**TASMANIAN INDUSTRIAL COMMISSION**

**Industrial Relations Act 1974**
s 29(1) application for hearing of an industrial dispute

**Health Services Union, Tasmania Branch**
(T14796 of 2020)

and

**Minister administering the State Service Act 2000/Tasmanian Health Service**

PRESIDENT D J BARCLAY 16 NOVEMBER 2020

**Application to amend application – no submissions in opposition – application granted**

## DECISION

**[1]** The Applicant has sought to amend its Application. As initially brought the Application seeks:

> "An Interim Order that the Respondent not terminate the employment of Mr. John Dickson on the basis of matters contained within the Head of Agency's letter of 14th July 2020; or, if such an Order is jurisdictionally barred, an Interim Order that (regarding matters contained in the Head of Agency's letter of 14 July 2020) the Head of Agency's conclusion 'forming the view to impose the sanction of termination of employment' be retracted.
>
> And an application for a Final Order that (regarding matters contained in the Head of Agency's letter of 14 July 2020) the Head of Agency's conclusion 'forming the view to impose the sanction of termination of employment' be retracted."

**[2]** The proposed amendments are as follows:

> "1. That the Head of Agency appoint an investigator in accordance with ED5 to undertake an investigation that affords procedural fairness in the determination of whether Mr. Dickson breached the Code of Conduct, as alleged in Mr. Michael Pervan's letter of 17 July 2019 (and as amended in Mr. Pervan's letter dated 13 August 2019 and Katherine Morgan-Wicks' letter of 2 October 2019) ("The Allegations").
>
> 2. In respect of the matters currently in dispute, that the respondent take no further action in respect to Mr. Dickson's employment until the investigator appointed under paragraph one provides his or her report to the Head of Agency."

**[3]** Neither party has provided any submissions in support or in opposition to the Application to amend. I am advised the Respondent does not wish to make any submissions in respect to the Application to amend.

**[4]** The Application to amend is made pursuant to s 21(2) (k) of the *Industrial Relations Act* 1984. Section 21(1) provides that the Commission may regulate its own procedure. Subsection 2 (k) of that section goes on to provide that, without prejudice to the generality of subsection (1), the Commission may allow an amendment, on such terms as the Commission thinks fit, of the proceedings or a document relating to the matter.

**[5]** The discretion provided in s 21(2)(k) is unfettered. However the discretion must be exercised having regard to s 20 which relevantly provides that the Commission shall act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms.

**[6]** A major factor in considering an application to amend is whether the opposite party will be prejudiced by the amendments in such a way that allowing the amendment would result in unfairness to that party which could not be cured by the Commission (by, for example allowing extra time for the opposite party to respond to the amendment).

**[7]** The amendment should also generally fall within the factual matrix of the original application and raise similar issues as the original application. Otherwise it may be necessary for a party to commence the application again.

**[8]** In the present case the factual matrix is the same. There are no time limit issues which would work an injustice on the Respondent if the amendment was made where the amendment might raise new or additional matters not the subject of the original application.

**[9]** Whilst the proposed amendment seems quite different from the original application they both seek to raise the same issues. Initially the Applicant asserted that the matter had miscarried because there was a misapprehension by the investigator of what constitutes sexual harassment. On that basis it was alleged the Head of Agency should retract the conclusion that imposing the sanction of termination was appropriate because such a conclusion was not open because the investigation was so flawed.

**[10]** The effect of the amendments, if allowed, seeks that the Head of Agency carry out the investigation again and until that is done no further action be taken in respect to the employment.

**[11]** While the emphasis may have changed, the substantive challenge remains the same. The investigation is so flawed it cannot be relied on.

**[12]** Of relevance to granting the amendment is that the Application is still at an early stage. The parties are arguing over whether the Commission has jurisdiction to make the orders sought. The Respondent advises that even if the amendment is granted that submission will still be advanced.

**[13]** No steps have been taken in respect to the merits of the application. No one has expended time and energy on the merits of the substantive dispute which will be wasted if the amendment is allowed.

**[14]** I propose to grant the application to amend. I have regard to the matters referred to above including that the Respondent did not seek to make any submissions in opposition to the application to amend.

**[15]** I make the following orders:

1. That the Application dated 11 September 2020 be amended by deleting the remedy sought (as referred to in paragraph 1 above) and substituting the remedy sought as set out in paragraph 2 above.

2. The Applicant is to file and serve an amended Application in the terms set out in order 1 on or before **4.00 p.m. Monday, 23 November 2020**.

3. The Respondent is to file and serve its response to the Applicants submissions dated 9 November 2020 on or before **4.00 p.m. Monday, 7 December 2020.**

4. The matter is listed for a directions hearing at **10.00 a.m. Tuesday, 8 December 2020** for the purposes of scheduling the Respondents application that the Application be dismissed pursuant to s 21(2)(c)(iv) of the *Industrial Relations Act* 1984.

5. The parties have liberty to apply.

D J Barclay
**President**