

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984 (Tas)

Section 29(1) application for hearing of an industrial dispute

United Firefighters Union of Australia, Tasmanian Branch

(T14775 of 2020)

and

Minister Administering the State Service Act 2000/Department of Police, Fire and Emergency Management

DEPUTY PRESIDENT N ELLIS

24 MARCH 2022

Industrial dispute – broad power of section 31(1) - settlement of industrial dispute - order issued

DECISION NO.2

[1] On 18 June 2020, the United Firefighters Union of Australia, Tasmania Branch (UFUA) (the Applicant), lodged an application on behalf of Mr Jeremy Ripper, pursuant to s 29(1) of the *Industrial Relations Act 1984 (Tas)* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the *State Service Act 2000/Department of Police, Fire and Emergency Management* (the Respondent).

[2] The matter went to a hearing and submissions were sought from the parties.

[3] On 31 March 2021, a decision was issued and held that, pursuant to the Tasmanian Fire Fighting Industry Employees Award (the Award) and the Tasmanian Fire Fighting Industry Employees' Industrial Agreement 2016 (the Agreement), an employee who is a non-rostered shift worker (NRSW) and required to work on a public holiday, is entitled to be paid the ordinary hours for the holiday with pay in addition to the overtime rate of double the normal rate of pay for all hours worked.

[4] The parties were directed to confer for the purpose of giving effect to this Decision. The file remained open with leave reserved for either party to seek to have the matter relisted should it be considered necessary.

[5] On 27 October 2021, the Commission received correspondence from Mr Leigh Hills, representative on behalf of UFUA, who noted the following:

“Despite numerous attempt by the Applicant via either email, phone or 1-1 meetings to confer with the Respondent to give effect to the decision as per outcomes, the Applicant has not received any indication and or acknowledgement as to the Respondent intent.

The Applicant therefore seeks an order from the commission to give effect to the decision and requests that the matter be relisted. It is the Applicants intent to avail itself of any means available to it in order to resolve this matter.”

[6] The matter was relisted and several conferences held throughout the end of 2021.

[7] On 18 January 2022, Directions were issued to the parties directing them to provide a draft order and their relevant outline of submissions.

[8] On 31 January 2022, an agreed form of words was filed by the parties with the Commission as a draft order, as follows:

“To give effect to the decision handed down on 31 March 2021. In accordance with s 31(1) of the *Industrial Relations Act 1984*, I order that the respondent pay Non-Rostered Shift Workers subject to the Award and the Agreement that are required to undertake unplanned work on public holidays:

- a) Ordinary hours for public holidays, according to the provisions of Part VI, clause 3 (a)(ii) of the Award - Holidays with Pay; and
- b) Double the normal rate of pay for all time worked according to clause 30(d) and (e)(ii)(2)(b) or subsequent replacement provision of the Agreement.”

The issues

[9] Submissions from the parties were to address the powers of the Commission to issue an Order to give effect to the decision handed down on 31 March 2021 (the Decision).

The Applicants submissions

[10] The Applicant submitted the Respondent has not given effect to the Decision and is not paying NRSW the relevant rate for working on a public holiday.

[11] The Applicant provided evidence in the form of a payslip for an employee who is a NRSW¹ and worked a recent public holiday on 26 January 2022 and was paid Overtime at 100% (TFFIE) which equated to single time/normal hours for eight hours work.

[12] The Applicant submitted that the Commission has the power to issue an Order subject to s 31(1) of the Act, and noted s 31(3) of the Act provides:

“(3) Notwithstanding subsection (2) (b) , a Commissioner may make an order requiring that an application be made under section 23 or 43 .”

[13] The Applicant contends it is not in the public interest to seek a further application for the purpose of an interpretation as the Decision provides the reasoning and interpretation of the relevant clauses. The Applicant submitted there was no error in the reasoning and the Decision.

[14] The Applicant alleged that the Respondent continues to be in breach of the Award and Agreement by not paying the NRSW overtime in accordance with Part VI clause 3 (a)(ii) of the Award and clause 30(d)(e) ii, 2(b) of the Agreement.

¹ Payslip of Mr Michael Watkins dated 16 February 2022.

[15] Applying s 48 of the Act, the Applicant is seeking penalties to prevent continued breaches by the Respondent.

[16] It was submitted it is in the public interest that further orders are provided to ensure industrial harmony and that provisions of the Awards and Agreement are not breached.

[17] Additionally, the Applicant relies on s 20 of the Act which requires the Commission to act "according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms"².

[18] Section 19 of the Act provides the jurisdiction of the Commission and states:

"(1) Subject to this Act, the Commission has jurisdiction to hear and determine any matter arising from, or relating to, an industrial matters.

(2) For the purposes of subsection (1), the Commission may-

(a) make, vary, rescind or correct an award or order..."

[19] The Applicant contends s 19 of the Act, in conjunction with s 31(1) of the Act, provides the power to the Commission to correct or provide further orders.

[20] The Applicant seeks an order pursuant to s 31(1) of the Act giving effect to the decision.

The Respondents submissions

[21] The Respondent noted the matter remains on foot and the provision of orders will provide the parties with a resolution.

[22] It was submitted that as no orders have been issued in relation to this matter, s 31(1) of the Act provides no impediment to the Commission to issue orders.

[23] It was submitted that ss 31(2), 31(3) and 31(4) of the Act are considerations to apply when issuing an order, however, as no order has been issued in relation to the matter, they do not apply.

[24] The Respondent submitted that the provision of an order provides the right of appeal pursuant to s 70(1)(b) of the Act.

[25] The Respondent noted the Applicant's references to "further orders" were incorrect as no orders have been made in relation to the Decision and therefore there can be no "further orders".

[26] The Respondent contends there has been no breach of the Award nor breach of s 48 of the Act. The matter remains open with the Commission with any further action dependent on the issuing of orders.

[27] The Respondent's position is that there is nothing preventing the Commission issuing an order.

² *Industrial Relations Act 1984* (Tas) s20(1)(a).

The relevant legislation

[28] Section 31 of the Act provides broad powers to the Commission in respect of a hearing under s 29 of the Act to prevent or settle an industrial dispute. Section 31 of the Act provides as follows:

“(1) Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken.”

[29] Further, s 31 of the Act sets out conditions for making an order and provides:

“(2) A Commissioner shall not make an order under this section –

- (a) that is inconsistent with the provisions of any Act dealing with the same subject-matter; or
- (b) that makes an award or that varies or creates a provision of an award.

(3) Notwithstanding subsection (2) (b) , a Commissioner may make an order requiring that an application be made under section 23 or 43 .

(4) An order under this section does not have effect so as to require any person to contravene, or fail to comply with, an award or to commit an offence, or to do an act which, if the order had not been made, would render that person liable to any legal proceedings.”

Has the Commission power to issue an order following the handing down of the decision?

[30] It is my view that s 31(1) of the Act provides broad powers to settle this dispute, which the parties have agreed remains unresolved. The parties are not requesting that the Decision is re-opened, rather an order be issued to give effect to the Decision and settle the matter.

[31] As noted in the Decision, I am satisfied that the application by the Applicant to seek leave and seek orders to be issued subsequent to the Decision resulted from the inability of the matter to be settled. I concur with the Applicant that the Respondent has not given effect to the Decision which was clear through the evidence provided in the payslip of Mr Michael Watkins³, a NRSW.

[32] The broad statutory powers at s 31(1) of the Act enable:

“...that anything should be required to be done, or that any action required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened, that Commission may, by order in writing, direct that that thing is to be done or that action is to be taken.”

³ Payslip of Mr Michael Watkins dated 16 February 2022.

[33] I am of the view that the issuing of orders will settle the matter and, as no orders have been made to date, it is within jurisdiction and the exercise of power to make an order in writing. I concur with the Respondent that this is not an application for “further orders” as submitted by the Applicant.

[34] I decline to support the Applicant’s contentions that penalties should apply for a breach of the Award, pursuant to s 48 of the Act. I am satisfied the matter remains unresolved as agreed by the parties and once the orders are issued, the parties will be bound by the order.

[35] In making this decision I have considered that procedural fairness has been afforded to the parties and that it is in the public interest to make the order. The issues raised in the initial application have not been re-opened and there has been no requirement to reconsider the merits of the matter and the Decision has not been affected. Rather, I am re-exercising the powers provided in s 31(1) of the Act to settle this industrial dispute.

Conclusion

[36] Based on my reasons above, I grant the application to issue an order of the Commission reflecting the parties agreed form of words.

Order

[37] To give effect to the Decision, and pursuant to s 31(1) of the Act, I order that the Respondent pay NRSW, who are subject to the Award and the Agreement, and that are required to undertake unplanned work on public holidays:

- a) Ordinary hours for public holidays, according to the provisions of Part VI, clause 3 (a)(ii) of the Award - Holidays with Pay; and
- b) Double the normal rate of pay for all time worked according to clause 30(d) and (e)(ii)(2)(b) or subsequent replacement provision of the Agreement.


Neroli Ellis
Deputy President

Matter heard on the papers