TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s29(1A) application for hearing of an industrial dispute

Aitken Dean Jonathon
(T14912 of 2022)

and

Minister administering the State Service Act 2000 – Department of Education

PRESIDENT BARCLAY HOBART, 1 SEPTEMBER 2022

Application for unfair dismissal remedy – nature of hearing – whether de novo hearing

DECISION

[1] The Applicant has applied for an unfair dismissal remedy as a result of the termination of his employment on 3 March 2022 following an investigation into allegations that he had indecently assaulted a student when he was a teacher at a high school in North-West Tasmania.

[2] The Applicant was charged with offences relating to the alleged conduct which were heard before a jury in the Supreme Court of Tasmania. He was acquitted of all charges. The investigation was commenced well after the Applicant was acquitted.

[3] The Respondent has made application that the Application for an unfair termination remedy be dismissed pursuant to s 21(1)(c)(iv) of the *Industrial Relations Act 1984* (the Act). That section relevantly provides:

> "21. Procedure of Commission and associated matters
>
> (1) Subject to this Act, the Commission may regulate its own procedure.
>
> (2) Without prejudice to the generality of subsection (1), the Commission may, in relation to a matter before it –
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> …
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> (c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –
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> …
>
> (iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;"

[4] The Respondent submits that the Application is without merit and as a result should be dismissed. In order to make that submission good, the Respondent argues that the Commission is not empowered to embark upon a de novo hearing and substitute its own

finding as to whether there was a valid reason for the termination of the employment, but rather has a more limited procedure for the hearing and determination of termination of employment matters. In essence the submission is that the Commission is to:

(a) Determine whether the employer found that there was a valid reason to dismiss the Applicant;

(b) ensure that the valid reason was not one prohibited by the Act;

(c) ensure the reason was the operative reason (or one of the operative reasons) for the termination of the employment; and

(d) to ensure that the Applicant was accorded procedural fairness during the process.

[5] This decision deals with whether or not the procedure for hearing unfair termination cases is a de novo hearing or some other form of hearing.

[6] It is submitted that it is not the role of the Commission to embark upon a hearing to determine the existence of the valid reason but that on a proper construction of the Act, and having regard to the fact that the finding by the employer of a valid reason is the exercise of a statutory power by the employer (the Minister by his or her delegate) that the Commission is to proceed on the basis that a valid reason exists for the termination of the employment. Further it is submitted that there is no general unfairness discretion and that the Commission is limited to a consideration of whether the Applicant was accorded procedural fairness only.

[7] It is noted that the submission is novel. Since the creation of the Commission by the Act on 16 May 1984, it has embarked upon a de novo hearing to determine whether there was a valid reason for the termination of the employment and whether otherwise the termination was unfair. However the Respondent submits that as a result of amendments to the Act which came into force on 1 January 2001 the nature of the procedure to be adopted by the Commission changed.

[8] Consideration of the Respondents submission requires an analysis of the relevant provisions of the Act. It is useful to remind oneself of what is involved in the task of construction. At its heart the task of construction is to discern Parliaments intention in enacting the piece of legislation under consideration.

[9] In *Work Health Authority v Outback Ballooning Pty Ltd*[1] Gageler J said:

> "Contributing to the overall difficulty in more recent times has been a tendency to downplay the centrality of legislative intention to the determination of the operation of the Commonwealth law. The tendency can be seen to have been the outworking of emergent scepticism about the very existence of legislative intention. That scepticism cannot be allowed to distort the understanding or application of established constitutional doctrine.
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> Those who regard the search for "intention" as fictitious must content themselves with an acceptance that it is the function of the courts, ultimately this Court, to specify what the purpose and effect (and hence the imputed intention) of the competing legislation is.
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> Groups acting deliberatively according to established procedures can meaningfully be seen to have intentions, distinct from the subjective intentions of their constituent individuals, both as to what collectively they seek to achieve and as to

[1] (2019) 266 CLR 428 at [74]-[77].

how collectively they seek to achieve it. Legislative assemblies in representative democracies are the paradigm of groups acting deliberatively, as courts in representative democracies have for the most part done well to recognise when construing legislative output.

'[O]ne of the surest indexes of a mature and developed jurisprudence' is 'to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning'. The responsibility of a court performing its constitutionally mandated function of authoritatively attributing meaning to a legislated text, to the extent necessary to resolve a dispute as to legal rights or legal obligations, is correspondingly 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'. That a finding of purpose can involve a 'contestable judgment' only heightens that responsibility.

The words "intention", "contemplation", "purpose", and "design" are used routinely by courts in relation to the meaning of legislation' and 'are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked'. Each is appropriate to be used by a court to acknowledge the indisputable and foundational fact that legislated text is the product of deliberative choice on the part of democratically elected representatives to pursue collectively chosen ends by collectively chosen means. To reduce legislative intention to a label for the outcome of a constructional choice made by the court itself, is to miss the point of the traditional terminology. It is to ignore that the responsibility of the court, in making a constructional choice, is to adopt an authoritative construction of legislated text which accords with the imputed intention of the enacting legislature. Worse, it is to use a constructional methodology which fails to give full expression to 'the constitutional relationship between courts and the legislature." [Citations omitted]

[10] In the present case this is important given that the Respondent relies on facts and circumstances which came into existence well after the amendments relied upon were enacted to support its construction of the Act.

[11] As to the task of construction itself in *SZTAL v Minister for Immigration and Border Protection*[2] the plurality said at [14]:

"The starting point for the ascertainment of the meaning of a statutory provision is the "text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected." [Citations omitted]

[12] In the same case Gageler J said further:[3]

"The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text.

[2] [2017] HCA 34, (2017) 347 ALR 405, (2017) 91 ALJR 936.
[3] Ibid [37]-[39].

The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.

Integral to making such a choice is discernment of statutory purpose." [Citations omitted]

[13] I have regard to these principles when considering the question of construction.

The statutory provisions

[14] In respect to hearings relating to termination of employment the Act provides as follows:

> **"29. Hearings for settling disputes**
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> (1) An organization, employer, employee or the Minister may apply to the President for a hearing before a Commissioner in respect of an industrial dispute.
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> (1AA) For the purpose of this section, a referral of a matter to the Commission by the Employer under section 16(2)(b) of the State Service Act 2000 is taken to be an application to the President for a hearing by the State Service employee named in that referral.
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> (1A) A former employee may apply to the President for a hearing before a Commissioner in respect of an industrial dispute relating to –
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> (a) the termination of employment of the former employee; or
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> (b) severance pay in respect of employment of the former employee terminated as a result of redundancy; or
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> (c) a breach of an award or a registered agreement involving the former employee; or
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> (d) a dispute over the entitlement to long service leave, or payment instead of any such leave, or the rate of ordinary pay at which any such leave or payment is to be paid in respect of the former employee.
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> (1B) An application for a hearing before a Commissioner in respect of an industrial dispute relating to termination of employment or severance pay relating to redundancy is to be made within 21 days after the date of termination or, if the Commissioner considers there to be exceptional circumstances, such further period as the Commissioner considers appropriate.
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> (1C) The Minister responsible for the Workplace Standards Authority may apply to the President for a hearing before a Commissioner in respect of an

industrial dispute relating to a breach of an award or a registered agreement.

(1D) An application for a hearing in respect of a dispute, including a dispute relating to –

(a) termination of employment; or

(b) severance pay; or

(c) breach of an award or a registered agreement; or

(d) long service leave –

must contain full particulars of –

(e) the circumstances giving rise to the dispute; and

(f) the nature of the claim; and

(g) the remedy being sought by the applicant.

(1E) At any time before setting a date for a hearing, or before the date of the hearing, the Commission, of its own motion or at the request of a party to the dispute, may require the applicant to provide further and better particulars of –

(a) the nature and circumstances of the dispute; and

(b) the nature of the claim; and

(c) the remedy sought –

if the Commission considers it necessary to ensure that the Commission and the parties to the dispute are properly informed.

(2) The President must –

(a) allocate to a Commissioner for hearing an application made under this section; and

(b) cause notice of the time and place of the hearing to be given to a person who, or an organisation which, the President considers is able to assist in the settlement or prevention of the industrial dispute.

(3) At any stage of proceedings relating to a hearing under subsection (2), the Commission, of its own motion or at the request of one or more of the parties to the proceedings, may attempt to conciliate the dispute.

30. Criteria applying to disputes relating to termination of employment

(1) In this section –

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;

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;

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

(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

(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.

(4) Without limitation, the following are not valid reasons for termination of employment:

(a) membership of a trade union or participation, or involvement, in trade union activities;

(b) seeking office as, acting as, or having acted as, a representative of employees;

(c) non-membership of a trade union;

(d) race, colour, gender, sexual preference, age, physical or intellectual disability, marital status, relationship status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except where the inherent nature of the work precludes employment for any of those reasons;

(e) absence from work during maternity or parental leave;

(f) temporary absence from work because of illness or injury, provided that nothing in this paragraph is to be construed as removing an employer's right to terminate an employee's employment on account of persistent or unjustified absenteeism;

(g) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.

(5) Where an employer terminates an employee’s employment, the onus of proving the existence of a valid reason for the termination rests with the employer.

(6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.

(7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.

(8) An employee responding to an employer under subsection (7) is to be offered the opportunity to be assisted by another person of the employee's choice.

(9) The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable.

(11) In determining the amount of compensation under subsection (10) , the Commission must have regard to all the circumstances of the case, including the following:

(a) the length of the employee's service with the employer;

(b) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;

(c) any other matter the Commission considers relevant.

(12)Where the Commission finds that an employee's employment has been unfairly terminated and has determined that reinstatement or re-employment is impracticable, any amount of compensation must not exceed an amount equivalent to 6 months' ordinary pay for that employee.

(13) The Commission is to take into account any efforts of the employee to mitigate the loss suffered as a result of the termination of his or her employment.

30A. Employees under federal award

A person –

(a) who is employed, or was employed, under a federal award but who is, or was, excluded from, or for any other reason does not have, or did not have at the relevant time, access to a remedy for termination of employment; or

(b) to whom the termination provisions contained in Division 3 of Part IVA of the Commonwealth Act do not, or did not at the relevant time, apply –

may apply to the Commission for the hearing of a dispute specified in section 29(1A)(a) or (b) .

31. Orders arising from hearings

(1) 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.

(1A) Before deciding whether or not to make an order in respect of an industrial dispute relating to termination of employment, a Commissioner is to give effect to the provisions of section 30.

(1B) If a Commissioner, in hearing an industrial dispute relating to termination of employment, finds that an employee or a former employee has been unfairly dismissed, the Commissioner may –

(a) if he or she believes it to be appropriate, order reinstatement or re-employment of the employee or former employee; or

(b) if in the Commissioner's opinion reinstatement or re-employment is impracticable, order that the employer pay the employee or former employee an amount of compensation, instead of reinstatement or re-employment, that the Commissioner considers appropriate in the circumstances, subject to section 30(12) .

(1C) A Commissioner, in hearing an industrial dispute relating to termination of employment resulting from redundancy, may make an order in respect of severance pay for an employee or former employee whose employment is to be, or has been, terminated.

(2) A Commissioner shall not make an order under this section –

(a) that is inconsistent with the provisions of any Act dealing with the same subject-matter; or

(b) that makes an award or that varies or creates a provision of an award.

(3) Notwithstanding subsection (2) (b), a Commissioner may make an order requiring that an application be made under section 23 or 43.

(4) An order under this section does not have effect so as to require any person to contravene, or fail to comply with, an award or to commit an offence, or to do an act which, if the order had not been made, would render that person liable to any legal proceedings.

(4A) The Registrar must cause a copy of an order made by the Commission to be served on –

(a) any person to whom the order applies; and

(b) any party to the hearing of the industrial dispute.

(4) A person shall not contravene, or fail to comply with, a direction contained in an order under this section.

Penalty: Fine not exceeding 50 penalty units.

(5) A person is not guilty of an offence under subsection (5) in respect of a direction made under this section unless a notice containing a copy of that direction has been served on him.

(6) An order under this section shall be deemed to have been served on the person to whom it applies if –

(a) where that person is a member of an organization – the order has been served on those office bearers of the organization who attended the relevant hearing; or

(b) where that person is not a member of an organization – a copy of the order has been published in a newspaper circulating in the locality in which that person is employed."

[15] Noting that the question under consideration is one of procedure, section 21 of the Act is also relevant. It provides:

21. Procedure of Commission and associated matters

(1) Subject to this Act, the Commission may regulate its own procedure.

(2) Without prejudice to the generality of subsection (1) , the Commission may, in relation to a matter before it –

(a) at or before the commencement of proceedings before the Commission, ascertain whether all private employers referred to in section 66 (1) who, and all organizations the members of which, in the opinion of the Commission, may be subject to an award made by the Commission, have been summoned to attend the proceedings, or have been given notice of those proceedings;

(b) direct that organisations or persons be summoned to attend those proceedings;

(c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –

(i) that the matter or part is trivial;

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii). . . . . .

(iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;

(d) take evidence on oath or affirmation;

(e) proceed to hear and determine the matter or any part of the matter in the absence of any party to it who has been duly summoned to appear or been duly served with notice of those proceedings;

(f) sit at any place;

(g) adjourn to any time and place;

(h) direct any person, whether a witness or intending witness or not, to leave the place in which those proceedings are being conducted;

(i) refer any matter to an expert and accept his report as evidence;

(j) permit the intervention, on such terms as it thinks fit, of an organization which, in the opinion of the Commission, is sufficiently interested in that matter;

(k) allow the amendment, on such terms as it thinks fit, of those proceedings or a document relating to that matter;

(l) correct, amend, or waive any error, defect, or irregularity;

(m) extend any time –

(i) prescribed by or under this Act, except a time prescribed in relation to an appeal; or

(ii) fixed by an order of the Commission; and

(n) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of that matter.

(3) Any person, not being a private employer or member of an association referred to in section 66, or an intervener, who attends proceedings before the Commission to give evidence as a witness when so summoned to do so is entitled to be paid such fees, allowances, and sums by way of reimbursement of expenses as are prescribed in the regulations.

The Respondents Submissions

[16] Because the submissions are novel and, if correct, result in a significant departure from the previous practice of the Commission, it is appropriate to set out the respondent's submissions, notwithstanding that they are lengthy.

[17] In its written submissions of 30 May 2022 the respondent says the following:

2. It is submitted that the following shows the jurisdiction of the Commission, conferred by the *Industrial Relations Act 1984* (Tas) ("*IR Act*"):

    a. The present application is made pursuant to s 29(1A)(a) of the *IR Act*. It concerns "an industrial dispute" relating to "the termination of employment of the former employee";

b. While s 31(1) gives to the Commission power to make orders with respect to industrial disputes generally, the Commission's power on an unfair dismissal application is specifically provided for by ss 31(1A)-(1C); these latter and specific provisions relating to an unfair dismissal application derogate from the Commission's general powers under s 31(1) with respect to industrial disputes generally;

c. Section 31(1B) is the sole source of the Commission's power to give relief upon a s 29(1A)(a) application. In determining whether an employee is entitled to an unfair dismissal remedy, the Commission "is to give effect to the provisions of section 30": s 31(1A).

d. The Commission's power under the *IR Act* to "make an order in respect of an industrial dispute relating to termination of employment" is limited by the terms of s 30: s 31(1A). The phrase "unfairly dismissed" employed by s 31(1B) is

merely shorthand for compliance with the requirements of s 30. Section 30 codifies the "criteria applying to disputes relating to termination of employment" and thereby covers the field with respect to what constitutes an "unfair dismissal". This construction is supported by the Second Reading Speech, which provided:

> For the first time, the Act will contain clear and fair criteria relating to unfair dismissal. Much of what is included is simply setting down existing practice and precedents into codified form. The intention behind this is to bring a level of clarity and certainty to this area so that employees and employers understand the fundamental rights, obligations and processes involved. It is hoped that by so doing much of the confusion and misunderstanding currently in evidence in relation to unfair dismissals will be eliminated.

To the extent that *MASSA v Prasad* and *Marope v MASSA* held otherwise, they should not be followed. The Respondent adopts the submissions advanced by the Minister in *Marope*, which are summarised in the Commission's reasons for decision in that case;

e. Applying s 30, the *IR Act* provides the following criteria which are exhaustive and determinative of any dispute relating to termination of employment:

   i. An employee or former employee is only protected from unfair dismissal if they have "a reasonable expectation of continuing employment": s 30(3);

   ii. The employment of an employee who has a "reasonable expectation of continuing employment" may be lawfully terminated if there is a valid reason for termination connected with either:

      1. "the capacity, performance or conduct of the employee", or

      2. "the operational requirements of the employer's business": s 30(3);

iii. The use of the indefinite article ("*a* valid reason") in s 30(3) reveals that a single valid reason is sufficient. If there were multiple reasons for termination and some of those were not valid reasons for termination, or if the termination can nevertheless be justified by a valid reason which was not referred to by the employer at the time of the termination as being an operative reason, the termination would be lawful because there is "a" valid reason for the termination;

iv. The phrase "a valid reason" is not synonymous with "harsh, unjust or unreasonable". A reason for termination may be both unfair and nevertheless "valid". A "valid reason" is principally a reason which is not specified as a prohibited reason. A "valid" reason is one which is genuine. The adjective "valid" "should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced is not a valid reason.

v. Section 30(7) covers the field regarding procedural fairness, such that a dismissal can only be relevantly "unfair" if:

1. the employee is terminated for reasons related to their "conduct, capacity or performance", and

2. they are not informed of those reasons and given an opportunity to respond to them, unless "in all the circumstances the employer cannot reasonably be expected to provide such an opportunity": s 30(7);

vi. If "the valid reason for the termination" is connected with "the operational requirements of the employer's business", there is no requirement to afford the employee procedural fairness before termination;

f. It may be noted that the *IR Act* confers no jurisdiction on the Commission to make a finding that a termination was harsh, unjust or unreasonable, or that a termination was unfair otherwise than by application of the criteria in s 30.

3. Critically, where the employee's breach of the *State Service Act 2000* (Tas) ("*SS Act*") Code of Conduct is said to constitute a valid reason for their termination, the Respondent submits that the Commission has no jurisdiction to conduct a *de novo* hearing of the allegations on a s 29(1A)(a) application for an unfair dismissal remedy. While this interpretation of the Commission's jurisdiction represents a departure from the jurisdiction exercised by the Fair Work Commission ("FWC") under the *Fair Work Act 2009* (Cth) ("*FW Act*") that departure is justified by the statutory nature of the employer's power to find a breach of the Code of Conduct has occurred, along with the dual jurisdiction of the Commission under the *SS Act* and the *IR Act* respectively.

(i) The statutory source of the employer's power to determine breach

4. Under the *SS Act*, the employer's finding that an employee has breached the Code of Conduct is an exercise of statutory power. This proposition is fundamental and allows for the Commission's jurisdiction under the *IR Act* to be distinguished from the FWC's under the *FW Act*. Section 10(3) of the *SS Act* relevantly provides:

(1) The Minister may impose one or more of the following sanctions on an employee who is found, under procedures established under subsection (3), to have breached the Code of Conduct:

…

(2) The Minister may delegate the power to impose any of the sanctions specified in subsection (1)(a) to (f).

(3) The Employer is to establish procedures for the investigation and determination of whether an employee has breached the Code of Conduct.

The employer's determination, following an investigation, that an employee has breached the Code of Conduct is an exercise of statutory power conferred by s 10(3) of the *SS Act*.

5. That proposition is uncontroversial. The authority for that proposition is *Cookson v Beveridge*, in which the applicant contended that the State Service Commissioner, as the *SS Act* then provided for, had no power to find a breach of the Code of Conduct proven. Underwood J rejected that contention and dismissed the appeal, saying:

> [16] Although the Act does not expressly confer a power on the Commissioner to determine whether there has been a breach of the Code of Conduct, I think that having regard to its purpose, such a power is either implicit in the words of s10(3), or upon their proper construction, the words of the subsection include that power.
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> …
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> [19] I am confident that Parliament intended, by the enactment of s10(3), to confer upon the Commissioner, as part of the establishment of procedures for investigation and determination of whether there had been a breach of the Code of Conduct, a power to determine such matters himself. The obvious intention was to provide that nomination of the person or persons empowered to investigate and determine whether there has been a breach of the Code is part and parcel of the establishment of procedures authorised by s10(3). The legislation should be construed accordingly.

The *SS Act* was significantly amended with effect from 1 July 2013; the State Service Commissioner was abolished and its power under s 10(3) was conferred on the "Employer", being the Minister administering the *SS Act*. If the legislature had intended to reverse the foundational holding in *Cookson v Beveridge* that s 10(3) confers statutory power to find a breach proven, it could have done so. It did not.

6. The principle for which *Cookson v Beveridge* stands was also confirmed by Blow J, as his Honour then was, in *Secretary v Beveridge*. The applicant in that case sought review under the *Judicial Review Act 2000* (Tas) ("*JR Act*") of the State Service Commissioner's delegate's finding that she no "jurisdiction to determine whether there had been a breach of any Australian law unless there has been a determination by a court or other body having jurisdiction to make determinations as to breaches of that law". Blow J allowed the appeal, holding that there was no such restriction on the exercise of the State Service Commissioner's power. It was implicit in his Honour's determination to grant relief under the *JR Act* that s 10(3) of to the State Service Commissioner to make

a finding of breach, as the *JR Act* only applies to decisions of an administrative character made under an enactment. That latter phrase has been interpreted to require the decision to derive its legal force from that enactment. The case is therefore authority for the proposition that the decision of the State Service Commissioner to determine whether there was a breach of the Code of Conduct was an exercise of statutory power.

7. With great respect to Underwood J and Blow J, the conclusions reached in the above two cases is also supported by s 16 of the *SS Act.* That section provides that the Employer's powers include the power to "conduct such investigations as the Employer considers necessary for the purposes of this Act". The power to conduct investigations impliedly includes a power to determine the outcome of such an investigation.

8. *Cookson v Beveridge* and *Secretary v Beveridge* are each authority for the proposition that the Employer's determination that an employee has breached the *SS Act* Code of Conduct is an exercise of statutory power under the *SS Act*. Whether that power is conferred by s 10(3) or s 16(2)(a) is immaterial. What is significant is the implications which flow from the identification of this statutory power to find a breach proven, including interplay between the *SS Act* and the *IR Act*, and the Commission's jurisdiction on an application for an unfair dismissal remedy.

9. Once it is accepted, as *Cookson v Beveridge* and *Secretary v Beveridge* require, that the determination of breach of the Code of Conduct is an exercise of statutory power, it can be appreciated that it is an exercise of public power under statute, rather than private power under contract. Two points follow. First, as an exercise of statutory power, the principles of administrative law attend the exercise of the decision to determine breach, as do administrative law remedies under the *JR Act* and the Supreme Court's inherent jurisdiction to review for jurisdictional and other errors. Second, the Employer's determination of breach is given statutory significance and force.

10. This second point is key. As an exercise of statutory power, the merits of the employer's finding that an employee has breached the Code of Conduct is not a matter for the Courts. As Brennan J observed in *Attorney-General (NSW) v Quinn*,

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. … The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The Commission is not a Court. Nevertheless, the question which arises is a matter of statutory interpretation, being whether on the proper construction of the *IR Act* the Commission is expressly or impliedly conferred power to conduct a merits review of the employer's decision made under the *SS Act*.

11. Plainly, the *IR Act* does not expressly confer jurisdiction to the Commission to

conduct a merits review of the employer's decision to find a breach proven. The *IR Act* does not contain a provision equivalent to, say, the *Magistrates Court (Administrative Appeals Division) Act 2000* (Tas) which states: "A review of a decision by the Court is to be by way of hearing de novo". It is significant that the legislature could have expressly conferred such a power on the Commission had that been the legislature's intention.

12. The *IR Act* may nevertheless impliedly confer jurisdiction on the Commission to conduct a merits review of the Employer's decision. However, the implication of such jurisdiction is contraindicated by both the dual jurisdiction of the Commission under the *SS Act* and *IR Act*, to which we will turn shortly, and moreover the legislature's conferral of statutory powers on other bodies to find a breach of the Code of Conduct proven.

13. The *Anti-Discrimination Act 1998* (Tas) ("*AD Act*") prohibits discrimination and certain conduct and confers jurisdiction to the Tasmanian Civil and Administrative Tribunal ("the Tribunal") to conduct inquiries into complaints of such conduct. If the Tribunal finds a complaint substantiated following inquiry, it is empowered to make certain orders, which include the following:

> (2) If the Tribunal finds after an inquiry that a complaint against a State Service officer or State Service employee is substantiated, it may order the Minister responsible for the Agency in which that officer or employee is employed to exercise any one or more of the powers specified in section 10 of the State Service Act 2000.
>
> (3) If the Tribunal makes an order under subsection (2), the inquiry held under this Act is taken to be a determination arising from an investigation under section 10 of the State Service Act 2000.

The *AD Act* was amended to include these subsections by the *State Service (Consequential and Miscellaneous Amendments) Act 2000* (Tas), which entered into force on 1 May 2001 along with the *SS Act* itself.

14. These subsections of the *AD Act* are relevant in two ways. First, they confirm the holdings in *Cookson v Beveridge* and *Secretary v Beveridge* that the Employer's determination that a worker has breached the Code of Conduct is an exercise of statutory power under the *SS Act*. Subsection 89(3), extracted above, deems the inquiry to be "a determination arising from an investigation under section 10" of the *SS Act*, which would be nonsensical if s 10 of the *SS Act* did not confer power on the Employer to make such a determination.

15. Second and moreover, ss 89(2)-(3) is inconsistent with any implication that the Commission has power to conduct a *de novo* hearing of the Employer's finding of breach. The Tribunal's power to order the Minister to exercise any one of the powers conferred by s 10 of the *SS Act* includes the power to order the Minister to impose a sanction of termination on an employee pursuant to s 10(1)(g). Section 89(3) deems the Tribunal's inquiry to be the Employer's determination of breach. That dismissed employee could then file an unfair dismissal application with the Commission. On such an application, the rhetorical question can be asked: Does the *IR Act* impliedly confer jurisdiction on the Commission to conduct a *de novo* hearing of the Tribunal's determination that an employee breached the *AD Act* (which is taken to be a breach of the *Code of Conduct*)? The answer is plainly 'no': the Commission is not an appellate body of the Tribunal.

16. However, the rhetorical question posed by this detour into the jurisdiction of the

Tribunal under the *AD Act* is not just answered by principles of comity between the Tribunal and the Commission, but by foundational principle. Where the legislature has expressly conferred power on a decision-maker to make a decision, no implication may be drawn that another statutory decision-maker has power to review that decision without clear and unmistakable language which confers such power. The name of the statutory decision-maker, whether styled as a 'Commission', 'tribunal', 'Employer' or 'Minister', is of no importance. This brings us full circle. Once it is accepted, as *Cookson v Beveridge* and *Secretary v Beveridge* confirm, and as s 89(3) of the *AD Act* suggests, that the *SS Act* confers power on the Employer to determine a breach of the Code of Conduct, no mere implication can be drawn that another statutory decision- maker has jurisdiction to conduct a *de novo* hearing of that decision.

(ii) The dual jurisdiction of the Commission under the SS Act *and* IR Act

17. The Commission's conferral of distinct jurisdiction by the *SS Act* and *IR Act* respectively (its 'dual jurisdiction') provides an alternative basis on which any implication of jurisdiction to conduct a *de novo* hearing on an unfair dismissal application under the *IR Act* may be rejected.

18. First, the *SS Act* confers the Commission jurisdiction to review State Service actions. Breach of the Code of Conduct is a jurisdictional fact which enlivens the employer's power to terminate an employee. An employee who has been found to have breached the *SS Act* Code of Conduct may apply to the Commission for a review of State Service Action with respect to that finding. The Commission has no power to conduct a *de novo* hearing on such a review; rather, the Commission's task is to look over the decision with a view to correcting error.

19. The Commission's *SS Act* jurisdiction to conduct a review of State Service action allows the Commission to scrutinise the Employer's determination that an employee has breached the *Code of Conduct*. This is critical. The Commission's jurisdiction to conduct a 'review' under the *SS Act* offers an employee an avenue of redress from a determination of breach, prior to any determination being made in relation to sanction. The availability of that relief is a critical departure from the scheme established by each of the *FW Act,* the *Workplace Relations Act 1996* (Cth) and the *Industrial Relations Act 1998* (Cth), which each provided no such mechanism to either public- or private-sector employees. Any implication drawn from the language of the Commonwealth enactments in favour of an industrial tribunal's power to conduct a *de novo* hearing of an employer's determination of breach is necessarily inapposite to the Commission, which has an independent source of jurisdiction under the *SS Act* to scrutinise the employer's determination. In other words, the Commission's power to conduct a *de novo* hearing of a determination of breach is not a necessary implication of the *IR Act*, where the legislature has conferred an independent source of jurisdiction under the *SS Act* for the Commission to scrutinise that decision.

20. It may be noted that the *SS Act* precludes the Commission jurisdiction to review a decision "in respect of the termination of the employee's employment". That provision ensures that the Commission's *SS Act* jurisdiction cannot be used to 'review' a *dismissal* decision; the Commission is only conferred jurisdiction with respect to termination by the *IR Act* and its 'unfair dismissal' remedy. That provision does not present any bar to the acceptance of the Respondent's submissions on construction: a determination that a breach of the *Code of Conduct* has been committed is not a decision "in respect of the termination of the employee's employment", but is rather a jurisdictional fact which enlivens the power to impose a sanction, including that of dismissal.

21. In *Evans v Frawley* Evans J held that the State Service Commissioner did not have jurisdiction to conduct a review into whether the worker was unable to efficiently and effectively perform their duties pursuant to s 50(1)(b) of the *SS Act*, in circumstances where the employer had already determined to impose a sanction of termination for the proven inability. His Honour held that, in those circumstances, the finding of inability to efficiently and effectively perform duties was "in relation to the decision to terminate employment". That case is readily distinguishable to a case such as the present, where no decision to impose a sanction of termination was made at the time the worker was notified of the finding of breach.

22. As the Commission has jurisdiction to conduct a review of the determination of breach under the *SS Act*, there is no warrant for a broad interpretation of its *IR Act* jurisdiction so as to imply power to conduct a *de novo* hearing. Fundamentally, a person employed under the *SS Act* has a number of avenues for redress against an adverse finding of misconduct, none of which are available to a private sector employee; this difference explains why the *FW Act*, which applies to both public and private sector employees, can be relevantly distinguished.

23. Second, the Commission's other source of jurisdiction is the *IR Act.* As identified earlier, the *IR Act* does not expressly confer the Commission power to conduct a *de novo* hearing. Consideration must therefore be given to whether the *IR Act* necessarily implies a power to conduct a *de novo* hearing on its own terms. At its highest, the best argument which can be mounted for such a construction is that the words "a valid reason for termination" impliedly confer such a power. That argument is supported by authority from the federal level in relation to a number of Commonwealth industrial relations enactments.

…

27 The *IR Act* is distinguishable on that basis. Unlike the *Industrial Relations Act 1988* (Cth), the *Workplace Relations Act 1996* (Cth), or the *FW Act*, the *IR Act* "criteria applying to disputes relating to termination of employment" does not refer to whether a dismissal was "harsh, unjust or unreasonable".

28 This construction is consistent with the legislative history of the *IR Act* and the *SS Act*, with are closely related. Previous iterations of the *IR Act* provided a positive right against "unjustifiable" termination. Prior to the enactment of the *SS Act*, the *IR Act* incorporated and gave effect to the International Labour Organisation's "Convention Concerning the Termination of Employment at the Initiative of the Employer" ("the Convention"). Indeed, s 31(1A) previously provided:

> Before deciding whether or not to make an order in respect of an industrial dispute relating to termination of employment, a Commissioner is to take into account the standards of general application contained in Part II of the International Labour Organisation's Convention concerning the Termination of Employment at the Initiative of the Employer as set out in Schedule 10 to the Commonwealth Act.[39]

Part II of the Convention provided "Standards of General Application", which entitled the Commission to "examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was *justified*".[40] By s 31(1A), the *IR Act* incorporated the

Convention's positive entitlement to a "justifiable" termination into Tasmanian law. This statutory conferral of a positive right to a "justifiable" termination ousted the common law, which has never recognised any obligation on an employer to afford fairness (whether procedural or substantive) in terminating an employee.[41] This legislative history shows that previous iterations of the *IR Act* conferred protection against "unjustifiable termination" which gave the Commissioner broad powers to consider both procedural and substantive fairness in determining whether a termination was "justified". That power was arguably analogous to the Commonwealth protection against "harsh, unjust or unreasonable" termination.

29 However, the *IR Act* provision which incorporated the Convention and the protection against "unjustified termination" was amended in 2001. Section 31(1A), which had adopted the Convention into Tasmanian law, was amended to its current version effective 1 January 2001. This largely coincided with the introduction of the *SS Act*, which entered into force on 1 May 2001. Following the introduction of the *SS Act* and the referral of jurisdiction concerning private sector employees to the Commonwealth, the Commission's power to "review", resided in the "review of State Service action" provisions of the *SS Act* rather than in the *IR Act*. Section 19AA of the *IR Act* entered into force on 4 February 2013 to effect this reform. This historical background suggests it was the legislature's intention to recall the conferral of jurisdiction over "unjustified terminations" in favour of a much narrower conception of "unfair dismissal" as presently reflected in s 30 of the *IR Act*.

(iii) The FWC's jurisprudence on de novo hearings

…

39. For these reasons, the Commission's 'dual jurisdiction' distinguishes it from the FWC and authorities in relation to various Commonwealth industrial relations enactments. Further, the FWC's jurisprudence on its power to conduct a de novo hearing is inconsistent and does not provide a principled foundation for the interpretation of the Commission's power under the IR Act.

40. While the IR Act provides a broad definition of 'employee', which encompasses both private and public sector employees, the subsequent enactment of the Industrial Relations (Commonwealth Powers) Act 2009 (Tas) removes the Commission's jurisdiction with respect to employment and termination of private sector employees and refers those matters to the Commonwealth and the operation of the FW Act. The IR Act's definition of 'employee', and of concepts which refer to an 'employee' (such as "industrial dispute"), must be viewed in that context.

41. It follows that a dismissal will not be relevantly "unfair" where there is a valid reason for the termination and, if it relates to the employee's conduct, capacity or performance, the employee is afforded procedural fairness in relation to the dismissal decision. A pre-requisite of such statutory protection is the employee's "reasonable expectation of continuing employment". There is no residual jurisdiction for the Commission to consider whether, notwithstanding that the employer has complied with its obligations under s 30, that the termination was otherwise "unfair" in the sense of "harsh, unjust or unreasonable". The IR Act does not confer such a broad "review"-type power on the Commission in the resolution of an industrial dispute under Pt II Div 4. The criteria applying to

disputes in s 30 define the metes and bounds of an "unfair" dismissal."[4]

[18] In summary the respondent says that as a result of amendments to the Act in 2001, the dual jurisdiction of the Commission under the Act and the *State Service Act 2000* (Tas), and the fact that the finding of a valid reason is the exercise of a statutory power by the employer, that it is necessary for there to be an express power to conduct a de novo hearing in respect to the question of valid reason. Additionally, the respondent points to the *Anti-Discrimination Act 1998* (Tas) and the powers granted under it to the Anti-discrimination Tribunal as evidence of the sorts of things that the Act would need to say to provide that the procedure of the Commission is to conduct de novo hearing in respect of the existence of a valid reason.

The Applicants submissions

[19] The applicant relies on written submissions dated 20 June 2022.

[20] The applicant responds to the respondent's submissions in respect of the question of de novo hearing the following terms:

> 17 The respondent inevitably and incorrectly interprets the IR Act as not conferring power on the Commission to review an employer's decision *de novo*. Rather, the respondent argues that the *"Commission's jurisdiction to conduct a 'review' under the SS Act offers an employee an avenue of redress from a determination of breach, prior to any determination being made in relation to sanction."* If the submission is to be understood correctly, the respondent is arguing that the applicant ought to have made the application for review at the time he has been notified of a decision on breach, but before a decision is made as to whether his employment has been terminated.
>
> 18 The respondent has not followed the High Court's guidance in *Project Blue Sky*. If it had done so, the respondent would have taken into account ss 30(2) and (6) of the IR Act, which lists the criteria applying to disputes relating to the termination of employment, including:
>
> > Section 30(2): In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that **all of the circumstances of the case** are fully taken into account. (emphasis added)
> >
> > […]
> >
> > Section 30(6): Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.
>
> 19 Section 30(2) obliges the Commission to fully take into account all facts and circumstances of the case when considering an application relating to termination of employment. The qualifier 'must' indicates this is not discretionary but rather obligatory in nature. The trigger invoking the Commission's ability to review a termination decision is the notice of termination – it is at this stage, and not before, that the statute mandates the Commission to take all facts and circumstances into account. The basis for the termination is clearly part of the facts and circumstances that are before the Commission and considered when reviewing the decision of the

[4] Citations omitted.

Secretary.

20 If the reasoning of the respondent were followed, the Commission would be making a decision on termination in the abstract, a hypothetical termination. This proposition is illogical and is inconsistent with the language and purpose of the provisions found in Part II of the IR Act.

21 Interpreting Part II of the IR Act in accordance with *Project Blue Sky*, it is clear that the appropriate juncture for a review by this Commission of an employment termination decision is after the employee has been notified of that decision, as the applicant in this matter has done.

22 The respondent proposes that each of the steps, in a process resulting in termination, can be reviewed - but only one at a time - as they are made. And the respondent says access to that review is via another section of the IR Act or *Judicial Review Act 2000* (Tas).[4] In the applicant's submission that interpretation strains the clear scheme of the IR Act.

Dual jurisdiction

23 The respondent asserts that purported 'dual jurisdiction' of the SS Act and the IR Act is a basis for rejecting the de novo hearing function of the Commission.5 This is incorrect. Rather than being dual in nature, the SS Act and IR Act interact complementarily. Section 50(4) of the SS Act expressly carves out disputes relating to the decision to terminate employment from the general 50(1)(b) category "any other State Service action that relates to his or her employment in the State Service." Section 50(4) of the SS Act refers termination disputes off to the 'appropriate industrial tribunal' which per the IR Act, is the Commission. Specifically, s19(1) of the IR Act determines that the Commission has jurisdiction to "hear and determine any matter arising from, or relating to, an industrial matter." Section 3 defines industrial matter to include at (a)(ii) the "termination of employment of an employee or former em*ployee.*"

24 The respondent has cited *Pervan v Frawley* at [64] to support the sweeping assertion at [18] of the respondent's Submissions that *"[t]he Commission has no power to conduct a de novo hearing on such a review; rather, the Commission's task is to look over the decision with a view to correcting error."* The respondent has relied on this judgment in a piecemeal fashion. In *Pervan v Frawley*, the review in that particular case was one which 'looked over' the decision for the purpose of correction rather than a *de novo* hearing. However, Porter J noted that there was "*no dispute that the Commissioner could review the merits of the Secretary's decision*", and stating specifically at [69]:

> *In the main, in relation to provisions which mandate or authorise the exercise of power where there exists a particular belief or state of satisfaction, judicial review is available on the question of whether the decision-maker could have reasonably formed that belief or reached that state. […] I cannot agree that the issue is one of fact in the sense that the formation of the belief under cl 4.1 is a purely subjective exercise immune from review.*

25 The proposition that the IR Act does not allow the Commission to conduct a merits review is inconsistent with the legislative framework which confers jurisdiction to the Commission and additionally contravenes the case law which has interpreted it.

Valid reason

26 The respondent is correct in stating that s30(3) allows for the termination of the employment if there is a valid reason, which the respondent has defined as "genuine", "sound, defensible or well founded" and that "a reason which is capricious, fanciful, spiteful or prejudiced is not a valid reason." This definition lies at the heart of the applicant's submission.

27 A reason must be valid – for example, a breach of the Code of Conduct is indeed a valid reason for termination. Equally, the IR Act provides a non-exhaustive list of reasons which are not valid reasons for termination of employment at s30(4)(a)-(g). These reasons are not limited, as the High Court in Cosco Holdings Pty Ltd v Thu9 confirmed, in that "[i]f there are other reasons for which an employer may not lawfully dismiss an employee, then equally, no doubt, such a reason will not be a "valid" reason."

28 Key to the validity of the reason is not just its subject matter but also its soundness, defensibility and proper foundation. In the applicant's case it was not so, because it was based on the findings of a flawed investigation.

29 The ED5 investigation based its findings on the transcripts of a Supreme Court criminal trial wherein the applicant was exonerated of all charges. The complainant was not interviewed in the context of the ED5 investigation because she refused to make herself available. The applicant has denied the accusations of improper conduct from the outset. Yet the Secretary still made findings against the applicant despite having no proper foundation to do so. That is, attributing the conduct to the applicant was not well-founded, sound or defensible.

30 It follows, then, that because no properly founded valid reason was given that the Commission has jurisdiction to conduct a *de novo* hearing to examine whether the alleged reason is made out on all the facts and circumstances.[11] The respondent's Submissions note that despite the fact that the *Fair Work Act 2009* (Cth) does not provide expressly for *de novo* hearings, "*authorities have construed from the words "valid reason" an implication that the FWC must itself conduct a de novo hearing.*"[12] The same principle could be applied to the applicant's matter.

31 In essence, the respondent proposes that the IR Act does not allow for a process to review the respondent's decision to terminate the applicant's employment (leaving aside that in the letter dated 3 March 2022, the Secretary informs the applicant that he has the right to make that very application for review). If this reasoning were followed, it would establish a system that allows the respondent to instigate and make determinations over employees without a logical oversight or review process.

32 The course of action proposed in the respondent's Submission provides the applicant with an overly cumbersome and illogical process of review inconsistent with the language and purpose of all the provisions of the Act. If the process proposed by the respondent were to be accepted as the correct one for review, the balance of power weighs heavily towards the Secretary, with a clear and unfair disadvantage to the applicant employee.

Fair Work Commission

33 The respondent goes to great lengths to analyse the de novo hearing process before the Fair Work Commission (FWC), concluding that "the FWC does not conduct a de novo hearing proper, but rather a merits review on the basis of the factual circumstances extant at the date of termination, even if such facts only came to light subsequently."14 If the jurisprudence of the FWC was indeed relevant in this matter, then it is the applicant's submission that a "merits review" rather than a "de novo hearing proper"(as defined by the respondent) would be sufficient to hear the review of his termination of employment.

Conclusion

34 The application contends that in hearing the application the Commissioner has jurisdiction to review the breach of Code of Conduct determination. The Commission is not bound by the Secretary's determination so the outcome of the application is not inevitable and the application is not bound to fail."[5]

Consideration

[21] It is important to remember that the Commission is exercising original jurisdiction when considering applications for a remedy arising out of the termination of employment. The Commission is not exercising any form of appellate jurisdiction in the first instance. Rather it is conducting a hearing into an industrial dispute arising out of an industrial matter as defined by the Act.

[22] The Act provides that the Commission has jurisdiction to hear and determine any matter arising from, or relating to, an industrial matter. In the exercise of that jurisdiction the Commission may conduct hearings for settling the industrial dispute.[6]

[23] The question, of course, is: what is the procedure to be adopted for the purpose of conducting the hearing to settle the industrial dispute?

Dual Jurisdiction

[24] The difficulty with the respondent's submission in respect to the dual jurisdiction is that jurisdiction for the Commission to review a State Service action, under the *State Service Act 2000*, was not granted to it until 2013. At the date at which the amendments to the act came into force in 2001 the Commission did not have any such dual jurisdiction. The significance of that is that the task of statutory construction to determine, from the words of the legislation, what Parliament's intention was when enacting the amendment.

[25] It can hardly be argued that Parliament had in mind the fact that the Commission would be exercising a dual jurisdiction when amending the Act in 2001 when no such dual jurisdiction existed. Had the Commission been vested with dual jurisdiction in 2001 then the respondent's submission may have had merit. However in my view when construing the act and the effect of the 2001 amendments I am to ignore the fact that some 12 years later the Commission was vested with jurisdiction to hear and determine applications relating to State Service actions.

[26] Further to that, in my view, there is no warrant to have regard to the *State Service Act 2000* when construing the Act. As the State Service Commissioner had exclusive

[5] Citations omitted.
[6] The Act, s 20.

jurisdiction over State Service actions in 2001 the Commission was independent to any decision made under the State Service Act and played no role under that act. Accordingly the attempt to use the State Service Act review of actions provisions (which did not apply to the Commission for another 12 years) as a reason to limit or otherwise affect the meaning of the Act is misconceived.

[27] It is also significant that the amendments which came into force in 2013 did not make any amendments to the unfair termination provisions currently under consideration. Accordingly, there is nothing in the 2013 amendments which could be said to have evinced any change in parliamentary intention with respect to the unfair termination provisions.

Referral of Private Employees to the Commonwealth

[28] The same may be said for the fact that the Commission's jurisdiction with respect to employment and termination of private sector employees was referred to the Commonwealth effective 1st of January 2010. That is, the relevant amendments to the Act relied on by the Respondent were effected some nine years earlier. Again the referral of private sector employees to the Commonwealth does not seem to me to be a factor which enlightens the question of construction of section 30 of the Act because to take such matters into account would be to impute an intention of Parliament which simply did not exist at the time of the relevant amendment. Again, there is nothing in the legislation which referred private sector employees to the Commonwealth which might be said to evince any change to the parliamentary intention and construction of the unfair termination provisions. Had other amendments been made (for example limiting employees to State Service employees or employers to the State) then perhaps such an intention may have been discernible. However that was not the case.

[29] The respondent further submits that the Fair Work Commission jurisprudence in respect to its power to conduct a de novo hearing ought not to be used to inform the question of whether or not this Commission is to conduct de novo hearings into termination of employment. I agree that the scheme of the *Fair Work Act 2009* (Cth) is sufficiently different to that of the Act such that little assistance is to be gained from the jurisprudence emanating from the Fair Work Commission.

The Act and s 30

[30] Prior to the current s 30, the Act incorporated the Industrial Labour Organisations Convention concerning the Termination of Employment at the Initiative of the Employer. The respondent submits that the incorporation of the Convention gave the Commission broad powers to consider both procedural and substantive fairness in determining whether termination was justified. However in light of the amendments effective 1 January 2001 the respondent submits that it was the legislature's intention to recall the conferral of jurisdiction over unjustifiable terminations in favour of a much narrower conception of unfair dismissal as reflected in section 30 of the act.

[31] It will be seen that on and from 1 January 2001 the Commission is obliged to have regard to section 30 of the act before deciding whether or not to make an order in respect of an industrial dispute relating to termination of employment. It is, in my view, significant that the time at which the Commission is to have regard to section 30 is at the time when it is deciding whether or not to make an order in respect of the dispute. The Commission is not required to have regard to section 30 when considering the nature of the hearing upon which it is embarked. That is, section 30 says nothing about the nature of the hearing and whether or not the hearing is to be a de novo hearing.

[32] Rather, section 30 sets out the matters (criteria) to which the Commission must have regard when deciding whether or not to make an order in respect of the dispute presently before it.

[33] Whilst the heading to section 30 does not form part of the act[7] the heading is accurate in that section 30 sets out a number of criteria to which the Commission is to have regard when determining whether or not to make an order. The following set out the matters of process that the Commission is to adopt: s 30(2) provides that the Commission is to ensure that fair consideration is accorded to both the employer and employee and that all the circumstances of the case are to be fully take into account. Subsection (5) provides that the onus of proving the existence of a valid reason is on the employer and subsection (6) provides that the onus of establishing that the employment has been unfairly terminated is on the applicant.

[34] The criteria to be applied to the consideration of whether the termination was a valid termination and therefore to what order to make are that subsection (3) requires that there must be a valid reason for termination connected with the capacity, performance or conduct of the employee or the operational requirements of the business. Subsection (4) lists a number of matters that do not constitute a valid reason. Subsection (7) provides an obligation to inform the employee of any conduct matters and to give the employee an opportunity to respond where the ground for termination is capacity, performance or conduct. These matters engage the validity of the termination. The matters referred to in the foregoing paragraph deal with the process through which the Commission must navigate in making the determination.

[35] Finally, subsection (9) provides that the principal remedy is reinstatement and subsections (10), (11) and (12) provide the Commission with power to order compensation instead of reinstatement in certain circumstances and the matters to consider in respect to the issue of compensation.

[36] The purpose of this examination of s 30 is to demonstrate that section 30 says nothing about the manner in which the Commission is to conduct the hearing. As already outlined the dual jurisdiction issue and referral of private employees to the Commonwealth also do not assist in construing the provision.

[37] Turning now to the Act, section 29 provides that an organisation, employer, employee or the Minister may apply for a hearing before a Commissioner in respect of an industrial dispute. Subsection (1A) provides that a former employee may apply to the President for a hearing in respect to an industrial dispute relating to termination of employment. Upon receipt of the application the President is to allocate the application to a Commissioner for hearing. It is to be noted that it is this section which refers to the nature of the proceeding, namely a hearing. The act does not otherwise define or identify what is meant by a hearing.

[38] It is also to be remembered that at the time section 30 came into force (as now) employee is defined as meaning a private employee or a State employee.[8] It is also to be remembered that at the time section 30 came into force in 2001, the Commission retained jurisdiction over private employees for all industrial disputes.

[39] In my view the Commission was (and is) able to determine the nature of the hearing required by section 29 to be carried out when exercising its jurisdiction to hear and determine the industrial matter, namely, termination of employment. This includes the holding of a de novo hearing.

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[7] *Acts Interpretation Act 1931* (Tas) s 6(4).

[8] The Act s 3.

[40] Section 21(1) of the Act provides that the Commission may regulate its own procedure. Informing that power are the matters referred to in section 21(2) of the Act. Section 21(2) provides that, and without prejudice to the generality of the power of the Commission to regulate its own procedure, the Commission can direct that persons be summonsed to attend proceedings, take evidence on oath or affirmation, and generally do all such things as are necessary or expedient for the expeditious and just hearing and determination of a matter.

[41] Is there anything in section 30 which requires the reading-down of the powers of the Commission referred to in section 21 to hear and determine matters arising from an industrial matter? In my view there is not. Indeed, the fact that the Commission is required by section 30(2) to ensure that fair consideration is accorded both parties and that all the circumstances of the case are to be fully taken into account, and that section 30 provides for onuses of proof at the hearing of the industrial matter, reinforce the fact that it is open to conduct a de novo hearing.

Parliament's Intention

[42] In respect to Parliament's expressed intention I note the second reading speech included the following:

> "for the first time, the Act will contain clear and fair criteria relating to unfair dismissal. Much of what is included is simply setting down existing practice and precedents into codified form."[9]

[43] The second reading speech, as an expression of Parliament's intention, makes it clear that section 30 as amended was intended to enshrine existing practice and precedents. The second reading speech reinforces the conclusion to which I have come. It might further be said that there is nothing in the second reading speech which specifically engages with the procedure by which the Commission is to hear unfair termination hearings, other than of course stating that much of the existing practice is set down in the section.

[44] The respondent argued that I should not have regard to the second reading speech for the purpose of the construction question as there was no ambiguity in s 30. It seems to me that the fact that I am considering competing questions of construction of section 30 suggest that there is ambiguity in the section. The fact that the provision does not specifically address the procedure for the type of hearing the Commission should conduct also presents ambiguity. Further, and in any event, I am permitted to have regard to extrinsic material capable of assisting interpretation of legislation where that material may confirm the interpretation conveyed by the ordinary meeting of the provision.[10]

Purpose and Objects of the Act

[45] I now come to the question of the purpose or object of the Act insofar as it is relevant to the construction of section 30. The purpose or object of the Act was to establish the Commission to have jurisdiction to hear and determine matters arising from or relating to industrial matters including the conducting of hearings and the settlement of disputes.[11]

[46] The purpose and object of the amendment to section 30 was to ensure that the Act contained clear and fair criteria relating to unfair dismissal disputes. At the time section

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[9] Tasmania, *Parliamentary Debates*, House of Assembly, [31 August 2000], [89], (J Bacon).
[10] (n 7), s 8B(1)(c).
[11] The Act, Long Title.

30 was amended, the means by which employees could challenge a termination of employment was in the Commission. It was not then possible to make an application in respect to termination of employment to the State Service Commissioner, although it was open for a State Service employee to challenge a finding of a breach of the Code of Conduct. Importantly, the Commission had no jurisdiction over State Service actions so that the Commission only exercised jurisdiction in respect to unfair terminations once the termination of employment had been effected. That jurisdiction is an exercise of the Commissions original jurisdiction to hear and determine industrial disputes.

[47] In respect to non-State Service employees, there was, of course, no means by which they could challenge a decision by an employer to terminate his or her employment until after the dismissal came into effect.

[48] There was therefore no means by which an aggrieved employee, whose employment had been terminated, to review the merits of the termination other than by making an application pursuant to section 29.

[49] It is also of significance that section 31(1B) refers to the Commission finding that an employee or former employee has been unfairly dismissed. This aligns with the onus provisions in section 30, whereby the onus of proving that a termination was unfair rests with the employee. It also informs the fact that the Commission is exercising original jurisdiction and that it is the first time that a body, with no interest in the outcome of any investigation into the conduct which led to the termination, is considering the case. Provision being made for onuses is, of course, an indication that the Commission will be dealing with evidence at a hearing and adopts the Convention regarding the onus of proof together indicating that the procedure under the Convention and in accordance with the amendments to s 30 were envisaged to remain essentially the same.

[50] In my view, the purpose and objects of the Act are best facilitated by a construction of the provisions which I have reached, enabling the Commission to hear and determine an industrial dispute relating to termination of employment in accordance with the procedures laid down elsewhere in the Act.

Unfairness

[51] On the question of unfairness, it is the respondent's submission that the only question of fairness is whether or not the dismissed employee has been accorded procedural fairness. In my view there is nothing in section 30 which requires such a narrow reading, especially at the time at which the amendments were enacted. At the time the amendments came into force the Commission retained jurisdiction over private employees. Then as now the definition of employee includes private and state employees. As the Act, when amended, applied to private employees, the jurisdiction of the Commission to review the circumstances of the termination of employment was the first and only time that such an employee could seek a review. As referred to above, it is also the first time an independent body is tasked with reviewing the decision to terminate the employment by the Minister. It could not have been Parliament's intention to limit the question of fairness, in the circumstances, to one of procedural fairness, especially in light of the fact that the amendments were to substantially extend enacting the existing practice. To do so is in fact inconsistent with past practice. In my opinion if the question of fairness is to be read down, parliament would have provided accordingly. It did not.

[52] I also note such a submission is inconsistent with the ordinary definition of unfair. Unfair is defined as "not fair; biased or partial; not just or equitable; unjust".[12] It is straining the meaning of unfair to limit the consideration of whether there has been

[12] Macquarie Dictionary, 6th Ed., 1604.

unfairness to a question of procedural fairness. Such a contention is also inconsistent with s 31(1B) of the Act which refers to a finding by the Commission that an employee was unfairly terminated. Constraining the meaning of unfair is also inconsistent with the requirement of the Commission to have regard to all of the circumstances of the case.

[53] I should say something about the Respondents submission that the Act must contain a provision similar to the Anti-Discrimination Act or the Magistrates Court legislation for the Commission to have power to conduct a de novo hearing. I do not agree. The Commission is empowered to regulate its own procedure for conducting hearings. The specific power to order reinstatement or reemployment means no similar provision as in the Anti-Discrimination legislation is required. Indeed the Commission is embarked on a different task to that of the Anti-Discrimination Tribunal. The Tribunal is concerned with issues of discrimination. The Commission is concerned with industrial disputes, including termination of employment at-large. The questions for consideration in the Commission are wider than questions of discrimination.

[54] Further, I do not accept that the Commission would, in effect, be an appeal tribunal from an order of the Anti-Discrimination Tribunal made under s 89 of the *Anti-Discrimination Act 1998*. The Respondent submits that it could not have been intended that this Commission could entertain an application from an employee where the Anti-Discrimination Tribunal made an order under s 10 of the State Service Act. In fact, in my view, it must have been obvious to the legislature that by effectively putting the Anti-Discrimination Tribunal in the shoes of the Minister in making such an order and in providing that the process before that tribunal was an ED 5 investigation, that the Commission would have jurisdiction to entertain an application in respect to the termination. Indeed ED 5 provides for that very thing.[13]

[55] It is also not without significance that this Commission is a specialist tribunal dealing with industrial matters and it would not be inappropriate for the Commission to hear a matter emanating from a determination of the Ant-Discrimination Tribunal. The analogy of an appeal is also not a good one. The fact the legislation provides that the exercise upon which the Anti-Discrimination Tribunal was engaged was legislated to be an ED 5 investigation makes it clear that that determination is a step in the ED 5 process and amounts to the finalisation of that particular ED 5 process, subject to review. Nothing about that limits the jurisdiction of the Commission to hear an application arising out of that ED 5 process. As I say, the fact Parliament provided that the task upon which the Anti-Discrimination Tribunal was embarked was an ED 5 investigation, and not simply an order of that tribunal, suggests Parliament intended this Commission to have jurisdiction in respect to an application for an unfair dismissal remedy.[14]

Outcome

[56] For these reasons I determine that the Commission has power to conduct the hearing required to be conducted pursuant to section 29 in the form of a de novo hearing. In broad summary, the Commission is empowered to determine its own procedure in accordance with s 21 of the Act. There is nothing in s 30, as amended in 2001, which limits or qualifies that power. Section 30 is in-fact silent as to the nature of the hearing which is to be conducted by the Commission. The arguments of dual jurisdiction and referral of private employees to the Commonwealth do not assist the Respondent as they occurred many years after the amendments relied upon and do not discern any change in Parliamentary intention from 2001. The former simply abolished the State Service Commissioner and substituted the Commission for the Commissioner. The latter came about as a result of a national agreement to enact a national law relating to private

[13] ED 5 clause 11.

[14] See ED 5 clause 11.1(a).

employees. The referral did not engage with any associated changes to the Commission's procedure or with any change to Parliament's intentions in 2001.

[57] I will hear further from the parties as to the further conduct of the matter.

Appearances:
Ms Weiss for the Applicant
Mr Jehne for the Respondent

HOBART
6 July 2022