TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s29 application for hearing of an industrial dispute

Harvey David Blackburn
(T13749 of 2010)

and

Tasmanian Paints Pty Ltd

DEPUTY PRESIDENT TIM ABEY HOBART, 16 August 2011

Jurisdiction – Limitation Act 1974 – meaning of 'action' – found 'action', limited to a proceeding in a court – found Tasmanian Industrial Commission is not a 'court' – jurisdictional application dismissed

REASONS FOR PRELIMINARY DECISION

[1] This is an application lodged pursuant s. 29[1A] of the Act. There may well have been some inadvertent confusion in that two applications were lodged on the same day (23 December 2010). The first application (T13748) was lodged pursuant to s 29(1) of the Act. This subsection relates to an *"employee"* rather than a *"former employee"* under s. 29(1A). Clearly in Mr Blackburn's case, s. 29(1A) is the correct subsection.

[2] Regrettably the *Directions* issued on 7 June 2011 incorrectly referred to T13748 rather than T13749.

[3] Nothing turns on this technical oversight. Whilst the particulars of the application are complex, the application clearly is founded under an industrial dispute relating to either s29(1A)(a), *termination of employment,* and/or s29(1A)(d)*, long service leave.*

[4] Mr Blackburn's contract of employment terminated in either March 2003 (respondent's contention) or November 2003 (applicant's contention). Either way, the application to the Commission was lodged more than six years after the date of termination.

[5] The respondent contends that the applicant is statute barred from proceeding by virtue of the *Limitation Act 1974.* In such circumstances the reasons for the delay in lodging the application are not material. With the consent of the parties I determine this question by way of a preliminary decision.

[6] Relevantly the *Limitation Act* provides:

> ***"General period in actions of contract, tort, &c.***
>
> ***4. (1)*** *Except as otherwise provided in this Division, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say:*

> ***(a)*** *actions founded on simple contract (including contract implied by law) or founded on tort, including actions for damages for a breach of statutory duty;*
>
> ***(b)*** *actions to enforce a recognizance;*
>
> ***(c)*** *actions to enforce an award, where the submission is not by an instrument under seal;*
>
> ***(d)*** *actions to recover any sum recoverable by virtue of an enactment, other than a penalty or forfeiture or a sum by way of penalty or forfeiture."*

[7] Section 2[1] defines "*action"* as:

> *"includes any proceeding in a court of law."*

[8] The question to be determined is whether the application before the Commission is an "*action"* contemplated by the *Limitation Act.*

[9] The respondent contends that by virtue of the word *"includes"* the above provision does not confine the application of the *Limitation Act* to matters which are dealt with by a Court. Further, there is no express provision in the *Limitation Act,* the *Long Service Leave Act* or the *Industrial Relations Act* which prohibits the application of the limitation period in the instant case.

[10] Mr Dilger referred to the judgment in *Frost v The Speaker of the Legislative Assembly of NSW*[1] which considered the application of the *Limitation Act 1969* to an alleged unfair contract claim. For material purposes, the NSW Act is expressed in similar terms to the Tasmanian Act. At para 38 Hungerford J commented;

> *"And neither do I consider the subject matter so described to be within s14(1)(d) as an action to recover money recoverable by virtue of an enactment. Such actions are typically those to recover liquidated sums where a statute gives the right of recovery, such as the recovery of remuneration and other amounts due under an industrial instrument by virtue of Pt 2 of Ch 7 of the Industrial Relations Act."*

[11] Mr Dilger submitted that these comments are pertinent to this matter as, "*had a claim for a liquidated sum such as long service leave entitlement been made in this matter, it would have been statute barred."*

[12] Hungerford J's comments in my view should be considered in full context. Firstly, the comment upon which Mr Dilger relies is an observation by way of example, and was not the primary subject of the judgment. It should therefore properly be characterised as *obiter.* Whilst no doubt a valid observation in the context of the NSW legislation, there are two other factors to be borne in mind.

[13] Firstly, it is widely held that the NSW Industrial Relations Commission is a 'court.'[2] Section 152 of the *Industrial Relations Act 1996 [NSW]* states that the Commission in Court Session is a "*superior court of record"* and has the equivalent status to that of the Supreme Court.

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[1] [2000] NSWIRComm 70

[2] Tana v Baxter [1986] 160 CLR 578

[14] Secondly, s369[3] of the NSW Act, which deals with the recovery of money under an industrial instrument and to which Hungerford J refers, specifically limits the period in which an application must be made to six years.

[15] Neither of the above factors have a parallel in the Tasmanian legislation.

[16] The actual subject matter in *Frost* was the question of whether the *Limitation Act* applied to a declaration pursuant to s106 relating to the capacity to declare an unfair contract either void or, in the alternative, varied.

[17] In considering whether the proceedings brought under s106 constituted an *'action,'* Hungerford J stated:[3]

> *"I do not doubt that proceedings brought under s 106 are an "action": see Minister for Youth and Community Services v Health and Research Employees' Association of Australia, NSW Branch (1987) 10 NSWLR 543 per Kirby P at 548, Priestley JA assuming at 552 and McHugh JA at 560-561. It will be seen that their Honours viewed s 88F, as I similarly view s 106, as a legal proceeding before a court so as to be comprehended within the term "action" (or perhaps also a "suit") which term includes every sort of legal proceeding unless the context indicates otherwise: see Re Carter Smith; ex parte Commissioners of Taxation [1908] 8 SR (NSW) 246 at 249; 25 WN (NSW) 92 and Tana v Baxter (1986) 160 CLR 572.*

[18] Notwithstanding this finding, His Honour went on to find that s106 proceedings were not subject to the *Limitation Act.* However as there is not an equivalent provision in the Tasmanian Act, this finding is not particularly relevant to the instant matter.

[19] In *Minister for Youth and Community Services v Health and Research Employees Association of Australia, NSW Branch,* Kirby P. said:[4]

> *"However, the words "action" and "suit" are clearly words, particularly in combination, of wide purport in describing proceedings before a court: cf Re Carter Smith; Ex parte Commissioners of Taxation (1908) 8 SR (NSW) 246 at 24925 WN (NSW) 92; see also Bradlaugh v Clarke (1883) 8 App Cas 354 at 361, 374 and Suttonv Sutton (1882) 22 Ch D 511 at 516. Any doubt I might have had upon this point is settled by the recent decision of the High Court of Australia in Tanav Baxter (1986) 160 CLR 572. Although it is true that the High Court was there dealing with "suit" in the different context of the Service and Execution of Process Act 1901 (Cth) (a facultative provision, widely defined) the reasoning which led their Honours to their conclusion, having regard to the nature of the relief available under s 88F of the Act, applies equally to the present circumstances. The Commission may grant relief of an injunctive nature (s 88F(2A), 88F(2B) and 88F(2C)). It may award costs. It may make orders as to the payment of moneys and make declarations affecting contracts or arrangements. In such circumstances, I consider that it is impossible to contend that the proceedings brought by the union are not a "suit or action"."*

[20] Butterworth's Legal Dictionary defines 'action' as follows:

> "Action Any proceeding in a court: (NSW) Limitation Act 1969 s 11. 'Action' is a generic term and in its proper legal sense includes suits by the Crown: *Bradlaugh v Clarke (1883) 8 App Cas 354 at 361-2*. This broad definition may be modified by statute: for example 'action' is defined as meaning any civil proceedings whether at law or in equity: (CTH) Bankruptcy Act 1966 s 60(5). Historically, suits in equity were not called actions, as distinct from actions at common law

[3] Para 27
[4] [1987] 10 NSWLR at 548

> which had to be based on a particular form of action or writ and were divided into real, personal, and mixed actions: *Willison v Warburton (1873) 4 ALR 66*. An action does not refer to the making of a claim under an arbitration clause in a contract and proceeding to arbitration: *Re Brown; Ex-parte Taylor v Queensland Electricity Commission (1989) 19 FCR 180; 83 ALR 141.* An action includes an appeal to the Federal Court of Australia from a decision of the Registrar of Trade Marks for the purposes of (CTH) Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 *s 5: Foodland Associated Ltd v John Weeks Pty Ltd (1988) 80 ALR 709; 11 IPR 158."*

[21] Whilst the definition of '*action*' in the *Limitation Act* does not preclude the possibility of proceedings in something other than a court, the authorities overwhelmingly support the conclusion that '*action*' in this context is confined to proceedings in a court. Indeed I am unaware of any authority which even hints at the possibility of an alternative conclusion.

[22] I find accordingly.

[23] The next question to be determined is whether the Tasmanian Industrial Commission is a '*court*?'

[24] This question was addressed comprehensively in *Blue Ribbon Products Pty Ltd v Tasmanian Industrial Commission.* At para 19 Blow J. concluded:[5]

> *"In my view Waterside Workers' Federation of Australia v J W Alexander Pty Ltd (supra) establishes beyond doubt that, prior to the 1997 amendments, the powers of commissioners to make orders under s31 for the purpose of preventing and settling industrial disputes were arbitral, rather than judicial, in nature. Although the Act now contains detailed provisions relating to disputes as to the termination of employment, I do not think that those provisions have resulted in orders for the reinstatement, re-employment or compensation of former employees having become orders of a judicial character, rather than orders of an administrative character. They are still orders creating new rights and obligations. Whilst s30(3) does create obligations on employers that exist prior to, and irrespective of, the initiation of proceedings under s29, and whilst the discretion of the Commission may have been fettered by the 2000 amendments, an order for reinstatement, re-employment or compensation remains an order creating new rights and obligations for the purpose of settling an industrial dispute. Given that that is the nature of such an order, and that it may be enforced only by a summary prosecution under s31(5), I think that, consistently with the High Court authorities that I have referred to, decisions whereby such orders are made must properly be characterised as decisions of an administrative character, despite the factors identified by Mr Turner that weigh in favour of them being characterised as judicial in character."*

[25] This judgment was confirmed on appeal.[6]

[26] I need go no further than this. Clearly the Supreme Court has found that the Tasmanian Industrial Commission is not a 'court'.

[27] It follows that Mr Blackburn's application before this Commission is not an 'action' contemplated by s4(1) of the *Limitation Act.*

[28] I find that the *Limitation Act 1974* does not apply to the application before the Commission.

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[5] (No2)[2004] TASSC 28 29 March 2004
[6] [2004] TASSC 142

[29] As a consequence there is no jurisdictional barrier to Mr Blackburn proceeding with his claim, at least as it relates to long service leave, which would include the rate of payment whilst on long service leave.

[30] There may well be a further issue to the extent that the applicant relies on "*an industrial dispute relating to the termination of employment of the former employee."* (s29(1A)(a)).

[31] Section 29(1B) provides that an application concerning a dispute relating to termination of employment 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."*

[32] The applicant has provided further particulars in his written response dated 25 July 2011. However it is still not entirely clear under which subsection/s of the Act the various components of the claim lie.

[33] I propose to convene a further Directions conference in the immediate future with the view of clarifying any outstanding matters prior to the matter proceeding to hearing.

Tim Abey
Deputy President

Appearances
Mr H Blackburn in person
Mr D Dilger for the respondent

Date and place of hearing:
June 24
2011
Hobart