

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 368 of 1986

IN THE MATTER OF an application
by the United Firefighters'
Union for interpretation of
the Fire Brigades Award
re payment in lieu of notice

PRESIDENT

HOBART, 23 April 1986

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Appearances, thank you.

MRS HERBERT: If the Commission pleases, **SYLVIA HERBERT** on behalf of the United Firefighters' Union, assisted by **MR LES WILLIAMS** and **MR JOHN CHIVERS**.

PRESIDENT: Thank you, Mrs Herbert.

MR CREW: Mr Commissioner, **PAUL CREW** from the State Fire Commission, assisted by **MR JOHN THOMSON**.

PRESIDENT: Thank you, Mr Crew.

MR CREW: Thank you.

PRESIDENT: Mr Crew, are you familiar with the procedure that the Commission observes in relation to interpretations?

MR CREW: Yes, sir. I am. I have been to one on a previous occasion, thank you.

PRESIDENT: Thank you.

 Yes, Mrs Herbert.

MRS HERBERT: Thank you, sir.

 The United Firefighters' Union is applying for interpretation of a clause of the Fire Brigades Award contained within Award No.1 of 1986. I have a copy of that particular award, sir.

PRESIDENT: Thank you. Exhibit H.1.

MRS HERBERT: Thank you.

 The specific clause that we're asking for an interpretation on at this stage, sir, is clause 42, 'TERMINATION OF SERVICE'.

It states there :

"Employment may be terminated by the employee on giving not less than one week's notice or by the employer on giving not less than one week's notice, or by the forfeiture or payment of one week's

MRS HERBERT:

wages as the case may be,
..."

The interpretation that the Firefighters' Union put on this is that they are of the opinion that the clause means that a person employed by the Commission must be in receipt of a salary to be given one week's notice, if not the second part comes into effect - payment of one week's wages.

The Commission in this case - the State Fire Commission - is of the opposite view.

The case in question relates to Senior Firefighter M.G. Lowe, 46 years of age, employed by the Commission for 15 years.

On 3/2/1984, Mr Lowe went off sick. It's not for me to give a medical opinion on that, but I believe it was with angina and vertigo. I don't think there's any argument as to that.

He was paid sick-leave that he had accrued up to 8 May 1984, when his sick-leave expired.

Just for your information, sir, not pertinent to this case, there was then a period of sick-leave without pay followed by applications to go onto the superannuation scheme which is within the Fire Commission; run by the National Mutual, which provides for when they have been absent from the employment of the Commission for a continuous period of 6 months they go on to a percentage of pay, sir.

There was quite a few protracted arguments as to whether the gentleman could be required to go on as permanently disabled, but this was unable to prove.

As I say, this is purely for your information, sir.

On 28/6/85, after a meeting had been

MRS HERBERT: held on the 27th between the Fire Commission, the union and the gentleman concerned, Mr Lowe was sent a letter from the Fire Commission.

PRESIDENT: Exhibit H.2.

MRS HERBERT: And the relevant paragraph on that letter is then :

"I therefore advise that your date of termination stands, as advised, as the 27th June 1985."

There were indications in that letter that he would be paid for ill health, early retirement, annual leave, long service leave, but no mention of one week's pay in lieu of notice.

Negotiations have taken place since that time, sir, regarding the amounts and actual things that were paid with regard to long service leave, annual leave and the early retirement fund. These have now been satisfactorily resolved and there is no problem with that whatsoever.

The problem that remains with us, sir, is the one week's pay in lieu of notice.

PRESIDENT: And is that because Exhibit H.2 was in fact dated 28 June and purports to terminate Mr Lowe as of 27 June?

MRS HERBERT: Yes, sir. By that time he was receiving no pay from the Commission at that time.

We now come to what followed from that matter. We are still arguing that he should receive one week's pay. Suffice that it is thought that he will never work again or other remarks that have been made, or that he's known that he will never return to work. The date of his termination was the date just quoted there, sir, the one of 27 June 1985.

On 21/8/85 the State Fire Commission wrote to the Department of Labour and Industry asking their opinion on the

MRS HERBERT: matter, whether they should pay a week's notice or not. And I have a copy of those letters here for you, sir.

PRESIDENT: Exhibit H.3.

MRS HERBERT: And the last paragraph is the one that comes under question.

And the statement there had in fact :

"... had in excess of one week's notice of his termination date. Therefore, no pay in lieu of notice is necessary."

That came from the Department of Labour and Industry. Mind you, on 21/10/85 the Department of Labour and Industry then correctly referred the matter, that the only person giving interpretations of awards is the Tasmanian Industrial Commission. So that's really why we are with you here today.

Following on that, we have the usual things then. The union decided on 3 October - which was before the Department of Labour and Industry had referred them to this Commission - they applied for a legal opinion. And this usually happens with a legal opinion. The unions applied for a legal opinion, a copy of which we have, if you would prefer. And of course, following that the Commission applies for a legal opinion.

PRESIDENT: Did they come a draw?

MRS HERBERT: And as we know the problems that can be obtained with legal opinions, sir, the union's legal opinion from Jennings Elliott, as you see there ...

PRESIDENT: Well if you would just bear with me.

MRS HERBERT: Sorry?

PRESIDENT: The union legal opinion will be Exhibit H.4 and I presume ...

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PRESIDENT - HERBERT

MRS HERBERT: The Dobson, Mitchell one is the ...

PRESIDENT: Is the Commission's legal opinion, which will be H.5.

MRS HERBERT: Yes.

PRESIDENT: Would you like the Commission's opinion?

MRS HERBERT: Well I was hoping, sir, that you wouldn't suggest that the Industrial Commission get a legal opinion as well. And as you can see from those ones, what was always probable is the fact that the union opinion said, 'Yes, it should be paid.' and the State Fire Commission's opinion said, 'No, it shouldn't be paid.' So the matter is still unsettled, sir.

It seems that we're, in this matter, purely looking for an interpretation of what is stated very clearly in the award.

I refer you back again to the award one, Exhibit H.1. It is given there, the management's prerogative, which is normal in most of these,

"... shall not affect the right of the employer to dismiss any employee without notice for misconduct or neglect of duty in which case the wages shall be paid up to the time of dismissal only."

The gentleman concerned does not fit into that category. So we, in our interpretation, have said that it falls within the first part :

"Employment may be terminated by the employee ... or by the employer on giving not less than one week's notice, or by the forfeiture or payment of one week's wages..."

It is our interpretation that although he was given one week's notice, at the time of giving notice the Commission were not paying him that - any money at the time. And

MRS HERBERT:

it's our contention that he is due to one week's wages in lieu of notice.

Thank you, sir.

PRESIDENT:

Yes. Thank you, Mrs Herbert.

Mr Crew?

MR CREW:

Thank you, sir.

Well Mrs Herbert has certainly presented a lot of information that we had intended to table to the Commission this morning, so we won't need to go into that. But I'd just like to clarify a few points with the Commission's case in this matter and refer back to, again, some of the essential background information.

That is, that Mr Lowe proceeded on sick-leave on 3 February 1984 and his sick pay exhausted by 8 May 1984.

Now some months later, on 13 July 1984, we received a notification from his doctor stating that Mr Lowe was 'suffering from I.H.D. and query Carotid Stenosis and is permanently unfit for work.'

Now receipt of that letter, stating that Mr Lowe was permanently unfit for work, created two options for the Commission. The first option was that we could terminate Mr Lowe's employment by giving one week's notice and terminate him on the grounds of ill health early retirement - based on that evidence. And the second option was that we could leave Mr Lowe on the payroll as unpaid, so that he would be eligible for total, but temporary, disabled benefit. Now this is a benefit not payable by the State Fire Commission, but by the superannuation scheme under which the United Firefighters' Union operate.

The Commission opted out for option B - that is to allow Mr Lowe to stop on the payroll as unpaid, so that he

MR CREW:

would receive this benefit under the superannuation scheme. And the reason for that was that the Commission considered that this provided the greatest potential benefit to Mr Lowe in view of his circumstances. And also this would allow the superannuation managers - the managers of the scheme - to fully assess his health situation to determine whether he would be able to retire on the grounds of ill health early retirement, or whether he would be entitled to receive the total and permanent benefits under the superannuation scheme.

So really it's been a question of, not of a formal termination of notice at all; it has always been the case that Mr Lowe, because of his ill health, was going to retire. It was just a question of when he would finally retire and whether he would retire on the grounds of ill health early retirement or under the total and permanent situation.

So there's never been any doubt in our mind that termination would occur, it was just a question of when and under what circumstances that termination would take place.

Now when the decision by the managers of the superannuation scheme was finally made - and that decision was that he would be retired on the grounds of ill health and early retirement - the Commission then calculated with the managers the entitlements due to him and provided the letter of termination to him with his entitlements under that scheme.

So that's where the Commission's position, I guess, paused for the time being.

Now following representations from the union, about receiving a week's pay in lieu of notice, we didn't feel we were competent to rule on that. So we sought advice from D.L.I. as has been mentioned by Mrs Herbert,

MR CREW:

and we also sought advice from our solicitors, Dobson, Mitchell & Allport - who have confirmed that Mr Lowe has given notice by virtue of his ill health and all the activities that were taking place prior to the decision by the superannuation managers, and that he would not be entitled to a week's wages in lieu of notice.

In fact section 24 (sic) of the regulations where it says :

"Employment may be terminated by the employee on giving not less than one week's notice..."

Well we believe that the notice of intention to terminate has always been there for quite some time. It was quite clear in Mr Lowe's mind that he was ceasing work, it was just a question of whether he was totally and permanently retired or he was retiring on the grounds of ill health and early retirement. There was certainly no doubt in the Commission's mind that his services were going to terminate in due course.

And that's, I guess, where we rest, sir.

PRESIDENT:

Is there any evidence to demonstrate that it was Mr Lowe who made representation to the superannuation fund or scheme to be considered permanently disabled and therefore entitled to payment, or did the Commission make that approach?

MR CREW:

I'd have to check through the file on that one, sir. I don't ...

PRESIDENT:

Or put it another way. Have you any documentary evidence, or any evidence of any kind that you can put before me, that would suggest that Mr Lowe requested that his services be terminated on grounds of ill health?

MR CREW:

No. I don't believe we can produce evidence from Mr Lowe himself.

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PRESIDENT - CREW

MR CREW: All we have, sir, is evidence from Mr Lowe's doctor, who states that he is permanently unfit for work. And I'd certainly be happy to table that, if you are prepared to accept that.

PRESIDENT: Yes. Thank you.

Exhibit C.1.

MR CREW: Sir, if I may interrupt? We have on file a total and permanent disablement claim - statement of claim - prepared and signed by Mr Lowe, dated 7 August 1984. We only have the one copy on file. Whether I can have that photocopied for tabling...?

PRESIDENT: Well, perhaps if you would show that to Mrs Herbert ...

MR CREW: Certainly.

PRESIDENT: ... and also show it to me, and you can then have it back.

MR CREW: Thank you, sir.

PRESIDENT: Mr Crew, to whom is this claim addressed?

MR CREW: Yes, they would go to National Mutual as the managers of the superannuation scheme, sir.

PRESIDENT: Yes, I see. And not to the Fire Commission?

MR CREW: No.

MR CREW: These things are a matter of course - normally forwarded through our office and then forwarded to the managers of the scheme, sir. Thank you.

PRESIDENT: I'm sorry, what was the date of that, please?

MR CREW: That is signed by Mr Lowe, dated 7 August 1984.

PRESIDENT: Thank you. Mrs Herbert?

MRS HERBERT: Thank you, sir. In regard to that form submitted, the National Mutual, on 18/2/85 and I am sorry, I haven't got a copy of that, said he was not permanently disabled but may improve as the condition had not yet been stabilized.

Our member was under the opinion that he was still actually employed at that time by the Fire Commission.

Nobody likes to become permanently disabled or wishes to be. There are, under the scheme, certain benefits that accrue if the gentleman puts in a form like that - of course if he can state that he is permanently disabled there are benefits but in the end it was not.

The facts that I have just said were contained in the letter to Mr Lowe from the Fire Commission on 18 February 1985 and it says there that his doctor, whoever, suggests that 'because of your vertigo you will be possibly considered unfit for firefighting duties', but however, in his opinion, 'you are not at this stage in any way considered totally and permanently disabled and indeed your condition may improve'.

That was a letter from the Fire Commission on 18 February 1985. They were still expecting him to improve. There is no objection to that?

MR CREW: No, sir, I have no objection to what Mrs Herbert is saying. It just fits in with the normal course of events

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PRESIDENT - HERBERT - CREW

MR CREW: with somebody who has made application for total and permanent benefits under the superannuation scheme.

As I mentioned earlier to you in our submission, the Commission opted for the opportunity for Mr Lowe to receive some benefits under the scheme whilst the managers of the scheme were assessing his medical condition and that is certainly the case.

PRESIDENT: Would Mr Lowe have been entitled to any payment under the terms of the Public Servants Retiring and Death Allowance Act?

MR CREW: I don't believe so, sir.

PRESIDENT: He'd be precluded because of some eligibility for superannuation, would he?

MR CREW: I would think so because, yes, the scheme does provide - he has this, what we call a total but temporary disablement benefit. It is about 82% of his salary and that goes for six months - I believe until his condition is assessed.

MRS HERBERT: I don't believe the urban fire brigades come under the Public Servants Retiring and Death Allowance Act, sir. Not this area.

PRESIDENT: They would now, wouldn't they?

MRS HERBERT: They probably would. I believe the Act was 1926. I am not quite sure whether they would come under it now.

PRESIDENT: They are State employees now, aren't they? They are all State employees.

MRS HERBERT: They are all State employees.

PRESIDENT: By definition.

MRS HERBERT: I don't think at the time that was even considered. The urban fire brigade has always been a little bit of an enigma there.

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PRESIDENT - HERBERT- CREW

MR CREW:

Although the superannuation scheme is a prescribed scheme, so whether that would render it outside the other one, I am not sure.

PRESIDENT:

Nothing turns on it. I was simply curious.

I have heard both sides on the points at issue. Ordinarily that would conclude the matter but since I am asked to interpret clause 42 of the award, I wonder if anyone would wish to address me on their apprehension of what those words really mean.

Mrs Herbert, perhaps if I can prompt you a little by asking you if it would be your view that the clause means that an employer in the instant case would have the option of giving a week's notice, regardless of whether in those circumstances the employee could work out the time for payment. Or if the employer decided that he could not give that kind of notice but instead decided to finish the person up summarily, as it were, he would have to then give that person a week's pay, whether or not that individual was entitled to pay immediately preceding the giving of notice or immediately preceding the date of termination.

Has that completely confused you?

MRS HERBERT:

Not really, it is what I said in the first place - that I did believe the fact that they are given one week's notice - one week's notice from work would presume that the person would be receiving money.

PRESIDENT:

Yes.

MRS HERBERT:

Or by the payment of one week's wages.

PRESIDENT:

Yes. What I am really asking you to do is to direct your attention to the words used in the clause and perhaps if I could take you through it:

"Employment may be terminated

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PRESIDENT - CREW - HERBERT

PRESIDENT: by the employee on giving not less than one week's notice ..."

That is clear.

"... or by the employer on giving not less than one week's notice ..."

If we could pause there and I might ask you if that option stands alone and do we then read:

"... or by the forfeiture or payment of one week's wages as the case may be ..."

Do we regard this as a disjunctive - something to be read in a different sense, or should we read it in this way - that employment may be terminated by the employee on giving not less than one week's notice or the forfeiture of a week's wages or by the employer on giving not less than one week's notice or the payment of a week's wages.

MRS HERBERT: Yes. I think I would have to say, yes. It is our contention that a person has to be receiving money before they can just be given a week's notice.

PRESIDENT: I don't think you're saying that at all.

MRS HERBERT: Don't you?

PRESIDENT: Because your case falls to the ground if that is what you are saying. I thought you said, it is your contention that an employee must first be receiving money before he can be given a week's notice.

MRS HERBERT: Yes, sir.

PRESIDENT: If he was not receiving money - if he was on sick-leave without pay, then your contention, if one were to uphold your contention, then to give him a week's pay when he is not receiving money would entitle him to

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PRESIDENT - HERBERT

PRESIDENT: nothing. I don't think you're saying that at all, are you?

MRS HERBERT: No. What we are saying, that there should be payment of one week's wages.

PRESIDENT: Yes.

MRS HERBERT: It doesn't say ...

PRESIDENT: Whether he can work it out or whether ...

MRS HERBERT: One week's wages as per the award, you should say or work it out, yes, but he wasn't working or receiving wages.

PRESIDENT: You are saying that he couldn't work it out.

MRS HERBERT: He couldn't work one week's notice.

PRESIDENT: No.

MRS HERBERT: He couldn't come back to work and say, "I'll work one week if you give me one week's notice". They never mentioned one week's notice. They just terminated his services from a due date.

PRESIDENT: What would have been the case had he been entitled to paid sick-leave at the time, do you suppose?

MRS HERBERT: I would still be of the opinion it was a week's wages from the date.

PRESIDENT: Yes, would you like to address me on those points, Mr Crew, or are you totally confused?

MR CREW: No, I certainly agree with your second contention, sir, that ...

PRESIDENT: I am not contending anything.

MR CREW: I'm sorry. With the statement that you asked of us - that the employment may be terminated by the employer on giving not less than one week's notice.

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PRESIDENT - HERBERT - CREW

PRESIDENT: It all turns on that little word
`or`. Is `or` a conjunctive or a
disjunctive?

MR CREW: Well certainly I find legal
interpretation or a layman's
interpretation quite difficult.

PRESIDENT: You're not alone in that.

MR CREW: I would look at this in layman's
terms, that employment may be
terminated by the employee on giving
not less than one week's notice and
taking that part of the sentence as a
distinct and separate part.

I would believe from the information
that we have available to us, that
the employee has in fact given notice
of his intention to cease work by
virtue of completing a claim for
total and permanent, because that in
itself and the submission of a
doctor's certificate saying that the
gentleman is unfit for work -
apparently unfit for work - is in
itself notice that the gentleman can
no longer work and it is just a
question of time. And when formally
the termination takes place and we
formally terminated that employment
period once the managers of the
superannuation scheme had decided
what the final benefits would be and
of course that was quite some time -
over 12 months from the time that Mr
Lowe gave notice of seeking the
termination of employment by applying
for his benefits under the scheme.

I believe that in itself is notice of
termination, without formally stating
the words, `I hereby terminate my
employment`.

PRESIDENT: I'm afraid you have drifted away from
the question we were talking about,
what the words in the clause mean.

MR CREW: Sir, I would prefer not to get into
an argument on that. I have
difficulty in understanding or
interpreting what they do mean.

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PRESIDENT - CREW

PRESIDENT:

Yes.

MRS HERBERT:

I just want to make one comment about that. We are just talking on words at the moment, sir. If I refer you to the exhibit from the State Fire Commission, Exhibit H.2, which was a letter to Mr Lowe on 28 June, he says in that third paragraph:

"I therefore advise that your date of termination stands, as advised, as the 27th June 1985."

28th June to the 27th is one day back. It is not one week's notice, is it? It doesn't say there, if we are going just purely on words, sir, - they don't even say, 'We give you one week's notice and your note will terminate on such-and-such a date'.

PRESIDENT:

Now Mr Crew can have a go.

MR CREW:

I'm not sure that that is totally relevant, but I think for your information, sir, that you should be aware that on 27 June a letter was personally handed to Mr Lowe, who refused to accept it.

We then came back to the office and rewrote the letter and posted it to him the next day.

PRESIDENT:

Could I, while you are on your feet and this will be the last time, could I ask this hypothetical question of you. Assume that Mr Lowe, on 27 June, had still been entitled to paid sick-leave. Would the Commission in those circumstances have considered that he was entitled to any additional payment?

MR CREW:

My action on that, sir, would be to have terminated Mr Lowe's employment from the date that his sick-leave would run out. Now had that been less than a week, then understanding the notification here we would have given him certainly the week's notice. If his sick-leave had run out as it certainly had, then I guess

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PRESIDENT - HERBERT - CREW

MR CREW: in view of the other circumstances, we would have terminated probably then and there, yes.

PRESIDENT: No, but the hypothetical question I put to you is, had his sick-leave not expired on the 27th?

MR CREW: We would terminate his employment from the date his sick-leave had run out. That would be my action there.

PRESIDENT: I am sorry. I am either not understanding or your not understanding me. If the Commission decided that on 27 June, is it ...?

MR CREW: Yes.

PRESIDENT: ... 1985, that it no longer wished to have Mr Lowe on its books, notwithstanding the fact that he was still in receipt of paid sick-leave and perhaps still had a credit of, let us say, 10 days, would the Commission in those circumstances have considered itself obligated to pay him a week's notice or if you like, another week's sick pay in lieu of notice or any monies whatsoever relating to notice?

MR CREW: I believe so.

PRESIDENT: So then, if that is the case it is argued by the Commission that the only reason that Mr Lowe was not in these circumstances entitled to any payment, was because his sick-leave had expired?

MR CREW: Yes.

PRESIDENT: I am aware that you had said, 'Well, he had a doctor's certificate saying that he was unfit for work anyway and that was tantamount to notice in any case', but it seems to me that what you are now saying is that the real test was whether or not he was at that point entitled to any paid sick-leave.

MR CREW: Yes, I guess that is probably so, sir.

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PRESIDENT - CREW

PRESIDENT:

You see, my task is not to decide this on the merits, Mr Crew. I can only look to the appropriate award provisions and endeavour to discover from the words used, whether or not in the circumstances described, Mr Lowe or the Commission - not so much Mr Lowe - the Commission would have been obliged to have given Mr Lowe one week's pay in lieu of notice.

As much and all as I might have a personal opinion, that can't come into it. I can only look at the words and say, 'What does the award mean? What is the intention of the award?' Do you understand that?

MR CREW:

Yes.

PRESIDENT:

And I'm sure you understand it?

MRS HERBERT:

Yes, thank you.

PRESIDENT:

Thank you. That being the case, I think I have heard enough. I will reserve my decision.

HEARING CONCLUDED