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

Dean Moss
(T14830 of 2022)

PRESIDENT D BARCLAY
COMMISSIONER T LEE
COMMISSIONER T CIRKOVIC HOBART, 1 SEPTEMBER 2022

DECISION

[1] This is an Appeal against a Decision by the Deputy President Ellis whereby she ordered the appellant to pay compensation to the respondent based on the "technical element" of the lack of payment of notice to the respondent at the time of the termination of his employment.

Background

[2] The respondent was terminated as a result of the Secretary of the Department of Health finding that he had breached the Code of Conduct contained in section 9 (3) of the State Service Act (the Act). It is not necessary to set out the conduct which the Secretary found that the respondent had committed which constituted the breach. It is sufficient to note that there were 38 allegations of harassment towards female colleagues with 21 being substantiated. As a result of the finding that the respondent had breached the code of conduct the Secretary terminated his employment. The respondent brought an application to the commission alleging that the termination of his employment was unfair.

[3] The Deputy President found there were valid reasons for the termination of the respondent's employment and that the process had been procedurally fair. Indeed she found that the conduct relied upon as the valid reason for termination was serious. While the Deputy President did not use the phrase "serious misconduct" she categorised the conduct as "of a serious nature and this conduct cannot be tolerated in any workplace"[1] and "the misconduct was of such a nature and incompatible with a safe workplace".[2] In our view, having regard to the conduct that the Deputy President found the respondent was guilty of and her findings it is clear that the conduct constitutes serious misconduct. The Deputy President found that the respondents sustained unwelcome physical contact and verbal comments, including inappropriate sexually explicit comments caused considerable harm to many trainees[3] Unwelcome physical contact and inappropriate sexually explicit comments over a sustained period of time is in our view serious misconduct. ,

[4] However, an issue arose whereby it transpired that the respondent had not been paid in lieu of notice at the time of the termination of his employment. As a result the Deputy President concluded as follows:

[1] The Decision of the Deputy President at paragraph 133
[2] Ibid paragraph 182
[3] Ibid paragraph 132

> **"[181]** However, failure to pay period of notice is a process error essentially of a technical nature. This error occurred after the Applicant's employment was terminated where I have found all processes except the final payment were accorded with procedural fairness. Furthermore, the error did not alter the outcome of the termination of employment. However, I am satisfied this final payment error results in unfairness for the Applicant due to the lack of notice period payment, arising from the employer terminating his employment.
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> **[182]** Pursuant to s(30) of the IR Act, my view is that reinstatement or re-employment is not feasible, not only because the evidence of the complainants is such I am persuaded that this would be impracticable, but the misconduct was of such a serious nature and incompatible with a safe workplace and the payment error was essentially only of a technical nature. However, Mr Moss had a contractual and statutory right to payment in lieu of notice as he was not summarily dismissed. I am satisfied that notice period should be paid to Mr Moss."

[5] It is these findings against which the appellant appeals in the order to pay compensation.

The Appeal

[6] The grounds of appeal are as follows:

> **Ground 1:** Pursuant to section 70(1A)(a)(i) and (v) of the Industrial Relations Act 1984 the Deputy President erred in fact and in law in determining that the appellant's failure to pay notice in accordance with the Health and Human Services (Tasmanian State Service) Award ('the Award') rendered the termination unfair for the purposes section 30 of the Industrial Relations Act 1984, because termination could not be rendered unfair by that failure.
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> **Ground 2:** Pursuant to section 70(1A)(a)(i) and (v) of the Industrial Relations Act 1984 the Deputy President erred in fact and in law in determining that a te1mination of employment, pursuant to section 44(3)(a) of the State Service Act 2000, gives rise to an entitlement to payment of notice under the Award.
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> **Ground 3:** In the alternative, and pursuant to section 70(1A)(a)(i) of the Industrial Relations Act 1984, in finding that the respondent's conduct '...is of a serious nature and this conduct cannot be tolerated in any workplace. ' (paragraph 133 of her reasons) the Deputy President erred in law and in fact in then failing to consider and apply paragraph (d) of Part 1, clause 9(d) of the Award, by which no sum was payable to the respondent beyond that which was paid to him.

Ground 3

[7] It is convenient to deal with ground 3 first. That ground asserts that the Deputy President erred in law and in fact in that, having found that the conduct of which the respondent was guilty was of a serious nature not to be tolerated in any workplace, she failed to consider and apply the relevant clause of the award to the effect that no sum by way of notice was payable to the respondent.

[8] The relevant clause of the award is clause 9 (d) of the Health and Human Services Award (the award). Clause 9 provides as follows:

"9. CONTRACT OF EMPLOYMENT

(a) Except as otherwise provided by the State Service Act 2000, employment is by the fortnight. Any employee not specifically engaged as a casual employee is deemed to be employed by the fortnight.

(b) An employee (other than a casual employee) who is willing to work his or her normal ordinary hours of work, is entitled to be paid a full fortnight's salary at a rate fixed by this award or relevant industrial agreement.

(c) Notice of termination by Employee and Employer

(i) Notice of termination by Employee

Employment is to be terminated by an employee by the giving of two weeks' notice to the employer or by the forfeiture of two weeks wages as the case may be.

(ii) Notice of termination by the Employer

(1) Employment is to be terminated by the employer by the giving of notice in accordance with the following table:

Period of Service	Period of Notice
From commencement and up to the Completion of 3 years	2 weeks
3 years and up to the completion of 5 years	3 weeks
5 years and over	4 weeks

(2) In addition to the period of notice provided an employee aged 45 years and older with 2 or more years of service is entitled to an additional week's notice.

(3) Payment in lieu of the period of notice must be made if the appropriate period of notice is not given or in circumstances where it is agreed the period of notice is to be waived and payment in lieu substituted.

d) Summary Dismissal

The employer has the right to dismiss an employee for serious misconduct or serious neglect of duty and in such circumstances the normal salary rate, allowances, penalty payments and accrued entitlements are to be paid up to the time of dismissal only.

(e) A casual employee is to be given a minimum of two hours' work or pay on each occasion they are required to attend work unless otherwise mutually agreed by the employee, employer and relevant union."

[9] The particular part of clause 9 relied on is subclause (d) relating to summary dismissal. It will be seen that that clause provides the employer may dismiss an employee for serious misconduct and in those circumstances the employer is not

required to pay salary, allowances, penalty payments and accrued entitlements beyond the time of dismissal. Put simply that means that where an employee is terminated for serious misconduct the employee is not entitled to be paid in lieu of notice.

[10] At the hearing before the Deputy president the appellant did not advance a case that the termination was a summary dismissal and that therefore clause 9 (d) of the award meant that the respondent was not entitled to a payment in lieu of notice. During argument on the appeal it became apparent that this was a result of a misunderstanding by the appellant that the termination was not a summary dismissal. Counsel for the appellant on the appeal submitted that summary dismissal equates with instant dismissal[4]. She said it seemed to her that summary dismissal was not really a term which sits neatly with a nine-month process that occurs in an Employment Direction 5 context.[5] We apprehend that the counsel was suggesting that as the ED5 investigation was a detailed investigation over a long period that that process was inconsistent with instant dismissal.

[11] However summary dismissal is in fact dismissal without notice. It is not immediate dismissal, although in certain circumstances it may be. It is to be remembered that summary dismissal is no more than an example of the general right of any contracting party to treat certain breaches of a contract (including a contract of employment) as bringing the agreement to an end. Those breaches are necessarily serious. In Blyth Chemicals Ltd v Bushnell[6] Dixon and McTiernan JJ said at 80–81:

> "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal … But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found."

[12] It is obvious that in certain circumstances it may take some time to investigate an employee's conduct to determine the nature and extent of that conduct and in particular whether it would justify summary dismissal. There is no requirement for a temporal connection between the conduct said to justify the termination and the summary dismissal. It is the termination without payment of notice (and potentially other accrued entitlements) which constitutes summary dismissal. Indeed there are circumstances in which a termination follows immediately upon the discovery of conduct sufficient to justify immediate termination but an employer nevertheless chooses to make a payment in lieu of notice. In those circumstances the termination is not regarded as a summary dismissal even though the conduct is serious misconduct. Some employers may choose to pay notice in cases where the conduct relied upon for the termination may or may not amount to misconduct justifying summary dismissal. If the dismissal is challenged then the employer does not have to prove that the conduct amounted to serious misconduct but rather that the conduct was sufficient to amount to a valid reason for termination.

[13] A question which arises is whether or not, having not advanced the case at the hearing that the respondent was summarily dismissed, the appellant can now rely on that as a reason to overturn the Deputy President's decision.

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[4] Transcript p 17 line26

[5] Employment Direction 5 is the employment direction which provides for the investigation of the conduct of employees to determine whether there may be conduct amounting to a breach of the Code of Conduct.

[6] (1933) 49 CLR 66

[14] Given the nature of the hearing and the task upon which the Deputy President embarked, namely a hearing of the matter to make findings herself as to the conduct and its legitimacy as a ground for dismissal, she ought to have considered the legal consequence of her finding that not only had the appellant demonstrated at the hearing that the respondent was guilty of the conduct relied upon to justify the termination but that the conduct was serious misconduct. Had the Deputy President done so she would have determined that the dismissal was a summary dismissal within the meaning of clause 9 (d) of the award as that clause is directed to serious misconduct.

[15] It follows that as a result of the Deputy President's finding that the Respondent's conduct was of a serious nature, which in our view amounts to serious misconduct, and the application of clause 9 (d) of the award, that the respondent was not entitled to the payment of notice.

[16] We pause to note that, in any event as the dismissal was without notice the termination was as a matter of law a summary dismissal..

[17] It follows that the Deputy President was in error in finding that the respondent was entitled to payment of notice. Such an error is an error within the meaning of section 70 (1A) (a) (i) of the Industrial Relations Act 1984 (IR Act). As a result of the error, and in accordance with section 71 (13) (a) of the IR Act we revoke that element of the decision of the Deputy President.

[18] As a result of our findings in respect to ground 3 it is unnecessary to consider the other grounds of appeal. However it is appropriate to comment on the submission advanced by the appellant in support of ground 2 relating to the interplay of section 44 (1) of the Act and the award provision requiring the giving or payment of notice upon termination of the employee's employment.

[19] Section 38 of the Act provides that the terms and conditions of employment of employees are to be those specified in an award relating to persons engaged in the work for which they are employed or, if no such award is in force, are to be determined by the Employer.

[20] Section 44 (1) of the Act provides that the Minister may at any time, by notice in writing, terminate the employment of a permanent employee. The appellant argues that the effect of section 44 (1) is that the Minister is not obliged to give notice in accordance with clause 9 of the award notwithstanding section 38 of the Act.

[21] The appellant argues that such a conclusion is to be drawn from the difference between section 44 and section 45 of the Act. Section 45 of the act provides that, in respect to the termination of a fixed term employee, the employer may at any time by notice in writing terminate the employment of such an employee in accordance with the terms and conditions under which the employee is appointed. The appellant argues that had the Minister been obliged to give notice when dismissing a permanent employee, section 44 would have contained something similar to that set out in section 45.

[22] The difficulty with such a submission is that section 44 and section 45 are dealing with different things. Section 45 deals with fixed term employees and provides the ability for the employer to terminate the fixed term employee's employment in accordance with the terms and conditions under which that employee is appointed. If there were no such ability to terminate the employment of a fixed term employee on notice then by default they would become a permanent employee as they could only have been terminated for the matters referred to in section 44. As such there is no

significance to be drawn from the fact that section 44 does not refer to the terms and conditions under which the employee was appointed.

[23] What is clear is that, as a result of section 38 of the Act the award forms part of the terms and conditions of the employment of the employee where an award applies to the engagement. As a result the notice provision of the award is expressly incorporated by reference into the contract of employment (the engagement) between the employer and the employee. Is there anything in section 44 then which permits the employer to ignore the terms and conditions of the employment? In our view there is not. The terms and conditions of the employee's employment constitute the legal framework, and identify the rights and obligations of the parties to the engagement. The terms and conditions of the employment are legally binding on both the employer and the employee. It seems to us that if a legal entitlement to notice is to be abrogated then there must be specific provision to that effect.

[24] The fact that the notice clause of the award may require the giving of notice, or payment in lieu of notice, does not, as the appellant argued, fetter the Minister's ability to terminate the employment of a permanent employee at any time. All that is required is that if the permanent employee is not to work out a period of notice that the permanent employee is to be paid in lieu of notice.

[25] Indeed it is clear that there are other fetters to the Minister's ability to terminate at any time in that processes must be undertaken to, for example, identify whether or not an employee is in breach of the Code of Conduct or is unable to perform the inherent requirements of the position. Until such time as those determinations are made the Minister is unable to terminate the employee's employment. To submit therefore that section 44 (1) provides an unfettered discretion to the Minister to terminate at any time is not correct. The requirement to pay an employee notice in lieu of working out a notice period does not limit the minister's ability to terminate the employment at any time. All that is to happen is that the employer must pay the award entitlement to notice. The minister is still able to choose the time of termination.

Outcome

[26] Ground three of the appellant's notice of appeal is upheld. The Deputy President's decision is revoked. In accordance with section 71 (13) (b) of the IR Act our decision is that the respondent's application to the commission dated 16 December 2019 is dismissed.

Appearances:
Mr G Chen for the Appellant
Mr and Ms Moss the Respondent

Date and place of hearing:
2022
11 July
HOBART