done and I certainly would have done if I had known that I was going to be terminated, but the two others – there was two band 1 positions that were – one was – they were in health-support areas and they were in food services and a cleaner and, yes, so they just didn't suit my skills at all."

[47] And later:²²

"MS KATSIN: Yes. And on 233, there's a minute from Todd Sales.

THE DEPUTY PRESIDENT: Yes.

MS KATSIN: In that, he recommends a number of positions that were considered to be suitable on the basis of the medical evidence tendered to the Department at that time and they're the SODs that were presented to us by the Department and discussed at that meeting on 23 February.

THE DEPUTY PRESIDENT: Yes.

MS KATSIN: Let me just find – well, Margaret, we discussed those SODs, didn't we?---Yes, we did.

Yes. And like I said before you – and like you said before – in your evidence before some of those SODs were considered, I guess, inappropriate. Can you remind us what those were?---Food services and cleaning were definitely not appropriate.

And can I ask you again: what would you have made your decision on if you were presented with a decision between being terminated or taking one of the band 2 positions that were recommended?---Taking a band 2 position that was recommended."

[48] Mr Wright acknowledged that the possibility of termination was not raised by the Secretary.²³

[49] Mrs Howell maintains that at the conclusion of the meeting the Secretary indicated the meeting would reconvene in "*a couple of weeks.*"

[50] Under cross-examination Mrs Howell's evidence was:²⁴

"All right, then. Stuart Wright – did he say to you that the meeting would – that you would reconvene?---I don't recall Stuart Wright saying that; I recall the secretary saying that.

²¹ Transcript p 13

²² Transcript p 33

²³ Transcript p 110

²⁴ Transcript p26

Okay. Can you recall the secretary's exact words?---He said that – he asked Ms Katsin to look for some positions, he said he would leave it with her, and then she was to send them through, and then the secretary said, "We will come back and have another meeting in a couple of weeks."

Now, might you have been mistaken – if he did, indeed, say those words, and for the moment we said that he did, might you have been mistaken about whether or not that meeting would involve you or not? May you have been mistaken?---No. No.

So the sequence of events were that the secretary said to Ms Katsin, "Tell us what duties you could do"; is that correct? So if I take you to the point where the meetings – we're talking about a period where the meeting is closing; is that right? So the secretary says to Ms Katsin words to the effect of, "Will you tell me what jobs are available for" - - -?---He asked Ms Katsin to go away, and look for positions which she thought that would maybe would – may be suitable.

And then he says, in the presence of Stuart Wright, "We will reconvene. You will come along, Ms Howell. Ms Katsin will come along as well"; words to that effect?---He didn't say – he didn't actually specify both, but he included both of us, and said that we would come along and discuss this further.

All right. Do you think that what he really meant was, "I will need to give this some further consideration," rather than the meeting?

MS KATSIN: I think, Deputy President, that Margaret has already answered that question.

THE DEPUTY PRESIDENT: Yes. It's a fairly important point; I think Mr Witt is entitled to explore it. You're putting a position – I will allow the question, but we're not going to labour it forever.

MR WITT: Thank you, Deputy President.

So the question was, Margaret, do you think the secretary might have meant that, "Look, I will need to consider this further," obviously anticipating – let me set this one up. So the secretary anticipated certain documents, or certain information from Ms Katsin?---Yes, he did.

Okay. If Ms Katsin provided that information, the secretary, as far as you understood – might the secretary have just simply been indicating that, "Well, look, we will need to consider that information further"?---No.

Okay. I will leave that there, on that discreet point. But on – were you aware that the Department wrote to Ms Katsin two days after that meeting?---Ms Katsin did tell me that she wrote to the Department, but I actually - - -

That wasn't my question. The question is – I'm sorry for stopping you there, but the question is, were you aware that Stuart Wright, two days after that meeting, wrote to Ms Katsin?---No, sorry, I wasn't aware that Stuart Wright wrote to Ms Katsin.

Thank you. Were you aware that Stuart Wright – well, if you weren't aware that he wrote to Ms Katsin, were you aware of the substance of any document that went from the Department to Ms Katsin around the duties that Ms Katsin was going should provide information of to the secretary? Sorry, that's a long question; do you want me to put that again?---No.

Okay?---No, I'm not aware of that. I have seen the positions. Ms Katsin emailed me the positions. Sorry, she did tell me that she – she emailed me and said that she had written to the Department, and she sent me the position descriptions to have a look at, and asked how I felt about them, which I told her they would be all suitable. And I remember, particularly, that the secretary said that we would return for another meeting because I was actually going away, and I thought, "This is good; this will happen while I'm away for a week, and I will be back for when we have the meeting."

[51] MR Wright denied that there was an undertaking for a further meeting. He said:²⁵

"Okay. So at that meeting Ms Howell – your evidence is that Ms Howell was to report back – sorry, Ms Howell and Ms Katsin were to report back on other duties that might have been available?---Yes.

Was there a timeframe agreed at that meeting for that?---Look, I can't recall a specific timeframe. I suppose everyone understood that it needed to be as soon as possible. It may have been 14 days, but I wouldn't want to say for certain on that point.

Okay?---Yes.

Now, were you there through the entire meeting with Ms Howell and the secretary?---Yes, I was.

Okay. In respect of further meetings what is your recall of that? So you had the meeting on 23 February?---Mm.

On the topic of whether or not there may be further meetings, what do you recall?---Well, there was no undertaking of a further meeting, all there was an undertaking was that Ms Katsin was going to provide this information around duties so the secretary could consider that."

[52] There is no reference to a further meeting in Mr Wright's contemporaneous notes.

[53] There is no collaborative evidence to support either Mrs Howell's or Mr Wright's recollection of this important point. As such I am unable to make a finding one way or the other. I am prepared to accept that Mrs Howell may have understood that there was to be a further meeting, with the proviso that this understanding may have been misplaced.

Mrs Howell – Further Evidence

[54] Mrs Howell acknowledged that she was feeling very depressed in the first part of 2010 and during the investigation. During the actual investigation Mrs Howell said she was *"emotionally upset but I tried to remain positive."*

[55] In relation to her health today Mrs Howell said:²⁶

"My health is very good. Emotionally I – my doctors have worked to find me more suitable medication and since I changed my medications I've been feeling emotionally better than I have for a very long period.

Sure. So you said that your medication has been changed since your assessments by the Department's doctors. So what is the actual change of

²⁵ Transcript p 102

²⁶ Transcript p 10

medication?---I was taking two antidepressants, so _____, and the doctor did a test that works out how your metabolism works and she was able to determine a suitable antidepressant that would help me, which was _____ so she added _____ and since then it was _____ so within a couple of weeks that I started to feel a whole lot better, and I really – yes, and everybody now is just – you know how much better I am emotionally.”

[56] In relation to her future capacity for work, Mrs Howell said:²⁷

“Yes. And what are your thoughts on your future capacity to work? I mean, you’ve given me written references from some people to say that you would be a good addition to the workplace. I also have copies of those for the Deputy President. I might hand them up first.

THE DEPUTY PRESIDENT: Thank you. We will mark this A6, references.

MS KATSIN: So to continue what I was saying: what are your thoughts on your future capacity to work?---My future capacity to work is excellent. I am very keen to go back to work. I feel I still have a lot to offer – well, I do have a lot to offer and I have really missed not working over these past 12 months.”

[57] Mrs Howell did not take any issue with the manner in which Mr Longstaff conducted the CD6 investigation.

Events Subsequent to 23 February 2010

[58] On 25 February Mr Wright emailed Ms Katsin requesting that the additional SODs be forwarded by 4 March.

[59] On 2 March the CPSU wrote to Mr Roberts.²⁸ It is a matter of regret that this letter created some confusion in that there is repeated reference to B4 when B3 was intended. This was explained in that under the previous award classification structure Mrs Howell was an A and C Employee level 4 which translated to a B3 under the current Award. This confusion was not clarified at the time and it is difficult to assess what impact, if any, it had on the Secretary’s considerations. I suspect however that it was more likely a source of annoyance or frustration, rather than determinative of the outcome.

[60] The CPSU correspondence asserted that Mrs Howell had an entitlement to return to work and the Agency was obligated to assign duties commensurate with her substantive position. There was further reference to Dr Reid’s report of 24 December 2010.

[61] The letter concluded:²⁹

“This advice further supports our assertion DHHS are obligated to assign suitable duties at her equivalent substantive level or consideration of band 3 roles as previously agreed. Notwithstanding the above, Margaret is available at your Department’s cost to attend any further medical assessments of her health if required.

In the interests of the parties to reach a swift agreement, we seek that the agency uphold their agreement and now consider all roles at Band 3 and meet with us to discuss these options ASAP.”

²⁷ Transcript p 14

²⁸ Exhibit A9

²⁹ Exhibit A9

[62] Mr Wright's evidence on the question of a further medical examination was:³⁰

"Mrs Howell has stated earlier in her evidence that she advised the secretary that she would undergo another medical assessment because of the assessment for the suitability of jobs was based on a medical assessment – that was some six months old at that time. Your notes confirm this as well. Can you confirm why the DHHS did not put Mrs Howell through another assessment?---Well, as far as I'm aware, the reason for that is simply because the underlying medical condition would not have altered.

Even after suggestions from Dr Reid that it had in regards to her medication? - --Well, again, I would have to see Dr Reid's letter, but my recollection of that letter was it was very, very brief and really wasn't what I would describe as a medical opinion."

[63] There is no evidence of any further communication between the parties until the CPSU emailed the Secretary on 21 March with several SODs attached for consideration.

[64] It transpires that these SODs were immediately assessed by Ms Jessup. The constraints provided to Ms Jessup were virtually identical to that used by Mr Sales in his initial assessment dated 27 January 2011. Of significance, the constraints recorded in Ms Jessup's report included:³¹

"...involves client contact with less ongoing computer work due to visual deficits associated with Ms Howell's medical condition. The position should have limited computer work, or use of organizational skills."

[65] The evidence of Ms Jessup was:³²

"In a nutshell, what was that assessment?---Overall?

Overall?---Overall, that the positions that had been identified weren't, in fact, suitable for someone with Ms Howell's restrictions because the skills and expertise required and capabilities required to do the five roles that I looked at did not fit well, I didn't think, with the restrictions that I was informed that Ms Howell had."

[66] Ms Jessup did not discuss the roles with Mrs Howell and relied on an assessment of the SODs on the papers and in the knowledge of the restrictions provided.³³

[67] Ms Jessup assessed one position which was additional to that provided by the union. That position was Administrative Assistant –STAHS, classified at B2. Ms Jessup explained that this was an actual vacancy at the time of the assessment. Ms Jessup's conclusion in relation to this position was:³⁴

"The Administrative Assistant role has a high level of computer based work. As the role provides reception and clerical services across two units, it would be expected that the occupant demonstrates will developed organisational skills with a capacity to handle numerous tasks. In part it would be a non routine work environment requiring initiative and flexibility. I do not believe the duties associated with this position would be commensurate with Ms Howells current capabilities on medical grounds."

³⁰ Transcript p 109

³¹ Exhibit R18

³² Transcript p 132

³³ Transcript p 136

³⁴ Exhibit R18

[68] Ms Jessup's minute was dated 24 March and presumably presented to the Secretary shortly thereafter. The determination of the Secretary was dated 25 March. The covering letter noted, *inter alia*:³⁵

"I note with disappointment that the undertaking made by you from the meeting of 23 February 2011 in relation to the provision of information concerning alternative duties that Ms Howell might perform has not been fulfilled."

[69] This is a curious comment given that the CPSU had clearly provided the information and suggests that it may well have been written before the assessment of Ms Jessup was completed. Nonetheless the attached Determination does make reference to Ms Jessup's assessment. I conclude that whilst the time frame between the completion of Ms Jessup's assessment and the finding of the Secretary was remarkably short in the context of this investigation, it was not improperly so.

[70] The Determination of the Secretary concluded:³⁶

Determination of Action

"The medical evidence in relation to Ms Howell's inability to perform her substantive duties is largely not in dispute. Although a submission after the investigation was completed was provided from treating Psychiatrist Dr Philip Reid through Mr Johnston, the reading of that evidence is that it is not particularly helpful in informing a decision. This is because it does not assist the decision maker in understanding what if any work restrictions would be required in Dr Reid's opinion should Ms Howell be returned to employment, including his opinion as to the duties she might perform. I was also not satisfied in isolation that Dr Reid was an appropriate medical practitioner to be able to comment to the extent that could be relied upon by an Occupational Physician as to Ms Howell's return to work in the circumstances. I have therefore placed limited weight on his evidence.

I am satisfied that Ms Howell is unable to perform her assigned duties."

[71] Whilst Mrs Howell was aware throughout the investigation process that termination was a possibility, her reaction to the Secretary's final determination was as follows:³⁷

"Well, after that meeting, did you expect that your employment would be terminated?--No, I certainly did not. I was really shocked. After saying we would meet again and talk about the positions that Stephanie had found, I was just totally shocked and it was just so unexpected."

Medical Evidence Post Termination

[72] The following medical evidence was tendered after the date of termination.

From the Applicant:

Dr King 4 April 2011³⁸:

"I have been informed that Margaret has been dismissed from her current position on the basis of "Ill health".

³⁵ Exhibit A10

³⁶ Supra

³⁷ Transcript p 14

³⁸ Exhibit A3

Whilst I can understand that neuropsychological testing done by Clive Skilbeck in July 2010 was rather damning with regard to her ability to perform in her current role, it should be understood that these tests were done at a time when her antidepressant medication was inadequate and her mental state was extremely unsettled.

Since then, further investigations regarding drug metabolism have led to a change in her medication which now has adequately treated her mood and further testing should be organized before grounds for dismissal should be made.

I have been treating Margaret now for over 9 years and her current health and mood is very good and certainly not grounds for dismissal. I feel she would be entirely competent to perform a job with use of computers, albeit not in the trial period role which she was unsuited for as a result of her brain injury, with added work load. Suitable redeployment should be undertaken."

Dr Reid 17 May 2011³⁹

"I understand you continue to assist Ms Howell and you wish to appeal the decision of the Secretary to terminate Ms Howell's employment. It is my understanding this is based on the impression that Ms Howell is unable to perform the duties of a Finance Services Officer on the basis of medical grounds and that alternative duties could not be found.

I have previously made the point that Ms Howell had found the process distressing and as likely to be depressed during consultations with Dr Skilbeck and Dr Stewart. Ms Howell's mood is much improved and therefore their assessments may have been somewhat pessimistic. From a psychiatric point of view Ms Howell's mood is now stable and she is fit to return to alternative duties. It is my understanding that an assessment was performed by Job Design with a reduced classification to Band 2. Ms Howell is now fit to perform these duties as a minimum as set out by Job Design.

In particular her mood state does not exclude her from the ongoing use of computers. Even after her subarachnoid haemorrhage computer skills were largely preserved.

I note Mr Roberts has suggested to apply for Total and Permanent Incapacity. My concern is that given her relatively good state of health Ms Howell may not qualify."

[73] From the respondent:

Dr Stewart 6 July 2011

"You have supplied two opinions from Dr Phillip Reid, one dated 24/12/2010 and one undated but received on 17/05/2011, as well as the report from Dr Dianne King dated 4/04/2011.

You have asked me whether the information from Ms Howell's treating medical practitioners in any way alters the opinion expressed in my report of 2/09/2010.

My understanding was that Ms Howell was looking at a Band 3 level of employment. I note that Dr Reid has referred to an assessment performed by Job Design with a reduced classification to Band 2, and he felt that Ms Howell was fit to perform those duties as a minimum set out by Job Design.

³⁹ Exhibit A2

I do not think that the information from Drs Reid and King causes me to alter my opinion."

Findings

[74] The uncontested evidence is that Mrs Howell is, on medical grounds, unable to return to her substantive position as a B3 Finance Services Officer. Accordingly I find that there was a valid reason for termination.

[75] The second and far more difficult question is whether the termination was fair in all the circumstances?

[76] Section 48(1) of the SSA provides for the following actions in relation to an employee who is found to be unable to efficiently and effectively perform the assigned duties:

"48. Inability of employees to perform duties

(1) The Minister may take one or more of the following actions in relation to an employee who is found, under procedures established under subsection (3), to be unable to efficiently and effectively perform the duties assigned to the employee:

(a) direct appropriate counselling;

(b) direct appropriate retraining;

(c) reduce salary within the range of salary applicable to the employee;

(d) reassign duties;

(e) reduce classification;

(f) terminate employment in accordance with section 44 or 45."

[77] Section 8(2) provides that the actions specified in (a) to (e) may be delegated but only the Secretary may terminate employment. I am satisfied that the scheme of this section should be read as an ascending range of options, with the action of termination selected only when no other alternative is practical or appropriate.

[78] There can be little doubt that 2008 to 2010 was a difficult period for both Mrs Howell and the Department. From the medical evidence it is clear that the stroke suffered by Mrs Howell in 2005 has negatively, and possibly permanently impacted on her capacity to perform certain work functions. This position was unfortunately exacerbated by a depressive illness, which on the evidence gave rise to a level of emotional instability, particularly in terms of managing performance feedback.

[79] During that period I am quite satisfied that the Department did all that could be reasonably expected to assist Mrs Howell. This included modification of duties, change in reporting lines and provision of external rehabilitation support.

[80] I am similarly satisfied that the CD6 investigation of Mr Longstaff was conducted properly and fairly.

[81] Suffice to say, that up until December 2010 I find no fault with the process followed by the Department.

[82] I turn now to the matter of performance related grounds.

[83] Mr Longstaff found that performance issues existed but noted that there had been shortcomings in the management of these issues, notably the absence of a Performance Development Agreement or Performance Improvement Plan. The Secretary made a finding that inability on other performance grounds had not been made out.

[84] In the circumstances it is surprising that the Respondent now seeks to rely on "*other performance issues*" as additional grounds to justify termination. Pressed on this question, Mr Witt asserted that there was a likelihood that the emotional instability of Mrs Howell, particularly as it relates to performance feedback, would reoccur irrespective of the position Mrs Howell was placed in. If true, there would be some force in this submission. If however the Department felt this way, why then did it go to some lengths in assessing alternative positions? I return to this issue later.

[85] The CPSU declined to participate in the Inability Hearing conducted by the Secretary. This was a policy position based on the adversarial nature of the proceedings and the perceived lack of independence of the Secretary. Whilst it is a position to be respected, it is an issue I hope can be resolved in the future, as in different circumstances it may well lead to an unfortunate outcome. In this case however I am satisfied that the absence of the applicant at the hearing did not adversely impact on the presentation of Mrs Howell's position.

[86] The introduction of Dr Reid's report of 24 December is an important point in the process. Whilst relatively brief, the report does observe that Mrs Howell was distressed at the time of Dr Skilbeck's assessment, and a subsequent change in medication had resulted in significant improvement. He opined that Mrs Howell had "*largely recovered and fit to undertake a return to work in alternative duties.*"

[87] In correspondence dated 12 January 2011, the Secretary acknowledged receipt of Dr Reid's advice and indicated that it would be taken into account. It was not until the Secretary's final Determination (25 March 2011) that Dr Reid's advice surfaced again. The Secretary was largely dismissive of this advice, both as to relevance and Dr Reid's qualifications to provide it.

[88] I find this to be most surprising. Dr Reid's advice focused on alternative duties, not Mrs Howell's substantive duties. In my view, at the very least, Dr Reid's advice should have flagged the real possibility that Mrs Howell's medical circumstances may have changed since the assessments of Drs. Stewart and Skilbeck. This change, particularly as it relates to lability of mood, and computer use, has been confirmed by the medical advice tendered subsequent to termination. The subsequent medical opinion from Dr Stewart does not negate this view, rather it confirms that Dr Stewart was focused on B3 positions whereas Dr Reid referred to alternative duties.

[89] In addition Mrs Howell advised at the 23 February meeting that her eyesight problem had resolved and suggested a further medical assessment, which was again proposed in correspondence from the CPSU dated 2 March 2011.

[90] I have no doubt the assessments of alternative duties by Mr Sales and Ms Jessup were undertaken professionally and competently. However in each case the *constraints* were essentially identical and specified "*limited computer work*" as a consequence of visual defects. In both cases the assessments were made "*on the papers*" without reference to Mrs Howell or her medical advisers. Computer work is an integral component of most B2 administrative positions. One can only speculate as to what the outcome might have been had 'computer work' been removed from the constraints presented to the assessors as a 'given.' The *Administrative Assistant – STAHS* position assessed by Ms Jessup is a case in point.

[91] The explanation provided by Mr Wright as to the decision not to undertake a further medical assessment is not convincing. It must be recognized however, that it was not Mr Wright's decision.

[92] It is true that Mrs Howell did not demonstrate a great deal of enthusiasm for a B2 position. To some extent this is understandable as she was not presented with any sort of ultimatum, and in my view, did not appreciate that her employment was genuinely at risk. It is equally true that Mrs Howell did not at any stage refuse to consider a B2 position. In her evidence Mrs Howell makes it clear that she would accept a B2 position as an alternative to termination. She was clearly shocked by the decision to terminate.

[93] In summary, I am satisfied that there was more than sufficient material before the Secretary to justify a further medical assessment. We don't know the outcome of such an assessment, but it may well have changed the course of events.

[94] Mrs Howell is a State servant of 37 years standing. Her ongoing employment is clearly of critical importance to her. In my view the Secretary should have gone the extra yard and directed that a further medical assessment be undertaken.

[95] For these reasons I find that the termination of employment was unfair.

Remedy

[96] The CPSU seeks re-employment. Ms Katsin contends that the provisions of s.47 (Redeployment) should apply if the Department is unable to find suitable alternative duties within the Agency. In practical terms this means that Mrs Howell would be placed on the redeployment list for a period whilst efforts are made to find an alternative position external to DHHS.

[97] I am unable to accept this contention.

[98] Section 47 is a discrete section applicable to employees *"surplus to the requirements of the Agency."* Mrs Howell is not surplus to requirements; she is unable on medical grounds to fulfill her substantive role. In this circumstance s48 (*Inability of employees to perform duties*) is invoked. Both sections 47 and 48 are discrete applying to different circumstances.

[99] That said, I note the Department's *Managing Redeployment Policy* states in relation to employee initiated circumstances:⁴⁰

"In such circumstances, it is the responsibility and therefore the goal of the Department/Operational Unit Managers to work with the employee to source suitable alternative duties at the employee's substantive classification level within or external to their Departmental/Operational Unit..."

[100] Whilst the statutory scheme of s47 does not, in my view, apply to Mrs Howell, I believe the sentiment expressed above should. It was not Mrs Howell's fault that she suffered a major medical setback. It is difficult to understand why efforts to find alternative duties should be any less rigorous in Mrs Howell's case than would be the case under the above policy, for example in the case of an employee returning from long term leave without pay. I am unable to mandate pursuit of alternative duties outside the Agency, but this decision should not rule it out.

⁴⁰ Exhibit A11

[101] I propose to order reinstatement.

[102] However in doing so the following comments outline my intention as to what should happen.

[103] It is my intention that Mrs Howell be restored as close as possible to the position she was in immediately prior to termination. Whether this be in a substantive role, a supernumerary position or a position of continuing suspension with pay is a matter for the Secretary to determine.

[104] As soon as possible Mrs Howell should undertake a further medical assessment as to employment suitability.

[105] Depending on the outcome of this assessment, every effort should be made to find a suitable position. If such a position is at a lower level (B2), I would expect salary maintenance for a limited period but not indefinitely.

[106] It should be understood that this process is not open ended. If after a reasonable period it proves not possible to find a suitable position, the Department may have no alternative but to terminate the employment contract. Having regard to all the circumstances including length of service, I consider a reasonable period to be not less than three months.

Order

Pursuant to section 31 of the *Industrial Relations Act 1984* I hereby order that the Minister administering the *State Service Act 2000*:

1. Reinstatement Margaret Howell to the position General Stream Band 3 at the level applicable immediately prior to the termination of employment.
2. That the re-instatement take effect not later than 8 August 2011.
3. That Mrs Howell be paid the salary she would have otherwise earned from the date of termination until the date of reinstatement less an amount equivalent to payments already made in the nature of notice and ex gratia payments.

Tim Abey
Deputy President

Appearances

Ms S Katsin for the applicant
Mr T Witt for the respondent

Date and place of hearing:

June 2 and 9
July 6 and 7
2011
Hobart