



Tasmanian Industrial Commission

State Service Act 2000

Applicant No. 1 of 2018

and

A Department of the State of Tasmania

This is a redacted version of a decision previously made and is being made public in the public interest in accordance with the relevant guidelines.

HOBART, 28 March 2018

Decision by Acting Secretary to commence investigation pursuant to clause 7.1 of Employment direction 5 – procedural fairness – whether Applicant entitled to procedural fairness at the time decision made – held – not entitled to procedural fairness at that stage of ED 5 process

DECISION

- [1] The Applicant has made application to review a decision of the Acting Secretary of the Department to commence an investigation into some allegations that the Applicant was guilty of misconduct.
- [2] The Applicant submits that she was denied procedural fairness when the decision to investigate the alleged conduct was made.
- [3] This decision relates to whether or not the Applicant was entitled to procedural fairness at the time the decision to investigate was made.
- [4] The decision to investigate was made pursuant to Employment Direction 5. Relevantly it provides:

7.1 Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged breach of the Code in accordance with these principles. The Investigator must be impartial and must report to the Head of Agency in accordance with Clause 7.9 of the outcome of their investigation.

- [5] Further, the Employment Direction provides at clause 7.4 the following:

7.4 Prior to the commencement of the investigation or in circumstances outlined in clause 7.7, the Head of Agency must inform, in writing, the employee suspected of committing a breach of the Code:

- (a) of the substance of the alleged breach of the Code;
- (b) of the intention to investigate the alleged breach;
- (c) who will investigate the alleged breach;
- (d) that the employee may seek his or her own advice it can be assisted by a person of the employee's choice throughout the process; and
- (e) of the possible implications for the employee if the matter proceeds to a determination by the Head of Agency that the employee has breached the Code.

- [6] Clause 7 also provides for the employee to be interviewed and to provide documentary evidence and further, the clause provides that the employee is to be provided with a copy of the Investigators report so as to provide an employee with an opportunity to respond to it.
- [7] It can be seen that, on a clear construction of clause 7 of the Employment Direction that, once the decision to investigate has been made, the affected employee is provided with procedural fairness on at least two occasions. I say on at least two occasions because I am aware that, in some circumstances, a Department will invite the employee to make a specific submissions in respect to proposed sanction after he or she has made submissions in respect to the content of the Investigators report. I note further that there is a right to have this Commission review any sanctions imposed on the employee.
- [8] The question is, whether in this scheme, an employee has a right to procedural fairness at the stage at which the initial decision referred to in clause 7.1 is made. On a plain reading of the words, and having regard to the opportunities for procedural fairness once the initial decision has been made, it is by no means clear that an employee is entitled to procedural fairness at the stage of the initial decision to investigate. It can be seen for example that the notice given to the employee pursuant to clause 7.4 assumes the decision to investigate has already been made. This strongly suggests that there is no right to procedural fairness at the stage of the decision to investigate.
- [9] The Applicant relies on a decision of the High Court, *Minister for Immigration and Border Protection v WZARH*¹. The Applicant submits that the decision is of general application and is to the effect that in the absence of clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by the decisions.

¹ [2015] CLR 326

[10] That appears in the decision of the Kiefel, Bell and Keane JJ. Of importance are the following words,² when rejecting the notion of legitimate expectations for the law of Australia, because that concept may distract from the real question:

“namely, what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.”

[11] Further,³ the court said:

“In considering whether the respondent was denied procedural fairness so as to vitiate the recommendation of the Second Reviewer, two points may be made at the outset. First, it was common ground that the IMR process was required to accord the respondent procedural fairness even though the decision-making process proceeded under administrative guidelines. Secondly, there is no general rule that procedural fairness requires an administrative decision maker to afford a person affected by the decision an oral hearing in every case. Whether an oral hearing is required in order to accord procedural fairness to a person affected by an administrative decision depends on the practical requirements of procedural fairness in the circumstances of the case.” (footnotes omitted).

[12] The reference to oral hearing was because the case involves an allegation that a second oral hearing should have been conducted, and failure to do so was the denial of procedural fairness. The reference to the legal framework within which the decision is made is of course the Employment Direction. The practical requirements of procedural fairness in the circumstances of the case will also arise from the Employment Direction. I must therefore construe the Employment Direction.

[13] In my view there is no obligation to accord procedural fairness at the preliminary stage of deciding to commence an investigation. The Employment Direction at clause 7.1 does not refer to procedural fairness. Indeed the test is whether a Head of Agency has reasonable grounds to believe that a breach of the code may have occurred. The test is not whether or not a breach of the code has occurred but whether one may have occurred. Such a test is not suggestive of an obligation to accord procedural fairness. The threshold is low. Further, as I have set out above there are at least two opportunities when procedural fairness is accorded to an employee.

[14] I am fortified in my view by the decision in *Pervan v Frawley*⁴. In that case the court was considering Commissioners Direction 5 which for present purposes is identical to clause 7.1 of Employment Direction 5. The court held that there was no obligation to accord procedural fairness at the stage at which the decision to commence the

² Ibid page 335

³ Ibid page 336

⁴ [2011] 20 Tas R 185

investigation is made.

- [15] While I am not strictly bound to follow *Pervan v Frawley*⁵ in my view the Commission should follow decisions of superior courts which are of application to the matters in dispute for reasons of judicial comity⁶ unless it is convinced that the decision is clearly wrong. Accordingly I am of the view that *Pervan v Frawley* should be followed unless it is clearly wrong. Whether it is wrong depends upon the Applicants submission that *Minister for Immigration and Border Protection v WZARH* makes it clear that *Pervan v Frawley* is now not good law. In turn that submission seems to assume that *WZARH* is a new statement of the law in respect to clear legislative intention being required to oust procedural fairness. That is, *Pervan v Frawley* was decided in 2011 and *WZARH* was decided in 2015 and therefore its statement of the law, being new law, succeeds that of *Pervan*.
- [16] In my view *WZARH* does not cast doubt on the correctness of *Pervan v Frawley*. It can be seen that whilst *WZARH* does state that a clear contrary legislative intention is required to oust procedural fairness, the decision still requires an examination of the circumstances as a whole. Further, it has been the law for a long time that a clear legislative intention to oust procedural fairness is required⁷. Further it must be remembered that the cases are often dealing with different aspects of the content of natural justice, and very often these cases were dealing with proprietary rights and decisions which materially affected the position of the person subject to the decision.
- [17] I also note that the holding, or ratio of *WZARH* is in fact that legitimate expectation does not provide a basis for determining the content of an obligation to accord procedural fairness. That is the holding of the case and according to the doctrine of precedent it is only that statement of the law which is binding, and for the purposes of judicial comity should be followed.
- [18] In *Pervan v Frawley* Porter J undertook an examination of the equivalent of Employment Direction 5. In following other authority including High Court authority⁸ Porter J found that the scheme of the Commissioners Direction (which for present purposes is indistinguishable from the Employment Direction) accorded procedural fairness and that there was no requirement for an additional layer of procedural fairness at the time the decision to investigate was made.⁹ These decisions are to the effect that where the decision making process takes place in stages, procedural fairness may be satisfied having regard to the scheme as a whole. That is procedural fairness is not required at every stage of the scheme so long as the overall scheme is fair. Something, as I have

⁵ It is likely that the doctrine of precedent does not apply to the Commission given that the doctrine is one of the common law and the Commission does not exercise jurisdiction under the common law.

⁶ I am conscious that the Commission is not a judicial body. I use the expression for ease of reference as it is a well understood concept.

⁷ See for example *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. I can find reference in the Laws of Australia to a decision of the High Court in 1958.

⁸ *Ibid* page 200

⁹ *Ibid* page 206

referred to, above to which *WZARH* referred.

- [19] It appears to still be good law that preliminary decisions, of which the decision to launch an investigation is one, will not ordinarily attract procedural fairness in the sense of requiring a hearing or permitting submissions to be made at that stage so long as the scheme overall provides appropriate procedural fairness and there are no material rights or interests affected by the preliminary decision.¹⁰ This must particularly be the case where a suspension from duty with or without pay has not been imposed on an Applicant.
- [20] Whilst I do not think that procedural fairness in the form of permitting a hearing or taking submissions is likely to be required at this stage at which the employee may be suspended with pay, where the employee is not suspended from duties at all, it is more likely that there is no requirement to accord an employee a right to be heard at the stage of the preliminary decision to investigate.
- [21] I find that the Applicant was not entitled to procedural fairness at the time the decision to investigate was made.

D J BARCLAY
PRESIDENT

¹⁰ It seems that reputational matters alone (save perhaps in the case of legal practitioners) are insufficient to justify procedural fairness.