

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

s29(1A) application for hearing of an industrial dispute

Marcus Leon Pelham

(T14803 of 2020)

and

Abt Railway Ministerial Corporation t/a West Coast Wilderness Railway ABN 97 434 110 683

PRESIDENT D J BARCLAY

HOBART, 25 NOVEMBER 2020

Application for termination of employment dismissal remedy – jurisdictional objection – whether Industrial Relations Act or Fair Work Act applies – whether respondent is a constitutional corporation and parties national system employer and employee

DECISION

[1] The Applicant has made an application for a remedy as a result of the termination of his employment (the Application). The Respondent submits that the Commission has no jurisdiction to deal with the matter. This decision relates to that issue.

Background

[2] The Applicant was employed by the Abt Railway Ministerial Corporation t/a West Coast Wilderness Railway ABN 97 434 110 683 from December 2018 until his employment was terminated by letter dated 18 September 2020 purportedly on the grounds of redundancy. The Applicant was employed as Food and Beverage Operations Manager.

[3] The Applicant asserts that the redundancy is not a genuine redundancy and that the termination of his employment was unfair.

[4] This decision relates to an application by the Respondent that the Application be dismissed pursuant to s 21(2)(c)(iv) of the *Industrial Relations Act 1984* (the Act). That section relevantly provides that:

“(c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –

(i) that the matter or part is trivial;

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii)

(iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;"

[5] The basis of the Application is that the Commission does not have jurisdiction to deal with the matter.

The Respondents Contentions

[6] Put simply the Respondent submits that the employer is a constitutional corporation. As a result of being a constitutional corporation and the referral of powers to the Commonwealth with respect to industrial matters pursuant to the *Industrial Relations (Commonwealth Powers) Act 2009* it is the Commonwealth that has jurisdiction in respect of any dispute involving the Respondent in respect relating to industrial matters and not the state (and therefore the Commission).

[7] As a result of the Respondent being a constitutional corporation it is a "national system employer" for the purposes of the Commonwealth *Fair Work Act 2009* (FWA). It follows, it is submitted, that the Applicant is a "national system employee".

[8] The FWA defines a constitutional corporation as a corporation within the meaning of s 51(xx) of the Constitution. Section 51(xx) provides that the Commonwealth parliament has power to make laws in respect to trading or financial corporations. Therefore a constitutional corporation includes a trading corporation.

[9] The question therefore becomes whether the Respondent is in fact a constitutional corporation. As a result of the definition of Constitutional Corporation in the Constitution, that in turn will depend on whether the Respondent is a trading corporation.

[10] The Respondent relies on the purposes for which the Respondent was established, and its activities (as evidence by its Annual Report for 2019-2020) to establish that the Respondent is a trading corporation and as a result a constitutional corporation to which the FWA applies.

The Applicants Contentions

[11] The Applicant, via his solicitors, unfortunately does not really grapple with this submission. Rather is submits that the legislation establishing the Respondent "makes it very clear that the applicant is employed by the Minister". As a result it follow that the Applicant is not employed by a constitutional corporation and therefore the Commission has jurisdiction.

[12] The Applicant otherwise relies on a provision of his employment contract which provides that unresolved disputes or grievances may be referred to this Commission for conciliation and/or arbitration.¹

Consideration

[13] I will deal first with the issue of the employment agreement.

[14] Clause 11.1 of the Agreement provides that "when a dispute or grievance arises" the dispute resolution procedure as set out in clause 11 is to be followed. In my view the reference to dispute or grievance relates to a dispute or grievance arising out of the

¹ Undated employment agreement between the parties, clause 11.

employment agreement. In the case of redundancy that would relate to such things as whether the correct redundancy payment was made as defined in the agreement.

[15] Whether or not the termination of the employment was fair or lawful in my view does not relate to a dispute arising from the employment agreement. Rather it relates to the termination of the agreement and not to matters within and covered by the agreement. It appears the Applicant was paid redundancy pay in accordance with the employment agreement. The dispute does not engage a term of the agreement. Rather the Application enlivens a dispute relating to the termination of the agreement, not about an entitlement under the agreement. As such the dispute resolution procedure is not engaged.

[16] Even if I am wrong about that, s26 of the FWA provides that the FWA "is intended to apply to the exclusion of all State and Territory laws so far as they would otherwise apply in relation to a national system employee or a national system employer". As a result, if the Respondent is a constitutional corporation within the meaning of section 12 of the FWA (and therefore the applicant and respondent is a national system employer and employee) the Tasmanian law cannot apply and the employment agreement in so far as clause 11 is concerned cannot be enforced.

[17] In respect to the argument that the Applicant is employed by the Minister section 5 of the *Abt Railway Development Act 1999* (the Railway Act) provides:

"5. Ministerial Corporation

- (1) The Abt Railway Ministerial Corporation is established.
- (2) The Ministerial Corporation consists of the Minister and –
 - (a) is a body corporate; and
 - (b) has perpetual succession; and
 - (c) has a corporate seal; and
 - (d) may sue and be sued in its corporate name; and
 - (e) may do and suffer all things that a corporation may by law do and suffer and that are necessary for or incidental to the purpose for which it is established; and
 - (f) is a statutory body representing the Crown for the purposes of any Act.
- (3) The seal is to be kept and used as authorised by the Ministerial Corporation.
- (4) All courts and persons acting judicially are to take judicial notice of –
 - (a) the imprint of the seal on any document presuming that it was duly sealed; and
 - (b) the signature of the Minister on any document signed by the Minister on behalf of the Ministerial Corporation"

[18] It can be seen that the Respondent is a statutory corporation. The Minister is the sole director and shareholder. However that does not mean the Minister is the legal entity which operates the railway. It is the corporation incorporated by s5 of the Railway Act which is the legal entity which carries on the business. It is not correct therefore to say that the Minister employs the Applicant. Further section 7 of the Railway Act, to which I

refer below empowers the corporation to enter into contracts (which would include employment contracts) to carry out its functions.

Is the Respondent a trading corporation and therefore a constitutional corporation?

[19] The functions and powers of the Respondent are contained in ss 6 and 7 of the Railway Act. They provide:

“ 6. Functions of Ministerial Corporation

The functions of the Ministerial Corporation are –

- (a) to arrange for any necessary approval to undertake the railway development; and
- (b) to construct or arrange for the construction of the railway development; and
- (c) to operate, or to arrange for a person to operate, the railway development; and
- (d) to facilitate associated developments in the vicinity of the railway.

7. Powers of Ministerial Corporation

The Ministerial Corporation may –

- (a) purchase, exchange, take on hire or lease, hold, dispose of, manage, use or otherwise deal with real or personal property; and
- (b) enter into any agreement or contract in order to carry out its functions; and
- (c) undertake any other activity it considers necessary to perform its functions under this Act.”

[20] It can be seen that the powers of the Respondent are those which one would expect of a trading corporation. The Respondent has helpfully set out authority in respect to the question of what a trading corporation is. It said:²

“In this regard the Commission is referred to *Commonwealth v Tasmania* ('the Tasmanian Dam Case') 1983 158 CLR 1 and *R v Judges of the Federal Court of Australia and Adamson; ex parte Western Australia National Football League (Inc.) and West Perth Football Club ('Adamson')* (1979) 143 CLR 190. In the *Tasmanian Dam Case*, the *Hydro Electric Commission* was held (by the majority) to be a trading corporation within the meaning of section 51 (xx) of the Constitution. Murphy J expressed the view of the majority at page 179:

“The constitutional description of trading corporation includes those bodies incorporated for the purpose of trading and also those corporations which trade; see *ex parte National Football League Western Australia; re Adamson* (1979) 143 CLR 190 at pp 238 to 239; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Fencott v Muler* (1983) 152 CLR 570. The *Hydro Electric Commission* incorporated by, and under, the *Hydro Electric Commission Act 1944 (Tas)* is a trading corporation both by virtue of its constitution and its activities, which make it a major trader. Once it is established that the Commission is a trading or financial corporation, it is immaterial that it has other functions.”

² Respondents Submissions in Reply dated 3 November 2020.

Reference is also made to Mason J in Adamson at page 233:

"Trading corporation' is not and never has been a term of art or one having a special legal meaning ... Essentially, it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation."

More recently, the High Court in *Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail (2015) HCA 11* determined that Queensland Rail is a trading corporation. As Gageler J stated at [70]:

"The basic point that the constitutional description of trading is capable of being applied to a corporation either by reference to its substantial trading purpose (irrespective of activity) or by reference to its substantial trading activity (irrespective of purpose) is sound in principle and supported by authority."

[21] Does then the Respondent trade? It is clear from the financial statements that over 50 percent of its revenue is derived from the sale of goods and services. The other approximately 50% of the Respondents revenue is from a government grant. The financial statements show that the non-grant income is derived from the operation of the railway (ticket sales, café sales and retail sales). All these activities are trading activities. Indeed the totality of the activities of the Respondent are these trading activities. The grant income is not earned by virtue of any activity, but rather is a grant from the state to assist in the overall operation of the corporations business of operating the railway.

[22] I am satisfied that the Respondent is a trading corporation. Accordingly it follows that it is a constitutional corporation for the purposes of section 12 of the FWA.

Outcome

[23] As a result, and noting section 26 of the FWA, it is the Commonwealth that has jurisdiction in respect to the dispute and not this Commission. The Applicant is a national system employee and the Respondent is a national system employer. I also note that the employment agreement refers to and incorporates parts of the National Employment Standards, which of course are contained in the FWA. Accordingly it may be seen that on an objective basis having regard to the words of the employment agreement that the parties must have intended that the terms and conditions of the employment would be governed by the FWA.

[24] As this Commission has no jurisdiction to deal with the matter the Applicants Application for an unfair dismissal remedy is dismissed.



Parties Representatives:

Mr C Whitelaw for the Applicant
Ms G Chen for the Respondent

Date and place of hearing:

Determined on the papers