TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974
s29(1) application for hearing of an industrial dispute

Australian Nursing and Midwifery Federation (Tasmanian Branch)

and

Marion Starosta
(T14144 of 2013)

and

Minister administering the State Service Act 2000 – Tasmanian Health Service/Formerly Department of Health and Human Services

PRESIDENT BARCLAY HOBART, 29 OCTOBER 2021

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

DECISION

[1] The Respondent, the Tasmanian Health Service, has made an application that the Applicants' case be dismissed for want of prosecution. That is, that the Application should be dismissed because the Applicants have not advanced their claim for a period of some 7 years and that the delay is excessive, unreasonable and prejudices the Respondent in its defence to the Application. Accordingly, the Respondent submits, the Application should be dismissed.

[2] In this application Marion Starosta has been added as an Applicant. The Application was originally made by the Australian Nursing and Midwifery Federation (Tasmanian Branch) (ANMF) on behalf of a number of Diabetes Nurse Educators in 2013. In 2014 Ms Starosta had brought her own application, however on 14 August 2017 that application was dismissed and Ms Starosta joined in this Application.

[3] In her submission's Ms Starosta notes that she contacted the Commission on 13 July 2021 asking to be added as an independent applicant to this Application as she felt the ANMF were not adequately representing her interests. Such an order was made unopposed on 15 July 2021.

The Law

[4] The Respondent relies on s 21(2)(c)(iv) of the *Industrial Relations Act 1984* (the Act) which relevantly provides:

> "Without prejudice to the generality of subsection (1), the Commission may, in relation to a matter before it –
>
> ... (c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –

... (iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;"

[5] It is clear that in appropriate cases the Commission has power to dismiss an application for want of prosecution as such an application invokes the power to dismiss "for any other reason".

[6] In its written submissions the Respondent identifies the considerations relevant to dismissal for want of prosecution as follows:

> "13. Dismissal of an application under s 21(2)(c)(iv), and the factors relevant to consideration, have been considered previously by the Commission in the matter of Brendon Nowak v J K Peddell & S E Peddell trading as Bing-I-Oysters T13833 of 2011. In this decision, President Abey considered relevant authorities regarding when it is appropriate for the Commission to exercise its discretion to dismiss an application for want of prosecution, and provided a summary of previous decisions of the New South Wales Industrial Relations Commission, the Supreme Court of Tasmania, and the Full Bench of the (former) Australian Industrial Relations Commission on the question.
>
> 14. These principles are nicely summarised by Neasey J in The Closer Settlement Board v Thomas [1982] as follows:
>
> > "The exercise of discretion in a summons of this kind is to be determined according to the overall justice of the matter, which depends upon all its facts and circumstances. The exercise of the court's discretion is not to be confined by fixed rules. The nature of this exercise of discretion does, however, require close consideration to be given to some of the same factors which are of importance in an application to extend time after the expiration of a statutory limitation period; namely the extent and quality of delay, whether primary responsibility for it lies with the party or his legal advisers, and the extent and nature of prejudice to one party or the other. (emphasis added).
>
> 15. The Full Bench decision of Betta Milk Co-op Society Limited trading as Betta Milk v Philip Tony Patterson referenced the observations of the House of Lords in Birkett v James, where it was said: "the power [to dismiss actions brought before the Court] should only be exercised where the Court is satisfied ... that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and ... that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action ...".
>
> 16. These previous authorities indicate that, while no rigid formulae should be adopted and each case should be considered on its own specific circumstances, the general factors to be considered for dismissing an application for want of prosecution are:
>
> (a) The length of the delay;
>
> (b) The reason for delay; and
>
> (c) Any potential prejudice or unfairness caused to the other party by the delay."

[7] Whilst I have an unfettered discretion in that there is no guidance given by the legislation as to how the discretion is to be exercised I agree that an application of this

type is to be determined by the overall justice of the matter. Further I agree that length of delay, reasons for delay and potential for prejudice or unfairness caused by the delay will inform the exercise of the discretion.

The Facts

[8] The Application was filed on 20 December 2013. It was part of a number of applications made to the Commission as a result of a new career structure which was introduced to Nurses and Midwives employed in the Tasmanian Public Sector. The career structure involved translation to new career structures and hence new classification levels and wage points.

[9] Significant disputation occurred as a result of the transition. Indeed some 31 applications were made to the Commission. Some of those applications involved many individuals. One application related to 89 positions.

[10] In my view it is important not to isolate this Application from all the other applications as it is relevant to consider the union Applicants situation generally when considering the issue of delay. Obviously the resources of the ANMF are finite (as indeed are the resources of the Department). All applications were being dealt with at the same time. I am prepared to take that into account as part of the overall factual matrix within which I should determine the application to dismiss for want of prosecution.

[11] In that regard the submission of the ANMF gives a summary of the events from 2014 until 2017 as follows:

> "13. When the transition to the new career structure was implemented the volume of applications was unexpected. While a number of matters settled (or were abandoned) many remained on foot.
>
> 14. The bulk of the Applications for review were lodged by, on on behalf of, members of the ANMF.
>
> 15. Since 2014 there have been several changes of ANMF employees with responsibility for the reclassification reviews. Unfortunately, this resulted in delays. The current ANMF employee returned to fulltime work with the ANMF in late 2015. Prior to 2016, this person worked on a very part-time basis and had no carriage of any disputes.
>
> 16. As the parties are aware these matters (particularly where multiple witnesses are involved) require many hours of preparation prior to commencing a hearing, and staffing constaints (within the ANMF) meant that progress was slow. There are, of course, other demands on the time of each of the parties. The following classification matters did proceed:
>
> > (i) A review in relation to Family Child Health members was prosecuted by the ANMF in 2013/2014 (T14097 of 2013) that decision was appealed (T14214 of 2014) with a decision of the full bench reported on 13 January 2015. It would appear that, pending the outcome of the Appeal, no further matters progressed during this time.
> >
> > (ii) In 2015 the ANMF sought that application T14245 of 2014 be referred to the full bench of the Tasmanian Industrial Commission asserting that several errors had arisen in the T14214 of 2014 appeal which would impact on any decision of a single Commissioner. Initially, by way of decision dated 10 June 2015, President Abey declined the request. The matter was later reconsidered by President Abey with additional submissions made and a

hearing held on 12 August 2015, a new decision (dated 28 September T14245 No 2) was issued allowing for a full bench to be allocated the matter. The matter ultimately settled by consent.

(iii) In November 2016, a hearing commenced in relation to T14211 of 2014, but the matter progressed to a conference in chambers and ultimately settled by consent.

(iv) On 28 and 29 of November 2016 two days of hearing occurred in Launceston (T14194 of 2014) with a decision (Commissioner Gay) handed down on 14 July 2017. The delay in the decision was due to problems with transcripts which, for technical reasons, were not provided until 19 April and 8 May 2017.

(v) On 9 and 15 February 2017 a hearing was held for a classification dispute (T14229 of 2014) which resulted in a decision of Deputy President Wells dated 19 May 2017."

17. In June 2017, the then Deputy President Nicole Wells asked the parties to participate in an 'informal discussion' for the purposes of trying to resolve some of the outstanding TCR matters. At that time there were 26 matters on the list. Some (as with the Diabetic Nurse Educators) were for groups of employees/members. One matter had been lodged by another health union (although ANMF represented the bulk of those seeking a reclassification as part of the same workplace). The first meeting occurred on 1 June 2017.

18. On 7 June 2017 the ANMF sent a survey monkey to all impacted members (including the Diabetes Nurse Educators) via email asking a range of questions including asking if they would be willing to consider an alternative proposal (as yet to be determined) to resolve the matter. A reminder SMS text message was sent on 13 of June 2017. Where no email or mobile was provided the individual member was contacted by phone. Not all persons on the list were still ANMF members.

19. As a result of the survey, and over a period of many months with considerable discussion between the ANMF/THS, a number of matters progressed with the following resolved: T14075 and T14077 of 2014; T14063 of 2014 using the 'alternative method' and a number of other groups/individuals decided to withdraw.

20. However, applications lodged by the Diabetic Nurse Educators and others on the list (circulated by the THS in their application to dismiss) remained 'live'.

21. Recently, follow up emails and discussions with members resulted in all but the Diabetic Nurse Educators deciding to withdraw from the various matters.

22. Meetings have been held (albeit infrequently and attended by different Educators and ANMF employees) to discuss the application by and with the Diabetic Nurse Educator group. The notice of intention by the THS to lodge the application to dismiss has assisted the group to focus and they wish to proceed.

23. The primary reason for the delay has been volume of work for the ANMF (not only in relation to the classification reviews) and, more recently, difficulty obtaining consensus from the Diabetic Nurse Educator group."

Length and explanation for delay

[12] It may be seen that steps (albeit not in respect to his particular application) were taken, including taking matters to hearing and appeal during this time. The matters related to the translation to the new career structure of nurses as does this Application.

[13] Further in June 2017 the Commission facilitated an alternative means of resolution by internal review. Several matters were resolved although not the Diabetes Nurse Educators matters. No doubt it took some time for those matters to be finalised.

[14] It may be seen therefore that the real delay when little or nothing was done in respect all the translation cases, including this one, commences around the end of 2017. The delay may therefore be categorised as a delay of some 3 years and 6 months (or thereabouts) prior to the Respondents Application to dismiss for want of prosecution.

[15] While I agree that the delay for this matter (other than being considered as part of the alternative means of resolution in June 2017) taken in isolation is some 7 years if one has regard to the context within which this Application has been made and the work done by the parties on other translation matters (including by the Respondent) the delay for which there is, on its face little or no explanation, is some 3 years and 6 months.

[16] To put it another way, I regard the work done by both sides on the other translation matters, the fact there were 31 Applications filed (and some 26 outstanding as June 2017[1]) and having regard to the resources available as amounting to a reasonable explanation for the delay until sometime after June 2017 when the alternative means of resolution were adopted and the nurses the subject of this application chose not to use that alternative means.

[17] That leaves a delay of some 3.5 years without an adequate explanation for that delay.

[18] I should say something about Ms Starosta. She says in her submissions that she was not offered the opportunity to take advantage of the alternative means of resolving the dispute. She further submits that she did not understand that she had any control over the pace of the proceedings. She did not believe she had any influence or ability to expedite the progression of her case. She agrees she did not contact the Commission in respect to her application. She further says that she was advised by the ANMF that it would be in her best interests to join in the group application (that is, this Application) in about 2017. I infer that from then she understood the ANMF were looking after her interests. Such an assumption is not unreasonable. One may ask the rhetorical question – otherwise why did the ANMF assume control of her case?

[19] Further, in respect to Ms Starosta I note she only became a party to these proceedings in 2021. As such there is no relevant delay on her part independent to the delay of the ANMF. Indeed she sought to become a party to the proceedings to protect her interests.

[1] Submissions of ANMF dated 20 August 2021 paragraph 17.

Prejudice

[20] The Respondent points to actual prejudice as a result of the delay. In its submission the prejudice is described thus:

> "24. The significant length of the delay causes undue prejudice and unfairness to the Respondent in the ability to appropriately establish a defence to the Application, due to the availability of relevant witnesses and the negative effect on memory.
>
> 25. Since the time the Application was filed with the Commission, there has been changes to management personnel within the Diabetes units.
>
> 26. The Nurse Unit Managers of each of the three units are no longer engaged in those positions. The current Nurse Unit Managers of two of the units (Hobart and Launceston) are part of the state-wide group and so are affected by the current application. This would create an obvious conflict of interest if they were to provide witness evidence in this Application.
>
> 27. While senior management figures do remain within the Agency, the point-in-time assessment being seven years ago and movement across different roles during this time would naturally result in a negative effect on memories.
>
> 28. This creates real and apparent prejudice to the Respondent in providing evidence regarding the scope and extent of the Diabetes Nurse Educators' duties at the time of translation.
>
> 29. The Applicants would not suffer prejudice to the same extent. While the length of time may impact memory for all parties involved, the members of the state-wide group would be in a position to provide personal evidence of their recollection of their role at the time of translation, which the Respondent may find difficult to dispute due to the change in relevant managers. It is likely that the Commission would be forced to prefer the personal recollections of the Applicants, to the detriment and prejudice of the Respondent."

[21] Ms Starosta points out that it is her understanding that the Nurse Unit Manager Ms Muskett is still available to give evidence. The Respondent also notes that senior management figures remain with the agency but notes the passage of time will affect memory. That, of course is common to both parties.

[22] Additionally the Respondent points out that two nurses affected by the Application are now Nurse Unit Managers and as a result they will have a conflict of interest. While that may be correct I am entitled to expect that they will, if called to give evidence, be truthful. As a result the conflict should be more apparent than real.

[23] The Respondent also submits that the prejudice to the Applicants will be less. That of course overlooks the prejudice that the Application will be terminated summarily locking them out of a remedy without having had a chance to advance their case.

Other Matters

[24] The ANMF point out that the Respondent did nothing to advance the matter. That is explicable, until after June 2017, on the same basis I have found that the Applicants have a reasonable explanation for the delay until shortly after June 2017. Things were moving forward, even though this particular application was not one of them. It is not surprising that the Respondent did not complain about any delay until after 2017 when matters were no longer being advanced.

[25] However it is clear that the Respondent did not try to advance the matter themselves except by bringing this application to dismiss for want of prosecution after 2017. The ANMF relies on *Khavounitis v NRMA Insurance Limited*[2] for the contention that the conduct of the party applying for dismissal for want of prosecution may be relevant. In that case Underwood J (as he then was) set out the law as follows:

> "23 The discretion that has to be exercised is not expressly fettered, but must be exercised in accordance with principles that have been developed by the common law. See Norbis v Norbis [1986] HCA 17; (1986) 161 CLR 513. In Tasmania, those principles are authoritatively set out in the Closer Settlement Board v Thomas [1982] Tas R 179. In that case, Neasey J referred with approval at 185 to Witten v Lombard Australia Ltd (1968) WN (Pt1) NSW 405 and Stollznow v Calvert [1980] 2 NSWLR 149 and said at 186:
>
> > "The exercise of discretion in a summons of this kind is to be determined according to the overall justice of the matter, which depends upon all its facts and circumstances. The exercise of the court's discretion is not to be confined by fixed rules. The nature of this exercise of discretion does, however, require close consideration to be given to some of the same factors which are of importance in an application to extend time after the expiration of a statutory limitation period; namely the extent and quality of delay, whether primary responsibility for it lies with the party or his legal advisers, and the extent and nature of prejudice to one party or the other. In particular, as it is relevant in this case, I agree with Moffitt P that according to circumstances, although consideration of the plaintiff's delay and the reasons for it are by the nature of the case of primary importance, inaction or delay on the part of the defendant may be relevant."
>
> 24 At 194, Cosgrove J also referred with approval to Stollznow v Calvert and said at 195:
>
> > "...a litigant who applies for the dismissal for want of prosecution of his opponent's action (or counter-claim) should be able to assert and establish at least -
> >
> > (a) that his opponent has delayed for a significantly long time;
> >
> > (b) that, viewed against the background of the whole matter, including the conduct of both the applicant and his opponent, that delay is inexcusable; and
> >
> > (c) that in all the circumstances it would be unjust to the applicant to allow the action (or counter-claim) to proceed and that the justice of the case requires that the action (or counter-claim) be dismissed."
>
> 25 The above principles have since been applied at first instance on many occasions. See, eg, W Coogan & Co (Hobart) Pty Ltd v Reid, Lawless, Thompson and Yapp 48/1992; Gutteridge Haskins & Davey Pty Ltd v Seaview Properties Pty Ltd & Ors B31/1990; Barrow & Anor v Kearney B5/1995; Wing v Stewart B11/1995.
>
> 26 The same broad approach has been taken in all other States. See Masel v Transport Industries Insurance Co Ltd & Others [1995] VicRp 59; [1995] 2 VR 328, a recent case in which the exercise of the discretion in other States is surveyed.

[2] [1999] TASSC 2

27 In considering the justice of the case, regard must now also be had to the provisions of the Rules of Court, O32A. Neasey J referred to the provisions of this Order as then enacted in the Closer Settlement Board v Thomas (supra) and said, at 188 - 189:

> "In deciding such an application, however, the nature and content of our re-trial rules is certainly a relevant consideration. The indicated remedy for a defendant where the plaintiff delays in setting down is not a summons to dismiss; rather it is that he should take the next step himself, which he has as much opportunity as the plaintiff to do. A defendant's right to 'let the sleeping dog lie', to which many of the cases elsewhere refer, still exists here, but where the defendant seeks to avail himself of it and to have an action dismissed for want of prosecution by the plaintiff, the defendant's own conduct in relation to the trial rules will in my view be under review as well as the plaintiff's."

28 Almost two decades have passed since those words were written and in that period of time the concept of court management of the pre-trial conduct of proceedings has become entrenched in the philosophy and practice of litigation in all Australian jurisdictions. The principal aims of case management are the reduction of delay and expense in the achievement of a resolution of litigation. At any stage of the proceedings, a party thereto is entitled to come to the court with a complaint of delay and, if appropriate, the court will step in and make pre-trial orders to manage the conduct of those proceedings to eliminate that delay. The sanction for failure to comply with such orders is the striking out of the pleadings of the defaulting party. In my view, an applicant who complains of delay and asks for a strike out order but has not sought pre-trial orders pursuant to O32A, needs to explain why he or she did not have recourse to the case management offered by O32A in an attempt to eliminate that delay at an early stage. Unexplained failure to invoke case management to eliminate delay may, as it does in this case, lead to the inference that no objection was taken to the delay. Although an applicant is entitled to "let sleeping dogs lie", the case for resultant prejudice is much harder to make out when such prejudice could have been avoided by a simple application for directions."

There is a point of distinction from *Khavounitis* immediately apparent and that is that the Commission does not have formal case management. However s 21(2)(n) of the Act provides that the Commissions may:

(n) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of that matter.

As such, had the Respondent been concerned about the delay it could have sought directions to facilitate the matter being expediently and expeditiously heard. It did not do so. It is not without significance that the Commission provided assistance to facilitate the alternative means of resolution in 2017. It would have been obvious to the parties that they could have sought assistance to have the matter brought on for hearing should the delay have been exercising their minds. That is a matter which I take into account in the overall assessment of the justice of the case."

[26] As I have noted there is a period of some 3.5 years delay which is inadequately explained. The prejudice to which the Respondent points is real, however the important witnesses appear to still be available. While memories fade both parties may be affected. While the delay is long I regard the prejudice to the Applicants that their proceedings will be summarily terminated as outweighing the prejudice to the Respondent. In my opinion the Respondent will be able to properly present a defence to the Application if that is what it chooses to do. I also note that it is relevant that the ANMF is looking after the interests

of a number of nurses. It may be appropriate in those circumstances (of course depending on the particular facts of the case), where the proceeding are in fact representative proceedings to inquire of the Applicant what is intended with finalising the matters before applying for summary dismissal. It is unlike a case brought by an individual who is looking after their own interests and may (again depending on the individual facts of each case) be assumed to have decided, for example not to advance their matter. However it will not always be the case that an applicant for dismissal for want of prosecution should not make inquire of an individual applicant before proceeding. Alternatively of course the Respondent could have sought directions to advance the matter, especially where the proceedings are representative in nature and the impact of the application to dismiss may be far reaching affecting a large number of applicants all of whom are likely to be impacted differently by such an application.

[27] Had the issue of availability of witnesses or the consequences of fading memory been an issue an application could have been made for directions to advance the matter. That of course is not decisive. However I find that the overall justice of the case requires that the Respondents application to dismiss the proceedings for want of prosecution be dismissed.

[28] Finally I note that as Ms Starosta has only personally been made a party this year it cannot be said, on the evidence before me that she is guilty of any relevant delay.

Outcome

[29] The Application for dismissal for want of prosecution is dismissed. I will schedule the matter for a directions hearing in due course to make it ready for arbitration.

D J Barclay
President

Heard on papers