TASMANIAN INDUSTRIAL COMMISSION

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

Frank, Vincze
(T14853 of 2021)

and

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

PRESIDENT D J BARCLAY HOBART, 6 DECEMBER 2021

Application for remedy for unfair dismissal – whether parties are a national system employee and employer – whether Commission has jurisdiction to hear and determine matter

DECISION

[1] This is an Application relating to the termination of the Applicants employment with the Abt Railway Ministerial Corporation.

[2] The Applicants employment was terminated on 11 June 2021 and he lodged an application for a remedy as a result of the dismissal on 1 July 2021. The Respondent submits that the Commission has no jurisdiction to entertain the application on the basis that the Respondent is a constitutional corporation that is a trading corporation within the meaning of s 51(xx) of the *Constitution.* As a result the Respondent submits that it is a national system employer and the Applicant is therefore a national system employee. It follows, says the Respondent that the Commonwealth *Fair Work Act* (FWA) applies to the dispute by virtue of s 26(1) of the FWA and the jurisdiction of this Commission is thereby excluded.

[3] The Applicant maintains that the Commission has jurisdiction to deal with the matter on two bases:

1. That s 26 of the FWA is limited by s 27 of that Act and, as the Applicant is seeking to invoke the jurisdiction of the Commission to deal with a dispute to enforce his contract of employment[1] the Commission retains jurisdiction; and

2. That the Commission has power to privately arbitrate the dispute either by virtue of the provisions of the contract of employment or the Code of Conduct.

[4] During argument a third basis of jurisdiction was raised by me, namely s 740 of the FWA which may suggest the Commission has jurisdiction to privately arbitrate the dispute. Upon reflection however the dispute must be about the national employment standards or a safety net contractual entitlement. Obviously this dispute is not about those matters and s 740 cannot therefore assist the Applicant.

Does the FWA apply to exclude the jurisdiction of the Commission?

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[1] Applicants Outline of Submissions in Response dated 7 September 2021, paragraph 8.

[5] I have previously dealt with this issue in *Pelham v Abt Railway Corporation*[2] (*Pelham*) where I said:

> "[16]……. 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.
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> ...
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> *Is the Respondent a trading corporation and therefore a constitutional corporation?*
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> [19] The functions and powers of the Respondent are contained in ss 6 and 7 of the Railway Act. They provide:
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> "**6. Functions of Ministerial Corporation**
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> 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."
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> [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:
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> "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:

[2] 14803 of 2020

"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."

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."

[6] The materials before me in this case are essentially those which were before me in *Pelham.* I remain satisfied that the Respondent is a trading corporation within the meaning of s 51(xx) of the Constitution and as such is a national system employer and the Respondent is a national system employee.

[7] However the Applicant presses an argument which was not put in *Pelham.* The Applicant submits that s 26 of the FWA is limited by s 27. Section 26 relevantly provides:

"(1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.

(2) A *State or Territory industrial law* is:

(a) a general State industrial law;

...

(3) Each of the following is a *general State industrial law*:

...

(e) the Industrial Relations Act 1984 of Tasmania."

[8] It may be seen therefore that the *Industrial Relations Act* is excluded from application to a national system employer and national system employee. As such if this provision is not subject to s 27 as the Applicant submits the Commission has no jurisdiction to deal with the application.

[9] The Applicant submits that s 27(2)(o) of the FWA assists. Section 27 provides that s 26 does not apply to non-excluded matters defined in s 27(2) of the FWA. Subsection (o) relates to claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies (unfair contracts).

[10] As referred to above the Applicant maintains that the dispute in respect to the termination of his employment invokes the jurisdiction of the Commission to deal with a dispute to enforce his contract. This submission is refined in the Applicants supplementary submissions as follows[3]:

> "It should be added that nothing in the above submission should be construed as suggesting the Commission can or should exercise judicial power. It is common ground that the Commission cannot do so. The submission is simply that the Commission's statutory function in hearing and determining industrial matters means the State Act deals with rights or remedies which are *'incidental to'* clams for enforcement of contracts. It is acknowledged that an actual claim for enforcement of Mr Vincze's contract could only be pursued through the courts. If the Commission is of the view that the operation of section 27(2)(o) is limited to statutes conferring judicial power, then the submission is not pressed."

[11] The defect in the Applicants reasoning is that in fact the Applicant is seeking a statutory remedy provided by the *Industrial Relations Act* (IR Act). He is not in fact seeking a remedy pursuant to the contract. If he were then the Commission would be required to exercise judicial power which it is unable to do. If it is necessary to have regard to the contract of employment on the way to determining whether the Applicant is entitled to a remedy under the IR Act the Commission is not enforcing the contract. Rather it forms part of the factual matrix which the Commission may have regard to when determining whether the Applicant is entitled to a statutory unfair dismissal remedy. If this Application proceeded that would be the basis upon which the Commission would, and would be bound to proceed so as not to exercise judicial power.

[12] In my opinion therefore s 26 of the FWA is not limited by s 27 in this case. The Applicant is not seeking to enforce his contract as understood by s 27(2)(o) and as the Applicant and the Respondent are part of the national system the Commission has no jurisdiction to entertain the Application. However the issue of private arbitration remains to be decided.

Does the Commission have power to privately arbitrate the dispute?

[13] The Applicant submits that the Commission has power to arbitrate the dispute because of the provisions of the contract of employment and/or the Code of Conduct.

[14] The Applicant relies on two bases to establish that the Commission can privately arbitrate. The first is by virtue of the contract of employment and the Code of Conduct and the second is by virtue of s 61 of the IR Act.

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[3] Supplementary Submissions of the Applicant dated 12 October 2021 paragraph 8

[15] In aid of the proposition that the contract and code of themselves give the Commission power to arbitrate the Applicant relies on *CFMEU v Australian Labour Relations Commission.*[4]

[16] Before dealing with that case I should note that cl 11 of the contract deals with dispute resolution. It provides:

> "11. DISPUTE RESOLUTION PROCEDURES
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> 11.1 When a possible dispute of grievance arises the Appointee should in the first instance discuss the issue with the Designated Manager.
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> 11.2 The Appointee may choose to be represented or assisted with the issue by a workplace union delegate or by another person.
>
> 11.3 If the issue remains unresolved, either party may refer the dispute /grievance to the Tasmanian Industrial Commission for conciliation and then if necessary arbitration.
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> 11.4 Whilst a dispute/grievance is being dealt with through this process the status quo will remain and work will continue without disruption.
>
> 11.5 However where a safety issue is involved immediate priority will be given to the resolution of it having regard to recognised safety standards and relevant legislation. This may involve the cessation of work where an Appointee's safety is at risk."

[17] The code deals with the investigation process where the general manager believes there may be a breach of the code. After providing for the way the investigation is to proceed it concludes:

> "9. If the disciplinary action is termination, the Minister will be advised in order to make the final determination, the employee may apply to the Tasmanian Industrial Commission for appeal."

[18] Clearly enough the contract provides for reference of a dispute to the Commission for conciliation and if necessary arbitration. The Code speaks of an appeal from a termination. In practice this would be an application pursuant to s 29 of the IR Act for as remedy for alleged unfair termination. For completeness I note that is what the Applicant has done in this case.

[19] Returning to *CFMEU v Australian Labour Relations Commission,* that was a case involving an agreement certified under the Commonwealth Industrial Relations Act which agreement contained a clause enabling the Australian Industrial Relations Commission (as it then was) to conduct a hearing into an unresolved dispute.

[20] The question which arose for the determination by the High Court was whether the Commission could, pursuant to the clause proceed to determine certain issues in dispute. The Applicant referred me to paragraph 31 of the decision. However I regard paragraphs 29 to 32 as relevant. There the Court said:

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[4] [2001] 203 CLR 645

"29 What was said in Hegarty applies, but with some modification, to an agreement by parties to an industrial situation. As already indicated, it is incidental to the conciliation and arbitration power for the Parliament to permit parties to an industrial situation to agree on the terms on which they will settle the matters in issue between them conditional upon their agreement having the same legal effect as an award. So, too, it is incidental to that power for the Parliament to give legal effect to agreed procedures for maintaining a settlement of that kind and, also, for it to authorise the Commission to participate in those procedures.

30 There is, however, a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.

31 Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.

32 To the extent that s 170MH of the IR Act operates in conjunction with an agreed dispute resolution procedure to authorise the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement, it merely authorises the Commission to exercise a power of private arbitration. And procedures for the resolution of disputes over the application of an agreement made by parties to an industrial situation to prevent that situation from developing into an industrial dispute are clearly procedures for maintaining that agreement. Parliament may legislate to authorise the Commission to participate in procedures of that kind. Accordingly, s 170MH of the IR Act is valid." (my emphasis).

[21] It may be seen that the decision is to the effect that parliament may give an industrial tribunal power to arbitrate disputes under an agreement between employees and employers. In my opinion the decision does not stand for the proposition that the parties themselves, absent some statutory power to do so, can give an industrial commission power to arbitrate a dispute between them. There must be a statutory basis for the exercise of jurisdiction. The Commission is a creature of statute. It does not exercise inherent jurisdiction. It may only exercise the powers given to it by statute.

[22] As such I determine that the Commission must have statutory power to arbitrate the dispute under the agreement.

[23] The Applicants points to s 61 of the IR Act. That section provides:

"61. Private conciliation and arbitration

(1) Where the President is of the opinion that it is desirable to do so for the purpose of resolving an industrial matter concerning 2 or more parties, he may, at the written request of all those parties, appoint a Commissioner to

conduct a conciliation or an arbitration in respect of that industrial matter, subject to the parties agreeing to accept the Commissioner's decision on the conciliation or arbitration as final.

(2) All proceedings relating to a conciliation or an arbitration pursuant to this section shall be conducted in private and any record of those proceedings shall be supplied by the Commission only to the parties to that conciliation or arbitration.

(3) In conducting a conciliation or an arbitration pursuant to this section, a Commissioner shall have regard to the matters specified in section 20 (1) and to any principles previously determined by a Full Bench and which still have application.

(4) The decision of a Commissioner acting pursuant to this section shall not be applied as an award or order of the Commission, but may be incorporated in, or form, an agreement made pursuant to section 55 (1)."

[24] The relevant part of the section is subsection (1), which in effect provides:

(a) where in the opinion of the President it is desirable to do so;

(b) at the written request of the parties;

(c) the commission may conduct a conciliation or arbitration;

subject to

(d) the parties agreeing to accept the Commissioners decision as final."

[25] I may deal firstly with the code. The code is not an agreement between the parties. It is a document prepared by the Respondent and is incorporated by clause 4 of schedule 2 of the contract of employment. There is no genuine agreement between the parties as to the content of the code. As such I find that the code does not amount to an agreement or request of the parties for the commission to conduct a conciliation or arbitration within the meaning of s 61 of the IR Act. In fact it is part of a clause which specifies the steps which are to be carried out in an investigation for a suspected breach of the Code of Conduct. It is not a written request by the parties for the Commission to conduct a private arbitration. It is a document prepared by the Respondent.

[26] In respect to the contract, that is a document which evidences an agreement between the parties as to dispute resolution. It provides that when a possible dispute or grievance arises and remains unresolved the dispute or grievance may be referred to the Commission. What the dispute resolution procedure does not say is that the decision of the Commissioner who conciliates or arbitrates the matter is agreed to be final. It is clear that s 61 requires the parties to agree that the decision of the particular Commissioner (the section uses the possessive "commissioner's") is final. The contract does not do that. As such the dispute settlement procedure does not fall within the terms of s 61 of the IR Act and the Commission therefore has no jurisdiction to deal with it.

[27] I should add that in my view the dispute settlement procedure by its terms does not apply to terminations of employment. Reading clause 11 of the contract as a whole as one must[5] the clause is aimed at disputes which arise during the course of the employment relationship. The clause refers to discussing the issue with the designated manager and that if not resolved the dispute is escalated to the Commission. Whilst the dispute is ongoing the status quo remains so that work is not disrupted and where safety

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[5] *AMWU v Berri Pty Limited* [2017] FWCFB 3005, 114.

issues are involved certain steps are taken. All of that suggests that the subject matter of the dispute relates to the employment relationship and not to its termination.

[28] That conclusion is also consistent with the fact that the code provides for the Commission to deal with the termination. Whilst I have found that it is not possible, its significance is that it is separately provided for outside the dispute settlement procedure. That is there is a separate procedure for breaches of the code of conduct and terminations of employment for such breaches.

Outcome

[29] I determine that the Commission has no jurisdiction to entertain the Application. Accordingly in accordance with s 21(2)(c)(iv) of the IR Act I determine that the proceedings should be dismissed.

D J Barclay
President

Parties Representatives:
Mr Szlawski and Mr Miller for the Applicant
Mr Turner SC for the Respondent

Date and place of hearing:
Hobart 5 October 2021