



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Aaron Groves v Minister administering the *State Service Act 2000* [2024] TASICFB 1

PARTIES:

Aaron Groves (Appellant)

Minister administering the *State Service Act 2000* (Respondent)

SUBJECT: Appeal pursuant to s 70(1) against a decision of President Barclay in matter RO19 of 2022-23

FILE NO: T15096 of 2023

HEARING LOCATION: Determined on the papers

DATE REASONS ISSUED: 21 June 2024

COMMISSIONERS: Deputy President N Ellis
Commissioner T Lee
Commissioner T Cirkovic

CATCHWORDS: Appeal against review of any other State Service Action – whether Commission has jurisdiction to hear appeal – s 19AA(3) – no jurisdiction to hear appeal – appeal dismissed

REPRESENTATION:

Appellant: Simon Officer

Respondent: Mark Jehne

AARON GROVES v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000

REASONS FOR DECISION

HOBART, 21 JUNE 2024

[1] On 31 October 2022, Dr. Aaron Groves (the Appellant) lodged an application for a review of a State Service action pursuant to s 50(1)(b) of the *State Service Act 2000* (SS Act) (the review application).¹ The Appellant seeks to appeal the decision (Decision) of the President made on 15 September 2023 dismissing the review application.²

[2] The Respondent objects to the appeal on the basis that it is beyond the jurisdiction of the Full Bench of the Tasmanian Industrial Commission (the Commission) and is incompetent.

[3] It is appropriate that we determine the jurisdictional objection before considering the substance of the appeal. The parties consented to this approach. For the reasons that follow we have decided to uphold the jurisdictional objection and dismiss the appeal.

Background

[4] The Appellant was the Chief Civil Psychiatrist and Chief Forensic Psychiatrist under the *Mental Health Act 2013* (Tas). He was employed by the Department of Health (Tasmania).

[5] In July 2022, the Appellant received a notice from the Secretary of the Department of Health (the Secretary) of an intention to investigate an alleged breach of the Code of Conduct set out in s 9 of the SS Act.³ The Appellant was not suspended from his employment at that time. On 12 August 2022, an additional notice setting out further particulars of allegations was provided to the Appellant. The Secretary once again elected not to suspend the Appellant at that time. On 22 August 2022, a third notice was received by the Appellant. At that time, the Secretary advised the Appellant that he was suspended from duties on full pay in accordance with Employment Direction No. 4: Procedure for Suspension of State Service Employees with or without pay (ED4) pending the outcome of the investigation into the allegations. On or around 3 October 2022, the Australian Health Practitioner Regulation Agency (AHPRA) suspended the medical registration of the Appellant while it investigated the matter. On 18 October 2022, the Acting Secretary of the Department of Health (the Acting Secretary) advised the Appellant that as AHPRA had suspended his registration, he was unable to perform the inherent requirements of his role, that his employment was “stood aside”, and that he would not be paid a salary.

[6] On 31 October 2022, the Appellant lodged the review application. The grounds for review included the contention that the action taken by the Acting Secretary was inconsistent with his letter of appointment. While the letter of appointment provided a right for the employer to stand him down with pay in certain circumstances, there was no right to stand him down without pay. It was also claimed in the grounds for review that the State Service action was inconsistent with the consultation obligations under ED4. In particular, that ED4 expressly

¹ *State Service Act 2000* (Tas) s 50(1)(b).

² Made pursuant to the *Industrial Relations Act 1984* (Tas) s 70(1)(ba) (‘the IR Act’).

³ *State Service Act 2000* (Tas) s 9.

states that a Head of Agency or their delegate is not able to suspend an employee without pay.

[7] President Barclay issued directions in order to deal with the review application. The Respondent raised a number of jurisdictional objections, including that the Commission is without jurisdiction to deal with the review application because the application had been filed out of time and further that the Commission is unable to grant the relief sought because to do so would be an exercise of judicial power. There were proceedings before the President conducted on 23 November and 5 December 2022. In the period between the Appellant lodging the review application and the proceedings before the President, the Appellant's employment came to an end on 23 November 2022 as a result of the expiration of his time limited contract.

[8] Subsequent to the proceedings on 5 December 2022, directions were issued for materials to be filed dealing with various jurisdictional objections to the review application that had been raised either by the Respondent or the President during the proceedings on 5 December 2022. The directions noted that the jurisdictional issues were to be determined on the papers. Submissions were filed in accordance with the directions, the last of these submissions being filed by the Appellant on 13 February 2023.

[9] There was an email exchange between the legal representatives of the Respondent and Appellant on 14 February 2023. As part of the exchange, the Appellant's representative raised an objection to the President determining the matter on the grounds that he convened the without prejudice conference and assisted the parties on 5 December 2022.

[10] Further directions were set for the filing of materials on the recusal application. The last of those materials were filed by the Respondent on 17 March 2023. The President published a decision dismissing the recusal application on 18 August 2023. A further decision dismissing the review application on the basis that there was no jurisdiction to deal with the matter was issued on 15 September 2023. It is the 15 September 2023 decision that is the subject of this appeal.

The decision under appeal

[11] The decision of the President dealt with and determined two jurisdictional objections to the review application. The first was whether the application was made out of time. The President found that the application was made within time and, while it is not stated as such in the decision, appears to have dismissed that jurisdictional objection.

[12] As to the second jurisdictional objection, which is framed under the heading "Does the Commission have the power to grant the relief sought", the consideration of this jurisdictional objection is reproduced below:

"[17] The Respondent submits that the relief sought requires the exercise of judicial power, which subject to the terms of any relevant legislation, cannot be exercised by

an administrative tribunal.⁴ Whether or not what is being asked of a tribunal is the exercise of judicial power depends on an examination of what, precisely, the relief sought is. In this case the relief sought is:

“31. Dr Groves respectfully requests that the Commission exercise its discretion as follows in the determination of his application for review:

- (a) The Commission grant the application for a review of the action.
- (b) The Commission direct the Secretary of the Department of Health, or any person to whom the powers of the Secretary have been delegated, to:
 - (i) Set aside the State Service Action and reinstate Dr Grove’s suspension on full pay with effect on and from 10 October 2022;
 - (ii) Arrange immediate payment to Dr Groves of all salary and entitlements that remain unpaid as a result of the State Service Action.”

[18] It may be seen that a direction is sought, amongst other things, that the Commission set aside the action and reinstate the Applicant to his previous status of suspended from work on full pay. That is obviously relief sought to quell an ongoing dispute and to restore the status quo. However, since the application was filed, the Applicant’s Instrument of Appointment as an officer of the State expired on 22 November 2022. As such, the relief sought relating to the setting aside of the stand down is no longer a live issue.

[19] What is left is the balance of the relief relating to the payment of salary for a period of about 6 weeks. To determine whether the Applicant was entitled to that money, I would have to determine whether there was lawful authority to cease the Employment Direction No. 4 suspension and to thereafter stand the Applicant down from his employment without pay. Resolution of that claim involves ascertaining whether the Applicant has a current enforceable legal right to 6 weeks pay. That question does not involve the quelling of any industrial dispute which is ongoing between the parties. That is, settling that legal issue is not a step in quelling an ongoing industrial dispute. As a result of the Applicant no longer being an employee for the purposes of the application for review, the nature of the relief sought has changed. The question is now judicial engaging only a question of the Applicant’s current enforceable legal rights independent of any ongoing industrial dispute.

[20] Accordingly, as I am not permitted to exercise judicial power, I must dismiss the application.

Outcome

[21] The Application is dismissed.”

⁴ *Marope v Minister administering the State Service Act 2000* – Tasmanian Health Service T14766 of 2020; *Marope v Minister administering the State Service Act 2000 – Tasmanian Health Service* [2023] TASIC 33.

[13] The Notice of Appeal was filed on 6 October 2023, which was within the required 21 days of the publication of the Decision, pursuant to s 71(1) of the *Industrial Relations Act 1984* (Tas) (IR Act). The grounds of appeal are as follows:

“This appeal is made under section 70(1)(ba) of the *Industrial Relations Act 1984* (Tas). That section enables an appeal to the Full Bench of a decision to dismiss under s 21(2)(c) of the Act.

1) The Commission erred in dismissing the Application for Review dated 31 October 2022 (Substantive Application) on the basis that the application before it required the exercise of judicial power alone (Ground 1).

2) In the alternative to Ground 1, to the extent that the Substantive Application before the Commission required the exercise of judicial power alone, the Commission erred in finding that it was not permitted to exercise that judicial power (Ground 2).

3) In addition or in the alternative to Grounds 1 and 2, to the extent that the Commission's decision that it was required to dismiss the Substantive Application was predicated on the wording of the relief sought in same, the Commission erred, as the Commission ought to have allowed the Applicant's application to amend the wording of the relief sought to cure the purported defect which led to the dismissal of the Substantive Application (Ground 3).

4) In the alternative to Grounds 1 to 3, the Commission erred in dismissing the Substantive Application on the basis that it was exercising judicial power, in circumstances where that discrete issue had not been raised for determination by the Commission (Ground 4).

Particulars

The discrete jurisdictional questions raised *sua sponte* by the Commission for determination as preliminary questions are set out in email correspondence sent on behalf of President Barclay to the parties dated 15 December 2022.”

The jurisdictional objection

[14] As noted above, the Respondent objects to the appeal on the basis that there is no right of appeal to a Full Bench against a decision to dismiss a review application. The Appellant contests that proposition.

Legislative framework

[15] It is appropriate to start with an examination of the provisions of the *State Service Act 2000* that are relevant to this matter.

[16] Section 50 of the SS Act sets out the basis upon which an employee is entitled to make an application to the Commission for a review of a State Service action.⁵

[17] Section 50 of the SS Act is in the following terms:⁶

“50. Review of actions

- (1) Subject to subsections (2) and (3), an employee is entitled to make application to the Tasmanian Industrial Commission for a review –
 - (a) of the selection of a person or an employee to perform duties other than duties to be performed for a specified term or for the duration of a specified task; or
 - (b) of any other State Service action that relates to his or her employment in the State Service.
- (2) An employee is not entitled to make an application for a review under subsection (1)(a) if that employee was not an applicant for the duties to which the appointment or promotion relates.
- (3) An employee is not entitled to make an application for a review under subsection (1)(b) in respect of the termination of the employee's employment.
- (4) Notwithstanding anything contained in subsection (1), (2) or (3), disputes in relation to the decision to terminate employment are to be dealt with by the appropriate industrial tribunal in accordance with the legislation under which that tribunal is established.”

[18] Section 51 of the SS Act sets out a range of provisions regulating the manner in which the Commission is to conduct the review, including powers to dismiss an application for review and actions the Commission may take in determination of an application for a review.

[19] Section 51 of the SS Act is in the following terms:⁷

“51. Determination of a review

- (1) Subject to subsection (1A), the procedure for a review under section 50(1) is to be determined by the President of the Tasmanian Industrial Commission.
- (1A) Timeframes for an employee to apply for a review under section 50(1) are as prescribed by the regulations.
- (2) The procedure determined by the President of the Tasmanian Industrial Commission may provide for an internal review to be conducted within the Agency in which the State Service action was taken before the conduct of the review by the Tasmanian Industrial Commission.
- (3) The procedure referred to in subsection (1) –
 - (a) is to afford procedural fairness; and
 - (b) may be different for different categories of employees; and

⁵ *State Service action* means action by an officer or an employee but does not include an action to make an appointment under section 31(1) of the SS Act.

⁶ *State Service Act 2000* (Tas) s 50.

⁷ *State Service Act 2000* (Tas) s 51.

- (c) may vary according to the circumstances in which the State Service action occurred.
- (4) Before the determination of the application for a review, the Tasmanian Industrial Commission may direct the Head of Agency to take such action relating to the subject matter of the review as the Tasmanian Industrial Commission considers to be appropriate.
- (5) If the Tasmanian Industrial Commission is of the opinion that an application for a review is frivolous or vexatious, the Tasmanian Industrial Commission may refuse to undertake the review and dismiss the application.
- (6) In the determination of an application for a review, the Tasmanian Industrial Commission may –
 - (a) refuse to grant the application for a review and, if appropriate, direct the Head of Agency to take such action as the Tasmanian Industrial Commission considers appropriate; or
 - (b) in the case of an application for a review under section 50(1)(a) , grant the application and direct the Head of Agency to undertake again the selection in accordance with section 39 and undertake such other requirements as are imposed by the Tasmanian Industrial Commission; or
 - (c) in the case of an application for a review under section 50(1)(b) , grant the application and recommend or direct the Employer or the Head of Agency or any person to whom the powers of the Employer or the Head of Agency have been delegated, to take such action as the Tasmanian Industrial Commission considers appropriate.
- (7) The determination of the Tasmanian Industrial Commission in respect of an application for a review is final.”

[20] The jurisdiction for the Commission to review a State Service action under the SS Act is located in s 19AA of the IR Act:⁸

“19AA. Commission to review matters under section 50 of the State Service Act 2000

(1) The Commission is to review a matter in respect of which an application for review has been made to it under section 50(1) of the State Service Act 2000.

(2) The Commission may refer any matter in respect of which an application for review has been made to it under section 50(1) of the State Service Act 2000 to the Ombudsman, the Integrity Commission or the Anti-Discrimination Commissioner or any other person or body that may be prescribed in the regulations.

(3) A person is not entitled to make application to the Full Bench of the Commission in respect of a matter referred to in section 50(1) of the State Service Act 2000.”

⁸ *Industrial Relations Act 1984* (Tas) s 19AA.

[21] As set out above, s 51(1)(5) provides power for the Commission to refuse to undertake a review and dismiss an application for a review if satisfied the application is frivolous or vexatious.⁹ The Commission also has a broad power to dismiss a matter before it as set out in s 21 of the IR Act as follows:¹⁰

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 –
 - (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;

[22] The only power for the Full Bench to hear appeals of decisions made by the Commission stems from the IR Act, the relevant sections of which are set out here:¹¹

“70. Rights of appeal

- (1) An appeal may be made to the Full Bench against –
 - (ba) a decision made by the Commission to dismiss, or refrain from further hearing, a matter, or part of a matter, under section 21(2)(c) by the party who applied for the hearing; and
- (1A) A Full Bench is not to uphold an appeal under subsection (1) unless in its opinion –
 - (a) the Commissioner against whose decision the appeal is made, in reaching that decision –
 - (i) made a legal error; or
 - (ii) acted on a wrong principle; or
 - (iii) gave weight to an irrelevant matter; or
 - (iv) gave insufficient weight to a relevant matter; or
 - (v) made a mistake as to the facts; or
 - (b) the decision was plainly unreasonable or unjust.”

⁹ *State Service Act 2000* (Tas) s 51(1)(5).

¹⁰ *Industrial Relations Act 1984* (Tas) s 21.

¹¹ *Ibid* s 70.

Respondent's position

[23] To determine whether the appeal has been competently brought under s 70(1)(ba) of the IR Act, it is appropriate to set out the Respondent's position first as it is they that object to the appeal being competent.

[24] The Respondent submits that no appeal lies from a determination or dismissal by the Commission of a review application made pursuant to s 50(1) of the SS Act.

[25] The Respondent relies on the decision from the Full Court of the Supreme Court of Tasmania in *Bennett v Minister Administering the State Service Act*,¹² where the Full Court noted an appeal "is a statutory remedy and not a common law or equitable right, or one awarded on fairness..."¹³

[26] The Respondent argues that the IR Act and SS Act confer separate and independent jurisdictions on the Commission and have separate and distinct sources of statutory power for making procedural rules and for the dismissal of proceedings. It was submitted that s 21(2)(c) of the IR Act is only engaged by the dismissal proceeding initiated under the IR Act and not from a review application.¹⁴

[27] Section 70(1)(b) of the IR Act,¹⁵ the Respondent further argues, confers a right to appeal to "the party who applied for the hearing" being a reference to the Appellant for a "hearing before a Commissioner in respect of an industrial dispute" made under s 29(1) or s 29(1A) of the IR Act. It was submitted that this can be distinguished from the SS Act, which refers to an "application for review", rather than to an application for a hearing.

[28] The Respondent argues s 19AA of the IR Act establishes the Commission's discrete jurisdiction over review applications lodged under the SS Act, separate to its jurisdiction to determine industrial disputes under the IR Act.¹⁶ It was submitted that s 19AA (3) is an express statement that "in respect of a matter referred to in" s 50(1) of the SS Act, there is no entitlement to an appeal to the Full Bench from the Commissioner's determination of a review application.

[29] The Respondent's position is that the narrow construction of s 70(1)(ba) of the IR Act¹⁷ is confirmed by s 19AA(3) of the IR Act,¹⁸ which expressly states there is no entitlement to make an application to the Full Bench in respect of a review and s 51(7) of the SS Act,¹⁹ which states the determination in respect of a review is final.

[30] It was submitted these provisions are consistent and would have no work to do if s 70(1)(ba) was interpreted as the Appellant contends.

¹² (2009) 19 Tas R 210 ('*Bennett*').

¹³ *Ibid* [14].

¹⁴ *Industrial Relations Act 1984* (Tas) s 21(2)(c).

¹⁵ *Ibid* s 70(1)(b).

¹⁶ *Ibid* s 19AA.

¹⁷ *Industrial Relations Act 1984* (Tas) s 70(1)(ba).

¹⁸ *Ibid* s 19AA (3).

¹⁹ *State Service Act 2000* (Tas) s 51(7).

[31] In response to the contention that the appeal is against the decision to dismiss, rather than an appeal against a determination, the Respondent submitted that s 51(7) of the SS Act refers equally to a determination to summarily dismiss an application as to a determination on the merits pursuant to s 51(6) of the SS Act.²⁰ On either account, it was submitted that s 51(7) precludes an appeal to the Full Bench.

[32] In any event, the Respondent submitted that it is immaterial which section this application was dismissed under as the terms of the SS Act are sufficiently broad to warrant an implied power of the Commission to do whatever is necessary for the exercise of its express powers according to law.²¹

[33] The Respondent submits that therefore there is no jurisdiction to hear and determine the application for an appeal and that it therefore should be dismissed.

Appellant's position

[34] In making the case for the Full Bench's jurisdiction to hear this matter, the Appellant submitted that the power to dismiss an application for a review is found in s 51(5) of the SS Act on the grounds that the application is "frivolous or vexatious".²² Additionally, he argues that s 51(5) confers no power to dismiss an application prior to determination for want of jurisdiction.

[35] In observing that President Barclay did not cite frivolousness or vexatiousness as a reason for dismissing the application below, it was argued the only possible power to dismiss the application must reside in s 21(2)(c) of the IR Act.²³ This is based on a review application being "a matter before" the Commission.

[36] The powers of appeal are found in s 70(1)(ba) for a decision made under s 21(2)(c) of the IR Act. It was submitted the wording of the IR Act is plain and the ordinary meaning of the words should be construed.

[37] In relation to the wording of s 51(7) of the SS Act, it was accepted that a determination of the Commission in respect of an application for a review is final, however it was submitted the decision of the President to dismiss the application on a jurisdictional basis was not a "determination" of the review, as the Applicant has not been heard on the merits of the application. Rather it was a dismissal under the powers conferred by s 21(2)(c) of the IR Act.

[38] The same distinction was drawn for s 19AA(3) of the IR Act, as they argue the appeal is on the decision to dismiss the matter under s 21(2)(c) of the IR Act and not an appeal of the determination made under s 50(1) of the SS Act.

[39] The Notice of Appeal advocates, inter alia, "that the Commission erred in the exercise of its discretion insofar as it should have allowed the Applicant to amend its application to cure

²⁰ Ibid s 51(6).

²¹ Respondent's Submissions on Jurisdiction [18].

²² *State Service Act 2000* (Tas) s 51(5).

²³ *Industrial Relations Act 1984* (Tas) s 21(2)(c).

any purported defect, or at least considered this request before dismissing the substantive review application on preliminary grounds”.²⁴

[40] The Appellant contends the dismissal of the review by the President was made under s 21(2)(c) of the IR Act and therefore the appeal is within jurisdiction and should be heard by the Full Bench.

Consideration

[41] It is not in contest that the preliminary jurisdictional matter of the right of appeal is a threshold issue and must be determined first as the “first duty” by the Commission.²⁵

[42] For the reasons set out below, we have determined that as this is an appeal against a matter referred to in s 50(1) of the *State Service Act 2000* there is no right to appeal.

[43] The Full Bench must have regard to the provisions of the IR Act to determine if the appeal is competently made under s 70(1)(ba). As Crawford CJ stated in *Bennett*:

“[14] The appellant submitted that as a matter of fairness and equity, his entitlement to appeal from the decision of the Commissioner should be upheld. However, the submission ignores that a right of appeal is a statutory remedy and not a common law or equitable right, or one awarded out of fairness. *Commissioner of Railways v Cavanough* [1935] HCA 45; (1935) 53 CLR 220 at 225.

[15] What is concerned here is a question of statutory construction. While, if there be doubt, a consideration of fairness and justice might influence an interpretation of the Act, the Court's principal task is to have regard to the provisions of the Act itself.”²⁶

[44] The plurality in *SZTAL v Minister for Immigration and Border Protection*²⁷ (SZTAL) succinctly described the contemporary approach to statutory construction:²⁸

“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.”²⁹

²⁴ Appellant's submissions in reply [15].

²⁵ *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 415.

²⁶ *Bennett* (n 4) [14]-[15].

²⁷ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (Kiefel CJ, Nettle and Gordon JJ).

²⁸ *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFCB 318 at [10].

²⁹ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14]; also see *Australian Mines and Metals Association Inc v CFMEU* [2018] FCAFC 223 at [76] – [86].

[45] In determining this matter, the task of statutory construction involves two separate pieces of legislation, both of which confer various rights that are relevant to the determination of this matter.

[46] The Appellant submitted the following with respect to the interaction of the two acts: “To the extent necessary, the framework for the operation of the Commission is governed by the IR Act, with specific rules for the determination of a review under s 50(1) of the SS Act set out in s 51 of that Act. The two pieces of legislation stand together”.³⁰ There appears to be common ground on this point and we agree it is the correct approach to construing the two pieces of legislation.

[47] There is no express provision made for appeals from a decision made by the Commission in respect to an application for a review of a State Service action, either in the SS Act or the IR Act.

[48] The application for an appeal in this matter was made pursuant to s 70(1)(ba) of the IR Act which provides a right for an appeal to be made against a decision that is made under s 21(2)(c) of the IR Act. The Appellant does not appear to contest the proposition that if the President’s decision to dismiss the review application was not made pursuant to s 21(2)(c) then there is no jurisdiction to appeal the decision.

[49] However, it is not clear from the decision of the President what statutory power was relied on to dismiss the application.

[50] The Appellant submits that the decision of the President to dismiss the application was a decision made pursuant to s 21(2)(c) of the IR Act. We see merit in this submission as s 21(2)(c) provides a broad power, particularly via s 21(2)(c)(iv) to dismiss “a matter” for “any other reason”. There is no reason that we can discern to construe this provision narrowly such that it would exclude dismissing a matter referred to in s 50(1) of the SS Act. Further the ordinary meaning of the words would undoubtedly extend to a decision to dismiss a review application on a jurisdictional basis.

[51] In contrast, s 50 of the SS Act provides a narrower basis on which to dismiss an application for review. Section 51(5) provides an express power to dismiss an application for review if the Commission is of the opinion that the application for review is frivolous or vexatious. The Respondent submits it is open for us to find that the President dismissed the application on that basis. That submission has no basis. There is nothing to indicate that the President dismissed the application on the basis the application was frivolous or vexatious. Those words do not appear in the President’s decision, nor was that proposition put to him by either party.

[52] The Respondent also submits that it is open to find that the President dismissed the application, under 51(6)(a) of the SS Act. We disagree that the President was able, even if this is what he purported to do, to dismiss the application under this provision. This is because, properly understood, the powers of the Commission to take the actions set out in s 51(6)(a), (b) and (c) are actions the Commission may take “In the determination of the application for a

³⁰ Paragraph 8 of the Respondent’s submissions dated 5 March 2024.

review” as set out in the opening paragraph of s 51(6). That task can be contrasted with the preceding paragraph which provides a power to “...refuse to undertake the review and dismiss the application” if satisfied the application “is frivolous or vexatious”. We agree with the Appellant that in order to dismiss an application under s 51(6)(a) the Commission would first need to engage in the task of determining the application for a review. However, that is not what happened here. The President dismissed the application on the basis that the final remedy sought required the exercise of judicial power and dismissed the application on that basis. Following that reasoning, we do not think that s 51(7) is directly relevant to the consideration here as the President has not been involved in the determination of an application for review. Rather, he refused to undertake the review and dismissed it for want of jurisdiction rather than determine the matter on its merits.

[53] We therefore concur with the Appellant that there was a decision made under s 21(2)(c)(iv) of the IR Act by the President. The President dismissed the application for a review of an action for want of jurisdiction. There is no doubt that the powers in s 21(2)(c) are broad and apply to any matter. We see no reason that the powers do not apply to a decision to dismiss an application for review made pursuant to s 50 of the SS Act. We doubt, as asserted by the Respondent, that the Commission has an implied power to dismiss an application. The Commission is a creature of statute and needs to exercise powers within the limits of its statutory authority. However, that matter does not need to be further considered as the power in s 21(2)(c) is broad enough to allow the dismissal of the application on a jurisdictional basis.

[54] The right to an appeal pursuant to s 70(1)(ba) expressly requires the appeal to be made against a decision made by the Commission under s 21(2)(c) of the IR Act. As we are satisfied that is what occurred here, the general provision in that Act allows for a right to an appeal against the decision to dismiss the application.

[55] However, as we set out earlier, the two Acts stand together and all of the relevant provisions must be construed. While s 70(1)(ba) allows for appeals to be made to a Full Bench from a decision under s 21(2)(c), s 19AA(3) of the IR Act expressly prohibits applications to a Full Bench in respect to a matter referred to in section 50(1) of the SS Act.

[56] The Respondent submits that these provisions should be construed as follows: “...the Applicant fails to consider the plain statutory language of s 19AA(3) of the IR Act, which expressly bars any application to the Full Bench in respect of a “matter” referred to in s 50(1) of the SS Act. The distinction the Applicant seeks to draw between a summary dismissal and a determination on the merits cannot be sustained in light of s 19AA(3), which applies broadly “in respect of a matter referred to in” s 50(1) of the SS Act. The provision draws no distinction between a determination on the merits or otherwise. As the Applicant’s review application was a “matter” referred to in s 50(1) of the SS Act, s 19AA(3) of the IR Act clearly provides that no appeal lies to the Full Bench.”³¹

[57] We agree with that submission. Section 19AA(3) is clear in its terms. The application for the review of action was made pursuant to s 50(1)(b) of the SS Act. The application was at

³¹ Paragraph 6 of the Respondent’s submissions dated 23 February 2024.

all times a matter referred to in s 50(1) of the SS Act. Its dismissal on a jurisdictional basis does not alter that it is a matter referred to in s 50(1).

[58] Section 19AA(3) of the IR Act is broad in its reach. There is no reason to construe it as only pertaining to a prohibition on applications to a Full Bench in respect to determinations of applications for review. It is to properly be understood on its ordinary meaning and context. While the application for review was dismissed using the power in s 21 (2)(c), the appeal against that decision is nevertheless an appeal against a decision made in respect of a matter referred to in s 50(1) and is therefore subject to the express prohibition to be the subject of an application to a Full Bench.

[59] As s 19AA(3) excludes the right of appeal to the Full Bench for a decision made on an application for a review of action made under s 50(1) of the SS Act the appeal is not competent and must be dismissed for that reason.

[60] In the event that we are wrong about the manner in which the dismissal of the review application occurred below and it was in fact dismissed pursuant to s 51(6)(a) of the SS Act, this appeal would still not be competent. The operation of s 51(7) which provides: “The determination of the Tasmanian Industrial Commission in respect of an application for a review is final” combined with the operation of s 19AA(3) put it beyond doubt that there is no right of appeal from a decision to dismiss a review application pursuant to s 51(6)(a) of the SS Act.

[61] Whilst we are unable to deal with the appeal, we have some sympathy for the Appellant on at least two points. Firstly, consideration of the limits on the exercise of Commonwealth judicial power by a Commonwealth or State Tribunal are not directly relevant to a consideration of the powers of the Tasmanian Industrial Commission in the application for review brought by the Appellant. The Commission derives its powers to conduct State Service Reviews from s 19AA of the IR Act. It is not apparent that the IR Act limits the Commission from granting the relief that was sought by the Applicant and no part of the relief sought requires or necessitates the exercise of Commonwealth judicial power. Section 51(6)(c) allows the Commission to grant the application and provides a broad power to direct the employer to take such action as the Commission considers appropriate.

[62] Secondly, to the extent all parties proceeded on the probably erroneous assumption that there was a barrier to the Commission exercising judicial power (other than Commonwealth judicial power), there was no opportunity given to the Applicant to amend the application, as he sought to do, to potentially deal with the claim that the remedy sought required the exercise of judicial power. The President does not deal with that request in his decision. To the extent that the application was dismissed on the basis of the remedy sought being outside of the Commission’s power and the Applicant’s request to have an opportunity to amend the application in order to remove any prospect that it required the exercise of judicial power, we think that as a matter of procedural fairness that opportunity should have been given or at least reasons given for not providing the opportunity.

Conclusion

[63] For the reasons above, the appeal brought by the Appellant is an application to the Full Bench in respect of a matter referred to in s 50(1) of the SS Act. However, the Appellant

is not entitled to make such an application. Therefore, the Commission is without jurisdiction to hear and determine this appeal.

[64] Accordingly, the appeal is dismissed.

[65] We appreciate that the Appellant is plainly aggrieved by the decision of the President to dismiss the application for review on the grounds it required the Commission to exercise judicial power. However, the appropriate course of action would have been to seek judicial review.

