

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1) application for hearing of and industrial dispute

The Australian Workers' Union, Tasmania Branch
(T14713 of 2019)

and

Minister administering the State Service Act 2000 – Department of Primary Industries, Parks, Water and Environment

PRESIDENT D J BARCLAY

HOBART, 5 MAY 2020

Industrial dispute – date of effect and date of approval of AWU Public Sector Union Wages Agreement 2018 – whether certain employees covered in consequence of retrospective effect of the Agreement where no longer employed by state – s 55 and s 58 of the *Industrial Relations Act 1984* considered

DECISION

[1] On 2 December 2019 The Australian Workers' Union, Tasmania Branch (AWU), (the Applicant) 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 Primary Industries, Parks, Water and Environment) (DPIPWE) (the Respondent) arising out of an alleged breach of the AWU Public Sector Union Wages Agreement 2018.

[2] This Application relates to an agreed question which I am required to answer as follows:

“Are those persons who were employed by the State up to the 18th August 2019 but not thereafter, entitled to the benefits conferred by the AWU Public Sector Union Wages Agreement 2018 approved by the Tasmanian Industrial Commission on the 19th August 2019?”

The Dispute

[3] The Application arises in respect to 13 former employees of the Parks and Wildlife Service (the effected employees) who were employed, either on a permanent basis, or pursuant to a fixed term instrument. All the effected employees ceased to be employed by the Parks and Wildlife Service or indeed by the State in any capacity prior to 19 August 2019. The latest finishing date was 14 June 2019 with most of the effected employees finishing on 31 May 2019¹.

[4] The relevance of that is that on 19 August 2019 I approved an Industrial Agreement pursuant to the provision of the *Industrial Relations Act 1984* (the Act) namely the AWU Public Sector Wages Agreement 2018 (the Agreement).

[5] Relevantly, the Agreement provided for a pay increase of 2.1%. The Agreement

¹ In fact of the 13 employees 1 ceased on 14 June and all the rest on 31 May 2019.

provided that the pay rise was with "effect from the first full pay period commencing on or after (ffppcoa) 1 December 2018"².

[6] The effected employees were not employed at the date of the approval of the Agreement however they were employed during a period that the Agreement provided for the pay increase.

[7] The effected employees sought payment of a sum of money to reflect the fact that the Agreement provided for a pay rise during the period they were working. The Respondent refused to pay the effected employees on the basis that they were not employees at the time the Agreement was approved and therefore the wages increase did not apply to them.

[8] The question for my consideration is whether, notwithstanding that the Agreement was approved after the effected employees ceased to be employed by the State they are entitled to the pay increase because of the retrospective effect of the Agreement.

The Agreement

[9] The Agreement, in so far as relevant for these proceedings provides that:

(a) It applies with effect from 1 July 2018 and remains in force until 30 June 2019³; and

(b) Salaries will increase by 2.1% with effect from the first full pay period commencing on or after 1 December 2018⁴;

[10] The Agreement is dated 12 August 2019 and was approved on 19 August 2019.

[11] It is notable that the Agreement at the date of signing and approval related to a period entirely in the past. The Agreement only provided for pay increases together with a sign on bonus. It was a product of protracted negotiations and in some instances industrial disputation. It is clear from the terms of the Agreement that it was intended to have retrospective effect.

The Applicants Contentions

[12] In essence the Applicant contends that, because of clause 6 the Agreement, it relates to employees who were employed between 1 July 2018 and 30 June 2019. It matters not, says the Applicant that the Agreement was entered into at a later date nor that it was approved at a later date. The Agreement itself provides for the period it applies. Any employee who worked for the Respondent and who would have been covered by the Agreement has he benefit of it notwithstanding they are no longer employed.

[13] Additionally the Applicant relies on s 55(6) and s 58(1)(c) of the Act. Relevantly those sections provide:

"55 Making of Industrial Agreements

(6) An industrial agreement has effect from –

(a) the date it is approved by the Commission; or

(b) such other date agreed by the parties to the agreement and approved by the Commission.

² Clause 7 (i)

³ Clause 6

⁴ Clause 7

58 (1) An industrial agreement duly registered extends to and is binding on

(c) every employee who is, at any time while the agreement is in force, employed at a work site or place to which the agreement applies by an employer on whom the agreement is binding.”

[14] The Applicant submits that the effect of those provisions is that the Agreement has specified that it operates from 1 July 2018 until 30 June 2019 and that during that time the Agreement extended to and bound the effected employees.

[15] Accordingly the Applicant says the Agreement applied to the effected employees and they are entitled to the benefit of it.

The Respondents Contentions

[16] The Respondent argues that the Agreement applies only to those employed by the State at the date of approval being 19 August 2019. As the effected employees were not employed as at the date of approval the Agreement did not apply to them. Further the Respondent argues that the date the Agreement came into effect (for the purposes of s 55(6) of the Act) is distinct from the date of operation of the Agreement. That is “operation” and “effect” are different things. The Respondent says the Agreement came into effect on 19 August 2019, the date it was approved.

[17] The Respondent also argues that by virtue of s 55(1) of the Act and the definition of “employee” in s 3 that the employees to whom the Agreement relates can only be current employees at the time of approval. It says that as an Agreement must relate to an “industrial matter” as defined which related to employees (who are defined as current employees of the state). As the effected employees were not current employees the Agreement could not relate to them

Consideration

[18] In my view the Respondents first argument fails to grapple with the words of the Agreement. The Agreement is of retrospective effect. That is, it specifies that it relates to a period in the past. Indeed the agreement relates to a period entirely in the past. There is nothing in the Agreement which requires a person who is covered by the Agreement to be an employee at the time it came into effect. There is nothing which requires such a requirement to be implied.

[19] Indeed s 58 deals with who is bound by an industrial agreement. As noted above it relates to any employee who at any time while the agreement is in force was employed at a work site or place to which the agreement applied.

[20] Was the Agreement in force when the effected employees were employed? In my view it was. Clause 6 of the Agreement is headed “Date and Period of Operation”. It then provides that it “applies with effect” from 1 July 2018 and remains “in force” until 30 June 2019. The use of the phrase “in force” is the same as the phrase used in s 58 of the Act. Why then should the phrases not have the same meaning? In my view they have the same meaning. As such, as provided by clause 6 of the Agreement and in accordance with s 58 of the Act it was in force between 1 July 2018 and 30 June 2019. During that time the effected employees were employed by the State and did work covered by the Agreement. Further the use of the phrase “applies with effect from” in clause 6 of the Agreement picks up s 55 of the Act. The Agreement has effect from the date agreed by the parties in the Agreement. That date is 1 July 2018.

[21] It is a consequence of the drafting of the Agreement and its retrospective effect that it covers the effected employees. It is to be noted that the act of approval ratifies the Agreement

for the purposes of the Act. From approval it has effect within the meaning of the Act. It has effect from the date specified in the Agreement and if no date, from approval.⁵ I note that clause 6 of the Agreement uses the word "effect" which word is also used in s 55(6) of the Act.

[22] In respect to the Respondents second argument, I find that there is nothing in the Act to require a construction of the Agreement that it must relate only to current employees; which must be the effect of the Respondents argument. The Respondent argues that as a result of the definition of "industrial matter" and "employee" in s 3 of the Act that the employees to whom the Agreement relate are employees at the time of approval.

[23] An Agreement will often (almost invariably) relate to future employees. If an Agreement related to "employees" as defined in s 3 (i.e. current employees for the purposes of an industrial matter) at a specific point in time (i.e. approval) it would mean that future employees should also be excluded from the benefit of the Agreement. The Respondents argument is essentially that the Agreement can only apply to employees who are employees at a given point in time (be that the date of effect or the date of approval). That has never been the case.

[24] The argument is also contrary to the specific provision relating to agreements and to whom they apply as defined by s 58 of the Act. It is a consequence of approval and registration of an agreement that s 58 applies. Once registered the Agreement applies to all those that s58 provides. It is a consequence of the Agreement being retrospective and in force from 1 July 2018 that the effected employees are covered.

Outcome

[25] I determine that the effected employees are covered by and have the benefit of the Agreement.

[26] The question is answered yes.



Parties Representatives:

Mr R Flanagan for AWU

Ms L Bessell for DPIPWE

Date and place of hearing:

Determined on the papers

⁵ The Act s. 55(6)