



TASMANIAN INDUSTRIAL COMMISSION

Decision redacted so as to prevent identification of the Applicant.

CITATION: Applicant 1 v Minister administering the State Service Act 2000/a Department of the State of Tasmania [2023] TASIC(RO) 4

PARTIES: Applicant 1 (Applicant)

Minister administering the State Service Act 2000/a Department of the State of Tasmania

SUBJECT: State Service Act 2000, s 50(1)(b) Review of actions

FILE NO: RO19 of 2022/23

HEARING DATE(S): 23 November 2022, 5 December 2022

HEARING LOCATION: Hobart

DATE REASONS ISSUED: 15 September 2023

MEMBERS: Barclay, P

CATCHWORDS: Jurisdiction – whether application out of time – whether application requires exercise of judicial power – application dismissed

REPRESENTATION:

Applicant: Simon Officer

Respondent: Mark Jehne

**APPLICANT 1 v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000-A
DEPARTMENT OF THE STATE OF TASMANIA [2023] TASIC(RO) 4**

REASONS FOR DECISION

15 SEPTEMBER 2023

[1] The Applicant has applied for orders, amongst others, that the standing down of his employment without pay be set aside and that the Commission direct that the Applicant be returned to the status his employment was immediately before the stand down, namely being suspended with pay pursuant to Employment Direction No. 5.

[2] The Respondent has made application that the Commission is without jurisdiction because the application has 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, which the Commission as an administrative tribunal is unable to do. The Respondent submits that the Application should therefore be dismissed.

Has the Application been filed out of time?

[3] An application for review of a State Service action is to be made within 14 days of the event that gave rise to the making of the application. Regulation 31 of the *State Service Regulations 2021* governs the time limit within which an application is to be made and is in the following terms:

“31. Timeframes in relation to reviews under section 50(1)(b) of Act

(1) In this regulation –

application for a review means an application for a review under section 50(1)(b) of the Act.

(2) An application for a review of the appointment of a person without advertising, in accordance with a determination of the Employer under section 39(1) of the Act, is to be lodged with the Tasmanian Industrial Commission within 14 days after the employee lodging the application knew, or reasonably ought to have known, of the appointment of the person.

(3) An application for a review of the promotion of a permanent employee without advertising, in accordance with the intention of the Head of Agency as notified in the Gazette under section 40(2) of the Act, is to be lodged with the Tasmanian Industrial Commission within 14 days after the date on which the intention was so notified in the Gazette.

(4) An application for a review of a State Service action, other than an action that may be the subject of an application for a review under sub regulation (2) or

(3), is to be made within 14 days from the date of the occurrence of the event that gave rise to the making of the application.

- (5) For the purposes of this regulation, a period specified in this regulation is to be calculated exclusive of any public holidays in the relevant part of the State that may fall within that period.”

[4] The relevant part of the regulation provides that an application “is to be made within 14 days from the date of the occurrence of the event that gave rise to the making of the application”.

[5] In *Application 2 of 2018 and A Department of the State of Tasmania*, the Deputy President held that the “event” referred to in regulation 31(3) is not necessarily the action which is sought to be reviewed. She held that the “event” was the service upon the Applicant of notice of that the action had been taken. It is the Respondent’s case that *Applicant 2/2018* is clearly wrong and should not be followed.

[6] In its written submissions the Respondent sets out the following:

- “23. The commencement of the limitation period for an application for review of State Service action is at the opposite end of the spectrum. Whereas the limitation periods for all the other applications are fixed by reference to the worker’s actual or constructive knowledge of an action or decision, or publication of an intention in the Gazette, the limitation period for a review of State Service action is expressly set by reference to the “occurrence of the event”. If r 31(4) sought to import a requirement of actual or constructive notice, the regulation could plainly have provided for a limitation period referable to “the applicant’s actual or constructive knowledge of the occurrence of the event”, or it could have adopted similar language as is used in r 31(2) through (3). The SS Regulations do not so provide.
24. To construe an “event” as having only “occurred” once a particular worker who subsequently makes an application for a review of that decision or action is given actual or constructive notice of that action or decision would be to impermissibly impose a gloss on the plain language of the provision. Such a construction would ignore the obvious distinction drawn by r 31(2)-(4) between limitation periods anchored by subjective knowledge, and the limitation period in r 31(4) which is to be determined purely by objective reference to the “occurrence of the event”.
25. To the extent that the decision in *Applicant 2/2018 and A Department of the State of Tasmania* suggests to the contrary, that decision is plainly wrong and should not be followed. While it is true that “the employee can only make the application if they are aware of the decision or action which adversely affect them”, to construe r 31(4) as requiring actual notice would be to elevate the Commission’s own normative assessment of what the regulations ought to provide over the ordinary language and context of the SS Regulations as they stand.”¹

¹ Citations omitted.

[7] It may be seen that the Respondent conflates the issue of notice with the “event”. The real question is a question of construction as to what the “occurrence of the event that gave rise to the application” means.

[8] In *Application 2/2018*, the Deputy President said it was the fact that the Applicant had knowledge of the action which led to the making of the application. That would seem to be the case as, if the Applicant in that matter had no knowledge of the action, no application would have been made.

[9] In an unpublished decision² the Deputy President followed her previous decision and made it clear that she was of the view that, because the regulations used the word “event” and not the word “action”, that parliament intended those words to have different meanings.

[10] In its submissions, the Respondent points to three matters said to indicate that the Deputy President was in error. The submissions are in the following terms:

“30. Three points arise. First, the Deputy President’s construction of “the date of the occurrence of the event which gave rise to the making of the application” reveals error. With great respect, the Deputy President’s construction requires a leap of logic unsupported by the provision when read in context: namely, that “action” and “event” must mean different things. While the use of different language may generally be presumed to mean different things, that presumption must yield where the context of the provision suggests that the words are synonymous. As r 31 expressly provides for actual or constructive notice in r 31(2)-(3), there is no contextual basis to imply in the word “event” as used in r 31(4) a reference to actual notice. The “event that gave rise to the making of the application” is the substantive matter in dispute.

31. Second, a further leap of logic is revealed by the Deputy President’s construction: namely, that “event which gave rise to the making of the application” must mean “the first occasion when actual notice of a State Service action is given to an employee”. A number of points arise:

(a) The first occasion when actual notice of a State Service action is received by an employee will often be beyond the Employer’s knowledge and will in many cases be indeterminate. If the Employer communicates a decision by post or email the Employer will not know in the absence of a response whether the employee has actually read the correspondence and is thereby on notice of the State Service action. On such a construction, the limitation clock would start ticking at the time of the employee’s choosing, being a date beyond the knowledge of the employer.

(b) It follows that the Deputy President’s construction of “the date of the occurrence of the event which gave rise to the making of the application” must require either actual or constructive notice - constructive notice being

² RO7 of 2022/23.

in an instance where the Employer's correspondence is left unread by the employee. However, it cannot be said that mere constructive notice of a decision without actual notice could ever "give rise to the making of an application".

- (c) The Deputy President's construction also raises issues where the worker's evidence is that the first receipt of notice is not, in fact, the "event which gave rise to the making of the application. A hypothetical scenario illustrates this point: a worker receives an email notifying them of a State Service action on the 1st day of a month. The worker does not understand its content or that they have a right of review. The worker makes an appointment to speak to their union or a lawyer on the 10th day of the month. The union or lawyer explains to them the import of the letter and that they have a right of review, and the worker instructs them to make such an application. The union or lawyer lodges the application on the 21st day of the month. Is the application within time? The worker's evidence would be that "the date of the occurrence of the event which gave rise to the making of the application" was the 10th day of the month, as that is the date of discoverability that they had a cause of action. On the Deputy President's approach, the worker's application is within time.

- 32. Third, there is no warrant to interpret the limitation periods provided by the SS Regulations in light of the State Service Principles. That approach reveals error of law."³

[11] Those submissions demonstrate the conflation of "event" with notice. There is no reference to notice in sub-regulation (4). There is in sub-regulation (1). This is a strong indicator that had parliament wished to engage the concept of notice in sub-regulation (4) it would have used that word, but it did not. The presumption that different words have different meanings referred to in paragraph 30 of the Respondent's submissions is not displaced.

[12] The Respondent submits that the Deputy President implied into the meaning of event a requirement of actual notice. If she did, that was wrong. However, I do not think her conclusion that it was the event of service of the notice that an action had been taken, was the relevant event which led to the application being made, was wrong.

[13] There is no reason that "event" should not be given its ordinary meaning. An event is a thing that happens or takes place; and occurrence or incident.⁴

[14] Service of notice of something is an event. Other events which may commence the running of the time limit, but which do not involve the concept of notice may be, for example, that an employee is moved to work at a different building or office or that an employer provided motor vehicle is taken away from the employee. If no written confirmation was given to the employee of those actions, the time would run because the event has happened. The issue of notice would not arise.

³ Citations omitted.

⁴ *Macquarie Dictionary* (6th ed, 2013) 'event'; *The Shorter Oxford English Dictionary on Historical Principles Volume II* (3rd ed, 1984) 'event'.

[15] I am not satisfied that the decision in *Application 2/2018* is plainly wrong, and I am prepared to follow it. I should add that I agree with the Deputy President that a construction of the regulation which could lead to a time limit expiring before any attempt was made to let the affected employee know about the action seems unjust and should be avoided. This is especially the case as there seems no way to extend the time limit.⁵ In this case such an outcome is avoided by giving the word “event” its ordinary and natural meaning and not limiting it to issues of notice. To limit the concept of an event to notice is straining the meaning of event. There is nothing in the regulation which requires departure from the ordinary meaning of the word “event”.

[16] As such, the event which gave rise to the application in this case was the service of the notice of the action. As such, as the Applicant became aware of the action (the “event”) on 18 October 2022, the application is made within time.

Does the Commission have power to grant the relief sought?

[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.⁶ 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 G 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 the Secretary of the Department, or any person to whom the powers of the Secretary have been delegated, to:
 - (i) set aside the State Service Action and reinstate Dr G’s suspension on full pay with effect on and from 10 October 2022;
 - (ii) arrange immediate payment to Dr G 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

⁵ In the decision of *Bullard v Tasmanian Industrial Commission* [2023] TASSC 3, Porter AJ suggests that the *Industrial Relations Act 1984* is, in fact, engaged for reviews of State Service actions. That may give rise to an entitlement to apply for an extension of time (see s 21(2)(m) of that Act), although it may be that that section does not extend to a time limit in the *State Service Act*.

⁶ *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.

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.

