TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974
s29(1) application for hearing of an industrial dispute

Robert Deverell
(T14840 of 2021)

and

Minister administering the State Service Act 2000 – Department of Police, Fire and Emergency Management

PRESIDENT BARCLAY LAUNCESTON, 24 MAY 2021

Application alleging breach of the Firefighting Industrial Agreement arising from resignation from employment – date of resignation – resignation letter silent as to notice – what notice given – application dismissed

DECISION

[1] This matter came on for hearing on 18 May 2021. I dismissed the Applicants Application at that time and gave some brief reasons and said that further reasons would be published later. These are those reasons.

[2] The Applicant has made an application for an order directing the Respondent to comply with clause 15.1 of the *Firefighting Industrial Agreement 2019* (the Agreement) in relation to the payment of monies said to be owing to him in consequence of his resignation from his employment with the Tasmania Fire Service (TFS).

[3] There are two components to the claim. The first is that his entitlements are to take into account a salary increase provided by the Agreement which the Respondent has failed to take account in calculating his accrued entitlements payable on resignation.

[4] The second is that the Applicant is entitled to be paid a further 4 weeks' pay for the period of notice on his resignation.

[5] In essence the Applicant submits that the effective date of his resignation is 30 October 2020 and that any payments due to him should be calculated up to that date.

[6] This decision deals with the date the Applicants resignation became effective. This determination will inform the quantum of any payments and also whether there are any payments outstanding for notice.

[7] I note that the Agreement was registered on 16 October 2020. As such if the effective date of the Applicants resignation is 30 October then the Agreement will apply to his employment (in so far as the Agreement so provides).

Background

[8] The Applicant suffered an injury within the meaning of the *Workers Rehabilitation and Compensation Act 1988* (WC Act) in around April 2019. He made a claim for workers compensation. Payments were apparently made to the Applicant pursuant to the WC Act.

[9] On 29 September 2020 the Applicant settled his workers compensation claim for a lump sum. The Applicant executed a Deed of Settlement. As part of this application I required a copy of the Deed of Settlement.

[10] Relevantly for this application the Deed provides that the Applicant agreed[1]

> "...to resign or retire from his employment with the Employer upon the determination of any application made by the ..[Applicant].. for the payment of any benefit arising out of his employment pursuant to any policy of insurance and/or any application by the ..[Applicant].. to access superannuation benefits".

[11] On 2 October 2020 the Applicant emailed a letter of resignation (the Resignation Letter). That letter is dated 2 October 2020. Setting aside the preamble and salutation the letter was in the following terms:

> "Please accept this letter as my formal notification to you that I am resigning from my position with the Tasmania Fire Service.
>
> Thank you for all the opportunities, both professional and personal that have been provided to me in the 43 years of service with the Tasmania Fire Service".

[12] The letter was signed by the Applicant.

[13] By letter dated 19 October 2020 the Chief Officer Mr Arnol wrote to the Applicant in the following terms (again not including preamble or salutation):

> "Your resignation from the position of Senior Station Officer, 003602 with the Tasmania Fire Service effective from the close of business on Friday 2 October 2020 has been accepted.
>
> On behalf of the State Fire Commission, I thank you for your contribution to Tasmania Fire Service and wish you well for the future."

[14] It may be seen from the correspondence that the issue arises whether the resignation is effective from 2 October 2020.

The Evidence

[15] The Applicant, in his witness statement[2], said that he called the TFS on three occasions, twice on 29 September 2020 and once on 2 October 2020. He says that on 2 October 2020 he called a specific number and spoke to someone at Payroll. He says he asked how much notice he should provide and to whom he should send the notice of resignation.

[16] He says he was told that[3]:

> "a. That I should direct my resignation to the Chief Officer, TFS

[1] Deed of Release and Settlement dated 29 September 2020 clause 2.8
[2] A1
[3] A1 paragraph 8

b. That my payments would continue as normal until the end of the next pay period

c. That they did not know how much notice I needed to provide".

[17] The Applicant goes on to state that when he sent the Resignation Letter he did not specify any period of notice because he assumed that he would need to provide 14 days' notice and assumed that the "default"[4] reading of the Resignation Letter would be "in line with the industrial instruments under which I was employed"[5].

[18] I note that the Award (which is the industrial instrument relevant to notice) requires 4 weeks' notice.

[19] The Applicant gave evidence. His evidence was broadly consistent with his witness statement. He confirmed that when he spoke to Payroll (as he thought it was although it transpired to be a Ms McDougall from Human Resources) he was not told what notice he should give.

[20] The Respondent called Fiona McDougall who at the relevant time was the People and Culture Advisor for the Department of Police, Fire and Emergency. In her statement[6] she recalls a telephone discussion with the Applicant on 30 September 2020. Ms McDougall was aware of the Applicants workers compensation claim. Ms McDougall recalls that she was concerned the Applicant was confused over the impact of his workers compensation claim and was seeking advice in respect to resignation and its impact on his workers compensation claim and his RBF benefits. Ms McDougall says that she did not know the answers and advised the applicant to seek legal advice.

[21] After the phone call Ms McDougall sent an email to the Manager of Injury Management Advisory Service because she thought the manager should know about the Applicants confusion. That email is, relevantly, in the following terms[7]:

> "Rob called me earlier and expressed confusion around what he had to do next, and whether or not he had to resign from TFS prior to going to RBF, and I believe he may have received some unhelpful advice from RBF that is causing the confusion. I suggested that prior to taking any action he get in contact with his Solicitor for clarification around next steps, and that you may also be able to provide guidance around some aspects of the process."

[22] Ms McDougall was unable to specifically recall any other discussion she had with the Applicant but agreed there was more than one. She does agree that she may have told the Applicant that usually resignation letters are sent to the immediate manager.

[23] Ms McDougall also gave evidence. Her evidence was consistent with her witness statement. One issue arose whether Ms McDougall advised the Applicant to seek legal advice. The Applicants evidence was that he did not recall being given that advice. Whilst nothing really turns on the issue I accept the evidence of Ms McDougall in that regard. She sent an email regarding the contents of her discussion the next day. I have set it out above. It refers to the suggestion that the Applicant seek legal advice. The email was sent the day after the telephone conversation. It is likely that Ms McDougall had a good recollection of the content of the discussion when she sent it. I find therefore that the Applicant was advised to seek legal advice. He decided not to do that.

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[4] A1 paragraph 10
[5] ibid
[6] R1
[7] B1 annexure A

[24] I note that the applicant does not assert he was told what notice period to put in his Resignation Letter. I accept that the Applicant may well have assumed that he was obliged to, and by implication did give, 14 days' notice of resignation.

[25] I accept that the Departments representatives made no representations as to notice periods.

[26] Mr John Lampkin, Manager of Payroll Services for the Department also made a statement and gave evidence. He said that the records indicate that the Applicants "resignation" was processed with effect from 30 September 2020. In his evidence he clarified that the "resignation" was processed then as the Applicant, in line with the workers compensation settlement was not to receive any more payments.

[27] It is clear that on 30 September 2020 the Applicant had not resigned. I do not regard the reference to "resignation" as amounting, as suggested by the Applicant, to any form of termination of the Applicants employment. I accept Mr Lampkin's evidence that the process was in fact ceasing further payments in light of the settlement. In any event there is no evidence that the Applicant was advised that his employment was terminated on 30 September. It is trite to say that a termination of employment by the employer to be effective must be communicated to the employee.

The Applicants submissions

[28] The Applicant submits that he intended to abide by the relevant industrial processes and that he changed his actions to comply with the advice provided to him by the Respondent. It may be right that the Applicant intended to abide by relevant industrial processes, however the Applicant could not have "changed his actions[8]" to comply with the advice provided in so far as the advice related to notice because no such advice as to notice was given.

[29] The Applicant further submits that:[9]

> "The Applicant submits that if the Chief Officer intended to terminate the employment of Mr Deverell prior to the date on which Mr Deverell intended to finish, then it could be argued that this would then be considered to be termination of employment by the employer, which would have required 5 weeks of notice as outlined at PART II 2. (a)(i) and (ii) of the Award".

[30] The difficulty with the submission is that the Respondent did not terminate the employment.

[31] The Applicant did by his resignation. A further difficulty is that the Resignation Letter did not disclose when the Applicant intended to finish. There is no evidence he ever told anyone from the TFS when he intended to resign

[32] The Applicant also makes the following submission:[10]

> " The Applicant contends that Mr Deverell was acting in good conscience when he sought advice from the Respondent on the method and form of his resignation.
>
> The Applicant submits that consideration should be given to the technical nature of this dispute and that consideration should be given to the principal of equity.

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[8] Applicants submissions paragraph 6
[9] Ibid, paragraph 8
[10] Ibid paragraph 9 to 12

The Applicant contends that an employee who provides notification of their resignation would ordinarily be afforded the assumption that they intended to abide by the relevant industrial instruments.

The Applicant contends that it is not clear why the Respondent did afford Mr Deverell with the assumption of intent to comply with the relevant industrial instruments."

[33] Whilst it may be accepted that the Applicant was acting in good conscience I cannot see how any principles of equity[11] would arise. There is no evidence that the Respondent made a representation upon which the Applicant has relied to his detriment which might give rise to an estoppel. As to the "assumption that they intended to abide by the relevant industrial instruments" I know of no such assumption. I find there is no basis to the claim that such an assumption exists. I am unaware of any such equitable doctrine.

[34] Finally the Applicant calls in aid the construction of the Notice provision of the Award.[12] The Applicant submits that for an employee to fail to provide notice of resignation, they must be able to work and unwilling to perform duties[13].

[35] There is no doubt about the construction of clause 11.2(b). It provides as follows:

"(b) Notice of termination by an employee

(i) The notice of termination required to be given by an employee is the same as that required of an employer, save and except that there is no requirement on the employee to give additional notice based on the age of the employee concerned.

(ii) If an employee fails to give notice the employer has the right to withhold monies due to the employee to a maximum amount equal to the ordinary time rate of pay for the period of notice."

[36] There is nothing in the words or industrial context of the Award that requires a conclusion that the notice provision relates only to those who are able to work but refuse to do so. The notice clause applies to all employees. The Award defines an employee as meaning a person employed under the *State Service Act 2000*. There is no scope to read that down or to construe the notice clause as having categories of employees.

The Respondents submissions

[37] The Respondent notes that the Award, clause 11.2(b) is for the benefit of the employer. By paragraph 20 of the Applicants submissions it may be seen that he agrees. It is therefore for the employee to comply with the clause and for the employer, if it chooses, to waive compliance. It may be seen by the Chief Officers letter that such compliance was waived.

[38] That this is the proper construction of the requirements of the notice provision is confirmed by the nature of an employee's resignation.

[39] The Respondent submits that resignation is a unilateral act of the employee. The employer does not have to accept the resignation for it to be effective. Once tendered the resignation is effective in accordance with its terms.

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[11] Even if tribunals could exercise equitable jurisdiction
[12] Tasmanian Fire Fighting Industry Employees Award clause 11.2(b)
[13] Supra paragraph 22

[40] The Respondent relies on *New South Wales v Paige.*[14] The Chief Justice in that case said[15]:

> "Subject to any contractual or statutory provision to the contrary, the act of resignation from employment, or from membership of an organisation, is a unilateral act that takes effect in accordance with its terms and does not depend upon acceptance by the person or body to whom the resignation is directed. This common law principle is a reflection of the significance the common law has always attached to personal autonomy. Where this principle applies, unilateral withdrawal of a resignation or notice of termination is not possible.
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> The historical position that resignation from offices was not complete until acceptance, has often been modified. Although it is still common to talk of resignations in a contractual context being "tendered" and "accepted", such formulations are "merely linguistic courtesies". (See Marks v The Commonwealth (1964) 111 CLR 549 at 571 per Windeyer J.)
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> There are, however, particular offices to which special considerations attach, so that a resignation does not take effect until acceptance. It was not suggested that the office of principal of a public school was of this kind. Nor did the Appellant seek to rely on any general principle relating to service in an office under the Crown. (See e.g. Marks v The Commonwealth, supra, at 557 per Kitto J; cf at 586-588 per Windeyer J.)
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> There are four alternative bases upon which it might be concluded in the present case that the principle that a resignation cannot usually be withdrawn does not apply:
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> i. That s 78 constitutes a statutory modification of the common law so that acceptance is required before a resignation takes effect.
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> ii. That the exception to the common law principle suggested in some case law, permitting withdrawal of a resignation made in the heat of the moment, applies in the present case.
>
> iii. That the practice that had developed in the Department to permit the withdrawal of a resignation, a practice which may have contractual force, can be relied upon by the Respondent.
>
> iv. That the resignation did not have effect because it had not reached a person with authority to receive it on behalf of the Crown.
>
> The common law principle that a resignation may not be withdrawn can be modified by statutory provision. (See e.g. McCarry "Termination of Employment Contracts by Notice"(1986) 60 ALJ 78 esp at 80 and the examples set out by Windeyer J in Marks v The Commonwealth at 571- 572.) If a statute provides that a resignation does not take effect until acceptance, then the common law principle that a resignation is a unilateral act does not apply and a resignation may be withdrawn.
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> In the context of public sector employment it is often the case that the provisions of a contract and of a statute exist side by side. The distinction between persons who occupy an office and those persons who are employees

[14](2004) 60 NSWLR 235
[15] Ibid paragraphs 277 to 283

is often of significance. (See generally McCarry, Aspects of Public Sector Employment Law, Law Book Company, 1988, Ch 2 .) The creation by the Teaching Services Act of "positions" is a statutory equivalent of the common law concept of an "office", that may exist side by side with a separate regime regulating conditions of employment. The issue is whether s 78, expressed in terms of a vacancy in a "position", extends to encompass the termination of the contractual relationship.

In the specific context of a contract of employment, the principle that a resignation cannot usually be withdrawn serves important purposes. In a judgment that has often been referred to with approval, (Birrell v Australian National Airlines Commission (1984) 5 FCR 447) Gray J said (at 458):

"The purpose of providing in a contract for a period of notice of termination is to enable the party receiving the notice to make other arrangements. An employee given notice by his or her employer has a period of time in which to seek another job; an employer who receives notice has time to arrange for a substitute employee. It would be harsh if arrangements so made during the running of the notice could be disrupted, and parties could be held to their contracts by unilateral withdrawal of the notice at the last minute. Such withdrawal, if possible, could lead to an employee being bound by contracts of employment to employers, or an employer being bound by contracts of employment with two employees, each being required to give notice to one or the other in order to be extricated from this position, or possibly to suffer the requirement to forfeit or pay wages for a period of time. In my view, I should lean against the adoption of any principle which could lead to such unfortunate consequences, and I should follow the authorities which tend to establish that withdrawal of a notice of termination of a contract of employment can only be effected by consent of both parties.""

Consideration

[41] I accept that *Paige* is a correct statement of the law.

[42] In this case the Applicant did not hold any position which ousts the common law position that resignation is a unilateral act. Further the Award does not require the notice of resignation to be accepted nor is there anything in the *State Service Act 2000* which might oust the common law position.

[43] Accordingly resignation is a unilateral act effected according to the terms upon which the resignation is tendered. In this case the Resignation Letter was silent as to notice. It is clear that the Resignation Letter did not refer to any period of notice. Accordingly I find on a proper construction of the Resignation Letter that the resignation was effective from the date of the letter. Indeed it is not suggested that anyone within TFS was aware of the Applicants intentions in regard to notice. It cannot therefore be argued that there was some extrinsic evidence available to assist in the construction of the Resignation Letter.

[44] I note that the Resignation Letter is not a statute or industrial instrument. Accordingly the principles which apply to construction of those documents do not apply to the construction of the Resignation Letter. The letter is to be read accordingly to its terms and given a construction which fairly represents the terms of the letter.

Outcome

[45] I find that the Applicant resigned on the terms set out in the Resignation Letter. That letter is silent as to notice. Accordingly the Resignation Letter conveyed that the

resignation was effective from the date of the letter. The TFS waived any non-compliance with the notice provision.

[46] I do not accept that there is an assumption that a person intends to abide by industrial instruments. No basis was put to establish such an assumption. Even if such an assumption did exist it cannot assist the Applicant because he only intended to give 14 days' notice which was not in compliance with the Award. As such any assumption would be displaced.

[47] There is nothing in the construction of the Notice clause in the Award which help the Applicant. The provision is for the benefit of the employer. As referred to in *Paige* it is so the employer can take steps to cover the loss of the employee. It follows that the employer can if it chooses waive the requirement for notice, which it did here. The clause requires the employee to give the notice. That requires an act of giving notice by the terminating employee. No such act of giving notice other than immediate notice occurred in this case.

[48] Accordingly I find that the effective date of the termination of the Applicants employment is 2 October 2020.

[49] I shall hear the parties further as to the disposition of the Application.

David Barclay
President

Appearances:
Mr McCullum for the Applicant
Ms Collins for DPFEM

Date and place of hearing:
2021
18 May
Launceston