TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29 application for hearing of industrial dispute

The Community and Public Sector Union (State Public Services Federation Tasmania) Inc
(T13660 of 2010)

and

Minister administering the State Service Act 2000
(Department of Police and Emergency Management)

COMMISSIONER JP McAlpine HOBART, 24 September 2010

Industrial dispute – mode terms and conditions of employment of an employee altered – period of salary maintenance challenged - application dismissed

REASONS FOR DECISION

[1] On 1 April, 2010 The Community and Public Sector Union (State Public Services Federation Tasmania) Inc (the applicant) 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 Service Act 2000 (the respondent) arising out of an alleged change to the mode, terms and conditions of employment of their member Mr Tim Welch.

[2] Mr Welch had been a serving police officer from April 1978 until March 2005. As a result of a Workers Compensation settlement he relinquished his position as a sworn member of the Tasmania Police Service, at that time, and took up a role with the Department of Police and Emergency Management (the department) as a Customer Service Officer at the Launceston Police Station.

[3] In September 2009 Mr Welch, along with other Customer Service Officers at the Launceston Police Station, were notified that new work arrangements were to be introduced. In summary the provision of customer service access to the public was to be reduced from a two shift operation to a day shift operation. A salary maintenance package amounting to a period of 6 months was offered by the department to those who opted to continue in the role.

[4] In Mr Welch's view the duration of the salary maintenance package was inadequate and he sought salary support for 12 months.

BACKGROUND

[5] On 5 October 2009 Mr Welch received a letter from the department informing him he would be given six month salary maintenance. He asserted that the promised consultation around the duration of salary maintenance did not take place.

[6] Mr Welch confirmed that he was not redeployed after the departmental restructure, but remained in his substantive position. His base salary remained the same, but he lost the income derived from shift penalty rates which he had previously enjoyed. He asserted he was not offered redundancy.

[7] Ms Serra for Mr Welch opined at p12, L5;

> *"The Department offered to pay six months' salary maintenance in lieu of 32 years dedicated service."*

[8] In support of Mr Welch's assertion that 12 months should be the salary maintenance period, she submitted exhibit A1, an example from the Department of Health and Human Services dated 4 December 2008. The exhibit at the second paragraph states;

> *"…moving to a day work environment will result in a reduction in fortnightly earnings for employees currently engaged as shift workers. It has been determined that these employees will be salary maintained for a twelve (12) month period from the date of change of service in 2009."*

[9] Ms Serra drew on exhibit A2 in further support of Mr Welch's view that 12 months of salary maintenance was appropriate. This document was a letter from the Director of Corporate Services outlining the conditions of employment for an employee who was to be transferred. The Director offered the employee an allowance for 12 months to maintain his salary at the level of his then substantive position.

[10] In this particular case, the employee's duties were to be reassigned to those employees remaining at his original place of work. In effect his substantive role became redundant.

[11] Again in support of her argument Ms Serra relied on exhibit A3 which referred to an arrangement agreed to by the Department of Health and Human Services regarding the provision of, in effect, subsidised travel for 12 months to employees whose place of work had been relocated.

[12] Ms Serra also raised, somewhat hesitantly, the matter of a senior public servant having recently been paid out a substantial sum of money in compensation for the premature cessation of his contract. She raised this, she said, to show what Government could do if it chose to.

[13] Further Ms Serra referred to the "Redeployment" clause in the *State Service Act 2000*, clause 47, which refers to the maintenance of salary at "no less" than the salary prior to redeployment for a period of 12 months. This, she said, set the precedent for fairness in compensating employees who lose income as a result of operational changes.

[14] She argued that the Commission has the power under s31(1) of the Act to impose a requirement on the department to pay Mr Welch salary maintenance for 12 months. She cited;

> "…. *Considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing, or settling the industrial dispute in respect of which the hearing was convened, that the Commissioner may, by order in writing , direct that that thing is to be done, or that action is to be taken*."

[15] Mr Martin for the Minister sought to clarify the issue around the cessation of Mr Welch's employment as a sworn police officer and his subsequent appointment to the State Service. He argued that the *Police Service Act 2003* under which serving police officers function allows the Minister, on request from the Commissioner of Police, to transfer a sworn member of the Police Service to the State Service.

[16] He argued that Mr Welch's employment, prior to his engagement as a Customer Service Officer in March 2005, came to an end when he resigned as a sworn police officer to take up his now substantive role. He presented evidence which sought to establish whether Mr Welch did indeed resign from Tasmania Police and was then engaged in the State Service or whether he was transferred. Exhibit R3 is a copy of the then Premier's authorisation of Mr Welch's transfer from Tasmania Police to the State Service. However exhibit R4 is a confirmation that Mr Welch was paid out long service leave and holiday pay on resignation.

[17] In response, Ms Serra argued that the State Service was a single employer regardless of how many departments it consisted of.

[18] Mr Martin conceded that, for the purposes of long service leave, Mr Welch's previous service had been recognised.

[19] Mr Welch argued that he had not been paid out his entire entitlements in that a half day long service leave had been carried over to his new role in March 2005. Mr Martin put this down to a clerical error and said it was not of significance.

[20] Contrary to Mr Welch's evidence, Mr Martin argued that discussions did take place with the employees regarding the rearrangement of the service they provided and around any compensation arrangements. He said these discussions were hosted by both the Commander of the Northern District and the Director of Corporate Services.

[21] Again contrary to Mr Welch's initial evidence Mr Martin said that redundancies were offered to everyone in the organisation and that it was Mr Welch's choice not to accept a redundancy package.

[22] He asserted that the department had originally offered a 3 month salary maintenance package, while the Union had argued a case for 12 months. The outcome was that the department raised their offer to 6 months. He confirmed that the Union, at the time, did not accept the 6 month package.

[23] Mr Martin argued that in the absence of anything in the *Tasmanian State Service Award* (the award) with respect to salary maintenance and, in his view, adequate notice of change had been given, the department had met its obligations with respect to the award.

[24] Mr Baker, for the Minister argued on three points; the Commission's jurisdiction to hear the matter, the repudiation of contract and the breach of the *Tasmanian State Service Agreement 2008* (the agreement) of no extra claims.

[25] He argued that an "industrial matter" as defined in clause 3, of the Act, Interpretation specifically excludes, at (g) of the definition,

> "*a bonus payment made at the discretion of the employer"*

[26] He cited the Macquarie dictionary definition of "bonus" as;

> "*Something that is given or paid over and above what is due, a sum of money paid to a shareholder, a partner, an employee, or an agent of a company ……. Over and above the regular dividend or pay."*

[27] He asserted that the Union was seeking to have the employer pay a discretionary payment above that prescribed in the award. He argued that there was no provision in the award or the *State Service Act 2000* which prescribes an entitlement by statute.

[28] Mr Baker sought to explain the process of "redeployment" addressed by Ms Serra. He asserted that "redeployment" was a last resort if an employee could not be placed in his substantive role. The appointment would last for 12 months where the substantive salary would be maintained should the employee be given lesser duties. After 12 months the person's employment is terminated, without any further monetary compensation. This he said was not the situation with Mr Welch.

[29] He argued that there has been no allegation of an award breach and asserted that the employer has complied with the award and the *State Services Act 2000* fully. Further he asserted that the Commission can only act to settle disputes in accordance with the provisions of the Act and that the Commission is only required to consider the terms and conditions expressed in the award.

[30] He asserted that there were two options open to the employer as a consequence of restructuring the customer service facility which the employer utilised; to offer voluntary redundancy to all the customer service officers and as an alternative, to offer day work opportunities. Evidence was given that only one person had chosen to avail themselves of the redundancy offer.

[31] Ms Serra asserted Mr Welch was advised not to apply for redundancy because, it was alleged, he would cost the department too much by dint of his 32 years of service. Mr Baker argued that although Mr Welch may have been a shift worker for some 32 years he only took up his current substantive role in March 2005.

[32] Although not raised by the applicant, Mr Baker sought to address the notion of a possible repudiation of contract. He cited the Act at s30(3), which states;

> "*The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with -*
>
> *(a)…….*
> *(b) the operational requirements of the employer's business."*

[33] He argued that the remuneration due to an employee whose employment had been unfairly terminated was outlined in the Act at s30(11). He also referred to sub section (12) which states;

> *"Where the Commission finds that an employee's employment has been unfairly terminated and had determined that reinstatement or re-employment*

is impracticable, any amount of compensation must not exceed an amount equivalent of 6 months' ordinary pay for that employee."

[34] Mr Baker argued that the instant matter before the Commission was a breach of the "No Extra Claims" clause contained in the agreement. At clause16(a) of the agreement it states;

"The parties agree for the life of the Agreement no further claims will be made or pursued concerning salaries or any conditions matters contained in the Agreement, or in the relevant award, other than for such matters as are specifically provided for in clause 17."

[35] Clause17 gives leave for the parties to pursue matters with respect to location allowances and for a joint review of shift work provisions.

[36] Mr Baker addressed the authority, exhibit A1, with respect to the Central Highlands Community Health Centre Service cited by Ms Serra. He argued that the offer of 12 months salary maintenance was never implemented because other events had overtaken particular situation. Ms Serra did not refute this.

[37] He also addressed the authority, exhibit A3, with respect to Housing Tasmania and the transport arrangements made for employees whose workplace changed from Devonport to Burnie. He argued that the offer to employees was only to participate in a car pooling scheme and that for a duration of 12 months.

[38] Ms Serra cited the deed of release that Mr Welch signed when accepting the workers compensation settlement. She confirmed he had resigned as a police officer in order to accept a transfer to the State Service. Mr Martin objected to the tabling of the document. He argued that terms of the deed of release stipulated confidentiality. Ms Serra withdrew the document.

[39] Mr Martin confirmed that the quantum of "compensation" (my terminology) that Mr Welch received was derived from the accumulated shift penalty losses over six months.

FINDINGS

[40] This matter has a number of facets which need to be addressed. I turn to the argument around Mr Welch's change of employment in March 2005. It is clear from the respondent's own evidence in exhibit R3 that Mr Welch was transferred from the Tasmania Police to the State Service. The concept that he resigned is not contradictory. It is common practice for holders of statutory appointments to "resign" their position to take up another either within the State Service or not.

[41] I agree with Ms Serra's observation with respect to the employer of state servants being a single employer with a number of departments. It is entirely understandable that the Tasmania Police Service is run as an organisation apart. However it is still funded by Tasmanian taxpayers through the State Government as is the State Service. The Act at clause 3, Interpretation defines "Government Department" as

"*(a) a department established under the State Services Act 2000;or*
(b) the Police Service"

Mr Welch clearly transferred from one "Government Department" to another by definition.

[42] Mr Martin's concession that Mr Welch's service prior to his transfer was recognised for "long service leave purposes" is telling. If long service leave is recognised, Mr Welch's actual service must be recognised. I do not accept the respondent's proposition that Mr Welch in effect left one employer to take employment with another. To make such a move would not require the Premier to approve a transfer.

[43] I put no weight on Mr Welch being paid out his long service leave and outstanding annual leave. That process I take to have been an administrative protocol and may well have been required to separate him from his role as a "sworn" police officer. On the other hand it my well have been a concession to Mr Welch to allow him to liquidate his entitlements at a police officer's salary.

[44] I turn to the allegation of lack of consultation with respect to negotiating the quantum of salary maintenance. Evidence from both parties showed that the Union and the department were in negotiations over the changes to work practice as well as the monetary consideration. Ms Serra herself acknowledged the department's right to make operational changes. The consultation undertaken may not have satisfied Mr Welch, but my view is that the department complied with the award.

[45] It was alleged that Mr Welch was encouraged by the department not to seek redundancy in September 2009 because the quantum of his expected payout after 32 years service. No evidence was educed to support this allegation however the allegation was not refuted by the respondent either. I conclude that it is not unreasonable to accept that an attempt may have been made to dissuade Mr Welch from applying for redundancy. That being the case, it follows that the department, at that time, did take into account Mr Welch's years of service.

[46] Mr Welch gave contradictory evidence in that he alleged he was not offered redundancy then subsequently alleged he was dissuaded from applying for redundancy. I accept Mr Marin's evidence that redundancy was offered to the entire section and that the onus was on Mr Welch to apply for it regardless of any overtures to the contrary by the department, should they have occurred. There was no evidence educed to indicate Mr Welch was denied a redundancy package.

[47] Ms Serra raised the issue of the "redeployment" process adopted by the State Service. She argued that the 12 months management of employees in that particular situation represented a precedent in the instant matter. I disagree with her position. The situation as alluded to earlier is an exit strategy for employees who can no longer be placed in a substantive role. Mr Welch is not in such a situation and enjoys ongoing employment.

[48] Mr Baker questioned the Commission's jurisdiction to hear the matter. He argued that the matter was not an industrial matter and the order sought by the applicant was beyond the power of the Commission. He defined salary maintenance as a "bonus at the discretion of the employer" which of course is specifically excluded as an industrial matter in the Act at clause 3, Interpretation.

[49] Industrial matter is defined in the aforementioned clause as;

> "…. *any matter pertaining to the relations of employers and employees, and without limiting the generality of the foregoing, includes –*

(a) a matter relating to –

(i) the mode, terms and conditions of employment; or
(ii) ….
(iii) ….
(iv) ….
(v) severance pay for an employee or former employee whose employment is to be, or has been, terminated as a result of redundancy; or
(vi) ….”

[50] This matter concerns an employee whose conditions of employment have been altered considerably. In detail it goes to the change in his mode of employment that of shift-work to day-work. Further it goes to the package offered by the department in compensation for his loss in the terms of his employment conditions. All of which, in my view satisfy (a)(i) above as a matter which can be dealt with by this Commission.

[51] Mr Baker argued that maintenance of salary, in the instant matter, was a bonus in that it was over and above that which was due to Mr Welch. I do not accept this categorisation of the payment. Mr Welch's normal salary up until the operational changes consisted of a base salary plus penalties. Through no action of his own, the opportunity to earn such penalties was denied him. The payment in my view was compensation for a loss, a matter with which this Commission deals regularly.

[52] Mr Baker also argued that maintenance of salary was a discretionary payment made by the employer and as such was beyond the jurisdiction of this Commission. This Commission regularly determines the quantum of redundancy packages as well as the quantum of compensation as a result of unfair dismissal. Both these modes of compensation are to a large extent at the discretion of the employer, but fall within the range of matters with which this Commission can deal. I see no difference in the treatment of a matter arising from salary maintenance dispute to that of redundancy and unfair dismissal.

[53] On a more pragmatic note, Mr Welch is still an employee of the department and any matter related to the transition from one mode of employment to another is an industrial matter. In my view clause 31(i) of the Act supports the Commission arbitrating the matter.

[54] However I do acknowledge Mr Baker's proposition that the Commission is bound by the Act and the applicable award or agreement. I also note, as he did, that the Act, the award, the agreement and the *State Service Act 2000* are all silent on maintenance of salary.

[55] Mr Baker asserted that the instant application was a breach of the current agreement, specifically clause 16 No Extra Claims. Sub-clause(a) states;

> “*The parties agree that for the life of the agreement no further claims will be made or pursued concerning salaries or any conditions contained in this agreement or relevant award……”*

Mr Baker himself confirmed that the matter in dispute was not “contained” in the agreement or the award, it follows that the Union raising the matter is therefore not in breach of the agreement.

[56] With regard to the authorities cited by Ms Serra, as examples of how various departments cope with introducing change, they offer some insight. However I do not agree that they can be relied upon as precedents. It is unfortunate that there is not a common approach across Government Departments to enable consistent logic to be applied to matters such as salary maintenance. It appears each department is at liberty to formulate such payments as they see fit and in doing so create inconsistencies.

[57] I turn now to the actual quantum of Mr Welch's salary maintenance payment. Had Mr Welch disputed and been successful in an unfair dismissal matter, under clause 30(12) of the Act the maximum this Commission could award would be 6 months ordinary pay. In effect Mr Welch has received 6 months salary and is still employed.

[58] Although I am not comfortable with the lack of transparency behind the department's decision to deem 6 months salary maintenance as adequate, given Mr Welch is still employed I concede that it is not an unreasonable compensation package.

[59] Mr Welch has no entitlement to salary maintenance beyond that which he has already received, I so find.

ORDER

The application is dismissed.

James P McAlpine
COMMISSIONER

Appearances:

Mr C Smith (28.4.10 and 10.6.10) and Ms C Serra (10.6.10) for The Community and Public Sector Union (State Public Services Federation Tasmania) Inc with Mr T Welch

Mr T Martin (28.4.10 and 10.6.10) and P Baker (10.6.10) for the Minister administering the State Service Act 2000

Date and Place of Hearing:

2010
April 28
June 10
Launceston