TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s23 application for award or variation of award

The Minister administering the State Service Act 2000
(T13857 of 2011)

TEACHING SERVICE (TASMANIAN PUBLIC SECTOR) AWARD

COMMISSIONER JP MCALPINE HOBART, 23 March 2012

Award variation – contested – threshold matter- matter to be heard as set down

REASONS FOR DECISION

[1] On 16 December 2011 the Minister administering the Tasmanian State Service Act 2000 (the Applicant) applied to the President, pursuant to Section 23(1) of the *Industrial Relations Act 1984* (the Act), for a hearing before a Commissioner in respect of a variation to the Teaching Service (Tasmanian Public Sector) Award (the Award).

[2] The amendment seeks to vary Part VI-Leave and Holidays with Pay, Clause 4(a) Recreation Leave; Teaching Staff. Specifically to vary the annual leave provision to accommodate a change from a three term to a four term school year.

[3] A hearing commenced in Hobart on 14 February 2012. A further hearing was conducted on 8 March 2012. At the hearing on 14 February Mr M Watson appeared for the Applicant. Mr P Turner sought, and was granted to leave to appear for the Applicant at the hearing held on 8 March 2012. Mr C Lane and Mr M Upston appeared for the Australian Education Union, Tasmanian Branch (the Union) on both occasions. At the outset, the Union sought the Commission desist from hearing the application at this time.

[4] The Union argued that the proposed amendments to the Award were predicated on the introduction of a four term school year to which it, the Union, had not agreed.

[5] It was argued that because the proposed amendments were not by consent of the parties, the Commission should not arbitrate an outcome in the first instance, but order the parties to negotiate.

[6] Mr Watson asserted that the intention to proceed with a four term school year model was based on the recommendations of the "Four Term Year Advisory Group" (the Group) of which the Union was a participant. The Group was made up of educators, parents and friends, other education unions and the Community and Public Sector Union State Public Services Federation Tasmania Inc. and took submissions from the wider community such as business and tourism interests. The Union was the only member to dissent from the Group's recommendations.

[7] The Minister for Education and Skills (the Minister) announced his acceptance of the Group's recommendations to move to a four term school year by way of a press statement on 1 August 2011[1]. In the statement he acknowledged the Union had opposed

[1] Exhibit A2

the four term proposal, but sought to work with it to address its concerns prior to implementation. Mr Watson asserted that the Minister had attempted to engage the Union since then in an implementation consultation process. The latest attempt was 23 November 2011, but to no avail. Mr Watson further argued that at this juncture there was only six months left to resolve issues before the implementation process had to start to meet the 2013 deadline set by the Minister, hence the need to bring the matter to the Commission to be arbitrated.

[8] Mr Lane acknowledged the Union had indeed refused to enter into discussions concerning the implementation of a four term school year because, he said, it had not agreed to the changes to employee leave arrangements. Indeed he said the Union rejected the findings of the Group and has concluded that the recommended changes have not been justified.

[9] However he also said[2]:

> *"It is true … that we have not been convinced as to the merits of the employer's proposal and consequently we do not**, at this stage**, (*my emphasis) *agree with the proposed changes."*

[10] He asserted the Minister has refused to negotiate the introduction of the four term year as part of the enterprise agreement bargaining process afoot. Further, he said, that seeking arbitration was *"an inappropriate way to deal with a change and a condition of employment"*[3]. He did however acknowledge that *"the Commission does have power to arbitrate*[4]*"*.

[11] He argued that the parties were engaged in bargaining around a new enterprise agreement and that this matter should be negotiated to a resolution with the other matters currently being discussed. Mr Watson argued that the Union's stated position is that it opposed the introduction of a four term school year and as such he was at a loss to understand what it was going to negotiate. He also asserted that he did not see this matter as a part of the current enterprise agreement negotiations.

[12] Mr Lane asserted that the matter was *"an industrial matter"*[5] and as such should be dealt with accordingly. He said that no union or employer *"should have the right to simply demand a change into an award regulated condition of employment"*[6]*,* arbitrated at the behest of one party without the parties having negotiated such a matter.

[13] He argued that had the Union approached the Commission with a log of claims which they sought to have arbitrated by the Commission, he, he believed, would have been told to *"go away and bargain"*[7]. He said the issue is exacerbated by the employer refusing to negotiate any claim before it which may impose additional costs on its budget. He cited the preamble of the Act which provides for the Commission *"To encourage workplace bargaining…"*[8]*.* He said *"bargaining implies that the parties must be prepared to be flexible and to compromise"*[9].

[14] Mr Lane cited s20 of the Act:

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[2] Transcript p19, L20
[3] Transcript p5, L5
[4] Transcript p5, L35
[5] Transcript p13, L35
[6] Transcript p14, L32
[7] Transcript p16, L30
[8] Transcript p17, L20
[9] Transcript p17, L30

> ***"Commission to act according to equity and good conscience***
>
> ***(1)*** *In the exercise of its jurisdiction under this Act, the Commission –*
>
> > ***(a)*** *shall act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms;*
> >
> > ***(b)*** *shall do such things as appear to it to be right and proper for effecting conciliation between parties, for preventing and settling industrial disputes, and for settling claims by agreement between parties;*
> >
> > ***(c)…****; and*
> >
> > ***(d)*** *shall have regard to the public interest."*

[15] Mr Upston said the application before the Commission would alter the conditions of employment of almost *"seven thousand workers"*[10] the majority of whom resist the proposed change. He asserted the employer would have *"need to mount a legally tight irrefutable researched based …case*[11] consistent with the public interest.

[16] He argued that s36 of the Act imposes an obligation on the Commission to consider the public interest of making an award.

S36 states:

> ***"Commission to be satisfied of public interest***
>
> ***(1)*** *Before the Commission makes an award under this Act or before the Commission approves an industrial agreement, the Commission shall be satisfied that that award or that agreement is consistent with the public interest.*
>
> ***(2)*** *In deciding whether a proposed award or a proposed industrial agreement would be consistent with the public interest, the Commission shall –*
>
> > ***(a)*** *consider the economic position of any industry likely to be affected by the proposed award or proposed agreement;*
> >
> > ***(b)*** *consider the economy of Tasmania and the likely effect of the proposed award or proposed agreement on the economy of Tasmania with particular reference to the level of employment; and*
> >
> > ***(c)*** *take into account any other matter considered by the Commission to be relevant to the public interest."*

[17] Mr Upston asserted that the threshold matter before the Commission was[12]:

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[10] Transcript p22, L5
[11] Transcript p22, L15
[12] Transcript p23, L12

> *"… whether the parties should be ordered to conciliate, to settle the claim by agreement and bargaining and whether in any event when acting with good conscience it is in the public interest to proceed with the application."*

[18] He said *"s34 of the Act gives the Commission a discretion to grant or refuse an application to make or vary an award…."*[13].

[19] He cited s24 of the Act, Award hearings before Commissioner sitting alone with reference to the Commission's discretionary power, particularly s24(5):

> ***"Award hearings before Commissioner sitting alone***
>
> ***(5) After conducting a hearing into an application*** *(my emphasis) made to him under this section, a Commissioner may, subject to section 36, make or refuse to make an award in relation to the subject-matter of the application."*

[20] He said *"the objects and scheme of the Act reinforces the requirement for negotiation and collective bargaining"*[14]. He cited s8(A) of *The Acts Interpretation Act* with respect to the promotion of the purpose of an act:

> ***8A. Regard to be had to purpose or object of Act***
>
> ***(1)*** *In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.*
>
> ***(2)*** *Subsection (1) applies whether or not the purpose or object is expressly stated in the Act.*

[21] Mr Upston asserted that the parties had, by consent, amended the Award only twelve months ago. He said included in the amendment was a provision for recreation leave, clause 4. He argued that variation sought to "entrench" the three term school year[15]. He pointed out that the Minister took no steps, during the development of the current Award, to reserve a position on the changes to the school year he now proposes. He said for the Commission to arbitrate an amendment to the Award without the parties bargaining would be a revocation of its decision T13741 of 2010[16].

[22] He said that the Minister was aware of the Group's work from October 2010, prior to the hearing of T13741. He argued that if the Minister was permitted to revisit an agreement, by way of arbitration, reached some 12 months prior it would *"fundamentally undermine the basis of bargaining, negotiation and consultation"*[17]. He cited authorities condemning parties who "renege" on previously negotiated agreements[18].

[23] Mr Watson asserted that there was no submission in the current agreement to "entrench" a three term school year[19]. He said the amendments introduced in T13741 were simply putting into the Award existing conditions articulated in a ministerial

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[13] Transcript p23, L17
[14] Transcript p25, L25-40
[15] Transcript p32, L40
[16] Transcript p32, L25
[17] Transcript p33, L35
[18] Exhibits R18 and 19
[19] Transcript p39, L30

direction. He said the Union had not introduced the potential for a change from a three to a four term school year in their log of claims in 2010, nor in the revised log of claims in 2011. He argued that the Group had not made its recommendations at the time the Award was amended last year. To have sought a four term inclusion in matter T13471 of 2010 would indeed have been to pre-empt their findings. He reiterated that the quantum of annual leave for teachers would not change as a result of the amendments sought to the Award.

[24] Mr Turner for the Applicant asserted that the instant matter was a matter under s23 of the Act and not s29. He argued that s29 of the Act, which deals with resolution of disputes, confers powers on the Commission to make orders and non-compliance with such orders could result in criminal sanction and does not relate to the instant matter. However, he said, s23 mandates the Commission *"fix a time and place for a hearing"* with respect to varying an award. He continued with the observation that s24 of the Act stipulates at (5):

> ***"Award hearings before Commissioner sitting alone***
>
> ***(5)*** *After conducting a hearing into an application made to him under this section, a Commissioner may, subject to section 36, make or refuse to make an award in relation to the subject-matter of the application."*

[25] He cited s20(1)(b), as did Mr Lane, with respect to settling claims *"by agreement between the parties"*. He also cited s21:

> ***"21. Procedure of Commission and associated matters***
>
> ***(2)*** *Without prejudice to the generality of subsection (1), the Commission may, in relation to a matter before it –*
>
> > ***(n)*** *generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of that matter."*

[26] He argued that neither s20(1)(b) or s21(2)(n) can be applied to an application for an award variation. However, he argued, s19(2)(a) in conjunction with s23 affords a statutory right for those bound by an award to seek a variation through the Commission, should they so choose. In rejecting the Union's assertion that introducing an amendment only twelve months after the initial agreement was inappropriate, he asserted the timing of such an application was immaterial.

[27] Mr Turner rejected the various authorities presented by Mr Upston as having no relevance in this jurisdiction and that *"our own"* provisions apply. He posed the question[20]:

> *" ... how can you effect a conciliation in circumstances where there is but one of two outcomes… We're not dealing with a set of circumstances where there can be argy-bargy ... such that we can talk about hours of work or rates of pay ... "*

[28] He cited a number of authorities which warn against a tribunal misconstruing statute as to that which is required of it or to the limits of its powers. He argued that it would be, in his view, a judicial error if the Commission forced a party into a negotiation

[20] Transcript p50, L40 - p51, L5

where only a single outcome is acceptable to that party. In the instant matter the government of the day through the Minister has endorsed a particular policy, which is a four term school year.

OUTCOME

[29] Mr Upston succinctly put the Unions view of the threshold matter before the Commission as being:

- to effect conciliation by ordering the parties to negotiate and bargain rather than arbitrating an outcome, and;
- rhetorically, is it in the public interest to proceed with application, if the Commission is acting in good conscience

[30] This matter, in the first instance, is governed by s23 of the Act. This section mandates at (2)(b) that the Commission upon receiving an application to amend an award must:

> ***"23. Applications for awards and variations of awards***
>
> ***(2)*** *Where an application for an award or the variation of an award is made to the Commission in accordance with this Act, the Commission shall –*
>
> ***(b)*** *fix a time and place for the hearing; …"*

[31] Being mandated the Commission is not in a position to do other than the Act requires. A time and place has been fixed for the hearing.

[32] Mr Upston asserted that the Act at s34 gives the Commission the discretion to grant or refuse an application to vary an award. This is not the case. This section only defines the entities in respect of whom the Commission can make an award. However at s24(5) of the Act the Commission is given the discretion to make or refuse an application to vary an award. However this discretion is only available to the Commission *"after conducting a hearing".*

[33] He further asserted, correctly, that s36 of the Act obliges the Commission to consider the public interest in making an award. Consideration as to the public interest can only be exercised once the matter has been heard, for without hearing argument there is nothing to base such consideration upon.

[34] Much of the Union's argument is based on a fundamental thrust of the Act as articulated in its preamble which, partly, seeks to *"encourage workplace bargaining"*; one accepts through the actions of the Commission.

[35] Mr Upston put the proposition that to hear the application and in effect arbitrate without *"ordering"* the parties to negotiate first was not in the public interest. He argued that the parties had, some 12 months earlier, reached a bargained position on a number of topics one of which was to *"entrench"* the three year school term into award. He argued that in varying this award the Commission would be condoning a party reneging on a previous agreement and again, not in the public interest.

[36] The matter to which he referred is T13741 of 2010. Mr Upston said of this application by the Union[21]:

> *"The applicant* (Union) *applied for a variation of this award and asked that a three term school year be entrenched in the award only twelve months ago."*

[37] This is simply not the case. In the decision T13741 at [1] it states:

> **[1]** *"…The applicant (The Union) sought to:*
>
> - *Align common allowances with the Tasmanian State Service Award*
> - *Transfer across any provisions from Ministerial Direction No. 3*
> - *Align leave provisions with the Tasmanian State Service Award*

[38] The wording of the decision was not challenged by either party. Further perusal of the transcript of the proceedings shows that at no time did the Union raise the issue of a three term school year let alone ask for it to be *"entrenched".* It is abundantly clear from the decision and the transcript that the purpose of the exercise undertaken some 12 months ago was to align existing conditions into the award on foot at the time. Indeed the verbs used in relaying the Union's wishes are *"align"* and *"transfer",* in my view, articulating the process conducted was a sensible and much needed housekeeping exercise.

[39] Further, at that time both parties were already engaged in the development of the "Four Term Year" proposal. Accepting that the development of the eventual proposal was in its infancy, and no conclusions drawn it follows that neither party would have had a position on the outcome at that stage. To accuse the Minister of reneging on an agreed matter some twelve months after its inception is both inaccurate and disingenuous.

[40] The Minister has been presented with a model of school terms different to that which exists. He seeks to have the award amended to reflect the new model.

[41] Regardless of the merits of the Minister's position there is nothing in the Act which prevents the Applicant from applying for an award variation.

[42] Mr Lane[22] stated that the Union was *"not convinced"* as to the merits of the Minister's proposed amendment. Further he said[23] rejecting the findings of the Group:

> *"…. the change has not been justified in terms of proper research and there is no demonstrated gain to be made in student's educational outcomes…"*

[43] The Union was an integral part of the Group developing the proposal. It is not unreasonable to assume that the perceived failings of the report the Union articulates are based on an intimate knowledge of the information upon which the recommendations were made. If the union is so convinced that the Minister's proposal is not founded on

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[21] Transcript p32, L35
[22] Transcript p19, L20
[23] Transcript p6, L25

"proper research" or has no *"demonstrated gain"* for the students I fail to see upon what basis it intends to negotiate. Should for example the Union gain concessions, through bargaining, in other areas such as wages or extra leave or the like the fundamentals of the Minister's proposal would still not have changed. It follows that it must maintain its opposition to the proposal because those aspects to which it objects would also not have changed.

[44] The Union asserted, to their knowledge, that all award variations have been by consent and none arbitrated. It is not surprising that it would not be aware of two award variations which were arbitrated. Both matters were proposed by Unions, both opposed by the particular Minister of the day and both arbitrated in favour of the applicant. The matters were T965, T967, T1015 and T1016 of 1987 and T930, T931, T961 and T962 of 1987.

[45] In summary, there is nothing in the Act to compel the Commission to order parties to bargain or negotiate. I am not convinced that hearing the matter without the parties having first negotiated is contrary to the public interest. Given that the parties have declared their polar positions the option open is to arbitrate. I propose to hear the matter as set down.

James McAlpine
COMMISSIONER

Appearances:
Mr Paul Turner and Mr Mark Watson for the Minister administering the State Service Act 2000
Mr Chris Lane and Mr Malcolm Upston for Australian Education Union, Tasmanian Branch

Date and place of hearing:
2012
Feb 29
March 8
Hobart