TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29(1) application for hearing of an industrial dispute

AUSTRALIAN EDUCATION UNION, TASMANIAN BRANCH
(T13665 of 2010)
(T13666 of 2010)

and

MINISTER ADMINISTERING THE STATE SERVICES ACT 2000 (TASMANIAN POLYTECHNIC AND TASMANIAN ACADEMY)

COMMISSIONER JP McALPINE Hobart, 7 July 2010

Industrial dispute - breach of award - application dismissed

REASONS FOR DECISION

[1] On 19 April 2010, the Australian Education Union, Tasmanian Branch, (the Union) applied to the President, pursuant to Section 29(1) of the *Industrial Relations Act 1984* (the Act), for a hearing before a Commissioner in respect of an industrial dispute with the Minister Administering the State Services Act 2000 (MASSA), the respondent, arising out of an alleged breach of award or registered agreement.

[2] The matter was listed for hearing at the Edward Braddon Commonwealth Law Courts Building, Hobart on Friday 30 April 2010 and continued on Wednesday 12 May 2010. On 30 April 2010 Mr M Upston appeared for the Union with Mr G Brown while Mr P Baker appeared for MASSA with Ms J Fitton and Mr T Kleyn. On 12 May 2010 Mr M Watson also appeared for MASSA.

[3] The applicant sought the two matters be heard jointly, the respondent offered no objection, the Commission acceded.

[4] The disputes arose as a result of the Agency withholding monies from the wages of those members of the Union in the Polytechnic and Academy systems who absented themselves from work without approval. The employees had participated in politically motivated rallies in protest against recently introduced changes to the post year 10 education system.

BACKGROUND

[5] The Tasmania Tomorrow post year 10 education initiatives came into effect in January 2009. On 2 January 2009, this Commission approved consent applications by the Union endorsed by MASSA for the creation of a new award, Post Year 10 Teaching Staff Award, and the Post Year 10 Teaching Staff Industrial Agreement. Both these documents reflected

the Tasmania Tomorrow structure incorporating the Tasmanian Academy, the Tasmanian Polytechnic and the Tasmanian Skills Institute. A further application by the Union, endorsed by MASSA to rescind the Tasmanian TAFE Teacher Award was approved at the same time.

[6] During the preceding year, 2008, and subsequently, elements within the Union had been actively opposed to the new direction of post year 10 education. However, during this same period the AEU executive participated with the Agency to rectify problems with the Post Year 10 implementation. The elements referred to, namely the Secondary Colleges Committee of Management and the TAFE executive, were at liberty, under the AEU rules, to initiate their own industrial action independent of the AEU Executive. I refer to these parties collectively as the PY10 Faction.

[7] Early in 2010 the then State Government announced the date of the forthcoming state parliamentary election. The PY10 Faction, under the auspices of the Union, agitated against the incumbent government and sought a reversal of the Tasmania Tomorrow initiatives. The PY10 Faction signalled the intent to conduct political rallies in the form of stop work meetings on 24, 25 and 26 February 2010 in the lead up to the state election voting day. The intention of the political rallies, in part, was to effect closure of Academy and Polytechnic campuses on the afternoons of the different rallies. The PY10 Faction had also called for further political demonstrations in the form of a "Day of Action" on 16 March, immediately prior to the state election voting day. The Day of Action was subsequently cancelled in response, it was reported, to intervention by the leader of one of the opposition parties.

[8] On 22 February 2010 at the request of MASSA, a hearing was convened before this Commission in respect of an industrial dispute with the Union. MASSA sought an order from the Commission directing Union members not to withdraw their labour on the days nominated by the PY10 Faction. The Union argued, through its State Manager, that the proposed action was totally politically driven and not an industrial matter.

[9] In a decision, verbally delivered on 23 February 2010, the Commission deemed, in this particular matter, it did not have the power to direct the Union members not to withdraw their labour and did not issue the order sought by the Minister. However the Commission saw that initiating industrial action for political purposes was not legitimate and strongly urged the Union to reconsider its proposed action. The Union chose to disregard the Commission's recommendations.

[10] Subsequently political rallies were held, orchestrated by the PY10 Faction with the support of the Union. The management of both the Polytechnic and the Academy saw fit to not pay employees for the time they absented themselves from work without approval.

[11] Both parties referred to the political rallies in their argument as "stop work meetings". I will respect their terminology while presenting their positions in the text.

APPLICANT'S POSITION

[12] Mr Upston, for the applicant, asserted at the outset that salary "deductions" were wrongful (P2, L30). He argued the employer had no power to make deductions to an employee's salary without written permission.

[13] He argued the Agency was in breach of both the Teaching Service (Tasmanian Public Sector) Award 2009 (the Award) and the Post Year 10 Teaching Staff Industrial Agreement

2009 (the Agreement). He said the respondent also failed to comply with the *State Service Act 2000* (the SSA), its regulations, the Financial Management Audit Act (the FMAA) and its regulations.

[14] Mr Upston argued that the respondent could not rely on SSA regulation 13, which states at (1):

> "*An employee is not to be absent from duty, without leave, unless reasonable cause for that absence is shown."*

but ignore the requirements of Commissioners Direction No5 (CD5), the SSA and the FMAA. He said the respondent had not followed the procedures expressed in CD5 with regard to investigating allegations of misconduct foisted on the 157 employees in question. Further he said SSA regulation 13 does not allow for the deduction of salary. He said should that power indeed exist the application must adhere to the common law of natural justice.

[15] He cited Exhibit A1, an email from the CEO of the Tasmanian Academy, Mr Mike Brakey, to all staff warning the potential for loss of salary:

> *"Should the action go ahead it is likely that staff attending the meetings will not be paid for the time when they are not fulfilling their employment obligations."* [1]

[16] In an email to staff from Ms Belinda McLennan the CEO of the Tasmanian Polytechnic (Exhibit R4) expressed a similar intent:

> *"… employees who do not meet their employment obligations due to the planned stop work meetings and day of action will not be paid for the duration of their absence."*

[17] Mr Upston cited an email from Mr Blakey dated 23 February 2010, Exhibit A2, which Mr Upston argued only referred to *"misconduct"* and not stand downs or deductions of pay. However in the same document Mr Blakey cited correspondence from the AEU State Manager which acknowledged the situation. The State Manager wrote to Union members:

> *"We have become aware that the employer has warned employees that their pay will be docked should they participate in the proposed stop work meetings and Day of Action. Such withholding of pay under these circumstances is not unusual and is seen to be legitimate."*

[18] Political rallies were held on 24, 25 and 26 February 2010 and scheduled to run from 1.30pm. On 24 March 2010 those employees who were thought to have absented themselves from work without approval were again warned that they would not be paid for the time of their absence and that this would be reflected in their pay on the following pay day. This notification from both the Polytechnic management and the Academy management (Exhibits A5 and A6) also sought to establish which of those employees who absented themselves from work had done so legitimately.

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[1] Exhibit A1 email from the CEO of the Tasmanian Academy, Mr Mike Brakey

[19] Mr Upston asserted that the pay deductions were arbitrary, some one hour, some one and a half hours. He also argued that there was no suggestion that the employees leaving the various campuses imposed a cost on the organisations. He submitted an email from an employee to Ms McLennan expressing that particular employee's indignation at having his pay docked (Exhibit A7) and an email in similar vein which was sent to Mr Greg Brown, Secondary Colleges President (Exhibit A8).

[20] Mr Upston argued that the employees were given no advice as to what authority was relied upon which legitimised deductions to pays. He said that these employees have significant autonomy over their work, and that there was flexibility built in to the hours of work enabling them to meet their obligations to the employer in the event they took time off. He also argued at p8, L40:

> *"… it is not open to an employer to deprive an employee, who was ready and willing to work, of award entitlements to wages, by declining to provide an employee with work."*

[21] The Commission confirmed that he was indeed referring to the employees who had consciously absented themselves from work without approval.

[22] He argued that some of the employees who had salary deducted were not scheduled to work on the nominated day, others had used their lunch hour and yet others could not work because the employer had cancelled classes. He also said that a number of employees could not fulfil their duties through no fault of their own because their classrooms were not accessible. He rejected the Agencies' response that *"No campus was closed..."* pa5, L5[2].

[23] He pointed out that the employees who absented themselves were not offered the opportunity to take time off in lieu (TOIL) or apply for annual leave or offered other alternatives. He also alleged that the deductions were made on higher pay rates to those in operation in February as a result of a pay increase in the interim.

[24] He said that the ordinary hours of work for these particular employees are to be achieved between 7.45am and 5pm. The employees' commitment is 35 hours per week. He said that the employees had autonomy, were professionals and were trusted. He stated that employees can come and go as they please provided they achieve 35 hours in any one week and that they do not need permission to go off site. He said there is no sign-on sign-off register. He conceded the employer did have a duty of care to know where its employees were during working hours.

[25] He said the Agencies asked the employees to advise their line manager if they proposed to attend the meetings. He conceded that the Agencies went to *"some length to find out who attended the meetings – it was less than 10 per cent of the total workforce."* (P2, L35)

[26] Mr Upston cited the matter AWU v BlueScope Steel Ltd [2007] (Bluescope Steel) (Exhibit A10) with respect to the usefulness of stop work meetings. At pa3, L5, he paraphrased Connor C thus:

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[2] pa refers to page numbers of transcript from 12 May 2010

> "*I would have thought that there would be a need for management to permit some forum for employees to discuss matters of mutual interest collectively, albeit not to take any industrial action, and not to extend, for any excessive length of time, provided always that there was no unnecessary disruption of work or that the employees abused the process. Often the most effective way for employees, and the least inconvenient course of action for the employer is for the employees to communicate through brief stop work meetings, and it is, after all, standard practice for any trade Union to conduct its affairs in that manner. But I would expect that the employees would attempt to make sure that the employees would raise the matter with management first, and arrange for such meetings to be convened at times when it would cause the least amount of inconvenience."*

[27] Mr Upston cited examples of employees who were *"too busy"* to read their emails, let alone inform management whether they had attended the stop work meeting or not. He argued that the memoranda (Exhibit A5 and A6) were not genuine because the timeframe was too short for salaries to be readjusted.

[28] He made the observation at pa6,L5 that a difference can be discerned between the refusal to work as directed, of employees who are under constant direction, and the refusal of teachers to work who are allowed a considerable degree of autonomy.

[29] Although he did not cite them, Mr Upston referred to three authorities:

> Commissioner of Police New South Wales (225)
> Annetts v McCann (1990)
> and Kiora v Minister for Immigration (1985)

which, he said, support his position that procedural fairness must be adhered to when a *"quasi penalty"* is imposed. He said *"None of the affected employees had any chance to persuade the agency."* pa7, L5.

[30] Mr Upston said he was not sure if the employer had activated s50A, Stand Down Provision, of the Act. He referred to Part 6 of the SSA Regulations, Suspension, where it stipulates the process to be followed in the case of suspension with or without pay. He argued the employer had not adhered to such procedures.

[31] He introduced an authority, Bruck Textiles v Textiles, Clothing and Footwear Union of Australia 2002 (Exhibit A14) (Bruck). This authority suggests that employers do not have a *"right"* to stand down employees without pay. Mr Upston went on to argue that should the employees have been stood down their pay should have been docked from the relevant pay period, not later as was the case in the instant matter. He also argued that the work obligations of the affected employees were conducted during ordinary working hours, **albeit not at the scheduled time** (my emphasis).

[32] Mr Upston also relied on the authority, United Firefighters' Union of Australia v Metropolitan Fire Brigades Board (UFU 1998) (Exhibits R2 and A15) which refers to Rogers J's decision in Csomore v Public Service Board of New South Wales (1987) 10 NSWLR 587 (Exhibit R2) (Csomore) (P12 at 21):

"that a statute or award is not to be construed as taking away the employer's right, acknowledged by the Common Law, to withhold payment of wages for periods of non-performance of duty, unless the language of the Award or other statutory instrument intractably compels such a construction."

[33] He said even if there is a right to withhold payment there is no right to deduct from salary without approval of the employee. He cited exhibit R2 Csomore at p598 F:

> *"Attendance by an employed person at the beach, instead of his workplace, for a week, will hardly qualify for an obligation to pay him pursuant to the section. The right of the employer is not a right to deduct or a right of set-off. It is the right to deny payment on non-fulfilment by the other party of the obligation which makes the weekly or fortnightly salary payable."*

[34] Mr Upston further argued that Csomore supported his position that deducting wages some four weeks after the fact was impermissible. He cited the Award Part III clause 5 Payment of Wages:

> *"(b) For the purpose of this clause, wages due to an employee: are to be paid and calculated on a fortnightly basis;*
>
> *...*
>
> *(d) The employer shall not deduct from wages due to an employee any moneys, unless it is authorised in writing by the employee."*

[35] Mr Upston cited the authority Welbourne and Others v Australian Post Commission, Supreme Court of Victoria 1983 (Welbourne). This authority deals with employees who have introduced work bans, but continued limited work, and where the employer refused to pay wages until the full range of duties were undertaken. In summary Fullagar J deemed that should the employer take the benefit of the work actually done he is liable for the payment of wages. Further Fullgar J argued that since the employer chose not to rescind the contract of employment, the only course open to him was to seek damages for loss incurred.

[36] Mr Upston argued that there was no absolute right for an employer to make deductions from salary. He observed that none of the cases he had relied upon dealt with deductions, but rather non payment or withholding wages. He further argued that there is no authority to deduct from wages *"some four weeks after a relevant event. Wages are payable for work done in the relevant period."* He argued that the deductions made on the 31 March pay day were a breach of the award since the pay day relevant to the action taken by the employees was 3 March.

[37] He cited the Act at s85 (1):

> *"Any provision of an award or registered agreement that is inconsistent with the provision of a contract of service prevails over the latter provision to the extent of that inconsistency."*

[38] Mr Upston argued his position was that compulsory attendance at a campus at a particular time without instructions to perform specific work is not a reasonable requirement.

He insisted that the employees in question had completed their required 70 hours over the fortnight.

[39] He cited the case of Australian Bank Employees Union v the National Australia Bank (1989) (ABEU) (Exhibit A17). In this matter the employees applied work bans. They were informed that unless they exercised the whole range of duties they would not be allocated any work, nor would they be paid. The employees returned to their place of work and continued to perform their normal tasks excluding those affected by work bans.

> *"At least where there is substantial performance, it must be doubtful whether the employer can withhold salary completely during that period when the employee is working… And where employment is covered by an award, an employer cannot deprive an employee of the entitlement to wages by declining to provide that employee with work…"*

[40] Mr Upston referred to Exhibit A15, the UFU 1998 case which referred to the Gapes v Commercial Bank of Australia (Exhibit A20) (Gapes). He cited the following at pp6&7, P11 of the authority:

> *"Where there is an award applicable to a contract of employment, it is necessary to ascertain that the award does provide expressly or implied about payment of remuneration.*
>
> *…*
>
> *Accordingly, there being a state of employment to which this award is applicable the obligation to pay salary as and when provided therein is not conditional on work performance.*
>
> *…*
>
> *Once there is a contract of employment of such a nature that in terms of the award, are applicable to it, then so far as the award speaks, the terms of the award must be obeyed."*

[41] He reiterated in the instant matter the remedy open to the employer would be to seek damages.

[42] Mr Upston cited s38 of the Act with respect to the award governing pay and payments:

> *"An award has effect according to its terms and, unless and to the extent that those terms expressly provide otherwise, the award extends to and binds-*
>
> *…*
>
> *(b) in the case of an award referred to in section 34-*
>
> *(i) all State employees employed in positions or classifications mentioned in the award; and*
>
> *(ii) all controlling authorities employing those State employees*

and operates throughout Tasmania."

[43] He also cited s61M of the Act with respect to the effect of a registered enterprise agreement. It should be noted that the agreement between the Union and MASSA is in fact an Industrial Agreement, not an enterprise agreement.

[44] He cited Visscher v the Honourable President Justice Giudice, (2009) (Visscher) (Exhibit A22) where he argued that the decision upheld that an award and the agreement stemming from that award subordinate any general law [para 14 of the authority].

[45] Mr Upston, in the same vein, cited Clark v Chief of Defence Force (1999) (Exhibit A23). In this matter an employee sought and was granted leave without pay, but for pertinent reasons sought to have the leave rescinded and to return to duties. This request was denied although the applicant was willing and able to resume his duties. The finding of Madwick J was in favour of the applicant in that he was willing and able to resume his duties but was denied the opportunity.

[46] Mr Upston argued that the FMAA precludes the right of the employer to deduct salary from an employee where he believes that employee had not rendered the service appropriate to the payment. He further argued that the award and the agreement make it *"impossible"* for an employer to disentitle an employee to salary during a period where that employee continued to provide a service.

[47] He cited the authorities of Secretary, Department of Health and Human Services v Beveridge (2004) (Exhibit A28) [NB in the transcript the exhibit was misnumbered A27] and Cookson v Beveridge(2003) (Exhibit A29) as well as Bennett v Commonwealth (1980) (Exhibit A30), promoting the requirement to follow the dictate of the State Service Code of Conduct (SSCC) and Commissioners Directions in investigating breaches of the said code. Mr Upston put his position as he saw it, the Act was not applied therefore it follows the Agency's actions were unauthorised.

[48] Mr Upston cited s59 and s61 of the FMAA (Exhibit A32) as an *"integral part of the regime for the recovery of…Overpayments of salary."* (transcript pa25, L 35).

[49] Mr Upston concluded by seeking a decision on the lawfulness of the deduction. He also conceded that *"…if the pay is withheld in that pay week then I may not contest." (ie. had the deduction from pay occurred on the pay day immediately following the absences,* my clarification*)*

[50] An argument was put forward by the applicant alleging a number of employees had monies deducted from their salary despite having legitimate reasons for not being at their place of work during the stop work meetings. An example was Mr Greg Brown, who had monies withheld as a result of not being in attendance at the Elizabeth campus of the Polytechnic during the stop work meeting in Hobart. Mr Brown was a significant personality in both the political campaign and subsequent industrial action. He asserted that on the day of the stop work meeting in Hobart he was in fact working for the AEU. He asserted he is employed two days per week with the AEU and three by the Agency. On applying to the Agency and declaring his situation monies for the unpaid hours were reimbursed. Mr Brown consequently suffered no loss.

[51] Mr Upston argued that the only power an employer has to recover anything from an employee was to apply the FMAA in recovery of overpayment of salary or to initiate misconduct proceedings. He also noted in the case of misconduct it is for the State Service Commissioner to ascertain the extent of misconduct not the TIC.

FOR THE RESPONDENT

[52] Mr Baker for the respondent said at, p11, L45, their position was that

> *"… the employee has an obligation to remain at work – during the hours of work – unless that employee has a specific direction or permission to leave the place of employment…."*

[53] He cited SSA regulation 13(1) with regard to unapproved absenteeism without reasonable cause. Further he cited the SSA, s9(2) State Service Code of Conduct which states:

> *"An employee must act with care and diligence in the course of State Service employment".*

[54] Mr Baker cited Mr Brown and "others" who forewarned of wages being docked. He also referred to Exhibits A1, 2, 5 and 6 illustrating the lengths to which the Polytechnic and Academy had gone to ensure that staff were aware of the consequence of their action with respect to not being paid for the hours they were absent from work.

[55] Mr Baker confirmed that a number of employees had money for unpaid hours reimbursed once it was proven there were legitimate reasons for not being in attendance on the days in question. He argued against Mr Upston's declaration that the employees in question were *"willing and able"* to undertake work. He rejected Mr Upston's justification that classes had been cancelled and therefore the employees could not perform their normal work. He asserted that the campuses had been thrown into confusion by the actions of the employees and the cancellation of some classes did not abrogate the employee's obligation to attend work.

[56] He further stressed that deductions were not made from salaries, but that there was *"non payment of salary for time not worked."* He argued that one cannot deduct something that is not earned. He cited the authority Csomore (Exhibit R2) where, he said, it was found an employer has the right to deny payment on the non-fulfilment of an obligation which makes a periodic salary payable. In further support of this position he cited a Federal Court matter before Ryan J with regard to an AIRC decision UFU 1998 (Exhibit R2). His honour cited a matter, Electricity Commission of NSW v Federated Engine Drivers and Firemen Association of Australasia (NSW) 1975:

> *"Cases abound in this commission and elsewhere, which state categorically, that in order to be entitled to payment of a wage which the terms of employment prescribe, an employee must be ready willing and able to perform in accordance with the lawful and reasonable direction of the employer, the service for which he is contracted. And any failure on his part to do just that, in itself, and for so long as the failure continues, disentitles him to such payment…It is the employee, whose own action, disentitles him to payment for the period that the dispute remains."*

[57] Mr Kleyn, also for the respondent, said that of approximately 2000 employees in the PY10 systems some 157 were not paid for the hours in question.

[58] Mr Baker asserted the applicant's argument would be better addressed under the SSA s50 Review of Actions which states:

> *"(1) Subject to subsections (2) and (3), an employee is entitled to make application to the Commissioner for a review, in accordance with the Commissioner's Directions-*
>
> *…*
>
> *(b) of any other State Service action that relates to his or her employment in the State Service."*

[59] Mr Baker cited a number of emails from a Mr Roland Fidao who signed himself AEU Rep Mt Nelson. (Exhibit R1). The emails are in response to the request by both management of the Academy and the Polytechnic for those intending to take industrial action to forewarn their team leaders to enable safe management of the institutions with reduced staffing.

[60] An email dated 18 February 2010, 5:18PM urges the recipients to:

> *"…hold off giving advance notice…."*

[61] Mr Fidao also advises;

> *"Giving notice makes it easier for pay to be docked (a move I am advised is unlikely….)"*

[62] An email dated 18 February 2010, 8:00PM Mr Fidao opined:

> *"Without knowing who is attending, <u>cancellation of all campus activities</u> will be the only option in line with duty of care."*

[63] He also directed:

> *"Please vacate the campus after 1pm whether attending or not…."*

[64] A further email from Mr Fidao to numerous employees, dated 19 February 2010, 11:51AM in which he asserts that the attached information from Chris Lane (State Manager for the AEU) *"supports what I told staff earlier."*

[65] He cited the following:

> *"<u>No-one should divulge their intentions about attending the stop work meeting, members or non members</u>"*

[66] The gist of the emails, Mr Baker argued was to frustrate the orderly management of the various campuses during the period of industrial action.

[67] He made the observation, that despite endeavours of the Union, only 136 employees out of 930 in the two Hobart campuses turned up for the stop work meetings. He drew the conclusion that the proposed "Day of Action" was cancelled because of the lack of participation in the mid week stop work meetings.

[68] He concurred with Mr Upston that the employees in this matter are employed within the terms of the SSA. These employees, he said are subject to the State Service Principles, which amongst other directives states at 7 (1)(a):

> *"The State Service is apolitical, performing its functions in an impartial, ethical and professional manner."*

[69] He also cited the State Service Code of Conduct states at 9(1):

> *"The employee must behave honestly and with integrity in the course of the State Service employment"*
>
> and at 9(2):
>
> *"The Employee must act with care and diligence in the course of their State Service employment."*

[70] In citing the above Mr Baker posed a rhetorical question at pa34, L35:

> *"…whether or not standing on the top of Mount Nelson with a banner, advocating a return to the TAFE College, indicating the ALP last, is acting in apolitical nature* (sic) *or indeed seeking to shut down colleges for an afternoon while attending a one hour stop work meeting is…attending to your duties in a professional manner…I'm not too sure wanting to shut down the colleges for an afternoon is acting with due care and diligence."*

[71] He argued further that asking an employee to remain at work was a reasonable request and consistent with SSA clause 9(6), the Code of Conduct:

> *"An employee must comply with…any lawful and reasonable direction given by a person having the authority…."*

[72] He said further that running a political campaign against the government which is their employer was inconsistent with SSA 9(13), the Code of Conduct, which states:

> *"An employee, while acting in the course of State Service employment, must behave in a way that upholds the state service principles."*

[73] Mr Baker argued that Mr Upston's intent of raising the issue of repudiation of contract because the employees did not observe the SSA regulation s13(1) was dependent on the aggrieved party accepting the action as such. He cited Visscher (Exhibit A22) to illustrate his point. He said in the instant matter the repudiation of contract had not been relied upon by the respondent.

[74] In response to Mr Upston's argument that the employees were not afforded the opportunity to take TOIL for the time they were absent, Mr Baker cited s15.3 of the Agreement which stipulates that TOIL can only be taken in lieu of overtime worked and that it must be by consent of the agency. It cannot, he said, be taken for working ordinary hours worked within the spread of ordinary hours. A communiqué was sent by Ms Millis (Exhibit R4) on 24 February 2010 to the senior staff in both organisations, specifically directing them to ensure employees in their areas were aware of the conditions under which TOIL may be granted.

[75] Mr Baker acknowledged the SSA Regulations Part 2, clause 7(2):

> *"**(2)** No deduction is to be made from the salary of an officer or employee except as provided by these regulations, an award or by any Act regulating contributions to any superannuation fund."*
>
> and Part III s5 (d) of the Award which states:
>
> *"The employer shall now not deduct wages due to an employee for the monies, unless it is authorised in writing by the employee"*

[76] He cited Csomore at pg 598(E):

> *"…The fact of employment, of itself, does ground entitlement in the payment. Attendance by an employed person at a beach instead of a workplace for a week would hardly qualify for an obligation to pay him, pursuant to the section…The right of the employer is not a right to deduct or a right to set off. It is a right to deny payment on the non-fulfilment by the party of the obligation, which makes for weekly of fortnightly salary payable."*

[77] He also said of Csomore that by allowing the employees to remain at work although not fulfilling their obligations and despite the breach accepting the contract of employment continued, it was not open to the employer to then "dock" their salaries. He noted in the decision Rogers J referred to a decision by Professor Coote, NZULR179, at p595 (D) of the decision. Professor Coote adjudged:

> *"The employee loses his right to wages, not because the contract has ended, but because in failing to earn them, he failed to fulfil the conditions precedent to them being payable."*

[78] He referred to s49 of the Act at (4):

> *"**(4)** An employee who is subject to an award or a registered agreement is entitled to be paid in respect of any week if –*
>
> ***…***
>
> ***(b)** the employee was ready and willing to work during those ordinary working hours in that week.*

[79] Mr Baker argued that the law quoted by Mr Upston and cited in the various authorities was incorrectly interpreted by him. He initially addressed Gapes (Exhibit R2) where he asserted that the bank had accepted that the applicant had continued to perform his role, in part. The finding was that the award expressly provided for unconditional payment of an annual salary unless the applicant was absent from duty without permission of the bank. This, he asserted, differed from the instant matter.

[80] He cited the Agreement which states at s14.1 that the ordinary hours of work for fulltime employees are 35 per week. He said the agreement, correctly constructed, indicated that in order for the employee to be paid they must complete the appropriate number of hours. Those hours, he argued, are to be determined by the agency, not the employee.

[81] Mr Baker cited an email from Mr Gourlay (Exhibit R3) which contained correspondence from Mr Brown to AEU members instructing them to meet at various places on the allotted days at 1:30pm. It should be noted the assembly points were remote from the various campuses. Mr Baker stated at pa47, L35 *"All at 1:30pm in the middle or towards the end of lunch break."* He said at pa48, L10:

> *"It was not a simple half hour stop work meeting at lunch time. It was calculated to cause the most disruption to the campuses, and as Mr Brown alluded to in his email, it would be better off if the colleges were simply shut down for the afternoon…"*

[82] He cited the authority UFU 1998 (Exhibit R2) where Ryan J relied on authorities in Gates, namely Lenny v Hawkes, where the employer was not at liberty to deduct wages for an employee who abandoned his stop work action and returned to work, but was refused work by the employer. He argued that there was no suggestion in that particular case that the employees were entitled to be paid during a stop work meeting, including Mr Lenny, who did return to work.

[83] Mr Baker cited an authority within the UFU 1998, Mallison v Scottish Australian Investment Co Ltd (1920) 28 CLR 66, upon which Ryan J concluded at p10 (17):

> *"…In my view, when examined in that way, the present Award conditioned the obligation on the employer to pay wages prescribed…upon the performance of* 'work' *by the employee."*

and further:

> *"…Remuneration prescribed by cl4 should be earned by the performance of* 'work' *or by being* 'on duty' *for the prescribed periods of ordinary time…"*

[84] Ryan J cited the authority Csomore at p12(21) which stated:

> *"Though a statute or an award is not be construed as taking the employer's right acknowledged by common law, to withhold payment of wages for periods of non-performance of duty, unless the language of the award and other statutory instruments irretractably compels such a construction"*

[85] Mr Baker argued that in the instant matter, neither the award, nor the agreement compels the employer to pay for non-performance.

[86] Mr Baker outlined the extensive communication process undertaken by the Academy and Polytechnic to ensure employees were aware that they would not be paid for unauthorised absences. Similarly with the process utilised to accurately establish which employees were at work and who were not legitimately absent. This process was acknowledged by the Union. He cited a series of emails (Exhibits R4 and R5) which were a comprehensive record of the processes followed.

[87] He said the process of establishing who should legitimately be paid for the particular times in question was extensive and commenced before the stop work meetings with requests by the Academy and the Polytechnic for those who proposed to attend the stop work meetings to inform their team leaders. The process continued through into March with considerable effort being expended to ensure those legitimately absent on the given days were not penalised.

[88] Mr Baker said the delay in adjusting wages for time not worked was unavoidable. Pays are processed electronically and default to the individuals regular pay amount. He said the stop work meetings took place in the middle of a pay period, which would generally have delayed any adjustments until the next pay day. However at the same time the payroll staff were processing pay increases for the Academy and Polytechnic staff. The delay was further exacerbated by the process of establishing who was and who was not at work.

[89] He referred to Mr Upston's earlier concession that his argument may have been diminished had the recovery of monies taken place on the first pay day after the stop work meetings. He said the timing was immaterial.

[90] He referred to Mr Lane's communication to AEU members (exhibit R6) where he said:

> *"We have become aware that the employer has warned employees that their pay will be docked should they participate in the proposed stop-work meetings on the day of action. Such withholding of pay under these circumstances is not unusual, and is seen as legitimate."*

[91] Mr Baker said some employees had asserted that they could not perform their duties because their particular campus was *"closed"*. He cited an explanatory email from Ms Milliss, an HR Consultant, to an employee rejecting the assertion. (Exhibit R7)

[92] Mr Baker argued that there is nothing in the Act which prevents the employer from withholding salary not earned.[3]

[93] Mr Baker confirmed that there had not been an accounting error as alluded to by Mr Upston and that all those employees who had payments withheld incorrectly have been reimbursed.

[94] Mr Kleyn for the MASSA said that payment for one and a half hours had been withheld from those who did not return to work after the meetings. He said they did not pursue the extra hours lost. He said those who returned to work had lost one hour's wage.

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[3] *Industrial Relations Act 1984* s49(4)

SUMMARY

[95] Mr Upston argued that AEU members were capable of acting unilaterally and as such it was their choice not to adhere to the communications by management with regard to notifying them of the intention to attend the stop work meeting. Mr Brown confirmed that the advice from Mr Lane to comply was not generally followed by the AEU members.

[96] He reiterated his position that monies were deducted from salaries in breach of the award. He argued that the agency's response to the stop work meetings was politically motivated.

[97] He cited the authority Bluescope Steel where the decision supports the use of *"brief"* stop work meetings to communicate to employees. He further argued that in October and November of 2009 stop work meetings were held in the kindergarten to year ten sector, without a similar response from the agency.

[98] The Commission made it known to Mr Upston that it had knowledge of similar action by teachers being met by the same response from the agency.

[99] Mr Upston asserted no campus was closed down and that the disruption was *"for a mere hour."* He justified Mr Fidao's provocative communications by arguing he was a teacher, not an industrial officer and not a lawyer.

[100] Mr Upston said at pa72, L35:

> *"One must remember that this action occurred in the middle of a state election where education was a central issue. I think both parties are at fault in relation to being not apolitical, I would submit, if there is relevance to that."*

[101]He argued that there was no evidence to demonstrate that teachers did not earn and work their ordinary hours.

FINDINGS

[102]The applicant made much of the employees having attended stop work meetings. He cited Bluescope Steel which expressed merit in holding short stop work meeting to enable employees to consider matters concerning their employment. This particular authority emphasised that these meetings should be short and with minimal disruption to the operation of the business. In matter T13649 which preceded the instant matter, the Union argued that the action intended by the employees, which was to stop work for a period of time, was totally politically motivated and had no industrial component to it. It follows that the "stop work" meetings were indeed political rallies, for the purpose espoused by the Union in T13639. From evidence it was clear the intent of the Union action was to inflict as much harm to the operation of the Polytechnic and Academy campuses as possible. Indeed Mr Fidao's email of 18 February 2010 evokes the campuses duty of care as a lever to have them closed down as a result of the Union action.

[103]The stop work meetings were political rallies not sharing information about employment conditions with the employer. The stop work meetings were designed to disrupt

not effect minimal inconvenience. In summary the instant matter has no parallels with the Bluescope Steel matter, unlike the circumstance of the kindergarten to year 10 issue in 2009

[104]As a point, I do not accept the argument by the applicant that Mr Fidao was acting as an individual and not as an official of the AEU in his communications with other teachers, both union members and non-members.

[105]The respondent, in the instant matter, did not rely on the alleged breaches of the State Service Code of Conduct nor did he rely on the alleged misconduct of the employees who absented themselves from work. The said employees were not stood down or suspended. The argument by the applicant regarding lack of adherence to the proper investigative aspects of Commissioner's Directions has no currency until the employer chooses to pursue individuals for alleged misconduct and/or alleged Code of Conduct violations.

[106]Regardless of the motivation behind the withdrawal of labour or the machinations of individuals, the matter turns on the legality or otherwise of the employer's action in not paying those employees in question for the time they withdrew their labour and in the manner in which that lower wage was eventually paid to the said employees.

[107]The Award at Part III clause 5 Payment of Wages states:

> *"(b) For the purposes of this clause, wages due to an employee:*
>
> *are to be paid and calculated on a fortnightly basis;*
>
> and further
>
> *(d) The employer shall not deduct from wages due to an employee any monies unless it is authorised in writing by the employee."*

[108]One must ask the question, what were the *"wages due"* to the employees for that fortnight in which they absented themselves from work for a period of time?

[109]There is nothing in the Award, or the Agreement or indeed in the SSA which compels the employer to pay an employee who absents themselves from work without authority or who cannot show *"reasonable cause"* (SSA Regulation 13(1)).

[110]It is clear that the employees did not have authority to leave work when they did. Attending a political rally is not *"reasonable cause"* for an unapproved absence from work.

[111]The Act states that wages are to be calculated on a fortnightly basis to establish what is due to the employee for that period. There are many reasons why a particular wage may have to be adjusted on a fortnightly basis. These may include annual leave, sick leave, leave without pay and a host of other reasons. It is not unreasonable to accept that failure to attend one's place of work at the prescribed time would be another reason for recalculating the monies owed.

[112] The applicant asserted that the employees did not have the opportunity to put their arguments to the employer. This is simply not the case. The employer demonstrated very clearly and exhaustively the process it adopted to engage with the employees.

[113] The applicant argued that the employees were not offered TOIL, or annual leave or any other concession by the employer as an alternative to losing wages. There was no evidence educed to indicate employees sought to negotiate with the employer to have time off work. There was no evidence educed to suggest those taking time off sought approval to make up the time at some other juncture. One can only conclude that the employees who took time off did so with the intent of denying the employer their labour for that particular period of time.

[114]It is open to the employer to accept that those employees who withdrew their labour did so as a definite act without the expectation that the said employees had any intention of accommodating the employer by making up time. Further, it would defy logic for an employer to actively facilitate disruption to its business.

[115]In the authority UFU 1998 (Exhibit R2) at p8, (14) with reference to the matter Lennie v Hawkes, Ryan J made the observation:

> *"However there was no suggestion in that case that the employees were entitled to remuneration for the periods of the stop work meetings."*

[116]Further, in the authority Csomore (Exhibit R2) where Rogers J said at p598 F:

> *"…The fact of employment of itself does ground entitlement to payment. Attendance by an employed person at the beach, instead of his workplace, for a week, will hardly qualify for an obligation to pay him pursuant to the section. The right of the employer is not a right to deduct or a right of set-off. It is the right to deny payment on non-fulfilment by the other party of the obligation which makes the weekly or fortnightly salary payable."*

[117]From the perspective of the employer those employees who chose to attend the political rallies could just as well have been at the beach during their time off work. The employer suffered the same outcome. I believe both Ryan J and Rogers J have applied practical common sense in their logic.

[118]The applicant cited a number of other authorities, none of which could be directly compared with the instant matter. Although they were of interest I did not find them particularly useful.

[119]Given the withdrawal of labour, the employees demonstrated they were not ready and willing to work. The employer had the right not to pay those employees who absented themselves from the various campuses for the period of time they were not at work. I so find.

[120]The applicant argued that deduction from wages some four weeks after the event was impermissible. He also argued that the employer cannot deduct from wages without written permission of the employee concerned (the Award Part III, clause 5(d)). He conceded that had the reduction in wages taken place on the payday appropriate to the pay period where time was lost, he may not have argued the point.

[121]The employees were forewarned that they would not be paid for the time they were absent. Attendance at the rallies was minimal; it was conceded by the applicant that less

than 10 percent of teachers took part. Had there been unanimous support from the teachers the respondent may have found it easier to have paid the corrected amount to the employees on the relevant pay day. However that was not the case.

[122] As alluded to in the hearing, the Commission was aware of industrial action taken by teachers in 1996 by way of rolling half day strikes. The individual teachers were not paid for the periods of time they were on strike. This was a similar situation to the one faced in the instant matter, with the same complexities of some teachers not participating and others legitimately absent from work during the industrial action. The main difference of course is the fact that in the instant matter, although industrial in nature, the action was purely politically motivated. However the effect on the employer was the same, employees withdrew their labour affecting disruption to the teaching program.

[123] This somewhat contradicts Mr Lane's advice to Mr Fidao (Exhibit R1) where he wrote:

> *"Action by an employer if an employee leaves their employment without permission is a possibility but, in my experience with the Union,* ***this has never been done in previous occasions*** *when the absence is a consequence of taking industrial action."* [Mr Lane's emphasis]

[124] This is also a strange declaration by Mr Lane in that it was he who was adamant that the action was not industrial, but *"purely political."* (T13649 of 2010).

[125] The employer went to considerable lengths to establish who was at work, who was legitimately not at work, and consequently identified those who were absent without permission. Even before the action took place, management of the Polytechnic and the Academy sought cooperation from those teachers who had chosen to attend the rallies to have them inform their team leader of their intent. In the main cooperation was not forthcoming.

[126] As cited above the Award has the provision at Part III clause 5(d):

> *"The employer shall not deduct from wages due to an employee any monies, unless it is authorised in writing by the employee."*

[127] Wages due to those affected employees for the pay fortnight ending 3 March 2010 should have recorded that less than 70 hours had been worked by the individuals, therefore less than a full fortnight's salary should have been paid. This cannot be seen as being a deduction from wages. It would have been quite simply the *"wages due"*.

[128] For reasons explained by the respondent, the full 70 hours salary was paid on 3 March. The respondent asserted that wages automatically default to a full pay unless consciously adjusted. To be fair to those who did not withdraw their labour, the agency went to considerable lengths to identify them; this took time. At the same time there was a general pay increase being implemented for teachers. To effect this took resources from the pay section.

[129] I accept the respondent's position that it was simply not possible to have the reduced wages paid on 3 March. In mitigation those employees who were to be affected by receiving pay for fewer hours worked were made aware of the consequences of their action from before they withdrew their labour and continually until the adjustment was made.

[130] Was paying less than the wages earned during the particular fortnight ending 31 March a *"deduction"* requiring written authority from the employee? The affected employees had been paid one or one and a half hours more than they had worked for the period ending 3 March 2010. They were in credit. The individual employee's cumulative total pay for the year to date on the 31 March pay day would show that their earnings would have been correct against the hours they had worked, for the year to date. Put another way, the employees were paid on 3 March for hours yet to be worked. It cannot be said that pay due was deducted, it was already in the employees' bank accounts.

[131]The applicant argued that the employer imposed a quasi penalty by not paying for the time the employees did not work. The employer paid what was due. The reduced wages were the result of the individual employee's conscious action, not initiated by the employer. There was no penalty associated with the reduced wages.

[132] I cite another passage from Csomore which has been referred to earlier. This refers to the decision of Professor Coote:

> *"The employee loses his right to wages, not because the contract has ended, but because in failing to earn them, he failed to fulfil the conditions precedent to them being payable*

[133] This statement in my view sums up the instant matter.

[134]Much as it would have been preferable for the reduced wages to be paid on 3 March, the employees were under no illusion that they would not be paid for the time they withdrew their labour. Even the AEU State Manager acknowledged the appropriateness of the employer's intended action.

> *"…the employer has warned employees that their pay will be docked should they participate in the proposed stop-work meetings on the day of action. Such withholding of pay under these circumstances is not unusual, and is seen as legitimate."*

[135]The employer fulfilled his obligation to pay correct wages in the most expedient manner open to him. He did not deduct monies from "wages due". The wages due in total were paid therefore there was no requirement for the respondent to be bound by Part III clause 5(d) of the award, in this instance. The respondent did not breach the award by paying reduced wages some four weeks after the fact, I so find.

[136]Mr Upston cited s59 and s61 of the FMAA (Exhibit A32) as an *"integral part of the regime for the recovery of…Overpayments of salary."* There is nothing in either clause which refers to overpayment of wages. Indeed read as a whole the FMAA is a roadmap for good corporate governance and the assurance of fiduciary rigour.

[137] Further he asserted the respondent had breached this act and specifically the aforementioned clauses. Clause 59 (1) says:

> *"…that any loss, deficiency, destruction or damage with respect to public or other money or public or other property may have occurred under*

> *circumstances which could render an officer liable to pay an amount to the Crown…Head of Agency may direct that an inquiry be held."*

[138] In the sense of this legislation there was no evidence that the department suffered a *"loss, deficiency, destruction or damage"* to *"money"* or *"property"*.

[139] Further the SSA at clause 3 defines *"officer"* as:

> *"…a person appointed as a Head of Agency, to a proscribed office or as a senior executive under section 31;"*

[140] By definition teachers are not officers; it follows clauses 59 and 61 of the FMAA does not apply in this matter, I so find.

[141] I turn to the assertion by the applicant that some of the employees who withdrew their labour had worked the prescribed 70 hours in the fortnight. The applicant argued that the post year 10 environment is such that there is considerable flexibility in the way teachers operate. However he also argued that some employees could not fulfil their obligation because classes were cancelled. The whole point of the employees withdrawing their labour, from evidence, was to cause disruption and the ultimate disruption, again from evidence, was to have the campuses shut down for the afternoon of the rallies.

[142] Employees agree beforehand on the hours and the manner in which they will work. Teachers in particular are ruled by a timetable. Albeit that in the post year 10 environment, that timetable spans from 7.45am until 5pm and beyond in some cases. It follows that individual teachers have prescribed hours of attendance. The applicant informed the Commission that teachers can come and go as they please. That may be so, but it does not detract from the protocol that, when required, a teacher must be in attendance during his prescribed hours to fulfil the obligation of working 70 hours in a fortnight. That is not to say that by agreement with the employer an individual may negotiate an exception.

[143] It is not open to employees to manipulate their hours of work to suit themselves without approval from the employer. I reject the validity of any hours claimed to have been worked to make up for attendance at the rallies unless authorised by the employer.

[144] In the same vein, the claim that employees could not perform their prescribed obligations because classes were cancelled is irrelevant. Their attendance at campus was required during their prescribed timetable. It is not open for the individual to decide if he should abrogate his responsibility without approval from the employer.

[145] The applicant argued that compulsory attendance at a campus at a particular time without instructions to perform specific work was not a reasonable requirement. Provided the timing of the requirement is within the individual's scheduled hours it is an eminently reasonable requirement. In fact to achieve the 70 hours per fortnight it would be essential. It falls on the employer to make that decision, not the employee.

[146] The applicant asserted that teachers should not fall under the same requirements to work *"as directed"* as those workers who are under constant supervision. This somewhat Orwellian logic could be paraphrased as: *all workers are equal but some workers are more equal than others*, particularly if they are teachers. I see no lesser a requirement for a teacher to follow the protocol than any other worker. I reject his assertion.

[147]The applicant argued that the *"deductions"*, his terminology, were arbitrary. The logic that only one hour went unpaid for those who returned to work and one and a half hours for those to did not, in my estimation is considerably generous to the employees. The Union directed teachers to leave from 1pm for a 1.30pm start to the rallies. The rally sites were remote from the campuses.

[148]The Award at Part V (1) (b) states that:

> *"Employees shall take a lunch break…between the hours of 12 noon and 2.00pm"*

[149]Given the intent to disrupt the operation of the campuses, the distance between the campuses and the meeting sites and the fact that the rallies were only due to start half an hour before the end of the lunch break, it is not unreasonable to accept that non payment for one hour and one and a half hours respectively was not punitive. I reject the applicant's assertion of arbitrary deductions.

[150] The applicant argued that an incorrect rate had been used to calculate the reduced wages. He provided no evidence of this. The respondent denied the allegation. Should the applicant have any validity in his assertion, for want of evidence, it must be taken up with the Agency separately.

[151]Finally the applicant asserted that the actions of the employer were politically motivated. The employer did no more than any employer would do when confronted by the withdrawal of labour. I reject the applicant's assertion.

ORDER

Pursuant to s.31 of the *Industrial Relations Act 1984*, both applications are dismissed, I so order.

J P McAlpine
Commissioner

Appearances:
Mr M Upston with Mr G Brown for the Australian Education Union, Tasmanian Branch
Mr P Baker for the Minister administering the State Service Act 2000 with Ms J Fitton, Mr T Kleyn (Polytechnic) and Mr M Watson (Department of Education)

Date and Place of Hearing:
2010
April 30
May 12
Hobart