TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974
S70(1b) application for hearing of an industrial dispute

Minister administering the State Service Act 2000/Department of Health

and

Raajiv Pratik Prasad
(T14682 of 2019)

PRESIDENT D BARCLAY
COMMISSIONER T LEE
COMMISSIONER T CIRKOVIC HOBART, 14 MAY 2020

DECISION

[1] The Respondent was employed by the Appellant (Department of Health) as a Medical Practitioner Level 1 (Intern) on a full time fixed-term contract in the Doctors-in-Training Program (Intern) 2018 at the Royal Hobart Hospital. The Respondent was terminated from his employment at the expiry of his fixed-term contract on 14 January 2019.

[2] The Respondent lodged an application alleging that he had been unfairly dismissed. That application was the subject of a hearing before the Deputy President. By decision dated 30 July 2019, the Deputy President found that the Respondent had a reasonable expectation of continuing employment and had been unfairly dismissed because the Appellant did not have a valid reason to terminate the employment of the Respondent. The Deputy President also made findings that the process of dismissal was "grossly flawed". The Deputy President ordered that the Respondent be reinstated to the position of Medical Practitioner Level 1 (Intern) for the purpose of participating in the final term of the Doctors-in-Training (Intern) Program 2019.

[3] The Appellant has appealed the decision of the Deputy President.

Background

[4] From 22 November 2018 the Respondent took extended personal leave due to long term mental health issues.

[5] In early January 2019 the Respondent advised the Appellant that he was ready to resume the training course. In order for the Respondent to finish the training course his fixed-term contract of employment would have had to have been extended as the extant contract was due to expire on 14 January 2019.

[6] On 3 January 2019 Dr King who was the acting Executive Director Medical Services wrote to the Respondent stating that the results of his mid-term assessments rated the Respondent as demonstrating deficiencies in a range of areas and that based on these deficiencies he would not be "passable" in the General Medicine Term. Dr King also advised in the letter that the performance of the Respondent was below that expected of an Intern. Dr King advised the Respondent that she could not support the

Respondents return to the program and hence the extension of his employment. The Respondent wrote a response to Dr King on 4 January and sought to address the concerns raised in Dr King's letter and sought a reconsideration of her decision to not offer an extension of his internship into term 1 2019.

[7] The Appellant by letter dated 23 January 2019 confirmed that the Respondent had been employed pursuant to a fixed-term contract which expired on 14 January 2019. The Appellant advised that it was of the view that, as a result, the Respondent's employment had come to an end. The Appellant advised that it did not intend to enter into any further arrangements with the Respondent.

[8] The Respondent, as Applicant before the Deputy President, contended that he had a reasonable expectation of ongoing employment and that there was no valid reason to terminate his employment. The Appellant relied on the fact that the Respondent had been employed pursuant to a fixed-term instrument and that it had expired and as a result the employment ceased by effluxion of time. It also contended that as the Appellant had been employed pursuant to a fixed-term instrument he could not have had a reasonable expectation of ongoing employment, and that as a result there did not have to be a valid reason to terminate the Respondent's employment.[1]

The Appeal

[9] The Notice of Appeal alleged that the Deputy President was in error in that she failed to apply the correct test in determining whether the Respondent had a reasonable expectation of ongoing employment (grounds 1 and 2), gave weight to an irrelevant matter (ground 3), gave insufficient weight to the prescribed end date in the Instrument of Appointment (ground 4), erred by determining that the Instrument of Appointment was for a specified task as opposed to for a specified period (grounds 5 and 6), and erred in making the order of reinstatement as it amounted to an appointment to a new position rather than a reinstatement (ground 7).

[10] We should note that ground 4 was amended at the hearing to refer to an expressed end date to the Instrument of Appointment rather than a "prescribed" date. Ground 6 was amended to delete the phrase "specific start date" and to insert "expressed start date".

Contentions and Consideration

[11] As it transpired at the hearing of the appeal the Appellant focused on ground 4[2] as amended which relies on s30(1) of the *Industrial Relations Act 1984* (the IR Act) which relevantly provides:

> "30. Criteria applying to disputes relating to termination of employment
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> (1) In this section –
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> continuing employment means employment that is of a continuing or indefinite nature or for which there is no expressed or implied end date to the contract of employment;
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> employee means a person who is or was engaged to work casual employment, part-time employment, full-time employment or probationary employment and includes a former employee;

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[1] See s30(3) of the *Industrial Relations Act 1984.*

[2] The Appellant otherwise relied on the written submission for the remaining grounds, save ground 7.

relationship status means the status of being, or having been, in a personal relationship, within the meaning of the Relationships Act 2003."

[12] It can be seen that the amendments made to the grounds of appeal engaged the wording of s30(1) of the IR Act.

[13] The focus was on the definition of "continuing employment". The relevance of the definition is that s30(3) of the IR Act provides that:

> "(3) 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) the capacity, performance or conduct of the employee; or
>
> (b) the operational requirements of the employer's business."

[14] It will be noted from the background of this decision that the Respondent, notwithstanding having been employed pursuant to a fixed-term Instrument of Appointment, argued that he had a reasonable expectation of continuing employment. It is apparent from the terms of s30(3) of the Act that an employer must have a valid reason connected with the Respondent's capacity, performance or conduct or in respect to operational requirements before it could terminate the employment of an employee who meets the threshold of having a reasonable expectation of continuing employment.

[15] Before us the Appellant argued that as a result of the definition in s30(1) of the IR Act of "continuing employment" the Respondent could not have had such an expectation because his Instrument of Appointment contained an expressed end date to the contract of employment.

[16] It is common ground that the Respondent's Instrument of Appointment had an expressed end date. The Instrument, which is dated 13 November 2017, contained five conditions, the first of which was:

> "Subject to the terms of this instrument the period of employment is effective from 2 January 2018 and, subject to the terms of this instrument, will expire on 14 January 2019.
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> The employee understands that the employee has been employed for the above period only and that following the expiration of that period there is no obligation on the Minister or the employee to enter into any further employment arrangements."

[17] There is nothing in the Instrument which affects the expressed start and end dates. That is, there are no other terms presently relevant to which the clause is subject as referred to at the commencement of condition 1.

[18] It may be seen therefore that the Instrument of Appointment, which of course forms part of the Respondents contract of employment, had an expressed end date, 14 January 2019.

[19] It is important to note that the definition of "continuing employment" contains two concepts, firstly employment of a continuing or indefinite nature, and secondly employment for which there is no expressed or implied end date. The concepts are

disjunctive. So much is clear from the use of the word "or" in the clause. As such, in the present case s30(1) can be read as:

> "continuing employment means employment for which there is no expressed or implied end date to the contract of employment."

[20] It is clear in this case that there is an expressed end date to the contract of employment. It follows as a matter of construction that because there is an express end date to the contract of employment that this precludes the employment being one of continuing employment as contemplated in s30(1). It further follows that there could hardly be a reasonable expectation of continuing employment where the condition precedent does not exist. In the circumstances, the provisions of s30(3) that prohibit an employer from terminating an employee without a valid reason do not apply in the circumstances of this case.

[21] Counsel for the Respondent valiantly attempted to argue that the Instrument of Appointment was for a specific task, namely the completion of the Doctors-in-Training Program (Intern), that the Respondent had 3 years to complete the training and as a result the Instrument had not expired and therefore the Respondent could (and did) have an expectation of ongoing employment at the time the Appellant advised him the Instrument had come to an end and hence the employment relationship had ceased. There are two reasons this argument cannot be accepted.

[22] Firstly, this argument seeks to elevate the fact that the appointment of the Respondent was to enable his participation in the Doctor-in-Training program to a level where the clear and express terms of the Instrument of Appointment which provides an express date for the end of the contract are rendered superfluous. We do not accept that this is a permissible construction of the terms of the engagement of the Respondent. The express end date in the Instrument of Appointment is crystal clear.

[23] Secondly, the Deputy President found that the Respondent was appointed as an employee on a fixed-term Instrument of Appointment for the duration of a specific task to participate in the training program for 2018.[3] That finding is that the specified task was the 2018 program. The Respondent had not sought to overturn that finding by appeal or cross appeal. In any event, we find that the only evidence before us as to what was objectively intended by the Instrument of Appointment at the date it was entered into was that the task was the training program for 2018. There was no evidence to suggest that the Respondent had three years to complete the task. The subjective intention of one party to the contract does not assist in its interpretation. The task of construction is to determine the objective intention of the parties to the contract.[4] No evidence was led at the hearing about the matter. We are left with the contract, which specified the 2018 year so that the only relevant task was the 2018 training program.

[24] In any case, the finding by the Deputy President that the Instrument of Appointment was for both a specified task and a fixed-term is contrary to s37 of the *State Service Act 2000* which relevantly provides:

> "(3) The appointment of a person as an employee is to be –
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> (a) as a permanent employee; or
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> (b) for a specified term or for the duration of a specified task;"

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[3] Decision paragraph 31.

[4] See for example Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the *Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited* [2017] FWCFB 3005.

[25] It can be seen that the Instrument of Appointment is to be either for permanent employment, for a specified term, or for a specified task. Properly construed this Instrument of Appointment was for a specified time. We agree with the Appellant's contention that the Instrument was for a specified time and that the reference to the training course provided the context or subject matter of the Instrument of Appointment. It was not however for a specified task. As noted above however, even if it was, it was for the 2018 training course and, by the time of the termination it has been completed.

[26] The Respondent also sought to argue that the first limb of the definition of continuing employment should be given greater weight than the second. He was unable to provide any authority as to why that should be the case. The submission is not one which can be accepted. The provision is to be given its ordinary and natural meaning. There is no ambiguity. There is nothing in the IR Act having regard to its purpose to suggest that any part of the section should be given greater weight than any other part.

[27] We find that, notwithstanding the argument about the Instrument of Appointment being for a specified task, if the Instrument contains an expressed end date, s30(1) of the IR Act will be engaged. It is engaged in this case. Accordingly we find that as the Instrument of Appointment contained an expressed end date there could be no expectation of continuing employment. As such there was no requirement for there to be a valid reason for the termination of the employment.

[28] Accordingly, we find that the Deputy President was in error in finding that as there was a reasonable expectation of ongoing employment the Appellant was required to have a valid reason for termination and that no such valid reason existed. It follows that the Deputy President was in error to find that the dismissal was unfair because there was no valid reason.

[29] We should say something about the reliance by the Deputy President on *McGregor v MASSA.*[5] That was a decision of Abey P regarding the definition of "continuing employment".

[30] The Deputy President noted that in paragraph 113, Abey P said:

> "Importantly, the definition [of continuing employment in 3 30(1)] contains the disjunctive 'or'. Properly read, this means that a contract which does not contain an *"expressed or implied end date"* automatically meets the definition of 'continuing employment'. Similarly, if an individual could demonstrate through evidence that their employment was of a continuing or indefinite nature,' even if their contract had a notional end date, they would similarly satisfy the definition."

[31] We consider that, with respect to the President (as he then was), he fell into error and his decision on this point should not be followed.

[32] He correctly identified the fact that the word "or" is disjunctive. However he then misapprehended the effect of the disjunction. He said that a contract which does not contain an express or implied end date automatically meets the definition of 'continuing employment'. The effect of that conclusion is to read "or" as "and" so that the section would read "employment that is of a continuing or indefinite nature and

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[5] T14123 of 2013.

for which there is no expressed or implied end date". Drafted in that way the President's conclusion may have been correct. However that is not what s30(1) says.

[33] Further, it cannot be the situation for every case that where there is no end date that the contract must be of a continuing or indefinite nature. The circumstances of particular contracts may vary considerably. To state that in all cases where there is no express or implied end date must mean that the contract is of a continuing or indefinite nature does not allow for all of those contingencies. Of course, such a statement also offends the decision rule.

[34] A contract may not contain an express or implied end date, yet clearly not be of a continuing or indefinite nature. A contract for a specified task may be one example. At the commencement of the contract for the task it may not be known when the task will be completed. To use a topical example, the development of a vaccine. It could not be said that there was an "end *date*". The vagueness of when the task might finish may make it difficult to imply an end date. There is however a clear understanding that when the task is completed (whenever that may be) the contract is at an end.

Outcome

[35] The Appeal is upheld. Grounds 4, 5 and 6 are made out. It is unnecessary to consider any other grounds of appeal. Pursuant to s71(13)(a) of the IR Act the decision of the Deputy President is revoked.

[36] This brings us to the question of the disposition of the appeal. While we have determined that the Respondent did not have a reasonable expectation of continuing employment and therefore there did not have to be a valid reason for termination that does not mean that the application was without jurisdiction.[6]

[37] Section 30(2) and Section 30 (6)-(8) of the Act remain relevant to a consideration as to whether a dismissal is unfair. As the Appellant was not required to have a valid reason for termination care must be taken not to conflate matters which may go to valid reason with the consideration of unfairness.

[38] Taking into account all of the circumstances of this case, it is apparent that the Respondent's employment terminated at the expiry of the fixed-term of his contract. The employer was entitled to allow the employment relationship to terminate in accordance with the terms of that contract without a valid reason. This weighs strongly in favour of a finding that the termination of employment was not unfair.

[39] We adopt the Deputy President's findings that both parties acknowledged that the Respondent was struggling to meet the assessment criteria and required additional support. The claims of Dr King that the Respondent was not performing at a standard expected of an Intern were not seriously challenged. These factors also weigh against a finding of unfairness.

[40] We accept the findings that the Deputy President that there were procedural flaws in the process leading to the termination of employment. We also accept that the Respondent faced considerable difficulties arising from his illness and have taken that into account. However, in all of the circumstances, we are not satisfied that these factors outweigh those that favour a finding that the termination is not unfair.

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[6] *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC 97.

[41] The Applicant's claim for unfair dismissal is dismissed.

President

Appearances:
Mr P Turner SC for the Appellant
Mr C Green for the Respondent

Date and place of hearing:
2019
10 December
HOBART