



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Duggan v Minister administering the *State Service Act 2000* [2024] TASICFB 2

PARTIES:

Bryce Duggan (Appellant)

Minister administering the *State Service Act 2000* (Respondent)

SUBJECT: Appeal pursuant to s 70(1) against a decision of President Barclay in matter T14949 of 2022 Duggan v Minister administering the *State Service Act 2000* – Department of Health – Ambulance Tasmania [2024] TASIC 6

FILE NO: T15135 of 2024

DATE REASONS ISSUED: 23 September 2024

COMMISSIONERS: Ellis DP
Lee C
Cirkovic C

CATCHWORDS: Appeal against dismissal of unfair termination of employment – whether Commission has jurisdiction to hear appeal – 21-day time frame for Notice of Appeal – no jurisdiction to hear appeal – appeal dismissed

REPRESENTATION:

Appellant in person

Respondent: G Chen

Matter determined on the papers.

BRYCE DUGGAN v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000

REASONS FOR DECISION

HOBART, 23 SEPTEMBER 2024

[1] This is an appeal to the Full Bench from a decision of President Barclay, where he dismissed an application for reinstatement of the Appellant following the termination of his employment at Ambulance Tasmania.

[2] Whether the application was lodged within the 21-day timeframe set out in s 71 of the *Industrial Relations Act 1984* (Tas) ('the IR Act') and whether there is any discretion to extend that prescribed time, are the central preliminary issues to be addressed in this decision.

[3] The Respondent objects to the appeal based on the Notice of Appeal ('NOA') being lodged 22 days after the date of service of the decision and based on the absence of the grounds of appeal as set out in s 71(2)(c) of the Act. The Appellant seeks an extension of time to enable the hearing and determination of the appeal.

[4] The Commission's jurisdiction needs to be satisfied prior to hearing the substance of this appeal. As such, we are addressing this issue in this decision.

[5] For the reasons set out below, it is our view that the Full Bench has no jurisdiction to hear this matter, and that the appeal must be dismissed.

LEGISLATIVE FRAMEWORK

[6] The power for the Full Bench to hear and determine appeals of decisions made by the Tasmanian Industrial Commission stems from the IR Act, the relevant sections of which we set out here:

"70. Rights of appeal

(1) An appeal may be made to the Full Bench against –

...

(ba) a decision made by the Commission to dismiss, or refrain from further hearing, a matter, or part of a matter, under section 21(2)(c) by the party who applied for the hearing; and"

[7] The procedure for an appeal is set out in s 71 of IR Act and states:

"(1) An appeal under section 70 must be made by lodging a notice of appeal with the Registrar within 21 days after the date of service of the notice relating to the decision being appealed against.

(2) A notice of appeal for the purposes of subsection (1) shall specify –
 (a) the award or decision against which the appeal is brought;
 (b) the organization, association, or person bringing the appeal; and
 (c) the grounds of the appeal.

- (2A) At any time before setting a date for a hearing, or before the date of the hearing, the Full Bench may require the appellant to provide, to the Full Bench and the other parties to the appeal, further and better particulars of the grounds for appeal.”

[8] Further to this procedure for an appeal, s 21(2)(m)(i) of the Act provides for an extension of time for some matters, excluding an appeal under the procedure of the Commission.

“21. Procedure of Commission and associated matters

- (1) Subject to this Act, the Commission may regulate its own procedure.
- (2) Without prejudice to the generality of subsection (1), the Commission may, in relation to a matter before it –

...

- (m) extend any time –
 - (i) prescribed by or under this Act, except a time prescribed in relation to an appeal; or”

The Background

[9] The Decision dismissing Mr Duggan’s application seeking reinstatement of his employment, following the termination of his employment on 6 June 2022 was initially issued on 10 April 2024. However, two amended decisions were then issued. A timeline of decisions issued is as follows:

- 10 April 2024 at 2:12 pm: The initial decision was issued
- 10 April 2024 at 2:49 pm: The decision was reissued to fix a typographical error
- 11 April 2024 at 1:30 pm: An amended decision was issued to fix an instance where the patient in question had inadvertently been identified

[10] The final decision was published on 1:30 pm on 11 April 2024 and served by email to Mr Duggan and his representative Lucas Digney of the Health Services Union, Tasmania Branch. Therefore, in order to conform with s 71(1) of the IR Act, it was necessary for the NOA to be lodged with the Registrar by 2 May 2024 to fall within the period of 21 days. However, Mr Duggan lodged the NOA with the Tasmanian Industrial Commission at 12:42 pm on 3 May 2024. It is apparent that the NOA was therefore not lodged within 21 days after the date of service of the notice relating to the decision being appealed against.

[11] The Applicant concedes the NOA was filed: “less than 24 hours late, as I inadvertently understood it was COB for the week as dated”.¹ While the Appellant made significant submissions on the merit of the case, there were no further submissions provided relevant to the lateness of the NOA.

[12] There is a further matter as to whether the NOA was competently made as it does not contain any particulars in the section for grounds for appeal. Mr. Duggan wrote on the NOA, “Grounds to be provided at a future date.”.

¹ Appellant submissions by email to TIC dated 26 July 2024.

[13] The Respondent submitted the Full Bench is without jurisdiction to deal with the appeal. Section 71(1) of the Act sets out the NOA must be lodged with the Registrar within 21 days after the date of service of the notice relating to the decision being appealed against and s 71(2) sets out the elements that the NOA must contain including at (c) the grounds of appeal.

[14] The Respondent contends the express words of s 21(2)(m) of the Act make it clear there is no power vested in the Commission to extend the time prescribed in relation to the filing of the NOA.

Is there any discretion to accept an application which is out of time?

[15] The right to an appeal pursuant to s 70(1)(ba) expressly requires the appeal to be made against a decision made by the Commission under s 21(2)(c) of the IR Act. As we are satisfied that is what occurred here, the general provision in that Act allows for a right to an appeal against the decision to dismiss the application.

[16] However, the preliminary jurisdictional matter of the right of appeal and the timeframe for the appeal to be made as set out in s 71(1) of the Act is a threshold issue and must be determined first as the “first duty” by the Commission.²

[17] The Full Bench must have regard to the provisions of the IR Act to determine if the appeal is competently made under s 70(1)(ba). As Crawford CJ stated in *Bennett*:

“[14] The appellant submitted that as a matter of fairness and equity, his entitlement to appeal from the decision of the Commissioner should be upheld. However, the submission ignores that a right of appeal is a statutory remedy and not a common law or equitable right, or one awarded out of fairness. *Commissioner of Railways v Cavanough* [1935] HCA 45; (1935) 53 CLR 220 at 225.

[15] What is concerned here is a question of statutory construction. While, if there be doubt, a consideration of fairness and justice might influence an interpretation of the Act, the Court's principal task is to have regard to the provisions of the Act itself.”³

[18] The words and context of the Act are clear⁴ and expressly set out the statutory right to appeal a decision arising from a dismissal of an application and the process and timeframe for the NOA to be lodged with the Registrar. The time prescribed is within 21 days after the decision is served on the parties.

[19] The Applicant has conceded he was out of time by “less than 24 hours” It is apparent that the NOA was not lodged with the Registrar within the 21-day period. Section 21(2)(m) of the IR Act expressly provides there is no exception for the time prescribed in relation to an appeal. The ordinary meaning of the words is clear. The Full Bench has no discretion to extend the time for lodgement of an NOA as the 21-day limit is clearly expressed in the Act.

[20] We also agree with the Respondent that the NOA was incomplete and did not contain any grounds of the appeal. Section 71(2)(c) of the Act expressly states that for the purpose of subsection (1), the NOA shall specify the relevant award or decision, the organisation, association or person bringing the appeal and the grounds of the appeal. The use of the term

² *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 415.

³ *Bennett v Minister Administering the State Service Act 2000* [2009] TASSC 95, [14]-[15].

⁴ In *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (Kiefel CJ, Nettle and Gordon JJ), the contemporary approach to statutory construction was outlined.

“shall” requires a mandatory obligation rather than a discretionary obligation. Statutory Interpretation in Australia 10ed 2024 states:⁵

“Where provisions set out requirements that are intended to allow persons to make representations relevant to a decision such as through responses to allegations, making applications for review, opposition to proposals and other forms of consultation, inquiries or appeals, a failure to comply with those requirements will usually be interpreted as producing an invalid result. So notice requirements and the giving of reasons will be strictly enforced unless there is a clear indication in the relevant legislation to the contrary: *Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242; *Sandvik Australia Pty Ltd v Commonwealth* (1989) 89 ALR 213 at 227. This obligation may extend to include the content of any such notice, advice, etc, where this is referred to in the legislation.

The High Court in *Deputy Commissioner of Taxation v Woodhams* observed:⁶

“It is the legislative purpose to be served by the giving of a ... notice that determines the nature and extent of the information necessary to satisfy the requirement to set out details ... Absence of information will involve a failure to provide necessary details if, without such information, the notice will not fulfil the purpose for which it is required to be given.”

[21] For an NOA to be competent it is required to conform with all three requirements in s 71(2) (a), (b) and (c). So much is clear from the words, “shall specify” in the chapeau to the subsection. The failure of Mr Duggan to specify any grounds of appeal at all mean that the NOA did not conform with the requirements of s71(2)(c) and was incompetent for that reason.

OUTCOME

[22] We find the application for an appeal in the form of the NOA lodged on 3 May 2024, has not been lodged within 21 days as set out in the Act. We further find that the Full Bench does not have any discretion to extend the time period for lodging an NOA. We also have determined that the NOA is invalid as it did not comply with the mandatory requirement set out in s 71(2)(c) of the Act. Therefore, the Full Bench has no jurisdiction to hear and determine this appeal.

[23] Accordingly, the appeal is dismissed.



⁵ Denis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 10th Ed, 2024) [11.27].

⁶ *Deputy Commissioner of Taxation v Woodhams* 199 CLR 370, 33.