Tasmanian Industrial Commission

State Service Act 2000

Applicant 1 of 2021

and

Tasmanian Health Service

PRESIDENT D J BARCLAY HOBART, 9 DECEMBER 2021

Application for Review of Actions – Mandatory Vaccination direction – whether the actions sought to be reviewed are "actions" within the meaning of s 50 of the *State Service Act 2000* (Tas)

DECISION

[1] The applicant has sought the review of state service actions pursuant to 50(1)(b) of the *State Service Act 2000* (Tas) (the Act) arising out of the Mandatory Vaccination of Certain Workers – No. 7 direction (the Direction[1]) issued by the Director of Public Health (the Director) pursuant to the provisions of the *Public Health Act 1997*.

[2] The actions sought to be reviewed are:

(a) The decision of the Secretary of Health to stand the Applicant aside from his duties with the Respondent;

(b) The decision to cease paying the Applicants salary; and

(c) The failure to suspend the Applicant in anticipation of a disciplinary procedure.

[3] These actions relate to the failure of the Applicant to advise the Respondent of his vaccination status.

[4] The Tasmanian Health Service (the Respondent) has submitted that the Commission has no jurisdiction to deal with the Application because either there is no relevant action within the meaning if s 50 of the Act, or that there is no "matter" enlivening jurisdiction within the meaning of s 19AA of the *Industrial Relations Act 1984*. The Respondent also submits, in relation to the action in the form of a failure to act to suspend the Applicant that such a claim is not within the ambit of the present application.

[5] This decision relates to the question of jurisdiction. The parties agreed the issue would be dealt with on the papers. The Applicant relies on undated submissions titled "Applicant's Submissions". I also have the Application. The Respondent relies on its

[1] There have been subsequent directions which have like effect as Direction No 7, but also expand on that direction. A reference to the "Direction" includes any subsequent directions up to 31 October 2021, the date of the impugned actions the subject of the Application. These Directions are included in the Respondents Position Statement.

Position Statement dated 25 November 2021 and its Submissions in Reply dated 3 December 2021.

Background

[6] On 7 October 2021 the Director made the Direction. It applies to various premises including residential aged care facilities and medical or health facilities and applies to various people including anyone employed or engaged in working at such premises. The effect of the Direction is that it prevents persons who are not vaccinated against the COVID-19 virus from entering those premises.

[7] It is common ground that the Direction applies to the Applicant. It is also common ground that the validity of the Direction is not in question[2].

[8] Prior to the Direction the Director had made previous directions of like effect. The Respondent wrote to employees of the Department of Health, including the Applicant on various dates regarding the Direction and previous directions, which correspondence amongst other things required the provision of information regarding employees' vaccination status.

[9] In the Respondents Position Statement it attached a number of documents including emails sent from the Respondent to its employees regarding the Direction and preceding directions to like effect. The emails and correspondence also relate to subsequent directions including Direction 10 dated 31 October 2021.

[10] A summary of the emails, in so far as they are relevant to the issues raised, is as follows[3]:

(a) Email dated 24 September 2021 - advising of the Director's direction, that it applies to all employees of the Department of Health and noting that "by 30 October all employees will either need to provide evidence that they are vaccinated against COVID-19, or evidence that they are exempted from being vaccinated against COVID-19 due to medical contraindication".

(b) Email dated 5 October 2021 – noting among other things that the "Public Health Direction specifies that staff must provide their vaccination evidence by 31 October 2021 to be able to work".

(c) Email 14 October 2021 – noting that the obligation to provide evidence of vaccination status "is a legal requirement of you as an employee" which must be done by 31 October 2021.

(d) Email 20 October 2021 – reminding employees of the obligation to provide the vaccination information and contained advice that if an employee failed to provide the information[4]:

"• You will be unable to enter a medical or health facility in Tasmania to engage in employment or an engagement to work, volunteering, a placement or work experience.

[2] I note that the validity of the Direction could not be an issue within the jurisdiction of the Commission.
[3] The dates to which I refer are the dates the emails were forwarded by the Secretary of Health to managers for forwarding to employees. As such, the dates may not correspond to the dates the emails were forwarded to the Applicant.
[4] Respondent's Submissions in Reply, "Email from Secretary reminding staff to provide evidence of compliance with public health directions dated 20 October 2021", pg 47.

- For employees, as you are unable to perform work in a medical or health facility or work for or on behalf of the Department of Health regardless of location, you will not be entitled to be paid on and from 31 October 2021 (no work, no pay principle).
- If you are a fixed-term employee of the Department of Health, you will be provided notice of termination of your employment pursuant to your instrument of appointment.

- If you are a permanent employee of the Department of Health, on and from 31 October 2021 we will commence a State Service process to terminate your employment, and you will not be paid on and from 31 October during this process."

(e) Email 25 October 2021 reminding employees of the obligation to provide evidence of vaccination status and repeating the consequences of a failure to do so as set out in the 20 October email.

(f) Email of 27 October 2021 in substantially the same terms as the 25 October 2021 email.

(g) Email 29 October 2021 to employees who had not provided evidence of vaccinations status. The email included the following[5]:

"… Should you not be sufficiently vaccinated or hold an exemption and have provided evidence of it to the Department of Health, I advise that:

1. with effect from 12:01am Sunday 31 October 2021, you will be required to 'stand aside' from your employment and will cease to receive payment of salary or any related remuneration from the Department of Health (except for work completed prior to 31 October 2021), and

2. you will not be able to attend a Department of Health workplace or undertake any work for the Department of Health. Security access to buildings will also be removed, as will your ability to access Department of Health networks, and

3. I intend to commence proceedings that may result in termination of your employment with the Department of Health."

[11] On 31 October 2021 the Secretary of the Department of Health (the Secretary) wrote to the Applicant noting the he had not provided evidence of his vaccination status as required by the Direction (which was now in place). The Secretary notified the Applicant that, in consequence of the Direction, he was unable to carry out his duties and he was therefore "stood aside" from his duties. As a result of being unable to carry out his duties he was told that he would not be entitled to receive salary. The letter also contained a direction to provide evidence of vaccination status (as required by the Direction) by 5 p.m. Sunday 7 November 2021. The letter advised that the failure to comply with the direction to provide the vaccination evidence by the time and date specified may result in the Secretary taking action to determine whether the Applicant had breached the State service Code of Conduct. The Applicant was further advised that the result of the Code of Conduct investigation may result in the termination of his employment.

[12] Finally on 15 November 2021 the Secretary wrote to the Applicant advising that she had reasonable grounds to believe the Applicant may have breached the Code of

[5] Respondent's Submissions in Reply, "Email from Secretary identifying recipients as having not provided evidence of compliance with public health directions", pg 53-54.

Conduct for failing to comply with the direction to provide information regarding his vaccination status as referred to in the letter of 31 October 2021. As a result the Secretary advised that she was commencing an investigation in accordance with Employment Direction 5 to determine whether the Applicant has breached the Code of Conduct.

[13] It is apparent from the review of the emails and the other correspondence that the Applicant has failed to provide information of his vaccination statues and that as a result he has been "stood down" and his salary has been suspended. It is also apparent that he was well aware of the potential consequences of failing to provide evidence of his vaccination status.

The Standing Aside Issue

[14] The Applicant submits that what is sought requires a consideration of the concept "stand down", suspension and what is meant by "stood aside". In his written submissions he expands on that (which while lengthy as the matter is being decided on the papers it is appropriate to set out the written submissions) as follows[6]:

> "**Stand Down**
>
> 22. 'The definition of 'stand down' in the Fair Work Act 200910 (FWA) is usefully instructive on understanding the circumstances in which the 'stand down' of an employee is appropriate.
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> 23. In development of the FWA, the legislature reflected previous case law dealing with stand down provisions in Awards.
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> 24. The FWA provides that an employer may stand down an employee during a period in which the employee cannot be usefully employed because of industrial action, a breakdown of machinery or equipment or a stoppage of work for any cause for which the employer cannot reasonably be held responsible (e.g. floods, fire, power failure).
>
> 25. Typically, a period of stand down is unpaid.
>
> 26. In the matter at hand, there is not a stoppage of work of this nature and there is not an absence of work to be done.
>
> 27. The majority (Marshall and Cowdroy JJ) in *Coal and Allied v MacPherson* (MacPherson) held.
>
> > It follows that Mr McPherson was not 'stood down' as that expression is usually understood in an industrial context, which connotes an absence of work to be done, for whatever cause. There was work for him to perform but he was not ready and willing to perform it until such time as he was prepared to return to work.
>
> 28. The power to stand down is limited.
>
> 29. As Sharpe J held in *Re Distilleries Award* 1976 (1976) 180 CAR 786 at 787.
>
> > I do not accept the contention…that standing down employees without pay should be an employer's right if that is the most convenient way of avoiding economic loss. The concept that it is management's prerogative to use labour at will has no place in Western society for decades.

[6] Applicant's Submissions dated 30 November 2021, pg 4-8 (footnotes omitted).

30. 'Stand down' without pay must be expressly conferred in contract, industrial instrument, or statute to have effect.

> A right to suspend or stand down an employee without pay may be granted by contract (Warburton v Taff Vale Railway (1902) 18 TLR 420), including by a term implied by custom or usage (Marshall v English Electric Co Ltd [1945] 1 AllER 653) or by statute (Browne v Commissioner for Railways (1935) 36 (SR)NSW 21.

31. The majority in MacPherson observed that the need for stand down provisions in industrial instruments has long been recognised, because absent such provisions an employee is prima facie entitled to wages for attending work, even if no work is available.16

32. The traditional understanding of 'stand down' is not included in the Industrial Relations Act 1984 (IRA). That is because the section entitled 'Power to stand down without pay' at 51A18 refers to the circumstance in consideration in this matter, and the one utilised by the Respondent, that is the concept of an employee being 'stood aside'. It does not relate to the 'absence of work to be done' which is the essential element in the traditionally understood meaning of 'stand down'.

Suspension

33. Suspension is the temporary cessation of certain rights of an employee. It is a mechanism that sees an employee relieved of duties and attendance at the workplace in the context of disciplinary proceedings. Suspension allows time and opportunity for an employer to determine whether a sanction, or course of action affecting the employee's employment, is warranted.

34. In Tasmanian State Service employment, Employment Direction 5 is invoked for misconduct investigations and Employment Direction 6 is invoked for an investigation into capacity.

35. Typically, a period of suspension is paid. As with stand down, the traditional rule is that neither the employer nor the employee has a right to suspend performance of obligation in the contract (ie. stop paying) in the absence of an express right to do so conferred by a contract, industrial instrument, or statute. This is foundational, passed on from jurisprudence.

> Suspension of an employee without pay is a course which, in the absence of a relevant term in the contract of employment or award, is not open to an employer. Ordinarily, an employer is not entitled to stand down an employee without wages: see Re Application by Building Workers' Industrial Union of Australia (1979) 41 FLR 192 at p 194.

36. In this matter, the right to suspend without pay is conferred by statute. Section 43 of the SSA states that *'Employment directions may make provision in relation to the suspension from duties of employees, with or without salary'.*

37. Employment Direction 4 is the statutory mechanism which may allow an employer to cease payment to the employee while misconduct is investigated, and a sanction considered.

Stood Aside

38. The Respondent uses the term 'stood aside' to describe, and give effect to, the common law principle of 'no work, no pay' on which it seeks to rely.

39. The 'no work, no pay' principle was developed in cases involving an employee willing to perform some duties but refusing to perform all duties. It was described by Buchanan J in Macpherson:

> A principle developed, both in the particular industrial jurisprudence of this country, and in the common law in the United Kingdom and Australia, to the effect that a refusal to perform normal duties disentitles an employee to payment, even though some duties were performed. Arising from the same idea that (that employees were not at liberty to perform duties selectively) there developed a right of the employer to refuse to accept the performance of any duties while the refusal to perform all ordinary duties continued. This was variously referred to as putting an employee 'off pay', a right to 'stand aside' an employee, as 'no work, no pay' or, more precisely, as 'no work as directed, no pay'.

40. Generally, the cases where the application of this principle has been considered, have involved conscious or deliberate refusal by an employee to perform some, or all, of the employee's ordinary duties.

41. *Gapes v Commonwealth Bank of Australia Ltd* and *Welbourn v Australian Postal Commission* involved a refusal by employees to perform part of their duties due to industrial bans and limitations. In both cases the employers were held liable to pay wages to employees on the basis that they had accepted the benefit of the partial performance of duties by the employees.

42. The development of the common law principle of 'standing aside' or as the Respondent often puts it 'no work, no pay' is centred on the notion of refusal.

43. It is beyond coincidence then that s. 50A of the IRA, 'Power to stand down without pay', states that.

> *Notwithstanding any other provisions of this Act, an employer may stand down, without pay, any employee who refuses to perform any or all of the duties that the employee normally carries out and could reasonably be expected to carry out for such a period the employee continues to so refuse.*

44. S. 50A embodies the exact derivation of the common law 'no work, no pay' principle – an employee refusing to perform some, or all duties.

45. The principle of parliamentary sovereignty is that legislation prevails over common law. If there is conflict between legislation and the common law, then legislation will prevail.

46. It is submitted that the Respondent's reliance on the common law is misplaced. The correct approach in considering the issue of 'standing aside' is to consider and apply the statutory provision that pertains to that subject. That statutory provision is Section 50A of the IRA.

47. There is no evidence that the Respondent considered s. 50A of the IRA in making the direction that the Applicant be 'stood aside'. This was an error in approach.

48. S. 50A makes a clear connection between a refusal and the performance of duties. The refusal required by the section is not a general refusal, it is a direct and deliberate refusal to perform duties. In making the decision to stand aside the Applicant, the HoA was required to consider whether the Applicant was directly refusing to perform some or all his duties. The HoA omitted to do so.

49. In this matter the Applicant has not refused to perform his duties. His duties are there to be done and he wants to do them.

50. It is submitted the 'correct approach' must involve consideration and compliance with the applicable law, including the IRA.

51. The suggestion that the only statute a state service officer is beholden to in making any action is the SSA is not accurate.

52. The HoA has erroneously supplanted the Statutory test in favour of a Common Law approach. Had the HoA applied the test prescribed by statute, the grounds to 'stand aside' would not be met.

53. That error of approach is capable of review and should be subject to correction."

[15] The Respondent submits in its reply (again the submissions are lengthy but it is appropriate to set them out) as follows:[7]

"6. The Applicant submits that he is able to work notwithstanding the public health directions. He "submits that the duties of his job can be done remotely" and that, because

"completion of his duties is not contingent upon him 'entering premises'", he is able to work notwithstanding the public health directions. He submits that the "terms and effect of the public health direction No. 7 are not clear, use imprecise language and open to various interpretations". These submissions are untenable and must be rejected.

7. The plain operation of paragraph (e)(ii), extracted above in its various iterations, is that every State Service employee working for or on behalf of the Department of Health, who provides services or goods for the Department as part of their employment, must be sufficiently vaccinated. There is no ambiguity. There is no imprecise language. No competing interpretations arise from the plain words. The Applicant must be sufficiently vaccinated to work for the Department of Health. That the Applicant may not "provide health and medical services or treatments", and thereby may not attract the operation of paragraph (e)(i) matters not, for he is plainly subject to the direction in paragraph (e)(ii). Breach of that direction is a criminal offence.

8. This discussion confirms that the Applicant's inability to work does not derive from any "State Service action". Rather, it is the public health direction which makes it unlawful for the Applicant to work.

9. The Respondent's correspondence with Department of Health staff, which culminated in the Secretary's letter of 31 October 2021, confirms that the Applicant's inability to work has not been caused by any "State Service action".

[7] Respondent's Submissions in Reply dated 3 December 2021, pg 3-8 (footnotes omitted).

…

10. The Secretary's correspondence of 31 October 2021 and its reference to the Applicant being "stood aside", which he seeks to impugn, must be read in the context of the above correspondence. Each piece of correspondence confirms that the Respondent was reacting to the legal requirements imposed by the public health directions themselves, rather than initiating any "State Service action" on its own accord. The 31 October 2021 reference to the Applicant being "stood aside" is, in the above context, shorthand for the effect of the public health direction, which prohibited the Applicant from performing his duties absent being vaccinated (or being excused from the same). It was, as in *Coal v Allied Mining Services Pty Ltd v MacPherson* ("*MacPherson*"), a "misnomer" to refer to the Applicant's refusal to comply with the legal preconditions for the lawful performance of his duties as him being "stood down", which is a technical term "commonly understood" as "a unilateral decision taken by an employer to withhold work and payment even when an employee is prepared to perform all normal duties as directed". In the present case, it was the Applicant's unilateral decision to not comply with the public health direction which rendered unlawful his performance of any duties. There was "State Service action".

11. This proposition may be tested by a counterfactual. If the correspondence of 31 October 2021 had never been sent, would the Applicant be in any different position? The answer is plainly 'no'. The public health directions operated to prohibit him from performing his duties, irrespective of any communication from the Secretary. There is no "State Service action" susceptible to review. Contrary to the Applicant's submission, there has been no attempt to adopt the public health directions into the employment relationship by way of, say, a policy or code of conduct; the public health directions have application entirely independently of anything done by the Respondent. The only conduct that could arguably fit the description of "State Service action" is the Secretary's decision to *communicate* to the Applicant the effect of the public health direction, but that is not what the Applicant seeks to challenge.

12. In any event, there is no merit to the Applicant's contentions.

    (a) **First**, the Applicant offers no authority for the proposition that the provisions of the *Fair Work Act 2009* (Cth) ("*Fair Work Act*") dealing with "Circumstances allowing stand down" reflect the common law approach to the definition of "stand down", or apply to the Applicant in light of the *Industrial Relations (Commonwealth Powers) Act 2009* (Tas).

    (b) **Second**, *MacPherson* concerned the interpretation of the *Workplace Relations Act 1996* (Cth) and the common law "no work, no pay" principle. It is not authority for the proposition advanced by the Applicant's submissions, namely that the *Fair Work Act*'s provisions on "stand down" have application in circumstances where there is "an absence of work to be done, for whatever cause". That construction would appear to be inconsistent with the terms of s 524(1) of the *Fair Work Act*, which provides that an "employer may … stand down an employee [when] the employee cannot usefully be employed because … (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible". Further, even if the *Fair Work Act* reflected the common law approach to "stand down" and applied to the Applicant, the Applicant does not identify why the public health directions which render the Applicant's performance of work unlawful could not constitute a "stoppage of work for any cause …".

(c) **Third**, the Applicant's comparison of s 50A of the *IR Act* (relating to refusal to perform duties) with the asserted common law understanding of "stand down" (relating to absence of work) does not assist the Applicant. There is nothing in the *IR Act* which suggests that s 50A covers the field to the exclusion of the common law in relation to the "no work, no pay" principle; s 50A is located within Pt III ("Awards") Div 3 ("Enforcement of awards and registered agreements"), and may be understood to be a method of enforcement of such an award or registered agreement. In the present case, where there is no attempt to enforce any award or registered agreement, and in any event where the Applicant's inability to work is not at the initiative of the employer, s 50A cannot have any operation.

(d) **Fourth**, the Applicant has refused to satisfy the legal preconditions for the lawful performance of his duties. The Applicant could choose to comply with the public health direction, but he has refused to do so; he has thereby also refused to work. Just as a teacher who refuses to apply for registration under the *Teachers Registration Act 2000* (Tas) cannot lawfully teach and is not entitled to be paid, so the Applicant's refusal to comply with the public health direction connotes a refusal to work. The Applicant's contention that he "has not refused to perform his duties" and that his "duties are there to be done and he wants to do them", must be rejected; he has declined to do what he must in order to lawfully perform his duties. The Applicant's performance of duties is unlawful independent of any employer action.

(e) **Fifth,** whether under the *State Service Act 2000* (Tas) ("*SS Act*"), s 50A of the *IR Act*, or the common law, the Applicant has identified no legal entitlement to being "suspended" as compared to being "stood down" or "stood aside". While he has expressed a normative preference for the former over the latter, no legal right or entitlement has been identified the breach of which may be corrected by the Commission.

(f) **Sixth**, the proposition that "an employee is prima facie entitled to wages for attending work even if no work is available" does not assist the Applicant. It is unlawful for the Applicant to attend work. It is unlawful for the Applicant to provide any services to his employer. He is not ready and willing to work. That is the consequence of the Applicant's non-compliance with the public health direction – not of any action undertaken by the Respondent.

(g) **Seventh**, there is no presumption that a State Service employee will be suspended with pay. Section 43 of the *SS Act* confers an express power to suspend without salary, and thereby excludes any common law principle or presumption to the contrary. Employment directions, issued by the Minister administering the *SS Act* in relation to "the administration of the State Service and employment matters relevant to the" Act are not statutory rules. They may be varied at any time. While the employment directions in force as from time to time must be followed, they are not a "statutory mechanism" and do not constrain the power conferred by s 43 of the *SS Act* to suspend without pay.

(h) **Eighth,** the operation of the "no work, no pay" principle is not inconsistent with the *SS Act*. While the Applicant initially asserted that s 38 of the SS Act precludes the continued operation of the principle, the Respondent submits s 38(2) does not apply in relation to the "no

work, no pay" principle. That subsection precludes the reduction of the *rate* of salary of a permanent employee. That construction is supported by the text and context of the *SS Act*:

(i) The general rule in s 38(2) is subject to express exceptions; the *SS Act* permits the reduction of salary in accordance with ss 10, 47 and 48: s 38(2)(b). Each of those provisions permit a reduction in the *rate* of salary paid to an employee: *SS Act* ss 10(1)(d); 47(8); 48(1)(c). The primary rule must also relate to the *rate* of salary for ss 10, 47 and 48 to sensibly be called exceptions to the primary rule.

(ii) A notable omission from the list of exceptions in s 38(2)(b) is suspension without salary pursuant to s 43. Suspension without pay does not relate to the *rate* of salary, but whether salary is paid at all. Sections 38(2) and 43 can be read cohesively only if s 38(2) is interpreted to preclude a reduction in the *rate* of salary, to be contrasted to the non-payment of salary at all under s 43.

As the Applicant's rate of salary has not been reduced, s 38(2) does not apply.

(i) **Ninth**, it follows that the *SS Act* does not codify the Respondent's powers in relation to the "no work, no pay" principle in circumstances where (i) the *SS Act* envisages that no employment direction may be made in relation to suspension, or in relation to suspension either with or without salary; (ii) the *SS Act* does not define what "suspension", including suspension without pay, means or in what circumstances that power is available; and (iii) the *SS Act* thereby does not express an intention to cover the field with respect to the concepts of "suspension", "stand down" and "stood aside", leaving room for the common law "no work, no pay" principle to continue in operation.

For these reasons, the Applicant's contentions should not be accepted."

[16] Having considered the submissions as they relate to the question whether the standing aside is an action capable of review, I agree with the Respondent that what the Secretary in fact did was to notify the Applicant that he was not permitted to attend work because of the Direction. In her letter of 31 October 2021, the Secretary referred to the Direction and the fact the Applicant had failed to provide evidence that he was sufficiently vaccinated as required by the Direction. She then said "as you are unable to carry out your duties….you are stood aside from your duties with the Department". While at first blush it may appear the Secretary is exercising a power to stand the Applicant aside, in fact when considered in context, particularly with the previous emails and other correspondence I reviewed above, the Secretary is really saying that the Applicant is not permitted to attend work because of his failure to comply with the Direction.

[17] The Applicant submits that by sending that letter the Secretary converted a necessary response to a public health issue and made it applicable to the employment relationship. However the Direction was always applicable to the employment relationship. The Directions was concerned with that very thing. The subject of the Direction was, amongst other things, dealing directly with employees and their capacity to work. The 31 October letter acknowledges the effect of the Direction given the Applicants failure to comply with it. I agree with the Respondent that the 31 October letter does not incorporate the Direction into the employment relationship.

[18] The Applicant submits that the Respondent could have taken no action in respect to the Direction. He submits that the particular type of action which the employer could have taken was the sole domain of the Respondent. I do not agree. The fact that the Applicant was unable to attend to his work was a result of the terms of the Direction. The Direction in place as at 31 October 2021 provided:

> "(e) on and from 31 October 2021 –
>
> (i) a person is not permitted to provide health and medical services or treatments unless the person is sufficiently vaccinated against the disease as specified in paragraph (h); and
>
> (ii) each State Service employee or State Service officer, within the meaning of the Acts Interpretation Act 1931 must be sufficiently vaccinated against the disease, as specified in paragraph (h), if the person –
>
> (A) is, as a State Service employee or State Service officer, working for or on behalf of the Department of Health; and
>
> (B) is providing services or goods, for that Department, as part of his or her employment as a State Service employee or State Service officer; and …"

[19] It may be seen that every State Service Employee working for the Respondent, and providing services as part of their employment, must be vaccinated. That clause includes the Applicant. As such it is a consequence of the Direction (as amended) which prevented the Applicant from working. Accordingly the Secretary had no discretion as to what she could do. She was not permitted to take no action as she (and the Applicant) are obliged to comply with the Direction[8].

[20] In my opinion the fact that the Applicant is not able to work is a consequence of the Direction and not as a result of any action taken by the Respondent. Essentially the Respondent was a conduit to the compliance with the Direction. I agree with the Respondent where it submits "[t]he 31 October 2021 reference to the Applicant being "stood aside" is, in the above context, shorthand for the effect of the public health direction, which prohibited the Applicant from performing his duties absent being vaccinated (or being excused from the same)"[9].

[21] As such the fact the Applicant is prevented from working is a consequence of the Direction (as amended) and not an action taken by the Respondent. The action is not reviewable as an action to which s 50 of the Act applies.

The Cessation of Salary Issue

[22] The Respondent submits as follows[10]:

> "**(b) The "action of ceasing salary"**
>
> 13. The Applicant seeks to review the "action of ceasing salary". The Respondent respectfully submits that the Commission has no jurisdiction to review that decision. There are two reasons.

[8] Section 16(3) of the *Public Health Act 1997*.
[9] Respondents Submissions In Reply dated 3 December 2021, pg 5-6 [10].
[10] Ibid, pg 8-10 (footnotes omitted).

14. **First**, as the Applicant no longer contends that the "action of ceasing salary" was wrong. That is apparent from the Applicant's submissions of 30 November 2021, which seeks

> A direction that the Employer and/or Head of Agency inform the Applicant that it will suspend the Applicant for the term of the ED-5 disciplinary process, and in doing so, will revoke its direction that the Applicant be 'stood aside'.

Moreover, ED4 provides for suspension with or without pay. No part of the Applicant's submission of 30 November 2021 contends that, should the Commission direct the Respondent to "suspend" him, that he is entitled to be suspended with pay rather than without. Plainly, the Applicant does not assert that he has an entitlement to suspension with pay. That concession, which differs from the relief initially sought, is proper.

15. Importantly, the Applicant's concession means that there is no "matter" which enlivens the Commission's jurisdiction to hear the application pursuant to s 19AA of the *IR Act*. The jurisdiction of the Tasmanian Industrial Commission ("the Commission") to hear the present application for review of State Service action pursuant to s 50(1)(b) of the *SS Act* derives from s 19AA of the *IR Act*. Section 19AA(1) relevantly provides:

> **19AA Commission to review matters under section 50 of the State Service Act 2000**
>
> (1) The Commission is to review a matter in respect of which an application for review has been made to it under section 50(1) of the State Service Act 2000. …

Section 19AA(1) conditions the Commission's jurisdiction on the identification of a "matter". The meaning of a "matter" has been the subject of extensive consideration by the High Court in relation to its use in the *Constitution*. In *Palmer v Ayers* the majority said:

> A "matter", as a justiciable controversy, is not co-extensive with a legal proceeding, but rather means the subject matter for determination in a legal proceeding – "controversies which might come before a Court of Justice" (emphasis added). It is identifiable independently of proceedings brought for its determination and encompasses all claims made within the scope of the controversy. What comprises a "single justiciable controversy" must be capable of identification, but it is not capable of exhaustive definition. "What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships".

Importantly, a "matter" is not established by the commencement of proceedings, but rather refers to the factual substratum against which legal proceedings seek relief.

16. The Applicant's submissions of 30 November 2021 confirm that no "matter" arises in the present case. Whereas the application sought a remedy that … "be paid during his suspension", the Applicant no longer contends that he has any entitlement to salary. Rather, the submissions of 30 November 2021 merely seek the Commission direct the employer to suspend the Applicant pursuant to Employment Direction 4 ("ED4") (with or without pay) and revoke

its determination that the Applicant is "stood aside". Whether the Applicant is suspended pursuant to ED4 or "stood aside", he seemingly does not cavil with the proposition that he has no entitlement to salary. In the absence of any claim to an entitlement to salary, there is no justiciable controversy which enlivens the Commission's jurisdiction pursuant to s 19AA(1) of the *IR Act.*

17. **Second** and in the alternative to the above, if the Commission does have jurisdiction the application should nevertheless be dismissed. The Applicant's submissions of 30 November 2021 do not assert any entitlement to salary. The "action of ceasing salary" cannot therefore be in error.

18. The Commission's task is to "[conduct] a review in the sense of "looking it over" with a view to correction, rather than carrying out a de novo process". However, where the Applicant does not assert that the "action of ceasing salary" was wrong, no error can possibly arise for correction. The application must be dismissed."

[23] It may be seen that the submissions are predicated on the basis that the Applicant does not contend that the decision to cease salary was wrong nor that he asserts an entitlement to salary. Indeed the submission goes further to the effect that concessions are made to that effect as the Applicant does not claim nor assert that the suspension he argues that he should be subject to (as opposed to being stood aside) is to be with pay.

[24] I do not agree that, taking the submission as a whole and in the context of the Application, any such concession is made. Certainly the Applicant does not expressly concede any such thing. It is clear that the Applicant is seeking to review at least two actions. One of which is expressly the action of ceasing salary.[11]

[25] Further the Applicant continues to submit that the "Action of either paying or not paying the Applicant is reviewable".[12] It is correct to say that the Applicant does not specifically say that the suspension he claims is the appropriate course of action for the Respondent to take, should it be with pay. However I apprehend that what he is submitting is that together with the suspension under Employment Directions 5, if the Respondent wishes to cease paying the Applicant, it will be obliged to consider whether the suspension is with or without pay in accordance with Employment Direction 4. Certainly the Applicant refers to this process when he considers suspension in his submissions[13].

[26] In the absence of an express concession about salary, where the submissions maintain that the suspension of pay is a reviewable action, and where he makes submissions to the effect that the appropriate mechanism to deal with the Applicant is by way of an investigations under Employment Direction 5 and that "Employment Direction 4 is the statutory mechanism which may allow an employer to cease payment to the employee while misconduct is investigated, and a sanction considered"[14], I do not agree that the Applicant has made any such concession about the payment of salary.

[27] The Respondent also submits that the remedy sought does not assert an entitlement to salary and therefore there is nothing to review in regards to salary.

[28] The remedy sought is a direction that "the Employer and/or Head of Agency inform the Applicant that it will suspend the Applicant for the term of the ED-5 disciplinary process, and in doing so will revoke its direction that the Applicant be "stood aside". I agree it says nothing about salary. However, again in the context of the submissions as a whole to which I have referred, the revocation of the direction standing down the Applicant

[11] Applicant's Submissions dated 30 November 2021, pg 2 [8(ii)].
[12] Ibid [19].
[13] Ibid [33]-[37].
[14] Ibid [37].

would include the decision not to pay salary as the Applicant submits that he should be suspended thus invoking Employment Direction 4 and in light of the determination to investigate by the Secretary pursuant to Employment Direction 5.

[29] Having found that there has been no concession as asserted by the Respondent, is there nevertheless an action capable of review. In my opinion there is. Whilst the Direction was the thing which prevents the Applicant from working, it is up to an employer to consider whether it will cease paying an employee salary, whether by invoking the no work no pay doctrine or otherwise. It does not happen automatically. An employer may choose to pay an employee even if they do not attend for work. The decision not to pay is a consequence of the Direction (the Applicant is not at work), but is not prescribed by the direction (that is the Direction says nothing about salary). Put another way the fact the Applicant was not able to work was a result of the Direction. The cessation of payment of salary was because the Respondent decided not to pay salary by invoking the no work no pay doctrine. Had the Respondent merely communicated the effect of the Direction, it would still have had to pay salary until it chose to cease paying. As such the decision not to pay salary is an action which is capable of being reviewed.

[30] I should note that having found that there was no relevant concession made by the Applicant that there was a matter to review within the meaning of s 19AA of the *Industrial Relations Act.*

Outcome

[31] I determine that the Commission has jurisdiction to entertain the Application is so far as it relates to the action of ceasing the payment of salary. I will hear the parties as to the further disposition of the Application.

D J Barclay
PRESIDENT

Decision on papers