

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

s29(1) application for hearing of an industrial dispute

Catherine McClaine

(T14152 of 2014)

and

Ministering Administering the State Service Act 2000 - Tasmanian Health Service/Formerly Department of Health and Human Services

PRESIDENT D J BARCLAY

HOBART, 29 OCTOBER 2021

Application for Reclassification arising out of translation – Interlocutory Application for Dismissal for Want of Prosecution

DECISION

[1] The Respondent has made an application to dismiss this Application for want of prosecution.

[2] This Application is associated with the application in ANMF & Starosta v. Department of Health No. 14144 of 2013 (Starosta). I have published reasons as to why I dismissed a similar application for early termination of the proceedings for want of prosecution. Those reasons should be read in conjunction with these reasons.

The Law

[3] In summary, by s 21(2)(c)(iv) of the *Industrial Relations Act 1984* (the Act) I am empowered to dismiss proceedings at any stage for “any other reason”. The Respondent submits that the reason here is that the Applicant has failed to prosecute her claim over a period of some 7 years and that as a result it is prejudiced in its defence of the claim.

[4] The general factors which I am to consider in an application for dismissal for want of prosecution are the length of delay, the reasons for the delay and any potential prejudice or unfairness caused to the other party by the delay. However these considerations serve to inform the overall question of the overall justice of the case and whether the justice of the case lies with dismissing it or allowing it to proceed.

The Facts

[5] The Applicant brought these proceedings in her own right. Unlike Starosta the Australian Nursing and Midwifery Federation (ANMF) has not represented the Applicant in these proceedings. That is not to say that this case has never been before the Commission. It, together with various other translation cases came before the Commission on 17 March 2015. Ms McClaine attended by telephone. The ANMF appeared. Essentially the ANMF sought to reopen a matter which had been before the Full Bench by referring some translation cases pending in the Commission to the Full Bench so it could be argued that the decision of the Full Bench previously handed down was wrong. That matter was

sought to reopen a matter which had been before the Full Bench by referring some translation cases pending in the Commission to the Full Bench so it could be argued that the decision of the Full Bench previously handed down was wrong. That matter was adjourned for written submissions. It was said that Ms McLaine's application would be affected by the Full Bench decision although it was not then explained how.

[6] In the event the matter was adjourned for written submissions. Ms McLaine submits she was told she would be provided with a copy of that day's transcript and a new date for hearing was to be confirmed after Easter. I note that exchange does not appear on the transcript. Nevertheless Ms McLaine says she received no further contact from the Commission.

[7] Ms McLaine submits that she made telephone contact with the Commission on two occasions between that conference on 17 March 2015 and the time of the present application by the Respondent in 2021. I am not aware of what contact the Applicant had with the ANMF save that the last meeting she had with the ANMF was 24 August 2017. I do not know whether the phone calls to the Commission were before or after that contact with the ANMF.

[8] It is clear however that the Applicant did not take any steps to advance her matter save those phone calls to which I have referred.

Length and reason for delay

[9] Unlike Starosta where the ANMF took steps with other matters which meant it was difficult to take steps with all of the matters it was advancing on behalf of nurses (some 26 applications as at June 2017) the Applicant in this case has not provided any explanation for the delay in her pursuing her case. She points in her submissions to a number of matters, none of which touch on why she did not seek to advance her case by either contacting the Respondent or seeking some formal direction from the Commission, save for the two occasions between the filing of her application on 7 January 2014 and the time of the application to dismiss for want of prosecution.

[10] In this case the delay is in the order of 7 years. There is no reasonable explanation for the delay. I make allowance for the fact the Applicant is self-represented. However only contacting the Commission on two occasions does not demonstrate any active steps to advance the matter. The Applicant has not advanced any compelling reasons as to why she did not take any steps to advance her case. She points to difficulties she suggests the ANMF and the Respondent had and to the fact that the Commission did not contact her after the March 2015 conference.

[11] None of these matter explain why the Applicant did not herself seek to advance her case. The delay is long and the explanation for delay lacking.

Prejudice

[12] I venture to repeat what I said in Starosta. In summary that is that the question of prejudice favours the Applicant. It is however a fine line. The Respondent will be able to contact witnesses who I understand will be available to give evidence. As such the prejudice is of fading memory having regard to the delay. That potential prejudice does not however outweigh the prejudice of summary termination of the proceedings.

Other matters

[13] In Starosta I took into account that the Respondent did not seek any directions to advance the matter prior to bringing the application for summary dismissal. That was against the background of the ANMF being seized of and advancing (or seeking to advance)

a large number of cases. Here however the Applicant had done very little to advance her claim in the 7 years since it was lodged. There was no sign, so far as this Applicant is concerned that she had any interest in advancing her case. The Respondent had heard nothing from the Applicant since 2015. She was no longer an employee.¹

[14] In my opinion it was not incumbent on the Respondent in this case to seek directions to advance the matter prior to applying to dismiss for want of prosecution. The delay, as I say was long. The Applicant had made no contact with the Respondent since March 2015. She had, left employment with the State Service. I note that the claim is modest (the defence between the salary for the classification the Applicant was in at the date of the Application and the wages of the new classification if she were successful for a period of some 16 months). It was not unreasonable, in those circumstances for the Respondent to assume that the Applicant no longer had any interest in advancing her matter.

Outcome

[15] Having regard to all the circumstances of the case, but primarily the very long delay with the Applicant taking effectively no steps to advance her case I am prepared to dismiss the applicants Application for reclassification for want of prosecution. In my opinion the justice of the case in is favour of the Respondents application notwithstanding that the result will be that the Applicant will be prevented from bringing her claim.

A new issue

[16] Even if I had not dismissed the Application for want of prosecution, I find that the Commission no longer has jurisdiction to hear and determine it. To explain that, the Commission is obliged, independently to the parties to ensure that it has jurisdiction to hear and determine a matter. If there is no jurisdiction anything the Commission may do would be a nullity and of no effect.

[17] In order for the Commission to have jurisdiction in a matter it must be exercising administrative powers. If it is being asked to exercise judicial powers it cannot do so.

[18] Since the Applicant resigned her employment on 23 June 2018 the application has become one of a claim for back pay. That is, a claim for a sum of money alleged to be owed because the Applicants position was misclassified. It seems that Applicant understood that was the nature of her claim. In an email to the Commission she sought to oppose the application to dismiss for want of prosecution and have her case "considered for reclassification and back payment".² That is, the purpose of the reclassification was to enable the Applicant to claim and be paid back pay.

[19] In *Marope (No.1)*³ I dealt with this question. I said:

"[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* the Full Bench of the Fair Work Commission said:

"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

¹ Applicants submissions page three, final bullet point

² Email to the Commission dated 30 March 2021.

³ T14766 of 2020

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 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.”

[20] This case is now clearly the ascertainment, declaration and enforcement of legal rights. As the Applicant is no longer an employee of the State what I am being asked to do (determine the appropriate classification) will not determine what rights should exist for the future (the terms and conditions of the Applicants employment in the future) but rather whether the Applicant has a right to money for a period in the past.

[21] Accordingly even if I had not dismissed the Application for want of prosecution, I am without jurisdiction to deal with it as in reality I will have to exercise judicial powers to ascertain legal rights of the Applicant in respect to matter in the past. As such I dismiss the Application pursuant to s 21(2)(c)(iv) of the Act.

Orders

- (a) The Application for Dismissal for Want of Prosecution is granted;
- (b) The Commission is without jurisdiction to hear and determine the matter; and
- (c) The Applicants application T14152 of 2014 for reclassification is dismissed.



D J Barclay
President

Parties Representatives:

Ms C McLaine the Applicant
Ms C Papworth for the Respondent

Date and place of hearing:

Determined on the papers