TASMANIAN INDUSTRIAL COMMISSION

***Industrial Relations Act* 1984**
s.70(1) appeal against decision

Helen Elizabeth Dudley
(T14582 of 2018)

and

Minister administering the State Service Act 2000 – Tasmanian Health Service

COMMISSIONER T LEE
COMMISSIONER N WILSON
COMMISSIONER T CIRKOVIC

MELBOURNE, 29 NOVEMBER 2018

DECISION

Appeal against a decision handed down by Commissioner Gay on 2 February 2018 – T14448 of 2016 – jurisdiction – competency of appeal – threshold issue – decision did not contain an order – principles in "Bennett" apply – decision incapable of appeal – no appeal lies.

Introduction

[1] This is an appeal pursuant to section 70(1)(b) of the *Industrial Relations Act 1984* (the Act) against a decision of Commissioner Gay in Matter T14448 of 2016 issued on 2 February 2018 relating to the alleged unfair termination of Ms Elizabeth Dudley (the Appellant). The Respondent to both the original application and this appeal is the Minister administering the State Service Act 2000 (MASSA).

[2] The Appellant seeks to appeal the Commissioner's decision in which it was determined that there was a valid reason for Ms Dudley's termination, that the Respondent had borne its s.30(5) responsibility, that the Applicant had not discharged the onus in respect of unfairness as provided in s.30(6), and that s.30(7) is satisfied. The Commissioner found as a consequence of coming to these conclusions the application could not succeed and accordingly determined, consistent with s.31(1), to not require anything to be done or any action to be taken.[1] The Commissioner went on to say that he would not, even if s.30(7) was found to have been given imperfect effect, after considering the effect of s. 31, require that something be done or an action be taken pursuant to s.31(1). Accordingly, the Commissioner dismissed the application.[2]

[3] A Notice of Appeal on behalf of Ms Dudley was filed with the Tasmanian Industrial Commission (the Commission) setting out five grounds of appeal. This Notice of Appeal was filed within the 21 day timeframe envisaged in section 71(1) of the Act. It is not necessary to set out the grounds of appeal for reasons which will become evident.

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[1] T14448 of 2016 at [394]

[2] T14448 of 2016 at [405]

Background

[4] On 30 August 2018 the Commission wrote to the parties on behalf of the Full Bench which drew the parties' attention to the decision *Bennett v Minister Administering the State Service Act 2000*[3] (*Bennett*) a decision of the Full Court of the Supreme Court of Tasmania. The correspondence noted that the Full Court held that *'(2) Pursuant to the Act, s 70(1)(b) the right of appeal is a statutory remedy and not a common law or equitable right. There is nothing in s 70(1)(b) which authorises an appeal from a dismissal'.*

[5] The Full Bench noted in the correspondence that Commissioner Gay had dismissed the application and Directions were issued which required the parties to file any submissions upon which it relies in respect to the issue of whether, in light of the decision in *Bennett*, it can entertain the appeal. The Directions also stated that it proposed that the issue be determined on the basis of the written submissions and required that the parties advise if they sought a hearing in the matter. Both the Respondent and Appellant filed written submissions in accordance with the directions and advised the Commission that they did not require a hearing and rely upon their written submissions. Accordingly, we have determined this matter on the basis of the submissions filed.

Jurisdictional issue

[6] Commissioner Gay's reasons for decision state at [394] and [405]:

> "[394]... I have found that there was a valid reason for Ms Dudley's employment to be terminated, that the Respondent has borne its s.30(5) responsibility, that the Applicant has not discharged the onus in respect of unfairness as provided in s.30(6), and that s.30(7) is satisfied. As a consequence of coming to these conclusions the application cannot succeed and accordingly I have determined, consistent with s.31(1), to not require anything to be done or any action to be taken.
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> ...
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> [405] ... I would not, even if s.30 (7) was found to have been given imperfect effect, and after considering the effect of s. 31, require that something be done or an action be taken pursuant to s. 31(1). Accordingly, I dismiss the application."

[7] The Respondent submits that as Commissioner Gay did not make an order under s.31(1) or require anything to be done by the parties to resolve the dispute, no right of appeal is conferred by the Act.[4]

[8] The Appellant submits that the Commission has jurisdiction to hear the appeal as what is stated at paragraphs [394] and [405] constitutes an order for the purposes of s.31(1) of the Act and an order contemplated by the terms of s.70(1)(b)(i).[5]

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[3] *Bennett v Minister Administering the State Service Act 2000* [2009] TASSC 95 190 IR 202

[4] Respondent's submissions at [3] – [4]

[5] Appellant's submissions at [8]

[9] The Appellant's appeal is made under section 70(1)(b) of the Act. The wording of section 70(1) sets out the various circumstances in which an appeal may be made to a Full Bench of the Commission. Section 70(1)(b) provides that an appeal may be made against, "...an order made by a Commissioner under section 31(1)..." Sections 70(1)(a) and (c) set out other circumstances in which an appeal can be made. However, it is apparent and it is not submitted by either party that either 70(1)(a) or (c) is relevant to this matter. It follows that the only basis upon which this particular appeal can be competent is if it satisfies the requirement of section 70(1)(b).

[10] The Respondent submits that a right of appeal is a statutory remedy provided for by section 70(1)(b) of the Act which provides that a right of appeal can only be made against an order. In support of its submission that the Commission is without jurisdiction to hear and determine the appeal, the Respondent refers to and relies on the decision of the Full Court of the Supreme Court of Tasmania in *Bennett* and three subsequent decisions of Full Benches of this Commission that have applied the decision in *Bennett*.[6]

[11] While the Appellant acknowledges the decision of *Bennett* and the Full Benches approach to application of the decisions, it submits that the Full Bench can conclude that the decisions ought to be distinguished and not followed in this case.[7] In support of this proposition, the appellant refers to section 31(1) and submits that what rights of appeal are created is a matter of statutory interpretation, following established principles, the history of the provision and context.[8]

[12] In its submissions as to the proper construction, the appellant makes a particular point that the power to be exercised under section 31 is ***after*** a hearing has been conducted.[9] The appellant makes particular reference to the leading judgement of Crawford CJ in *Bennett* where he stated that the language in section 31(1) could not be extended to include an order for dismissal and that rather, an order for dismissal is empowered by virtue of section 21(2)(c)(iv) from which there is no appeal under section 70.

[13] We note that His Honour was rather emphatic in reaching this conclusion. The relevant parts of the decision of Crawford CJ are replicated below:

> "17 That provision authorises, for the purpose of preventing or settling an industrial dispute in respect of which a hearing is convened, the making of an order directing that anything required to be done, be done, or that any action required to be taken, be taken. No order of that nature was made by the Commissioner. The language used in s 31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used.

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[6] T14002 of 2012, T14400 of 2016 and T14429 of 2016

[7] Submissions of the Appellant at [10]

[8] Submissions of the Appellant at [12]

[9] Submissions of the Appellant at [13]

> 18 By virtue of s 30(6), the appellant bore the onus of proving to the Commissioner that his employment was unfairly terminated. If he failed to persuade the Commissioner of that, the Commissioner was authorised by s 21(2)(c)(iv) to dismiss the matter. That is what occurred here. There is nothing in s 70(1)(b) authorising an appeal from a dismissal.
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> 19 For these reasons, I respectfully concur with the learned judge when he expressed the view that "no amount of generosity in the approach can result in a construction of s 31(1) which is wide enough to include what it is that the Commissioner did in this case"."[10]

[14] Evans J agreed with Crawford CJ and provided additional reasons and J Tennent agreed with Crawford CJ.

[15] The appellant makes the following observations about the reasoning of the Full Court in the *Bennett* decisions:

> "a. Section 21 is headed "Procedure of the Commission and associated matters." When interpreting legislation, headings cannot be ignored, as they form part of a statute. Where there is ambiguity they aid interpretation and can constrain the scope of a section.
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> b. The heading conveys that Section 21 concerns only procedural powers not powers that are arbitral or judicial.
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> c. In all instances in subsection 21(2)(c), the nature of the words used to empower dismissal convey that the power is available only when the proceedings have not yet been the subject of a final hearing or are partly heard but not yet determined.
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> d. The power to dismiss when referring to "*at any stage of the proceedings*" is qualified by the nature and context of the words which follow – "*or refrain from further hearing, or determining*". In addition, the power is only available if satisfied of one of three particular matters namely:
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> - that the matter is trivial; or
> - that it is not necessary or desirable in the public interest for there to be further proceedings; or
> - for any other reason the matter or part should be dismissed or discontinued.
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> e. If section 21(2)(c) contemplated and included a power to make an order dis missing an application about an industrial dispute (including termination of employment) **after** a hearing, then such a power would be expressly stated as a power to dismiss **after a final hearing and determination.** It would not appear in a section of the Act dealing with procedural matters."[11]

[16] On that basis the appellant contends that when an order to dismiss an application is made following a final hearing and determination regarding an industrial dispute the dismissal must be one made pursuant to section 31 of the Act.

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[10] *Bennett v Minister Administering the State Service Act 2000* [2009] TASSC 95 190 IR 202 at [17] – [19]

[11] Submissions of the Appellant at [19]

[17] The appellant relies on section 69(2) of the Act and its "expansive and mutually inclusive meaning to various words", and submits that the decision of Porter J at first instance at paragraph [45] ignores the terms of section 69(2) and their effect on what appeal rights exist by virtue of section 70. Section 69(2) is in the following terms:

> "(2) For the purposes of sections 70 and 71 , ***decision*** includes a declaration, an order, a determination, an approval, a refusal, a dismissal, an award or any other finding made by a Commissioner or the Registrar."

[18] The appellant also relies on historical amendments and extrinsic materials in support of the proposition that its preferred construction is correct. In particular, attention is drawn to the Fact Sheet for the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Bill 1992* (the Bill) which includes the words "Appeal rights are provided for all parties involved" and the second reading speech for the Bill which refers to an extension of appeal rights. Drawing on that text, it is submitted that there is nothing which conveys an intention of the parliament to narrow appeal rights.[12]

[19] Ultimately, and based on the argument advanced on statutory construction set out above, it is submitted that Commissioner Gay's statement at paragraph [394] is analogous to an order pursuant to section 31(1).

[20] The appellant also submits that the Full Court in reaching the decision in *Bennett* did not have the benefit of fulsome opposing submissions and did not contemplate the types of arguments made in these proceedings, including the reliance on the extrinsic materials referred to. The appellant submits that "Time is overdue for robust consideration of whether the matters submitted above permit another conclusion".[13]

Consideration

[21] The Full Bench is obliged to determine whether it has jurisdiction in relation to an Appeal.[14]

[22] The first question is a fundamental one of what the position is in respect to the decision in *Bennett*. The appellant does not explicitly submit that the decision in *Bennett* should not be followed because it is wrong. Rather, the appellant states that the "decisions" including *Bennett* and the three Full Benches of this Commission that have applied it can be distinguished and not followed in this case. However, it is apparent that the appellant is inviting this Full Bench to reach a different interpretation of the statute to that reached in *Bennett*. This is apparent from the submissions as a whole, including the submission that it is time to consider if another conclusion can be reached.

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[12] Submissions of the Appellant at [28] – [29]

[13] Submissions of the Appellant at [34] – [36]

[14] *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC97 at [20] per Crawford J

[23] We have considered the argument that there should be an alternative construction as to the meaning of the legislation such that there is a right of appeal from the decision of Commissioner Gay. We consider that there are factors raised in the appellant's submissions which may well have not been fully considered by the Full Court in *Bennett* given the nature of the proceedings and the absence of an experienced legal practitioner as a contradictor. In particular, we agree with the appellant that it is not apparent that the Court considered section 69(2) in construing the language in s70(1)(b). However, we note that s.69(2) is directed specifically at sections 70 and 71. It does not follow that reliance on it permits a different construction to s.31(1) than that reached in Bennett.

[24] In any event, the Full Court was not reliant on the existence of a contradictor to consider the alternative construction espoused by the appellant. The extrinsic materials relied upon by the appellant were presumably within the reach of the Full Court. While extrinsic materials can be relevant in the task of construction, it is the text itself that is the starting point in the task. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[15] the High Court described the task of legislative interpretation in the following terms:

> "47. This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

[25] Ultimately, the decision in *Bennett* was made in the manner that it was and continues to be binding authority on this Commission and must be followed

[26] The *Bennet* decision determined as follows:

> "16. The only right of appeal relied upon by the appellant is that given by s70(1)(b). It permits an appeal to the Full Bench against "an order made by a Commissioner under section 31(1) after a hearing relating to an industrial dispute in respect of ... any termination of employment ... by ... the party who applied for the hearing ...". The question that arises is whether the order of dismissal that was made by the Commissioner was an order under s31(1). It is in the following terms:
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> > "(1) Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was

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[15] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]

> convened, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken."
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> 17. That provision authorises, for the purpose of preventing or settling an industrial dispute in respect of which a hearing is convened, the making of an order directing that anything required to be done, be done, or that any action required to be taken, be taken. No order of that nature was made by the Commissioner. The language used in s31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used.
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> 18. By virtue of s30(6), the appellant bore the onus of proving to the Commissioner that his employment was unfairly terminated. If he failed to persuade the Commissioner of that, the Commissioner was authorised by s21(2)(c)(iv) to dismiss the matter. That is what occurred here. There is nothing in s70(1)(b) authorising an appeal from a dismissal."[16]

[27] The Supreme Court in *Bennett* determined that section 70(1)(b) does not authorise an appeal against the dismissal of an application for unfair dismissal remedy. Rather, an appeal can only be made against "an order". The respondent submits that as no order was made by the Commissioner there is no right of appeal. The appellant submits that what the Commissioner stated at [394] and/or [405] constituted an order for the purposes of 70(1)(b)(i). We disagree with the appellant. The Full Court made it clear in *Bennett* that the language used in s.31(1) cannot be extended to include an order of dismissal.[17] This was despite the decision of Commissioner McAlpine, the subject of the appeal in *Bennett* stating that "the application is dismissed, and I so order". That is, even an express statement to order the dismissal of the application was held by the Full Court in *Bennett* to not be an order capable of appeal, based on their construction of the text in 31(1).

[28] The language that the Commissioner has used in the matter the subject of this appeal falls victim to the same construction and cannot be distinguished. Even if the appellant is correct and the language used can be considered to constitute an order, there is no basis given the construction of section 31(1) we are bound to follow, to find that the words are effectively an order that is capable of being appealed.

[29] Our determination in this matter is consistent with the approach taken in three decisions of Full Benches of this Commission that have applied the decision in *Bennett*.[18] Having regard to the authority in *Bennett*, we are satisfied that no order was issued by the Commissioner in his decision in Matter T14582 of 2016 and therefore no appeal lies.

[30] We have already noted that the appellant in this matter has sought to argue for a different construction of the Act than that determined in *Bennett*, whilst at the same time acknowledging the precedent of the *Bennett* decisions and the Full Benches

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[16] [2009] TASSC 95 190 IR 202 at [16] – [18]

[17] [2009] TASSC 95 190 IR 202 at [17]

[18] T14002 of 2012, T14400 of 2016 and T14429 of 2016

application of the decisions as binding precedent. A similar approach was taken by the appellant in *Wolf v Minister administering the State Service Act 2000/Department of* Justice[19] (*Wolf*). In that matter the Full Bench determined as follows:

> "[21] The second point is essentially that a different construction of the Act is to be preferred to that adopted by the Supreme Court. The Appellant argues that this course is open to us as new argument has been raised in this appeal which was not put before the Full Court previously, and this Full Bench can make a finding unencumbered by precedent which was established without the benefit of, or consideration of the new argument. We reject this proposition. In Bennett, consistent with authority, the Full Court searched for the meaning of the Statute, having particular regard to the ordinary meaning of the words in the legislation and having done so, has determined the meaning of the provision. We have been taken to no authority for the proposition that new argument or changed circumstances permits us to depart from judicial consideration so directly on point. While the Full Court of the Supreme Court may not have adverted to various relevant sections of the Act it will be taken that the Full Court has had regard for the Act in its entirety. There is no warrant for us to assume to the contrary. We are not persuaded by the Appellant's submissions and see no reason not to abide by the principals in Bennett.
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> [22] It follows from the above, that we also reject the alternate submission that the Bill that was enacted gave effect to the stated intention in the Second Reading speech to provide appeal rights to virtually any decision. In this respect we agree with the observation of the Full Bench in Shepard that the expressed intention was not achieved, having regard to the construction of the Act determined in Bennett."

[31] We agree with that approach and with the observations made by the Full Bench in *Wolf* and adopt them here.

Conclusion

[32] For the reasons above, we dismiss the appeal as the Tasmanian Industrial Commission is without jurisdiction to hear and determine the appeal.

THE STAMP OF THE TASMANIAN INDUSTRIAL COMMISSION
TASMANIA

Tim Lee
COMMISSIONER

Date and place of hearing:
No hearing; determined on the papers

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[19] T14429 of 2016