



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Mosca v Minister administering the *State Service Act 2000* – Department of Health [2023] TASIC 4

PARTIES: Colin and Tracey Mosca (Applicants)

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: T14885 of 2022 and T14886 of 2022

HEARING DATE(S): Heard on the papers

HEARING LOCATION: Tasmanian Industrial Commission, Hobart

DATE REASONS ISSUED: 2 March 2023

MEMBER: President D J Barclay

CATCHWORDS: Application for compensation arising out of stand down without pay - submission by respondent that commission is without jurisdiction - whether arbitral or judicial question - held to be a judicial question in respect of which the commission is without power

REPRESENTATION:

**COLIN AND TRACEY MOSCA V MINISTER ADMINISTERING THE STATE
SERVICE ACT 2000 – DEPARTMENT OF HEALTH [2023] TASIC 4**

REASONS FOR DECISION

3 MARCH 2023

Application for compensation arising out of stand down without pay - submission by respondent that commission is without jurisdiction - whether arbitral or judicial question - held to be a judicial question in respect of which the commission is without power

DECISION

[1] The Applicants by separate application claim payment of salary for the period 1 November until 19 December 2021 said to be owing because the Respondent is in breach of the Ambulance Tasmania Award (the Award).

[2] As each application raises identical issues this decision relates to both applicants.

Background

[3] The Applicants were employed by the Respondent as intensive care paramedics. As a result of the COVID 19 epidemic employees of the Respondent were, by virtue of a health direction issued by the Director of Health¹, required to be vaccinated against COVID 19 in order to continue to provide their services to the Department of Health. The Applicants were employed to work for the Department of Health. It appears that the Applicants were not so vaccinated. As a result an Employment Direction No. 5 investigation was commenced by the Respondent.

[4] Prior to the commencement of the Employment Direction No.5 investigation taking place the applicants were stood down without pay because the health direction prevented the applicants from attending work and performing their duties as paramedics. The Applicants assert that the respondent had no legal right to stand down without pay. As a result the Applicant's bring this application claiming that the stand down was unlawful and that they should be paid for the period during which they were stood down.

The Applicant's Case

[5] The Applicants' case is relatively simple. They assert that the Award does not provide for the applicants being stood down without pay. They also assert that the Respondent failed to consult prior to the standing down as required by the Award. As a result, they submit, the Respondent is in breach of the Award and therefore they are entitled to be paid for the period that they were stood down. Finally, the applicants submit that the Respondent unilaterally varied the terms of the contract of employment.

The Respondent's Case

[6] The Respondent's case is not so simple. The Respondent submits that the "no work no pay" principle applies as a matter of contract. For the no work no pay principle to apply the contract between the parties cannot be inconsistent with the application of that principle. In

¹ Health Direction 7 (and subsequent directions issued from time to time)

that regard the Respondent submits that the Award provides for rates of salary but that there is no clause which provides for an employee's primary entitlement to salary or wages.

[7] If that regard I note clause 9 of the Award which provides:

...

(b) any employee (other than a casual employee) who is willing to work his or her normal ordinary hours of work, is entitled to be paid a full fortnight's salary at a rate fixed by this Award or relevant agreement...

[8] As it may be open to construe this provision as a provision providing for an employee's entitlement to salary and therefore inconsistent with the application of the no work no pay principle I asked the parties for further submissions in that regard.

[9] The Applicants submitted that they were at all relevant times willing to work therefore they are entitled to be paid. They reiterated the absence of consultation and the absence of any provision in any Award, Employment Direction or the State Service Act permitting the application of the no work no pay principle.

[10] The Respondent's submissions in this regard are to the effect that the clause does not provide for any entitlement to salary or wages, that the applicants were not willing to work as they had chosen not to be vaccinated, and that in any event the Commission has no power to declare that the applicants have a current enforceable legal right to money pursuant to the Award. I will consider these submissions below.

[11] In respect to consultation the Respondent submits that there was no breach of its obligation to consult as the stand down was not the action of the employer but rather was by operation of the public health direction.

[12] In respect to the assertion of a unilateral variation of the contract of employment the Respondent submits that no such variation occurred, and that the contract of employment was not performed because of the inability of the applicants to carry out their duties as a consequence of the public health direction.

Consideration

[13] I will consider the issue of jurisdiction first, as if I have no jurisdiction to deal with the matter all other issues fall away.

[14] The Respondent submits that I am being asked to exercise judicial power which, given that the commission is an administrative Tribunal I am unable to do. The Respondent in its written submissions amplifies the argument as follows:

"15. For the reasons given by President Barclay in Marope, the Commission cannot exercise judicial power. The Commission therefore cannot grant the Applicants the relief sought, being salary for the period of 1 November to 19 December 2021.

16. The Commission exercises arbitral power on a hearing of an industrial dispute under the IR Act. The Commission has accepted that it does not have judicial power in Marope and a number of subsequent cases. In those cases, the Commission referred to CFMEU v BHP Billiton Nickel West Pty Ltd and Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia in support of the proposition that the Commission may, as part of an exercise of arbitral power (in determining what the future rights of the parties should be) ascertain the existing rights of the parties (which

would otherwise be an exercise of judicial power). As Buchanan and Katzmann JJ put it in *Wagstaff Piling*:

Although [the Full Bench of Fair Work Australia] cannot exercise the judicial power of the Commonwealth, it is well established that a federal industrial tribunal, exercising powers of conciliation and arbitration, may legitimately form and act upon opinions about legal rights and obligations as a step in the exercise of its own functions and powers.

Those propositions are uncontentious.

17. In the present case, however, the relief sought by the Applicants does not require the exercise of any arbitral power by the Commission. The Applicants are not inviting the Commission to form an opinion about existing legal rights and obligations as a mere step in the arbitration of what rights and obligations should exist prospectively, but as a wholly retrospective exercise to declare and enforce what they contend are their presently existing rights.

18. That there can be no exercise of arbitral power is apparent from the Applicants' status as "former employee[s]". They were employed until 19 December 2021, when they each resigned from their employment. The present application does not fall within the circumstances identified at [12] of President Barclay's reasons in *Marope*".(Footnotes omitted).

[15] The Applicants submit that I am being asked to make findings to the effect that the Respondent is in breach of the relevant Award and that I have power to do so.

[16] It is necessary to consider the nature of the Applicant's application. The application has been made in the form of an Application for Hearing in Respect of Industrial Dispute pursuant to section 29 (1A) of the *Industrial Relations Act 1984* alleging a breach of an Award. The breach of the Award relates to a period of stand-down without pay between 1 November 2021 and 19 December 2021. The application seeks, in respect to Colin Mosca the sum of \$20,965 and in respect to Tracey Mosca the sum of \$9965. The applicants submit that the Respondent has no power to stand them down without pay and accordingly they are entitled to the sums claimed.

[17] In order to engage the Award the Applicants submit that the Respondent failed to consult with them prior to standing them down. The question is whether or not the application is in fact an application relating to the absence of consultation or whether it is really a question of whether or not the Respondent had a legal basis to stand the Applicants down without pay and that if they did not whether or not the applicants are entitled to the sums claimed.

[18] In my view, at its heart, the application is one which claims compensation in the sums specified on the basis that the Respondent had no legal right to stand down the Applicants without pay. Is this then a judicial question or is it an arbitral matter.

[19] In *Marope v MASSA*² I said the following:

"[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.

² T14766 of 2020 paragraphs 8 to 13

[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 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.

[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.”

[20] In that case the Applicant’s claim was for an amount in excess of \$500,000 for the consequences of an alleged failure to pay salary. The Applicant in that case had sought that the Commission instruct the Respondent to pay certain sums of money. It was obviously clear from that application that it was a claim for money arising out of a breach of the Award which was alleged to have occurred sometime prior to the application being lodged.

[21] In the present case the applicants say that as the Respondent had no legal basis to stand them down they are entitled to compensation. In my view I am being asked to determine that the applicants have a current enforceable legal right to the payment of money under the Award because either there was no legal basis for them to be stood down or because the Respondent failed to consult with the Applicants prior to the stand down. What is clear is that I am being asked to ascertain existing rights and obligations and I’m not being asked to ascertain what rights and obligations should exist between the parties. The factual matrix of the dispute relates to things in the past and no part of the resolution of that dispute engages what rights and obligations should exist between the parties.

[22] I conclude therefore that I am being asked to exercise judicial power. I am not permitted to do so and accordingly I have no jurisdiction to entertain this application.

[23] I should note that the Applicants are not left without a remedy. They are able to make a claim in a court of competent jurisdiction to seek damages in the sums specified for the alleged breach of the Award or for standing them down when there was no legal right to do so either pursuant to Award, Agreement or the common law.

[24] As a result of my findings I dismiss the application. I note that as I have no jurisdiction it is unnecessary to consider the question of consultation or the legality of the stand down. As I lack jurisdiction it would be inappropriate to say anything about those matters.



D J Barclay
President