

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

s29(1) application for hearing of an industrial dispute

Dolly-Neo Marope

(T14766 of 2020)

and

Minister administering the State Service Act 2000 – Tasmanian Health Service

PRESIDENT BARCLAY

HOBART, 21 JULY 2020

Industrial dispute – claim for waiting time payment – whether claim required exercise of arbitral or judicial power – application dismissed

DECISION

[1] On 26 May 2020, Ms Dolly-Neo Marope applied to the President, pursuant to s29(1) of the *Industrial Relations Act 1984* (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 - Tasmanian Health Service (THS) (the Respondent) arising from a dispute in relation to the payment of waiting time.

[2] The claim is for an amount in excess of \$500,000.00 for the failure to pay her salary in full on 8 June 2018. By virtue of clause 13(f) of the *Medical Practitioners (Public Sector) Award 2016* (the Award) an employee kept waiting for payment of wages is, subject to some exceptions, entitled to be paid waiting time at the rate of time and a half for the time they are kept waiting for their pay.

[3] The Applicant is seeking that the Commission:¹

“1. Instruct the THS NW to pay the withheld salary of June 2018 and give the THS a deadline within which to pay the withheld salary.

2. Instruct the THS NW to pay time waiting for the withheld salary, (as stipulated in the award), from 6th June 2018 to the date when the THS will decide to pay the withheld salary, especially, considering that the THS does not want to commit to a payment date. I attach a Payslip (ref. A19), it reflects my hourly base salary, at that time in 2018, of \$82.91 per hour for the record and utilisation in calculation.

3. Make the THS responsible to pay all legal costs of this case.”

[4] It can be seen that the Applicant is asking the Commission to order the payment of a sum calculated according to the Award which the Applicant claims is owed to her.

¹ Orders sought numbered 1, 2 and 3 in the application

[5] The Respondent has raised a preliminary issue that such relief sought requires the exercise of judicial power, a power which the Commission does not have.

[6] I directed the parties to make written submissions in respect to this issue. It is agreed that I am to determine the question whether the Commission has power to grant the relief sought on the basis of the written submissions.

[7] I note that the Applicant has not sought legal advice in respect to the matter. As a result her written submissions, understandably and without criticism of the Applicant, are of little assistance.

[8] The Respondent submits that in this case I am being asked to exercise judicial power. It is trite to say that an administrative tribunal, which this commission is, cannot exercise judicial functions.

[9] In *CFMEU v BHP Billiton Nickel West Pty Ltd*² the Full Bench of the Fair Work Commission said³:

“It is accepted that an administrative tribunal like the Commission cannot exercise the Commonwealth’s judicial power. The ascertainment, declaration and enforcement of legal rights is an exercise in judicial power. If opinions are formed about such matters in the course of arriving at a conclusion about what rights should exist in the future, the functions can legitimately fall within the arbitral power conferred on the Commission. These concepts have been applied in various High Court decisions.”

[10] In *Ranger Uranium*⁴ the High Court said:

“The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration.”

[11] In the present case I am being asked to determine that the Applicant has a current enforceable legal right to the payment of money under the Award and that I order that the Respondent pay that money. It is clear that such a task is judicial. I am being asked to ascertain existing rights and obligations. I am not being asked to ascertain what rights and obligations should exist between the parties.

[12] If for example the Respondent was intending to delay the payment of salary in the future and an employee wanted to claim waiting time if the payments in the future were in fact to be paid other than in accordance with the usual manner of payment of salary, I could determine whether the employee would be entitled to waiting time if the Respondent delayed the salary payments. Whilst I would be required to construe and interpret the Award I would be doing so in order to decide what rights should exist in the future if the Respondent proceeded to act in a certain way (i.e. pay the salary in circumstances which would give rise to an entitlement to waiting time payments in the future). However this case is not such a matter as that.

[13] Accordingly I have no power to grant the relief sought as to do so would result in the exercise of judicial power which the Commission does not possess.

² [2017] FWCFB 217

³ At paragraph 18

⁴ (1987) 163 CLR 656 at 666

[14] Whilst prima facie the Applicant has standing to bring the claim and the Commission has jurisdiction to deal with it as being an industrial dispute which has arisen about the breach of an award I am unable to give the Applicant the relief that she seeks. I note that the parties could have agreed to conciliate the matter, but in this case (and not surprisingly given the quantum of the claim) the Respondent had no interest in doing so.

[15] The Respondent has sought that I dismiss the matter pursuant to s. 21(2) (iv) of the *Industrial Relations Act*⁵ on the basis that I cannot make an order which would quell the dispute.

[16] I agree that I am unable to make an order of an administrative character which could quell the current dispute and as such I dismiss the Application.

[17] Of course the Applicant is not left without a remedy. She is free to institute proceedings in a court to seek to recover the money claimed on the basis that the Respondent is in breach of the Award by failing to pay waiting time. I of course express no view about the merit of such a claim.



Appearances:

Dr D Marope the Applicant
Mr P Turner for the Respondent

Date and place of hearing:

2020
6 March
HOBART

⁵ Section 21(2)(iv) of the Act relevantly provides that the Commission may dismiss a matter for any reason