TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974
s 29(1) application for hearing of an industrial dispute

Dr David Woods
(T14961 of 2019)

and

Minister administering the State Service Act 2000 – Tasmanian Health Service

DEPUTY PRESIDENT N M ELLIS 8 JULY 2021

Alleged unfair termination of employment – former employee in fixed term employment – application to dismiss on basis that applicant had no reasonable expectation of ongoing employment – construction of s 30 of Industrial Relations Act - State employee - State service employee – preliminary jurisdictional application dismissed - exceptional circumstances found - extension of time granted

REASONS FOR DECISION

[1] The Applicant has made an application for a dispute in relation to the termination of his employment and is seeking an unfair dismissal remedy. The Applicant was employed pursuant to a series of consecutive fixed term Instruments of Appointment (IOA). He commenced at the Launceston General Hospital (LGH) in 2002 and had been employed for seventeen years with his final IOA expiring on 31 July 2019.

[2] By email of 23 August 2019 the Applicant was advised by Mr Eric Daniels, Executive Director Operations for the North and North West Tasmanian Health Service (THS), that his employment would be terminated effective immediately.

[3] The parties agreed his employment status from 1 August 2016 to the 31 July 2019 was as a State servant. Additionally, his employment status from 1 August 2019 to 23 August 2019 was found by Pearce J in *Gutwein v Tasmanian Industrial Commission*[1] to be as "an employee of the State".

[4] A preliminary issue on the jurisdiction of the Commission has been raised by the Respondent. It was submitted that s 31(1A) of *Industrial Relations Act 1984* (the Act), whether or not to make an order, is only open to the Commission if the provisions of s 30 have been given effect.

[5] The Respondent submitted that s 30 only applies to a former employee who had a reasonable expectation of continuing employment and this could not be applied in this

[1] Gutwein v Tasmanian Industrial Commission [2020] TASSC 59.

case. This is allegedly the threshold which must be met. Further, it was contended this threshold criteria was a jurisdictional fact for making an order under s 31(1B) of the Act.

[6] Mr Turner, appearing for the Respondent submitted:[2]

> "If an employee has no such expectation, s 30 is of no application. That is the ordinary meaning of the provision read as a whole."

[7] The Respondent states the application should be dismissed pursuant to s21(2)(c)(iv) of the Act on the basis that the Commission has no jurisdiction to make an order pursuant to s31(1B) of the Act due to the Applicant not meeting the alleged threshold issue of having a reasonable expectation of continuing employment.

[8] The Applicant responded by stating the employee had a reasonable expectation of continuing employment by virtue of the fact he was employed on a number of rolling IOAs spanning a 17 year period. It was asserted the manner of termination of employment was unfair and a valid reason was not provided.

The Respondent's Submissions

[9] The Respondent states s 29(1A) of the Act entitles a former employee to make an application for a hearing in relation to the termination of a former employee. Section 31(1B) provides that if the Commissioner finds the employee has been unfairly dismissed, certain orders in writing may be made. It was submitted s 31(1A) states the Commissioner is to give effect to the provisions of s 30 before deciding whether or not to make an order.

[10] The heading of section 30 of the Act is: "Criteria applying to disputes relating to termination of employment". It was inserted into the Act by the *Industrial Relations Amendment Act 2000.* The Respondent relies on the second reading speech which included the following:[3]

> "For the first time, the Act will contain clear and fair criteria relating to unfair dismissal.
> Much of what is included is simply setting down existing practice and precedents into codified form"

[11] The Respondent provided the similar submissions in relation to this jurisdictional issue for a recent matter before President Barclay[4]. I repeat those submissions to encapsulate the Respondent' s position on the analysis of s 30 of the Act:[5]

> " 11. Section 30 only applies if the threshold in subsection (3) is met: the employee has a reasonable expectation of continuing employment. There can be no such expectation when the relevant contract (here the last instrument of appointment – covering the period ending on the 31st July 2019) specifies an end date. That is the, uncontentious, effect of Prasad. Dr Woods could not have had that expectation.
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> 12 However the other subsections of s 30 do not operate separately in the manner suggested by *Prasad*. Rather, the subsections interlink and work together, with each subsection naturally flowing onto the next –

[2] Respondents submissions, Para 13.
[3] House of Assembly 31 August 2000, Minister for Justice and Industrial Relations.
[4] Marope v THS T14826 of 2021.
[5] Respondent's submissions para 7-14.

- (1) is introductory, it provides definitions;
- (2) is also introductory, it mandates a fair approach;
- (3) is the primary operative provision: it prohibits the termination of the employment of an employee with a reasonable expectation of employment unless there is a valid reason, connected with (a) the capacity, performance or conduct of the employee; or (b) the operational requirements of the employer's business;
- (4) relates to (3), it gives examples of what are not valid reasons;
- (5) and (6) are procedural – who will have the onus of proving what; first, it is for the employer to prove the existence of a valid reason, if it cannot, the termination is contrary to (3) and that is the end of the matter; but if the employer has proven a valid reason, then the employee may nevertheless assert that the termination was unfair (for example, because the valid reason did not justify termination in all the circumstances), proof of which is on the employee;
- (7) qualifies how termination should occur if it relates to the employee's 'conduct, capacity or performance' – a clear reference back to (3)(a);
- (8) relates directly to (7);
- (9) onwards relate to remedy.

13 Thus, it can be seen that the jurisdictional fact is 'a reasonable expectation of continuing employment'. If an employee has no such expectation, s 30 is of no application. That is the ordinary meaning of the provision read as a whole. Consistently, since the introduction of s 30 some 20 years ago,6 until *Prasad*, no decision of the Commission has purported to exercise jurisdiction under s 30 unless there was a reasonable expectation of continuing employment.7

14 Subsection (6), which is clearly procedural, does not establish a separate jurisdiction that might apply to the termination of any employment, regardless of whether the employee had a reasonable expectation of continuing employment. Although it is true that s 30(6) refers only to 'employment' being unfairly terminated, (not 'the employment of a person who has a reasonable expectation of continuing employment'), the same can be said of subsections (4), (5), (7) and (8), yet it is beyond question that those subsections are dealing only with employment of persons who had the relevant expectation. The explanation for this is that subsection (3) creates a 'threshold' criterion for disputes relating to the termination of employment, so in the subsections that follow the term 'the employment' essentially becomes shorthand for 'the employment of an employee who has a reasonable expectation of continuing employment'.

15 Rather than create a separate basis for finding that termination is unfair, subsection (6) has work to do only if it is found that a valid reason exists. If a valid reason exists, then it is for the employer to prove that the outcome of termination was not unfair in all circumstances…"

[12] The Respondent relied upon decisions of the Commission[6] where it was submitted a reasonable expectation of ongoing employment had been considered for determining whether there was a valid reason for termination of employment before the test of unfairness was considered.

[6] T1449 of 2016, T14708 of 2019, T14618 of 2018 and T14692 of 20.

[13] The Respondent submitted the *Port of Devonport Corporation v Abey*[7] considered the conclusion of a contract by the effluxion of time which could amount to the termination of employment. This case was cited in *Prasad* for the proposition there may be jurisdiction despite the lack of expectation of continuing employment.

[14] The Respondent submitted the Full Bench of the TIC fell into error in their findings in *MASSA v Prasad*[8], where it was held that where an employee is employed pursuant to an Instrument of Appointment (IOA) with an expressed end date, that employee cannot have a reasonable expectation of ongoing employment and as a result the employer does not need to have a valid reason for termination of employment. Additionally, the Full Bench found it could make a determination whether the termination of the employment was fair or unfair.

[15] It was submitted the jurisdiction hinges on an employee having a reasonable expectation of continuing employment. The Respondent stated the comments in the *Prasad* decision were not as a result of detailed submissions as the issue had not arisen at first instance. The outcome could effectively grant jurisdiction which works separately and independently to s 30(3), which may lead to inconsistent results.

[16] The Respondent submitted without meeting the threshold of having a reasonable expectation of continuing employment, there is no jurisdiction for the present application to give any relief and sought that the application is dismissed pursuant to s 21 (2)(c)(iv).

The Applicant's submissions

[17] It was submitted the Applicant had a reasonable expectation of continuing employment demonstrated through the conduct of the parties and his rolling employment contracts spanning a period of 17 years. It was alleged he worked beyond the expiration date of a number of the IOAs.

[18] The Applicant submitted the view:[9]

> "…that other subsections of s.30 do not operate separately in the manner suggested by *Prasad* and agree the subsections interlink and work together."

Based on this view, the Applicant offered no further detailed submissions on this preliminary matter.

[19] It was submitted the Commission has jurisdiction to determine this matter based on the Applicant' s reasonable expectation of continuing employment and the termination of his employment by the employer by the effluxion of time.

[20] While it was agreed that the *Port of Devonport Corporation v Abey*[10], was not authority for the proposition that there was jurisdiction despite a lack of reasonable expectation of continuing employment, it was stated this case is the relevant authority determining whether ending an employment contract by the effluxion of time amounts to "termination". In this decision, Tennent J considered the primary judge's conclusion was correct in finding that is was open for the Commission to form a preliminary view supporting a reasonable expectation of continuing employment and hence there was jurisdiction.

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[7] Port of Devonport Corporation v Abey [2005] TASSC 97.
[8] MASSA v Prasad T14682 of 2019.
[9] Applicant's Reply to Respondent's submissions, Para 13, 27 April 2021
[10] Port of Devonport Corporation v Abey [2005] TASSC 97.

[21] However, in support of the issue of continuing employment, this case was distinguished by the Applicant from *Prasad* where the applicant was only subject to one IOA, in contrast to this case where the Applicant was subject to more than five IOAs.

[22] In relation to any entitlement to relief, it was submitted that the Respondent was incorrect in stating reinstatement, re-employment or compensation cannot be ordered as a result of an application filed by a former State employee, due to reinstatement and re-employment amounting to an appointment under the *State Service Act 2000 (SS Act).*

[23] The Applicant relied on s50(4) of the *SS Act* which provides:

> "… disputes in relation to the decision to terminate employment are to be dealt with by the appropriate industrial tribunal in accordance with the legislation under which that tribunal is established."

[24] Section 29(1A) of the Act provides for applications to the Commission relating to an industrial dispute relating to the termination of employment of a former employee. It was submitted that the matter relating to re-instatement or re-employment or the payment of compensation of a former employee who has been unfairly dismissed, is included under the definition of an "industrial matter" in s 3 of the Act.

[25] It was stated that s 30(9) of the Act, provides the Commission with the principal remedy where it is found employment has been unfairly dismissed, as an order for reinstatement or re-employment.

[26] Further, s 30(10) of the Act provides that the Commission may order compensation to be paid to an employee, who the Commission finds has been unfairly dismissed if the previous options are found to be impracticable.

[27] The Applicant relied on previous authorities where reinstatement of a State employee had been ordered as the remedy after a finding that a valid reason for termination of employment did not exist.[11]

[28] It was contested that if the Respondent's submissions were correct, it would result in a State employee whose employment had been found to be unfairly terminated would be left with no mechanism for redress. It was stated it would be unreasonable to deny a State employee the right to challenge such a decision.

[29] The Applicant submitted the Commission has jurisdiction to determine if the Applicant has been unfairly dismissed and if found, order the remedy as provided for in the Act.

Consideration

[30] The Respondent seeks this application be dismissed, pursuant to s 21 (2)(c)(iv) of the Act, which provides the Commission may:

> "(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 –
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> (i) that the matter or part is trivial;
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> (ii) that further proceedings are not necessary or desirable in the public interest; or

[11] Billett v MASSA T12651 of 2006, Pinner v MASSA T14618 of 2018

(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;"

[31] This is based on the alleged inability of the Commission to provide any relief or make an order as the Applicant does not meet the alleged threshold requirement of the former employee having a reasonable expectation of continuing employment. It was submitted this is a jurisdictional fact for making an order pursuant to s 31(1B).

[32] I am satisfied the jurisdictional facts relevant to this application satisfy the criteria required to provide jurisdiction to the Commission to hear the unfair termination of employment application which is defined as an industrial matter. The facts of this case are:

1. That the Applicant meets the definition of a former employee;

2. That the former employee has been dismissed;

3. There is a dispute as to the validity and/or fairness of the termination of employment.

[33] Section 30 of the Act provides as follows:

"**30.** Criteria applying to disputes relating to termination of employment

Continuing employment means employment that is of a continuing or indefinite nature or for which there is no expressed or implied end date to the contract of employment;

E*mployee* means a person who is or was engaged to work casual employment, part-time employment, full-time employment or probationary employment and includes a former employee;

relationship status means the status of being, or having been, in a personal relationship, within the meaning of the Relationships Act 2003 .

(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

(3) The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with –

(a) the capacity, performance or conduct of the employee; or

(b) the operational requirements of the employer's business.

(4) Without limitation, the following are not valid reasons for termination of employment:

(a) membership of a trade union or participation, or involvement, in trade union activities;

(b) seeking office as, acting as, or having acted as, a representative of employees;

(c) non-membership of a trade union;

(d) race, colour, gender, sexual preference, age, physical or intellectual disability, marital status, relationship status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except where the inherent nature of the work precludes employment for any of those reasons;

(e) absence from work during maternity or parental leave;

(f) temporary absence from work because of illness or injury, provided that nothing in this paragraph is to be construed as removing an employer's right to terminate an employee's employment on account of persistent or unjustified absenteeism;

(g) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.

(5) Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer.

(6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.

(7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.

(8) An employee responding to an employer under subsection (7) is to be offered the opportunity to be assisted by another person of the employee's choice.

(9) The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable.

(11) In determining the amount of compensation under subsection (10) , the Commission must have regard to all the circumstances of the case, including the following:

(a) the length of the employee's service with the employer;

(b) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;

(c) any other matter the Commission considers relevant.

(12) Where the Commission finds that an employee's employment has been unfairly terminated and has determined that reinstatement or re-employment is impracticable, any amount of compensation must not exceed an amount equivalent to 6 months' ordinary pay for that employee.

(13) The Commission is to take into account any efforts of the employee to mitigate the loss suffered as a result of the termination of his or her employment."

[34] The Respondent submits that a reasonable expectation of continuing employment is a jurisdictional fact and if there is no such expectation, s 30 has no application. I do not agree with the position that it is beyond question that subsections (5), (6) (7) and (8) are dealing only with employees who have a reasonable expectation of continuing employment. It does not say that.

[35] In my view, the ordinary meaning of the words do not reflect this, and there is a distinct difference in the wording of s 30(3), which states the criteria that: "employment of an employee who has a reasonable expectation of continuing employment" must have a valid reason to be terminated.

[36] The term "continuing employment" is defined in s 30(1) to provide clarity. The term "employee" is also defined and includes a former employee. As the term "continuing employment" is defined, the whole term would in my view, be drafted into the relative subsections to ensure the definition was invoked if it was intended to only capture an employee with an expectation of continuing employment.

[37] However, the terms employment and employee and used throughout s 30, but only in section 30(3) is the additional condition for an employee stated as one: "who has a reasonable expectation of continuing employment", which consequently requires a valid reason for that termination.

[38] If it was intended to narrow this application to read into "employment", the words, "the employment of an employee who has a reasonable expectation of continuing employment" it would have been so drafted. I am satisfied reading these words "continuing employment" into the term "employment" throughout s 30 is in conflict with the well-developed principles of statutory construction.

[39] I cannot read the words to increase their sphere of limitation in light of all terms "employment" implied to mean "employment of an employee who has a reasonable expectation of continuing employment". The words do not state this and to do so would change the sphere of operation.

[40] In *R v Young*[12], the NSW Court of Criminal Appeal declined an argument that it should imply the presence of a substantial number of words to give effect to the purpose of the relevant sections. In *R v PLV*[13] , Spiegelmann CJ reiterated these findings and stated:

"…I am unaware of any authority in which a court has "introduced" words to or "deleted" words from an Act, with an effect of *expanding* the sphere of operation

[12] R v Young [1999] NSWCCA 166.
[13] R v PLV [2001] NSWCCA 282.

that could be given to the words actually used. This was the actual issue in *R v Young*. There are many cases in which words have been read down. I know of no case in which words have been *read up*.

The introduction of the words 'or recall' into s 106(d) would expand the sphere of operation of that section. It is not, in my opinion, a permissible process of statutory construction."

[41] Similarly, in my view, to imply the attachment of the additional words to 'employment', expands the sphere of limitation by relating to only those employees who have a reasonable expectation of continuing employment as defined in s 30(1) of the Act as 'continuing employment' rather the broader term of 'employment'.

[42] Further to this argument, the Respondent states there is no separate basis for a finding that the termination of employment was unfair, and subsection (6) only has work to do, if it is found that a valid reason exists as provided in s 30(3). I do not agree with these submissions.

[43] I concur with the findings of President Barclay in a recent decision, *Marope v MASSA T14826 of 2021* dealing with a similar issue, where President Barclay, found at [31] to [33]:

"[31] Having introduced the consideration of unfairness for the first time as a criteria for validity of termination of employment, the absence of the conjunctive phrase to describe the employment is significant. The conjunctive phrase is used in respect to the criteria of valid reason. If it was a requirement for the criteria of unfairness then I would have expected parliament to have made that clear.

[32] I note that the purpose and object of this part of the legislation is remedial. As such there is no reason to read down the provisions or make criteria subject to limitations which are not expressed.

[33] Having regard to the matters above I do not think that I am justified in construing the section as if the definition of "continuing employment' appeared wherever the word "employment" appears."

[44] Furthermore, I concur and adopt his findings stated in the conclusion in [35] to [36]:

"[35] I determine that s 30 of the Act does not require there to be continuing employment, as defined, in order for an employee to make an application for an unfair dismissal remedy. Had parliament intended for 'continuing employment' as defined to limit 'employment' wherever it appears in section 30 then it should have done so. The section contains only one subsection where 'employment' is so defined. It would have been a simple matter for parliament to use the additional words, to use the phrase 'continuing employment' as defined or to define employment throughout as being of a continuing nature. It has not done that. As I have set out above I do not think it is permissible to read the words in to limit the meaning of "employment" wherever it appears on the section.

[36] To read in a whole phrase to limit the ordinary and natural meaning of the word 'employment' is not a small thing. I do not find that circumstances exist which justify such a course."

[45] The Applicant supports the Respondent's submissions and argues that Dr Woods had a reasonable expectation of continuing employment and therefore meets the criteria for determination of validity of termination of employment.

[46] For the above reasons, I do not concur with the submissions that require the condition of a reasonable expectation of continuing employment in s 30(3) to be met as a threshold for the application of the remainder of s 30 of the Act.

[47] I observe the Respondent submits the Full Bench decision in *Prasad* is wrong and should not be followed. The Applicant supported the threshold requirement of a reasonable expectation of continuing employment, which they submitted was the case in the Applicant's case.

[48] I am persuaded to adopt the findings of the recent Full Bench decision in *Prasad*, which separates the two stage process of the requirement for a valid reason for those employees with a reasonable expectation of continuing employment and the process of determining an unfair dismissal. The Full Bench stated at paragraph [37]:

> "Section 30(2) and Section 30 (6)-(8) of the Act remain relevant to a consideration as to whether a dismissal is unfair. As the Appellant was not required to have a valid reason for termination care must be taken not to conflate matters which may go to valid reason with the consideration of unfairness."

[49] The determination of whether he had a reasonable expectation of continuing employment would be considered in a subsequent hearing process. In the event I determine he did not have a reasonable expectation of continuing employment, in my view, it would still need to be determined whether the termination of employment was unfair. A valid reason would not be required pursuant to s 30(3) of the Act, if it was found he had no reasonable expectation of continuing employment.

[50] If the Applicant was found to be unfairly dismissed, the remedy is provided in s 31(1B) of the Act. I do not agree with the submissions that the Commission has no power to make the orders sought. For example, if the dismissal was found to be unfair, an order that the employer pay the former employee an amount of compensation may be a possible remedy, pursuant to s 31(1B) of the Act, if the reinstatement and reemployment were found to be impracticable.

[51] Having found I have jurisdiction to deal with the matter, clarified the construction relating to s 30 of the Act and the separate introduction of the criteria of unfairness as a consideration of the validity of the termination of employment, I am not prepared to exercise my discretion under s 21(2)(c)(4) of the Act as I am not satisfied there is a reason the matter should be dismissed.

Was the Applicant a State employee as defined in the s3 of the Act and an employee within the meaning of s30 (1) of the Act at the time of application?

[52] Both parties concede Dr Woods was an employee of the State from 1 August 2019 to 23 August 2019 and he therefore fell within the definitions outlined in ss 3 and 30(1) of the Act.

[53] The Respondent submitted he was not an employee captured by s 30(3) of the Act as the nature of his employment was not of a continuing or indefinite nature. It was stated his application did not raise any contention that he was a State employee for this period.

[54] The Respondent stated the possible remedy excludes reinstatement to the position he held 1 August 2019 to 23 August 2019 and re-employment is only available upon like terms and for the same reason is not available. It was argued that the above two options are not only impracticable, they are impossible.

[55] The Applicant submitted that as a State employee he filed his application on 9 September 2019, which was 17 days after being advised that his employment was terminated and therefore was within the 21 day time limit.

[56] I concur the Applicant was employed as a State Employee as defined in s 3 and s 30(1) of the Act for the employment period between 1 August 2019 to 23 August 2019 and a State employee is eligible to make an application under S29(1A) of the Act.

Were there exceptional circumstances present to grant an extension of time as provided in s 29(1B) of the Act?

The Applicant's position

[57] The Applicant made an application requesting an extension of 40 days due to the "exceptional circumstances" as set out in s 29(1B) of the Act.

[58] The Applicant relied on the case of *David Wanless v The Wilderness Society Inc,*[14] and the principles adopted by this Commission in relation to extension of time applications which are found in *Izard v Simmons Family Trust*[15]. In that matter the Commission examined a range of authorities and concluded:

> "The common thread in these authorities point to the following as being relevant matters for consideration:
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> - the length of the delay;
> - the explanation for the delay;
> - the prejudice to the Applicant if the extension of time is not granted;
> - the prejudice to the Respondent if the extension of time is granted;
> - action taken by the Applicant to contest the termination other than applying under the Act;
> - any relevant conduct of the Respondent;
> - the nature and circumstances of any representative error;
> - the Applicant's prospect of success at the substantive hearing."
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> These considerations are underpinned by the following principles:
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> - Prima facie that time limits should be complied with;
> - There is public interest in the prompt institution and prosecution of litigation before the Commission;
> - Ignorance of the law is no excuse;
> - The onus rests on the Applicant to demonstrate sufficient reason to justify extension;
> - Each case must be considered on its own facts and circumstances;
> - The mere absence of prejudice to the Respondent is an insufficient basis to grant an extension of time;

[14] David Wanless v The Wilderness Society Inc T13497 of 2009 at para 13.
[15] Izard v Simmons Family Trust T11310 of 2004.

- The discretion to allow out of time applications is directed towards ensuring that justice is afforded to both parties;
- Considerations of fairness as between the Applicant and other persons in a like position are relevant to the exercise of discretion."

[59] The Applicant added that in the context of s 29(1B) of the Act, the Commission observed in that case, that:

> "For an application to be successful there would need to be an additional element or elements consistent with the ordinary and natural meaning of the word "exceptional".

[60] It was submitted the Applicant was of the mistaken belief that whilst he considered the offer, he continued to be an employee. This misunderstanding was due to the conduct of the employer while he continued to work in the same role under the same conditions and the fact he was paid for those services at the LGH. His actual work and employment was terminated by the employer on 23 August 2019.

[61] Addressing the relevant matters for consideration, the Applicant's submissions are summarised below:

1. **Length of delay**
   The length of delay, being 40 days is required due to a number of issues during this period. Following the 31 July 2019, the Applicant continued to work for the employer, still communicated through meetings and emails and expected to return to work after 23 August 2019, until he received correspondence notifying his employment was at an end. The Applicant believed he remained an employee during this period. It was only on receipt of the letter of termination that he understood his employment was terminated and he filed the s 29(1A) application on the 9 September 2019, which was at day 17 of the 21 day period to make the application had this been the actual date of termination.
   This is the date the applicant believed was the date of termination of employment. A number of cases were relied on with extensions granted for periods of up to 161 days.

2. **Explanation for the delay**
   The Applicant genuinely held the belief that he continued to be employed as he worked after the 31st of July 2019, the date of expiration of his last signed contract. Having this belief, he lodged a s 50(1)(b) of the SS Act Review of Action application with respect to offer of the six month IOA. Had he been aware he was not an employee at that time, he would have lodged a s 29(1A) application within time.

3. **Prejudice to the Applicant if the extension of time was not granted**
   The prejudice will be substantial as it will prevent the pursuit of any means of redress and there has been significant financial detriment as a result of the Respondent's actions.

4. **Prejudice to the Respondent if the extension of time is granted**
   As the Respondent has always been aware of the Applicants' intention to contest the termination of employment, (as early as 6 August 2019 at the meeting with the ED Operations, and further in the s 50(1)(b) application), there is no prejudice to the Respondent.

5. **Action taken by the Applicant to contest the termination, other than applying under the Act**

The Applicant took active steps to notify the Respondent of his dissatisfaction to impose a 6 month IOA and requested how it could be contested. As soon as he received correspondence notifying him of his termination of employment on 23 August 2019, he lodged the s 29 (1A) application. He did not actively delay the process.
It was stated this case is similar to the *Wilderness Society* case where it was found the Applicant made it clear through his legal representative that it was to be contested and when the jurisdictional challenge was raised, he took immediate steps to seek legal advice. Dr Woods sought legal advice earlier in the dispute.

6. **Any relevant conduct of the Respondent**
There was an expectation from the Respondent that Dr Woods would and did continue to work during the three week period following the end date of his IOA, whilst considering the new offer. This led the Applicant to believe he was an employee and his employment would only cease if he decided not to sign the new IOA, which he was still considering.
It was alleged that the HR Manager at the meeting on 6 August 2019, advised an application for a review of action under s 50(1)(b) of the SS Act could be lodged. It was reasonable that advice could be relied upon by the Applicant. Had the employer advised Dr Woods at that meeting he was no longer a State service employee from 31 July 2019, the Applicant would have filed the application with the 21 day timeframe.

7. **The nature and circumstance of any representative error**
The Applicant's solicitors formed the view that the Applicant continued to be employed following 31 July 2019 and advised him to lodge the review of action application. The Applicant relied on *Mr H and The Minister Administering the State Service Act 20000/Department of Education*[16], where the application was lodged based on legal advice, in the incorrect jurisdiction being the Fair Work Commission and not the TIC. The representative error was acknowledged and it was clear the Applicant had taken reasonable steps. This case was compared to this matter in light of the advice to lodge a review of action under the SS Act as opposed to an application under s 29(1A) of the Act.

8. **The Applicant's prospect of success at the substantive hearing**
The Applicant submitted they would be successful at hearing and Dr Woods has been employed for 17 years on successive IOA's which is in breach of EDs."

[62] The Applicant alleged the relevant matters have been clearly established for exceptional circumstances with respect to the delay required for lodging the s 29(1A) application. Relying on, *HO v Professional Services Review Committee 295* [2007][17], and noting the Fair Work Commission also has a relevant test for exceptional circumstances, it was submitted the circumstances of this case are out of the ordinary course, unusual, special and uncommon and that this case has a series of events that together are exceptional circumstances.

[63] The Applicant sought an extension be granted until 9 September 2019 due to the exceptional circumstances of this case, in accordance with s 29(1B) of the Act.

The Respondent's position

[16] H and The Minister Administering the State Service Act 20000/Department of Education T13827 of 2011.
[17] HO v Professional Services Review Committee No. 295 [2007] FCA 388 (26 March 2007) at para 25.

[64] The Respondent stated the application should be dismissed as it was made outside the 21 day time requirement from the date of termination, as set out in s 29(1B) of the Act.

[65] It was submitted the application related to his employment as a State service employee based on the application details and the terms sought. It was alleged the application did not refer to his employment as a State employee, post 1 August 2019.

[66] It was submitted the Applicant was aware of his employment status and stated:[18]

> "However, at the outset, it needs to be borne in mind that Dr Woods could have been under no misapprehension-his employment as a State servant ended on 31st of July 2019 absent accepting the new appointment (of six months)"

[67] It was alleged he made a conscious decision to pursue an application for a review of action under the provisions of s 50(1)(b) of the SS act and not an application to the TIC until 9 September 2019.

[68] Addressing the relevant matters for consideration[19], the Respondent's submissions are summarised below:

1. **Length of delay**
   The application was delayed until the 9 September 2021 and there was a further delay in not agitating for an extension, which may be applicable in terms of the Applicant misapprehending the law (as expounded by his Honour Pearce J).

2. **Explanation for the delay**
   The delay is characterised as ignorance of the law and a desire to expend resources through the original application for a review of action.

3. **Prejudice to the Applicant if the extension of time was not granted**
   Without the granting of an extension, the Applicant would have no entitlement to relief. It was contended that s31(2)[20] of the Act states the Commission should not make an order if it is inconsistent with the provisions of the Act dealing with the same subject matter and that the remedies of reinstatement and reemployment are inconsistent with the *State Service Act*. Further, it was submitted if those remedies are not able to be ordered, then if cannot be said that it is "impracticable" rather impossible.

4. **Action taken by the Applicant to contest the termination ,other that applying under the Act**
   The Applicant has elected to pursue a review of action under s 50(1)(b) of the SSAct which tells against the extension of time.

5. **The Applicant's prospect of success at the substantive hearing**
   There has been nothing presented to make an assessment of the prospect of success. There was no assurance provided to Dr Woods that there would be any continuity of employment beyond 31st of July 2019 except for the offer of a further six month IOA. This position is in contrast with the statement of Cox CJ in *Saarinen v University of Tasmania*[21] which found industrial disputes often arise in relation to the termination of fixed term contracts where employers can act unfairly, particularly where there is a reasonable expectation of renewal of

[18] Respondents submissions Para 26, in relation to the S 29 (1A) Application Extension of Time.
[19] David Wanless v The Wilderness Society Inc, (T13497 of 2009) at para. 13 referred to in the Applicant's application to extend time 12 Feb 2021.
[20] Submission referred to s 30(2) which should be s 31(2) of the Act.
[21] Saarinen v University of Tasmania (1997) 7 Tas R 154 Page 161.

the contract and the employer refrains from honouring it. That decision was in the context of a previous legislative regime. It was stated there is nothing to demonstrate any unfairness in this case.

[69] The Respondent submitted there is no factor or combination of factors which constitute "special circumstances" and no extension of time should be granted and the application should be dismissed.

Consideration of granting exemption of time

[70] I must be satisfied that exceptional circumstances have been established before the discretion to extend time is enlivened.

[71] Section 29(1B) of the Act provides:

> "An application for a hearing before a Commissioner in respect of an industrial dispute relating to termination of employment or severance pay relating to redundancy is to be made within 21 days after the date of termination or, if the Commissioner considers there to be exceptional circumstances, such further period as the Commissioner considers appropriate." (my emphasis added)

[72] The ordinary meaning of "exceptional" can be found in the Macquarie Dictionary. The definition is: "forming an exception or unusual instance; unusual; extraordinary"

[73] The Applicant has outlined the principles found in *Izard v. Simmons Family Trust*[22], which have been adopted by this Commission relating to the consideration of exceptional circumstances and the subsequent discretional of granting an extension of time by the Commissioner. Both parties have filed submissions outlining their position on those relevant matters for consideration.

[74] I now apply the circumstances of this case against the criteria and principles established in *Izard*, to establish whether there are exceptional circumstances. It is clear each case must turn on the facts and the combination of circumstances applicable.

Length and explanation for the delay

[75] It is my view the Applicant genuinely believed he continued to be a State servant employee during the three week period he was offered to consider the new six month contract and until his employment was terminated on 23 August 2019. He was working in the same role, provided with the entitlements under the Award and was paid as an employee on a fortnightly basis. It appears his line managers and HR Consultant were also of the same mind, by advising him to seek review under the SS Act, which was not challenged, and at no time informing him of his change of employment status.

[76] He filed the s 29(1A) application on the 9 September 2019, which was at day 17 of the 21 day period to make the application had he been a State servant as he believed at the actual date of termination. I am satisfied this was his genuine belief and it was lodged in good faith.

[77] The delay has been identified following the finding of Pearce J[23] that he ended his tenure as a State servant on 31 July 2019 at the expiration of his IOA. It was found he was employed as a State employee from 1 August 2019.

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[22] Izard v. Simmons Family Trust T11310 of 2004.
[23] Gutwein v Tasmanian Industrial Commission [2020] TASSC 59.

[78] I am satisfied his lack of agitation to seek an extension earlier was due to his genuine belief he had lodged the application within the 21 day time limit.

[79] He lodged a s 50(1)(b) of the SS Act Review of Action application with respect to the 6 month IOA, during this period post the expiration of the IOA. Had he been made aware at that time by his employer that he was not a State service employee, he would have had an opportunity to lodge a s 29(1A) application within time. He did lodge this application while the Review of Action application was on foot. In my view, there was no intentional delay, rather applications lodged in line with the nature of the dispute.

[80] His status as an employee of the State is unusual and uncommon in my view, and this status would not be known by a reasonable person employed as a doctor in the THS.

Similarity, Pearce J in *Gutwein v Tasmanian Industrial Commission*[24] found his employment status as: "somewhat incongruous" and "an obvious tension" as below:

> "A determination that Dr Woods was not an employee under s 50 leads to results which may be regarded as somewhat incongruous. To me, there is an obvious tension in the conclusion that Dr Woods, in the circumstances, is an employee of the State but not an employee of the State Service. However, the terms of the Act compel me to the conclusion that, at the time of his application to the Commission, he had not been appointed for a specified term or for the duration of a specified task, and was therefore not a fixed-term employee."

[81] I do not concur with the Respondent that the Applicant had a desire to expend resources through his original application and I observe the significant financial detriment to the Applicant.

Prejudice to the Applicant if the extension of time was not granted

[82] Both parties submit the prejudice to the Applicant is significant if an extension of time is not granted, as he will have no form of redress or entitlement to relief for his alleged unfair dismissal.

[83] I concur that this process to date has been lengthy with multiple jurisdictional issues arising and if the extension of time is not granted, it will cause significant detriment and end for any entitlement to relief.

Prejudice to the Respondent if the extension of time is granted

[84] I note the Respondent has been aware of the Applicant's intention to contest the termination of employment. There were no submissions from the Respondent relating to this issue.

Action taken by the Applicant to contest the termination, other that applying under the Act

[85] I am satisfied the Applicant took active steps through engaging legal representation at an early stage and by notification to the Respondent of his dissatisfaction to impose a six month IOA. He also lodged the s 29(1A) application at the earliest time following notification of termination of employment.

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[24] Ibid.

[86] The Applicant relied on similarities with the *Wanless v Wilderness Society* case where it was found the Applicant made it clear through his legal representative that it was to be contested and he took immediate steps to seek legal advice.

[87] I find there were significant steps taken to contest the termination and the events leading to his dismissal and the Review of Action under s 50(1)(b) of the SS Act was lodged on the advice from the HR Consultant and his legal representative, prior to the current application.

Any relevant conduct of the Respondent

[88] It was submitted that during the three week offer to consider the IOA, the Applicant believed he was an employee and his employment would only cease if he decided not to sign the new IOA, which he was considering.

[89] I am of the view that had the employer advised Dr Woods at that meeting he was no longer a State service employee from 31 July 2019, the Applicant would have filed the application with the 21 day timeframe. There was no advice provided to the Applicant of the change in employment status to assist making informed decisions.

The nature and circumstance of any representative error

[90] I acknowledge the submissions that the Applicants solicitor formed the view that the Applicant continued to be employed as a State servant following 31 July 2019 and advised the Applicant to lodge the review of action application as opposed to an application pursuant to s 29(1A) of the Act.

The Applicant's prospect of success at the substantive hearing

[91] As no evidence has been tendered in the substantive matter, I am unable and it would be inappropriate for me, to determine the Applicant's prospect of success. However, I am unable to conclude that the Applicant's application is without any merit.

Conclusion

[92] Based on the consideration of the relevant matters above, I find this case represents an unusual, extraordinary situation where an employee continuously working in the same role has changed status overnight from a State servant to an employee of the State with no knowledge and without the change being brought to his attention by the employer. I am satisfied he believed he remained a State servant until his notice of termination of employment, which significantly influenced the timeline of lodging the application.

[93] I observe, that in my experience there are very few if any, other State employees employed in the THS. I am satisfied there were exceptional circumstances established to justify the granting of an extension of time.

[94] I have also found he was able to make an application under s 29(1A) as a former employee as a State employee as a result of meeting the definitions under the Act, although the nature and terms of his application were made as a State servant and would need to be more closely considered. In any event, I am satisfied the circumstances warrant an extension of time be granted for the s 29 application to be heard.

[95] In accordance with s 29(1B) of the Act, an extension of time until 9 September 2020 is granted.

Neroli Ellis
Deputy President

Date and place of hearing
Matter determined on the papers

Appearances
Ekaterina Skalidis for the Applicant
Paul Turner for the Respondent