TASMANIAN INDUSTRIAL COMMISSION

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

Health Services Union, Tasmania Branch
(T14850 of 2021)

and

Minister administering the State Service Act 2000/Tasmanian Health Service

DEPUTY PRESIDENT N ELLIS HOBART, 10 SEPTEMBER 2021

Industrial dispute - preliminary jurisdictional matter - whether application requires exercise of arbitral or judicial power - role of the union and current and future members – dispute resolution clauses-preliminary application dismissed

DECISION

[1] This decision deals with the preliminary jurisdictional matter raised by the Respondent of whether the Tasmanian Industrial Commission (the Commission) has arbitral power to deal with this application.

[2] The application was lodged on 28 May 2021 by the Health Services Union, Tasmania Branch (HSU) (the Applicant) pursuant to s 29(1) of the *Industrial Relations Act 1984* (Tas) (the Act) for a hearing before a Commissioner in respect of an industrial dispute relating to the terms, mode and conditions of employment of Ms Cheryl Rainbird with the Minister administering the State Service Act 2000/Tasmanian Health Service (the Respondent). An amended application was received on 29 June 2021 and replaced the original application (the amended application).

The Issue

[3] The scope of the amended application relates to Ms Rainbird's previous pattern of work of 6.30 am to 2.36 pm which commenced in 2001 and concluded in September 2020 when she was issued with a written directive to work from 7.00 am to 3.06 pm. The parties agreed the current pattern of work complies with the Award conditions.

[4] This dispute relates to an alleged breach of Part VII clause 1 of the Health and Human Services Award (the Award) where the previous pattern of work was outside the scope of ordinary hours for a day worker and overtime payment allegedly should have been made.

[5] The Respondent submitted this application is beyond the jurisdiction of the Commission, as there is no current dispute on foot and the remedy relates to the ascertainment and determination and enforcement of existing legal rights and obligations. The Respondent stated this requires an exercise in judicial power.

[6] The threshold issue relating to jurisdiction is a condition precedent which is to be determined first. With the consent of the parties, this preliminary jurisdictional issue is determined on the written submissions.

The Respondent's position

[7] The Respondent submitted that the dispute does not relate to future rights and obligations as the current pattern of work is not disputed. It was stated that this dispute related to the nature of a previous pattern of work and requires a determination of whether a mutual agreement existed at the time.

[8] The Respondent relied on *Huon Eldercare Limited T/A Huon Regional Care v Health Service Union* PR720316 which involved a dispute regarding right of entry. In *Huon Eldercare*[1], Deputy President Barclay found that where an application is seeking a declaration of what rights do or do not exist, in circumstances where there is no actual dispute on foot, this will be an exercise of judicial power.[2]

[9] The Respondent also relied on *Ranger Uranium Mines Pty Limited Ex parte Federation Miscellaneous Worker's Union of Australia* [1987] HCA 63 where it was found the inquiry and determination of matters to ascertain legal rights and obligations is a judicial function.

[10] The Respondent stated[3]:

> "The purpose of the Commission's inquiry must be restricted to a determination of whether rights and obligations should be created, while the purpose of a court's inquiry and determination may be used to decide whether a pre-existing legal obligation has been breached."

[11] The Respondent acknowledged the Applicant now raises the question regarding the construction of Part VII clause 1(c) of the Award and the ability to extend the scope of the ordinary hours or work and whether this may occur for an individual employee, whether a Workplace Flexibility Agreement (WFA) is required and the nature of the Union involvement. It was stated that as there is no current roster dispute, and no application under s 43 of the Act for an interpretation, there is no jurisdictional basis for a determination of the construction of the clauses.

[12] The Respondent submitted the Commission is able to determine the construction of the Award in the context of a s 29 dispute where there is a current dispute and to ascertain future rights and obligations.

[13] It was stated that removing the claim for payment of overtime rates in the amended application has not mitigated the issue that the inquiry and determination to resolve the dispute is based on existing rights, which is fundamentally a judicial function.

[14] It was alleged there was no possible remedy within the Commission's arbitral power to resolve the dispute. The Respondent sought that the application be dismissed under s 21(2)(c)(iv) of the Act.

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[1] PR720316.
[2] Ibid at [11], [18] and [21].
[3] Respondent's submissions on jurisdiction [19].

The Applicant's position

[15] The Applicant submitted that the dispute at hand relates to whether there was an agreement in place to alter Ms Rainbird's ordinary span of hours to avoid access to overtime. The dispute also relates to whether the Respondent can roster Ms Rainbird outside the span of hours in the absence of agreement.

[16] The parties are in dispute around the application of Part VII clause 1(c) of the Award and agreement to vary ordinary span of hours. The Applicant maintains there was never an agreement and that any agreement must be in writing by both parties.

[17] It was submitted this dispute is about future rights of the parties, namely whether an agreement exists which entitles the Respondent to roster Ms Rainbird outside the ordinary day work span of hours, and what form an agreement must take and what consultation must occur.[4]

[18] The Applicant sought from the amended application the following remedy as draft orders:[5]

> "There is no mutual agreement or WFA established for Ms Rainbird enabling her to work outside the span of hours without payment of overtime entitlements. Where a WFA or mutual agreement is not in effect-Part VII Clause 1 (a) of the HAHSA applies; and
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> The Commission Recommends that the parties confer to settle the matter where work has been performed by the Applicant between the hours of 0630 and 0700 and the Award clause was not applied."

[19] The Applicant submitted s 19 of the Act grants the Commission power to hear and determine any matter relating to an industrial matter and that a dispute has arisen under clauses 1 (a) and (c) of the Award. It was stated that this is an industrial dispute and all disputes have a historical basis. The rectification attempt of working within the ordinary span of hours does not resolve the dispute of whether or not there was a need to put an agreement in place.

[20] In response to the Respondent's position that the Applicant is seeking an exercise of power outside the Commission's jurisdiction, it was submitted s 31 provides a very wide scope to deal with industrial disputes. It referred to the Award grievance resolution mechanism which engages the Commission to conciliate and/or arbitrate if a dispute remains unresolved.

[21] The Applicant opposed the position that the Commission's jurisdiction is exclusively limited to the creation of future rights and obligations.

[22] They relied on the findings of *Ranger Uranium*[6] where the Commission, in the process of determining award construction, may form a view on legal rights and obligations of the parties. The Applicant stated that while this may not bind the parties, it will clarify the existing rights.

[23] The Applicant stated:[7]

> "What the Applicant seeks is a determination about the future application of the Award clause, its effect on future rostering rights and a recommendation

[4] Applicant Submission on Jurisdiction 21 July 2021 [1]-[4].
[5] Revised Application 29 June 2021.
[6] [1987] HCA 63.
[7] Para 11, Applicant Submission on Jurisdiction 21 July 2021.

> that the parties confer to resolve the matter of existing rights based on the construction of the clause. This will naturally require the Commission to pass judgement on the future application of the clause which inevitably draws the Commission to understand the factual matrix which has led the parties to be in dispute."

[24] The Applicant relied on *CFMEU v BHP Billiton Nickel West Pty Ltd* [2017] FWCFB 217, where the Full Bench noted if opinions are formed by the Commission about what rights should exist in the future, these functions fall within the arbitral power conferred on the Commission.

[25] The case of *Dolly-Neo Marope v Minister administering the State Service Act 2000* T14766 of 2020 was differentiated based on the nature of the relief sought which was a declaration about current enforceable rights and the payment of a penalty. It was submitted the current case is to ascertain an award construction and rule on rights which should exist between the parties, whilst expressing an opinion on the existing rights of parties.

[26] The Applicant submitted the findings in *Huon Eldercare*[8] are not significantly relevant to this case as a declaration was sought about the existing rights of entry, which it conceded was an express judicial power. It differentiated this case by saying the Applicant is not seeking a declaration about existing rights and there is a current dispute remaining on foot.

[27] The Applicant stated they were not seeking existing rights and obligations to be found, rather the construction of the Award clauses in question. They reiterated they are seeking confirmation on whether there is an agreement in place that can apply to future roster cycles and the prerequisites to an agreement under clause 1(c) of the Award.

[28] The Applicant submitted the current dispute is able to be determined within the powers of the Commission. It was stated the dispute is an industrial dispute that has arisen which the Commission has the power to settle under s 19(2)(c) of the Act, in essence to rule on the future rights of parties and pass opinion on the existing rights of parties.

Consideration

Does the Commission have jurisdiction to hear this dispute?

[29] I must establish whether there is jurisdiction to hear this dispute. Section 19 of the Act sets out the general jurisdiction of the Commission:

> "Subject to this Act, the Commission has jurisdiction to hear and determine any matter arising from, or relating to, an industrial matter."

[30] An industrial matter is defined in s 3 of the Act as any matter pertaining to the relations of employers and employees which includes a breach of an award and a matter relating to the mode, terms and conditions of employment.

[31] As this application was made pursuant to s 29 of the Act, the Applicant outlined the conditions of the alleged breach of Ms Rainbird, in her capacity as a day worker, who worked outside her ordinary span of hours. The Applicant submitted that this may affect "future rostering rights".

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[8] PR720316.

[32] An industrial dispute is defined in s 3 of the Act as follows:

> "*industrial dispute* means a dispute in relation to an industrial matter-
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> (a) that has arisen; or
> (b) that is likely to arise or is threatened or impending;"

[33] The Respondent states there is no current dispute. However, the Applicant states there is a dispute arising from an alleged breach of the Award which may reoccur without the determination of the construction of the relevant clause relating to workplace agreements.

[34] I concur with the Respondent's position that the amended remedy requires judicial power to determine a declaration of an existing right for Ms Rainbird, being that there was no mutual agreement or WFA established for Ms Rainbird.

[35] This is supported by the Fair Work Commission Full Bench decision of *CFMEU v BHP Billiton Nickel West Pty Ltd* [2017] FWCFB 217, where it was held that:

> An administrative tribunal like the Commission cannot exercise the Commonwealth's judicial power. The ascertainment, declaration and enforcement of legal rights is an exercise in judicial power. If opinions are formed about such matters in the course of arriving at a conclusion about what rights should exist in the future, the functions can legitimately fall within the arbitral power conferred on the Commission.

[36] However, I note that the remedy sought is only a request from the Applicant and draft orders sought does not determine jurisdiction or the arbitral powers provided in s 31(1) of the Act. A sought remedy may or may not be ordered and the order issued by the Commission may not be the remedy sought. An order of the Commission is issued in writing to "direct that that the thing is to be done or that action is to be taken[9]" as determined by the Commissioner to settle the dispute.

[37] It follows from s19 of the Act, and the definition of an industrial matter as outlined in s 3 of the Act, that the Commission has jurisdiction to hear and determine a matter relating to an alleged breach of award which is an industrial dispute pertaining to the employee/employer relationship which has arisen and may arise again. I am satisfied there is an industrial dispute on foot.

Does the Commission have arbitral powers to settle the dispute?

[38] The powers of the Commission are different to the jurisdiction of the Commission.

[39] Justice Slicer in *Blue Ribbon Products Pty Ltd v Tasmanian Industrial Commission* (2004) TASSC 142 distinguishes between jurisdiction and power. The source of the power is found in s 31(1) of the Act.

[40] At paragraph 57, he said:

> "The President and a Commissioner are afforded power and jurisdiction by s13 "as may be necessary or appropriate" for the purposes of the legislation, while the President is to allocate for hearing and determination applications in respect of industrial disputes (s15). The Commissioner is required to provide procedural fairness (s20) with jurisdiction: to hear and determine any matter

[9] *Industrial Relations Act 1984* (Tas) s 31(1).

> arising from, or relating to, an industrial matter (s19). The exercise of that jurisdiction "is not restricted to the specific claim made or to the subject-matter of the claim (s20(3)) …"

[41] The nature of the remedy sought by the Applicant does not govern the jurisdiction however it may inform what the dispute is about.

[42] This issue relates to whether this dispute requires arbitral or judicial power in order to settle the dispute, and in doing so, whether the Commission has the power to settle the dispute.

[43] The Respondent submitted that only judicial power could be exercised to settle this dispute as it is based on existing obligations and rights of an employee. This was found in *Marope*[10] where the dispute for late payment of wages required determination of a current enforceable legal right to the payment of money under the Award, and an order that the Respondent pay that money be issued, clearly required judicial power. I am satisfied that this case can be differentiated from the current dispute, as the narrow industrial dispute in *Marope*[11] only concerned the existing rights of Dr Marope and a remedy sought of a quantum of money.

[44] However, s 31(1) of the Act grants broad powers to the Commission in respect to preventing or settling the industrial dispute:

> "Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and 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 Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken."

[45] In addition, Justice Slicer in *Blue Ribbon*[12] stated "I think that Parliament intended s 31(1) to operate very widely in its scope…[13]".

[46] The principles of arbitral and judicial power were determined in the unanimous decision of the High Court of Australia in *Ranger Uranium*[14]. This decision was also relied upon in *Marope*[15].

[47] While this dispute related to a different type of industrial dispute, being the summary dismissal of seven employees and the issue of reinstatement, the decision provides valuable clarification of arbitral powers. In this decision[16], the High Court held:

> "18. However, the creation of legal rights and obligations is a function which may be performed in the exercise of arbitral power. This is even so if the function is performed in settlement of a dispute relating to past transactions, events and conduct: *Re Cram: Ex parte Newcastle Wallsend Coal Co. Pty. Ltd*., at p 409; p 176 of ALR.
> …

[10] T14766 of 2020.
[11] Ibid.
[12] (2004) TASSC 142.
[13] Ibid at [74].
[14] [1987] HCA 63.
[15] T14766 of 2020.
[16] *Ranger Uranium Mines Pty Limited Ex parte Federation Miscellaneous Worker's Union of Australia* [1987] HCA 63.

> 24. In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court in the course of proceedings instituted under s.119 of the Act does not *ipso facto* mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry and determination is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.
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> 25. The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration.
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> 26. Inquiry into and determination of facts for the purpose of ascertaining what rights and obligations should be brought into existence in settlement of an industrial dispute does not cease to be an exercise of arbitral power merely because, in the course thereof, the Commission may form an opinion as to the existing legal rights and obligations of the parties. As was pointed out in *Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty. Ltd.,* at p 409; p 176 of ALR, the formation of an opinion as to legal rights and obligations does not involve the exercise of judicial power, at least if it is "a step in arriving at the ultimate conclusions on which (is based) the making of an award intended to regulate the future rights of the parties". For, as was there made clear, "the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights." (my emphasis added)."

[48] I concur with the Applicant's submissions that the relevant grievance and dispute resolutions clauses of the Public Sector Wages Agreement (the Agreement) and Award must be implemented. Clause 6 of the Agreement states that the Agreement prevails to the extent of any inconsistency that occurs between this Agreement and the Award. Clause 12 of the Agreement provides a dispute settling procedure clause and it states that if a dispute remains unresolved, "the matter will be referred to the Tasmanian Industrial Commission."

[49] The Grievance and Dispute Settling Procedure set out in the Award Part XII clause 3(d) states if the issue remains unresolved, either party may refer the dispute to the Commission for "conciliation/arbitration and settlement". I note both industrial instruments were made and approved through consent applications to the Commission and it is clear there is an agreement a dispute will be referred to the Commission to determine the outcome of the dispute.

[50] In *Construction Forestry Mining and Energy Union v The Australian Industrial Relations Commission and Another* [2001] HCA 16, the application of dispute settlement clauses and powers were clarified as follows (citations omitted):

> "26 … Moreover, an arbitrated dispute resolution provision will be invalid to the extent that it purports to confer judicial power on the Commission or any one else. For present purposes, it is sufficient to note that a power to make a binding determination as to legal rights and liabilities arising under an award or agreement is, of its nature, judicial power.

> 27. Although the Commission may not arbitrate to give itself either powers or functions that the Parliament has not authorised or to provide for procedures which would involve the exercise of judicial power, it may exercise its arbitral power to provide for dispute resolution procedures…"

[51] In *Gutwein v Tasmanian Industrial Commission* [2021] TASSC 2, Marshall J observed the union's role in raising industrial disputes on behalf of past, current and future members. At paragraph 42, he stated:

> "A dispute about wage levels is a dispute relating to the terms and conditions of employment. However the appellant submits that an adjustment to the wages of person no longer employed cannot be an industrial matter because it concerns the relationship of ex- employers and ex- employees. Such an approach to the meaning of industrial matter is unduly narrow and fails to take into account the significance of an organisation of employees raising a dispute about the wage levels that should have applied at a particular period of time to certain of its members in the interests of those members and the entire classes of persons who the Union represents as persons eligible to join it. It fails to recognise the role of the union as a party principal in industrial relations regarding industrial disputes. (emphasis added)."

[52] In *Gutwein*[17], Marshall J cited *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees' Association* (1925) 35 CLR 528 where Isaacs J stated[18]:

> "…an industrial dispute could arise about the 'relative right and duties between persons who did not at the time of the dispute stand in contractual relation to each other'."

[53] Marshall J further stated[19]:

> "Put even more simply, the raising of a dispute about the inadequacy of wages paid to fixed term firefighters by the Union was on behalf of them, but also of persons in that occupation who are currently members or eligible for membership of the union. A union is recognised, at least since Burwood Cinema, as a party principal in industrial disputes. It had an interest in correcting what it considered to be a bad precedent whereby the fixed term firefighters had been inadequately remunerated. That precedent had the capacity to affect future wages claims for that class of employees."

[54] This application was lodged by the HSU who are a principal party to the Award. The status conferred by *Gutwein*[20], in my view, provides confirmation of the status of the Applicant, being the HSU who is representing the interests of their member Ms Rainbird, in addition to current and future members, concerning their conditions of employment.

[55] I am satisfied that further submissions from the Respondent (outlined in paragraph [23] above) have clarified the nature of the dispute to being one of an alleged breach which requires me to construe and interpret the relevant clauses of the Award to determine the proper application of the instrument, what rights should exist in the future and to ensure future agreements are compliant with the Award. The future is engaged by virtue of the application from the union, which may affect others who are current members and who may not yet be union members.

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[17] [2021] TASSC 2.
[18] *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees' Association* (1925) 35 CLR 528, 538.
[19] Ibid at 52.
[20] [2021] TASSC 2.

[56] I am satisfied that the current dispute, which the Commission is now tasked to determine, is a dispute concerning the proper application of the relevant clauses of the Award in order to determine the dispute between the parties.

[57] I find the Commission has arbitral power in relation to this dispute to determine whether clause 1(c) of the Award enables agreement to be reached by the employer with an employee without conferring with the relevant union (being HSU), and whether this can occur for an individual employee and whether a WFA is required. I am satisfied this dispute will impact on conditions for existing and future HSU members in the event of any request to vary the spread of ordinary hours.

[58] If an appropriate application was made, the ascertainment, declaration and enforcement of existing legal rights for Ms Rainbird would be a matter for the Court, and not a matter for this Commission.

[59] Having found the Commission has jurisdiction and arbitral powers to hear this industrial dispute, I dismiss the preliminary application of the Respondent and will proceed to issue a listing for a directions hearing.

Nerolie Ellis
Deputy President