TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Annette Davie v Minister administering the *S*tate Service Act 2000/Department of Health [2023] TASIC 5

PARTIES: Annette Davie (Applicant)

Minister administering the State Service Act 2000/Department of Health (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T14931 of 2022

HEARING DATE(S): 29 June 2022

HEARING LOCATION: Tasmanian Industrial Commission, Hobart

DATE REASONS ISSUED: 10 May 2023

MEMBER: President D J Barclay

CATCHWORDS: Application relating to termination of employment - preliminary question - whether notice required to be given to the employee pursuant to section 44 of the State Service Act requires actual notice to the employee

REPRESENTATION:

Caroline Saint, Australian Nursing and Midwifery Federation (Tasmanian Branch) for the applicant

Mark Jehne, Office of the Solicitor-General (Litigation) for the Respondent

ANNETTE DAVIE V MINISTER ADMINISTERING THE STATE SERVICE ACT 2000/DEPARTMENT OF HEALTH

REASONS FOR DECISION **10 MAY 2023**

[1] The Applicant has made an application for an unfair dismissal remedy arising out of the termination of her employment. The question has arisen as to the date of the termination of the Applicant's employment.

[2] The Applicant's employment was terminated by letter dated 4 May 2022 because the Applicant had, it is alleged, failed to comply with a lawful and reasonable direction to provide evidence that she was sufficiently vaccinated. This may be significant because on 5 May 2022 the Applicant forwarded a Covid Vaccine Medical Contraindication Form to the Respondent to the effect that as at that date the Applicant was not required to be vaccinated against Covid.

[3] Pursuant to section 44 of the *State Service Act* 2000 (the Act) the Minister is empowered by notice in writing to terminate the employment of a permanent employee. If the notice required to be provided by section 44 of the Act does not require actual notice to the Applicant then the Applicant's employment may have ceased on 4 May 2022. As a result the provision of the Covid Vaccine Medical Contraindication Form would have occurred after the termination of the Applicant's employment and as a result may not be an issue for consideration when determining whether or not there was a valid reason for termination of the Applicant's employment.

[4] If however the notice required to be given pursuant to the Act requires actual notice then it is common ground that the Applicant received and read the termination letter on 9 May 2022. The significance of that is that if the termination of the employment is not effective until actual notice then the fact that the Applicant was not required to be vaccinated as at the date of termination may be a relevant matter considering the question of whether there was a valid reason for that termination.

[5] The question for consideration is therefore whether section 44 (1) of the Act requires actual notice.

The provision

[6] The Act, section 44 provides:

> "Termination of employment of officers and employees
>
> (1) The Minister may at any time, by notice in writing, terminate the employment of a permanent employee.
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> (2) The notice is to specify the ground or grounds that are relied on for the termination.
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> (3) The following are the only grounds for termination:
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> (a) that the permanent employee is found under section 10 to have breached the Code of Conduct;
>
> (b) that the Head of Agency has requested the Minister under section 47(11) to terminate the employment of the permanent employee;

(c) that the permanent employee is found under section 48 to be unable to efficiently and effectively perform the duties assigned to that employee;

(ca) that the officer or employee is not performing his or her functions to the standard and requirements identified in the performance management plan relating to the officer or employee;

(d) any other ground prescribed by the regulations.

(4) The Minister may, by instrument in writing, delegate to a Head of Agency, on such terms and conditions as the Minister may determine, the Minister's power of termination of permanent employees.

(5) The Minister may, by instrument in writing, revoke wholly or in part or vary a delegation made under this section.

(6) The power of termination delegated to a Head of Agency when exercised by the Head of Agency is taken to have been exercised by the Minister."

The parties contentions

[7] The parties have provided submissions in support of their respective arguments. The Respondent provided its written submissions first. Relevantly they are in the following terms:

"7. The issue raised by the above circumstances is whether the exercise of the power to terminate in s 44(1) of the *SS Act* (which has been delegated here to the Secretary) requires actual notice (also known as 'express notice') to be given to the employee concerned. If actual notice is not required, the date of termination is 4 May 2022 being the date of the exercise of the statutory power; by contrast, if actual notice is required, the date of termination is 9 May 2022.

8. As a matter of statutory interpretation, s 44(1) might either require actual notice to be given to a terminated employee expressly, or as a matter of necessary implication. Again, s 44(1) provides:

(1) The Minister may at any time, by notice in writing, terminate the employment of a permanent employee.

9. It is convenient to deal first with the issue of whether s 44(1) expressly requires actual notice to be given to the terminated employee. The answer is 'no'. There are no words in either s 44 or s 10 of the *SS Act* which expressly state that the Minister's (or their delegate's) exercise of the power to terminate is conditional on the provision of actual notice to the dismissed employee.

10. In that regard, s 44(1) can be contrasted with many other legislative provisions which require that something is to be done in writing, with the added requirement that actual notice of that decision be given to another. Some examples from Tasmanian legislation include:

(a) "… by notice in writing served on the Applicant … "

(b) "… by notice in writing provided to the owner of the place or conveyance …"

(c) "… by notice in writing given to the planning authority …"

Unlike s 44(1) of the *SS Act*, each of the above provisions require the notice in writing to be 'served', 'provided' or 'given' to the recipient. Each of these provisions make the exercise of power conditional on the recipient's actual receipt of the written notice.

11. Other statutory provisions provide for constructive, rather than actual, notice of a matter. One such an example is "… by notice in writing to the holder of a permit … ". Such a provision does not require actual notice, but rather than the notice in writing must be directed to the recipient ("to"); the exercise of power is not conditional on the recipient's actual receipt of the notice.

12. The *Public Health Act 1997* (Tas) provides examples of each of the above notice requirements, providing in different provisions different requirements as to notice:

(a) "… by notice in writing served on the Applicant … "

(b) "… by notice in writing to the holder of a permit …"; and

(c) "… by notice in writing … ".

Plainly, these different formulations must each be given a different construction. The three examples given above may be said to represent the spectrum of notice requirements, from actual notice in writing at one end to, at the other, no requirement for subjective notice, with constructive notice in the middle.

13. If the legislature had intended by s 44(1) of the *SS Act* to require termination be effected only on the provision of actual notice to the employee, the above discussion reveals a number of statutory formulations which would have achieved that end. Had that been the legislature's intention, it could have provided in s 44(1) that the "Minister may at any time, by notice in writing *served on*15 *the employee*, terminate the employment of a permanent employee". Section 44(1) does not so provide. It is plain that there is no express requirement in s 44(1) that the employee be given actual notice of the decision to terminate.

14. Of course, a requirement for actual notice may be nevertheless be implied as a matter of statutory construction. In this analysis, the starting point is the words themselves. In addition to the use of the phrase "by notice in writing" in s 44(1) is the formulation "at any time". The words "at any time" must be given work to do. In this regard, the Minister's discretion to "at any time" exercise their power is necessarily inconsistent with any implication of a requirement for an employee to be given actual notice of such a decision. In other words, for a decision-maker to be empowered to make a decision "at any time", the exercise of that power cannot be made contingent on another person's conduct. An example may be given: the Minister may exercise their power to dismiss an employee "at any time", including outside of working hours when no actual notice can be given to an employee. A counterfactual example assists: if the Minister's power to dismiss an employee is conditional on actual notice being given to the employee, and the employee is evading service and refusing to receive actual notice, it could not be said that the Minister is empowered to make the decision "at any time" – for the making of that decision is contingent on the employee's compliance with the process. The words "at any time", in the absence of any requirement of actual notice of the Minister's written decision to terminate, weighs strongly in favour of no implication of a requirement for actual notice to be given to an employee."

[8] Additionally the Respondent relies on authority pursuant to the Partnerships Act in support of contention.

[9] The Applicant provided written submissions in response. Relevantly they are in the following terms:

> "7. With respect, to say at paragraph [9] 'There are no words in either s 44 or s 10 of the *SS Act* which expressly state that the … exercise of the power to terminate is conditional upon the provision of actual notice to the dismissed employee' is, absurd. The logical conclusion of such an interpretation would be that an employee could have their employment terminated yet be ignorant of this fact and therefore ignorant of their right to bring unfair dismissal proceedings, otherwise challenge the dismissal and/or receive payments and entitlements due to them. Such a construction is convoluted and would arguably run counter to the State Service Principles at section 7 of the Act.
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> 8. Paragraph [13] of the Respondent's submission says '[i]t is plain there is no express requirement in s 44(1) that the employee be given actual notice of the decision to terminate'. Yet, by the time s 44(1) is in play, the Minister is not advising of a 'decision to terminate' they are advising that the employment has been terminated and the notice is advising of the reasons for that termination in line with s 44(2).
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> 9. Paragraph [14] of the Respondent submissions considers whether 'actual notice may be *(sic)* nevertheless be implied as a matter of statutory construction'. On that analysis the conclusion is reached that there is 'no implication of a requirement for actual notice to be given' because that means the right of the Minister to make a decision at 'any time' is somehow thwarted. However, the requirement for the notice to be in writing, is a separate issue to the question of when 'at any time' a decision is made. To put it in a different way than that proposed by the Respondent, 'at any time' (under s 44(1)) when a decision has been made to terminate the employment relationship then the employee needs to be advised of this fact by way of 'notice in writing'. It is our submission that this construction, which means that the employee must be notified, is a less cumbersome approach than the proposal in para [14] of the Respondent's submission.
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> 10. The words 'notice in writing' must require the employee to become aware of the notice, otherwise the written notice has no work to do. Until such time as notice is communicated, the employee remains ignorant of the change in their employment status.
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> 11. The fact that the additional words 'served on the employee' (or a like variant)1 do not appear in s44(1) does not excuse the employer from advising the employee 'by notice in writing' that their employment has come to an end.
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> 12. Of course, section 44(1) of the *State Service Act* cannot be read in isolation, it appears as part of an entire Act as well as in a specific part (7) of that Act. Part 7 includes section 38(1) which states:
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> > Terms and conditions of employment of employees are to be those specified in an award relating to persons engaged in the work for which they are employed …
>
> 13. *The Nurses and Midwives (Tasmanian State Service) Award* [the Award] expressly addresses the question of notice and termination. RN Davie is employed under the provisions of the Award.
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> 14. Part III, clause 2 of the Award provides for the period of notice that must be given by the employer on termination of the employment of a nurse. In the case of RN Davie, the Award notice period is 5 weeks.

15. It is clear that, despite s 44 of the Act, the Award provisions (by virtue of s38(1) of the Act) need to be considered when determining to terminate the employment of a permanent employee2. Contrary to para [17] of the Respondent's submission, when exercising the statutory power, the Minister must also comply with the relevant Award provisions.

16. In the alternative, payment in lieu of notice may be made (clause 2(2)(d)) of the Award. Despite the assertion that notice provisions do not apply, this obligation is acknowledged in paragraph 17 of the Respondents submission.

In conclusion

17. If, the decision to terminate the employment of RN Davie was made on 4 May [para 4 of the Respondent submission] then termination in line with section 10(1)(g) of the Act – an alleged breach of the code of conduct – could no longer apply as RN Davie was by that date eligible for an exemption under the Public Health Order.

18. If the date that RN Davie could have collected the correspondence was 6 May, that might be a further date for consideration.

19. However, as the notice of termination was not received by the employee until 9 May then that date remains, as in our initial submission, the earliest date upon which the employment of RN Davie could have come to an end."

[10] Strictly only subsection 1 of section 44 of the Act is relevant. As is submitted by the Respondent there is no express requirement in that subsection to effect service on the employee. The section provides that the Minister may by notice in writing terminate the employment of a permanent employee. The provision also provides the Minister may determine to terminate employment of a permanent employee at any time. The Respondent argues that if actual notice of termination is required to be given to the employee then that amounts to a fetter on the Minister's ability to terminate employment of the employee at any time. I do not agree.

[11] In my view section 44 (1) of the Act provides that the Minister may at any time terminate the employment of a permanent employee. The mechanism by which the Minister terminates the employment is by notice in writing. If one were reading the provision and was asked "how does the Minister terminate the employment of a permanent employee?" The answer would be by notice in writing.

[12] The decision to terminate the employment can be made by the Minister at any time, however the mechanism by which he affects that termination is by notice in writing.

[13] The Respondent refers in its submissions to other expressions in other legislation of the requirement to serve various notices. In my view there is nothing contained in those pieces of legislation (dealing as they are with very different things) that assists the construction of section 44. The Respondent also points out different formulations of the requirements to give notice in the *Public Health Act* and submits that different formulations must be given a different construction. However the Respondent has not pointed to any different formulations of the requirement to effect service of a notice under the Act.

[14] What then does "by notice in writing" require? One might turn to what a notice is required to do. In my view notice is the notification to the recipient of the contents of that notice. The Shorter Oxford English Dictionary (3rd Ed.) defines notice as[1] (relevantly) "to notify", "to point out, make mention of to one" and to "serve with a notice".

[1] Volume 2 page 1416.

[15] The Macquarie Dictionary (6th Ed) defines notice as[2] "an intimation or warning", "a notification of the termination, at a specified time, of an agreement, as for renting or employment given by one of the parties", "to mention or refer to; point out, as to a person".

[16] These definitions accord with my view of the requirement of a notice. What the Respondent effectively argues for is that the word "notice" is to have little or no work. In essence the Respondent argues that section 44 (1) of the act is to be read as follows: The Minister may at any time, in writing, terminate the employment of a permanent employee.

[17] I have also gained some assistance from authorities relating to notices of discontinuance. In *Allan v Hocking*[3] the Full Court was considering order 29 of the 1965 Rules of the Supreme Court. Rule 1 of order 29 provided that the plaintiff may, by notice in writing, holy discontinue his action against all or any defendants. The full Court determined that the notice required delivery of a written notice.

[18] In doing so the full Court adopted the reasoning of the full Court of the Federal Court in *B & J Engineering Pty Ltd v Daroczy and Another*[4]. The full Court reviewed the history of the relevant rule relating to discontinuance and noted that amendments to the rules permitted discontinuance by notice in writing when formally leave to discontinue was required. The full Court said

> "[c]learly, the notice intended was not notice to the court but notice to the defendant, for the leave of the court was dispensed with and notice to the parties was substituted. The service of the notice was intended to inform the defendant of the discontinuance of the action and also to inform the defendant of the defendant's entitlement to costs and to enter judgement in respect of those costs if they be not paid".[5]

[19] In my view the notice in section 44 of the Act is required to be notice to the employee for it is the employee who is being notified of the termination. If no notice was required to be drawn to the attention of the employee then the word "notice" in the provision would have no work to do.

Outcome

[20] Accordingly, in light of the above reasons I determine that actual notice of termination is required to be given. There are various ways that actual service may be effected.[6] On the facts of this case it appears that actual notice of the termination was given on 9 May 2022. I will however refrain from making any orders arising from my determination and I will hear the parties further as to the application in light of these reasons.

[2] 1006.
[3] (2006) 15 Tas R 234.
[4] (1984) 57 ALR 240 at 242 – 244.
[5] Ibid p 243-244.
[6] See for example Acts Interpretation Act s 28AB.