



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Marope v Minister administering the State Service Act 2000 – Tasmanian Health Service [2023] TASIC 33

PARTIES: Dolly-Neo Marope (Applicant)

Minister administering the State Service Act 2000/Tasmanian Health Service (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T14907 of 2022

HEARING DATE(S): 29 June 2022

HEARING LOCATION: Tasmanian Industrial Commission, Hobart

DATE REASONS ISSUED: 20 July 2023

COMMISSIONER: President D J Barclay

CATCHWORDS: Application by former employee relating to breach of an award – jurisdictional issues – whether Commission may exercise jurisdiction in the nature of judicial power.

REPRESENTATION:

I Gunadasa for the Applicant

M Jehne for the Respondent

**DOLLY-NEO MAROPE v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000-
TASMANIAN HEALTH SERVICE**

REASONS FOR DECISION

20 JULY 2023

[1] This is an application by the Respondent seeking the dismissal of the applicant's principal application pursuant to section 21(2)(c)(iv) of the *Industrial Relations Act 1984* (Tas) (the Act).

[2] The parties have filed written submissions in support of their position. The respondent's submission helpfully sets out the background to the application. I take the liberty of setting out the background referred to in those submissions. I note that the applicant does not cavil with background:¹

"2. The following factual background is taken from the Commission's published decisions. Dr Marope was employed by the Respondent pursuant to a series of fixed term Instruments of Appointment commencing 1 August 2016. The final Instrument of Appointment was dated 6 March 2019 and provided that the appointment would end on 6 March 2022.

3. On 26 May 2020 Dr Marope made an application to the Commission in relation to a dispute concerning waiting time payments. That application was T14766 of 2020 ("T14766"). An entitlement to such payments was said to arise by virtue of cl 13(f) of the Medical Practitioners (Public Sector) Award 2016.¹ The relief sought by Dr Marope in T14766 was as follows:

1. Instruct the THS NW to pay the withheld salary of June 2018 and give the THS a deadline within which to pay the withheld salary.
2. Instruct the THS NW to pay time waiting for the withheld salary (as stipulated in the award) from 6th June 2018 to the date when the THS will decide to pay the withheld salary, especially, considering that the THS does not want to commit to a payment date. I attach a Payslip (ref. A19), it reflects my hourly base salary, at that time in 2018, of \$82.91 per hour for the record and utilisation in calculation.
3. Make the THS responsible to pay all legal costs of this case

The gravamen of Dr Marope's application was described as follows:

It can be seen that the Applicant is asking the Commission to order the payment of a sum calculated according to the Award which the Applicant claims is owed to her

Dr Marope's claim was "for an amount in excess of \$500,000.00.

4. In T14766, the Respondent contended that the relief sought by the Applicant required the exercise of judicial power beyond the jurisdiction of the Commission. Written submissions were filed in relation to that question, and the matter was determined by the Commission on the papers. Having reviewed the applicable authorities, President Barclay said:

¹ (citations omitted).

In the present case I am being asked to determine that the Applicant has a current enforceable legal right to the payment of money under the Award and that I order that the Respondent pay that money. It is clear that such a task is judicial. I am being asked to ascertain existing rights and obligations. I am not being asked to ascertain what rights and obligations should exist between the parties.

If, for example, the Respondent was intending to delay the payment of salary in the future and an employee wanted to claim waiting time if the payments in the future were in fact to be paid other than in accordance with the usual manner of payment of salary, I could determine whether the employee would be entitled to waiting time if the Respondent delayed the salary payments. Whilst I would be required to construe and interpret the Award, I would be doing so in order to decide what rights should exist in the future if the Respondent proceeded to act in a certain way (i.e. pay the salary in circumstances which would give rise to an entitlement to waiting time payments in the future). However, this case is not such a matter as that.

Accordingly, I have no power to grant the relief sought, as to do so would result in the exercise of judicial power which the Commission does not possess.

5. Having found that the Commission did not possess jurisdiction to grant the relief sought by the Applicant, the Commission dismissed the application as sought by the Respondent pursuant to s 21(2)(c)(iv) of the Act. That provision 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 – ...

(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 – ...

(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; ...

As President Barclay observed:

I agree that I am unable to make an order of an administrative character which could quell the current dispute and as such I dismiss the Application.

Of course, the Applicant is not left without a remedy. She is free to institute proceedings in a court to seek to recover the money claimed on the basis that the Respondent is in breach of the Award by failing to pay waiting time. I of course express no view about the merit of such a claim.

Dr Marope's application was therefore dismissed on 21 July 2020.

6. By email of 11 December 2020, Dr Marope was advised that her employment would be terminated effective from 25 December 2020. On 30 September 2021 the Commission dismissed Dr Marope's unfair dismissal application.

7. This brings us to Dr Marope's present application. By application dated 23 February 2022 pursuant to s 29(1A)(c) of the Act, Dr Marope has sought a hearing as a former employee in respect of an industrial dispute relating to "a breach of an award or a registered agreement involving the former employee". The relevant

industrial instruments are identified as the Medical Practitioners (Public Sector) Award 2016 (“the Award”) and the Salaried Medical Practitioners Interim Agreement 2015. The relevant provision of the Award is said to be cl 13, which relates to “Payment of wages”.

8. Dr Marope contends that her salary was withheld during two periods. First, from 20 May to 2 June 2018. Second, from 6 June to 8 October 2018. She contends that her solicitors wrote to the Respondent on 9 April 2020 requesting payment of the waiting time salary, and that she subsequently applied to the Commission “for payment of the outstanding monies stemming from the waiting time payment”. As discussed, that application was dismissed.

9. Dr Marope contends that the present application concerns “an industrial dispute”, and on that basis appears to suggest that the Commission has jurisdiction to grant the relief sought, notwithstanding President Barclay’s reasons for the dismissal of T14766. Dr Marope states the question for resolution is:

The Applicant requests that the following be determined:

(a) on the proper construction of Clause 13(d) of the Medical Practitioners (Public Sector) Award 2016 (Award), the Applicant is entitled to waiting time pay in the circumstances outlined in this application.

The Applicant thereby seeks relief in the nature of a declaration that she is entitled to money as a debt due.”

[3] The Respondent’s position is that the application should be dismissed on the basis that it is an abuse of process and further that the Commission has no jurisdiction to determine the present application. As a result of the view I have reached, I will deal with the question of jurisdiction first.

[4] The Respondent’s objection to jurisdiction is twofold: Firstly, that the Commission is being asked to exercise judicial power which it cannot do, and secondly, that the Commission has no power to issue what the applicant seeks in the application, namely relief in the nature of a declaration that she is entitled to waiting time pay. The Respondent submits that seeking relief in the form of a declaration only is the exercise of judicial power

[5] This Commission has repeatedly stated that it cannot exercise judicial power. That, of course, is correct. The nature of the Commission is that it is an administrative Tribunal and does not exercise judicial power. However, that general rule will yield to the circumstance where, on a proper construction of the Act, the Commission is vested with judicial power.

[6] As the Applicant points out, under state law (as opposed to Commonwealth powers referred to in ss 75 and 76 of the *Constitution*) State legislatures may confer judicial power on a body that is not a court.²

[7] Relevantly, for present purposes, s 29(1A)(c) of the Act provides that a former employee may apply to the Commission for a hearing in respect of industrial dispute relating to a breach of an award. Given that the person applying is a former employee making application in respect to an alleged breach of an award, it seems clear that the Commission is empowered to ascertain and existing enforce rights if such a breach is established (which is the exercise of judicial power). That is, in the case of a former employee the Commission is not embarking upon a consideration of what rights should exist for the future, which is an

² See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544.

exercise of arbitral power, but rather the Commission is considering whether or not there was a breach, and the Commission is empowered to direct a party to do a thing or to take action in respect of that past breach. Nothing about the dispute brought to the Commission by an individual former employee in his or her own right, relating to a past breach of an award, engages any future rights.

[8] It may be seen, therefore, that there is a distinction between the case of a current employee and that of a former employer. In respect to a current employee, the Commission is only empowered to exercise administrative arbitral functions. For former employees the Commission is permitted to exercise jurisdiction akin to judicial power.

[9] The resolution of that question is however not an end to the matter. The relief sought by the Applicant is in the following terms:

“26. The Applicant requests that the following is determined:

(a) on the proper construction of Clause 13(d) of the Medical Practitioners (Public Sector) Award 2016 (Award), the Applicant is entitled to waiting time pay in the circumstances outlined in this application.”

[10] The Applicant describes the relief sought as the resolution of a dispute concerning the proper interpretation and application of a provision of the Medical Practitioners (Public-Sector) Award 2016 and by implication whether the respondent has breached the award by failing to pay waiting time payments. In my view the applicant is seeking a declaration that she is entitled to waiting time pay in the circumstances of the dispute. The reference to the proper construction of the Award is in my view simply a preamble to the relief sought so that properly understood what the Applicant seeks is a determination by the Commission that she is entitled to waiting time pay.

[11] This begs the question as to whether or not the Commission is empowered to make a declaration without making an order contemplated by section 31 of the Act. Section 31(1) of the Act is in the following terms:

“(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.”

[12] It can be seen that the Commission is empowered by order to direct that a thing is to be done or an action to be taken. Relief in the form of a declaration without more does not fall within the meaning of s 31(1). Obviously, that is because administrative industrial tribunals exercise arbitral power make orders to quell the relevant industrial dispute for the present and future. The distinction with judicial power being that judicial functions are concerned with what rights and obligations in fact exist. Hence the making of a declaration is the exercise of judicial function as it declares existing rights relating to a dispute which has previously arisen between the parties.

[13] Notwithstanding that the Commission is exercising a form of judicial power when dealing with an alleged breach of an award by a former employee, the orders which the Commission can make are limited. That being said, I would not summarily terminate the proceedings, as it is open for the Applicant to apply to amend the application to include consequential orders which fall within the meaning of s 31(1) of the Act. It would be a very

serious step to terminate the proceedings where the Commission has jurisdiction to entertain the application, but the application fails for not seeking the appropriate relief. Of course, if the opposing party thinks there would be relevant prejudice if such an amendment were made, it may oppose the application to amend.

[14] I turn now to the Respondent's submissions that the Application should be dismissed as an abuse of process. The Respondent puts it this way in its written submissions:³

"16. These principles of law are applicable to Dr Marope's application. First, the present application is an abuse of process in that it makes a claim or raises an issue which was made or raised and determined in the earlier proceeding. The claim pressed by Dr Marope in each application is that the Commission has jurisdiction to grant her relief in an action for recovery of a debt arising under the Award, whether that relief be an order for payment or declaratory in nature. Expressed in these narrow terms as relating to the jurisdiction of the Commission, it follows that it would not necessarily be an abuse of process for Dr Marope to commence proceedings for waiting time payments arising under the Award, in a court of competent jurisdiction. However, the commencement of serial proceedings in the Commission contending that the Commission has jurisdiction to grant relief it has previously held that it cannot, is plainly a clear example of an abuse of process. It is an abuse of process in the nature of issue estoppel.

17. Second, and in the alternative, the present application is an abuse of process in that it makes a claim or raises an issue "which ought reasonably to have been made or raised for determination in that earlier proceeding". This form of abuse of process is largely analogous to Anshun estoppel. The question is whether the "claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding". This question directs attention to the relationship between the claims made by Dr Marope in T14766 and the present application:

(a) Unlike in *UBS AG v Tyne*, Dr Marope is the applicant in each proceeding. The applications are each made against the present Respondent.

(b) Each application concerns Dr Marope's claim for waiting time payments arising under cl 13(d) of the Award. Notwithstanding that President Barclay's reasons for decision in T14766 said the claim arose under cl 13(f) of the Award, as compared to cl 13(d) in the present application, there is no relevant distinction; on its proper construction, cl 13(d) provides any entitlement to waiting time payments, whereas cl 13(f) provides for the time when the entitlements are to be paid: "Where employment is terminated, all wages due are, where practicable, to be paid to the employee on the day of termination": cl 13(f)(i). Cl 13(f) does not provide an independent basis for any entitlement to a waiting time payment beyond cl 13(d). The cause of action in each application is identical.

(c) Each application concerns a largely identical factual substratum. Whereas T14766 sought waiting time payments for the period "6th June 2018 to the date when the THS will decide to pay the withheld salary", the present application seeks waiting time payments in relation to that period (6 June to 8 October 2018) along with an earlier period (20 May to 2 June 2018) when she is said to have been paid only one week's salary. The mere addition of this further claim does not radically distinguish the present application from T14766.

³ (Citations omitted).

(d) The only point of distinction between T14766 and the present proceeding is the relief sought. Whereas T14766 sought an order for the payment of money owed under the Award, the present application seeks declaratory relief, namely that “the Applicant is entitled to waiting time pay in the circumstances outlined in this application”. This is a distinction without difference; each application seeks relief in relation to a cause of action said to arise under cl 13(d) of the Award.

(e) Unlike in *UBS AG v Tyne*, Dr Marope has not attempted to provide any “proper explanation” for the conduct of the proceedings by way of evidence on affidavit.³⁹ The absence of any explanation for Dr Marope’s failure to in T14766 (a) claim waiting time pay for the period 20 May to 2 June 2018, or (b) seek declaratory relief that she is entitled to waiting time pay, supports a finding that it is unreasonable for the present application to now agitate those matters.

To apply *Tomlinson*, the present application is so closely connected with the subject matter of T14766 that it is unreasonable for Dr Marope to not have made her claim for declaratory relief in that first proceeding. Similarly, and to adopt Gageler J’s language from *UBS AG v Tyne*, “should” the present claim have been raised in T14766 if it was to be raised at all? The answer is plainly ‘yes’, for the reasons given above.

18. Dr Marope’s present application is an abuse of process on either of the above two bases. The application seeks to use the Commission’s processes to occasion unjustifiable oppression to the Respondent, by vexing it to answer substantially the same application twice, and moreover serves to bring the administration of justice into disrepute by seeking to gainsay the Commission’s determination of T14766.”

[15] It is clear that the Commission has power to dismiss the application if it is in fact an abuse of process.⁴ The Applicant does not contend otherwise.

[16] The principles relating to abuse of process are helpfully summarised in *Tomlinson v Ramsey Food Processing*.⁵ While lengthy, I set out the High Court majority’s comments on the matter:⁶

“An exercise of judicial power, it has been held, involves “as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons”. The rendering of a final judgment in that way “quells” the controversy between those persons. The rights and obligations in controversy, as between those persons, cease to have an independent existence: they “merge” in that final judgment. That merger has long been treated in Australia as equating to “res judicata” in the strict sense

Estoppel in relation to judicial determinations is of a different nature. It is a common law doctrine informed, in its relevant application, by similar considerations of finality and fairness. Yet its operation is not confined to an exercise of judicial power; it also operates in the context of a final judgment having been rendered in other adversarial proceedings. It operates in such a context as estoppel operates in other contexts: as a rule of law, to preclude the assertion of a right or obligation or the raising of an issue of fact or law.

⁴ See *Grassby v The Queen* (1989) 168 CLR 1; *Tasmanian Water and Sewerage Corporation Pty Ltd v RMPAT* (2013) 24 Tas R 124.

⁵ (2015) 256 CLR 507.

⁶ *Ibid* [20]-[26] (citations omitted).

Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as “cause of action estoppel”. Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding, and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where *res judicata* in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as “issue estoppel”. Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a “judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies”. The third form of estoppel is now most often referred to as “Anshun estoppel”, although it is still sometimes referred to as the “extended principle” in *Henderson v Henderson*. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a “true estoppel” and not as a form of *res judicata* in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.

The present significance of the recognition of those three forms of estoppel is that each has the potential to preclude assertion of a right or obligation, or the raising of an issue of fact or law, between parties to a proceeding, or their privies. Absent a principled basis for distinction – and none has been suggested – one principle must govern the identification of privies for the purpose of all forms of estoppel which result from the rendering of a final judgment in an adversarial proceeding.

To explain contemporary adherence to the comparatively narrow principle in *Ramsay v Pigram*, it is appropriate also to explain the relationship between the doctrine of estoppel and the doctrine of abuse of process as it has since come to be recognised and applied in Australia. The doctrine of abuse of process is informed in part by similar considerations of finality and fairness. Applied to the assertion of rights or obligations, or to the raising of issues in successive proceedings, it overlaps with the doctrine of estoppel. Thus, the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding.

Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court’s procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process, even where the earlier proceeding might not have given rise to an estoppel.”

[17] The Respondent relies on the third form of estoppel referred to in paragraph 22 of *Tomlinson* which I have set out above, namely that the claim or issue was raised and determined in the earlier proceedings. The Respondent submits that both applications claim that the Commission has jurisdiction to grant relief for the recovery of a debt said to be owed under the Award. In the earlier application the Applicant sought that the Commission instruct the Respondent to pay waiting time payments. This application seeks a declaration that the Applicant is entitled to the payments.

[18] There is really nothing different sought in either application. The first application sought an instruction to pay, and the present application seeks a declaration that the Application is entitled to waiting time pay. In reality, both applications seek the same thing, indeed on the way to making the orders sought in the first application (had the applicant been successful), it would have been necessary to make the determination sought in the present application.

[19] At first blush, therefore, it may appear that the present application is an abuse of process given that both applications seek the same thing. However, in my view, it is significant that the first application was dismissed on jurisdictional grounds. There was no occasion to make any determination of the merits or potential merits of the claim. Neither party was put to the trouble or expense of determining the question whether the Applicant was entitled to payment of waiting time payments. As a result, it is not the case that, as put by the Respondent, it will be oppressed by “vexing it to answer the same application twice”. The question of entitlement to waiting time payments was never considered by the Commission.

[20] Further, the present application does not seek to gainsay the first determination. The Applicant does not seek to argue that decision was wrong. What has occurred is that as a result of the Applicant becoming a former employee that Commission has jurisdiction to deal with the claim. The question now sought to be answered has never been considered by the Commission. The present application is not an abuse of process.

[21] I refuse to terminate the proceedings early as sought by the Respondent.

[22] The matter will be listed for a directions hearing in due course.

