

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s.70(1) appeal against decision

**Adrian Dennis Meehan
(T14601 of 2018)**

and

Minister administering the State Service Act 2000

PRESIDENT D BARCLAY
COMMISSIONER T LEE
COMMISSIONER N WILSON

HOBART, 22 JANUARY 2019

DECISION

Appeal against a decision handed down by Deputy President Ellis on 24 May 2018 – T14576 of 2018 – jurisdiction – competency of appeal – threshold issue – decision did not contain an order – principles in ‘Bennett’ apply – decision incapable of appeal – no appeal lies

Introduction

[1] This is an appeal pursuant to section 70(1)(b) of the *Industrial Relations Act 1984* (the Act) against a decision of Deputy President Ellis in Matter T14576 of 2018, issued on 24 May 2018, relating to the alleged unfair termination of employment of Mr Adrian Dennis Meehan (the Appellant). The Respondent to both the original application and this appeal is the Minister administering the State Service Act 2000 (MASSA).

[2] The Appellant seeks to appeal the Deputy President’s decision in which it was held that there was a valid reason for Mr Meehan’s termination of his employment. The Deputy President found, as a consequence of coming to this conclusion, that the application be dismissed. In making this decision, the Deputy President found that the Appellant was afforded procedural fairness and therefore was not treated unfairly.

[3] A Notice of Appeal was filed with the Tasmanian Industrial Commission (the Commission) setting out the Appellant’s grounds of appeal. The Notice of Appeal was filed within the 21 day timeline envisaged in section 71(1) of the Act.

[4] The Appellant alleges, pursuant to s70(1)(a) of the Act, that Deputy President Ellis either made a legal error, acted on a wrong principle, gave way to a relevant matter, or gave insufficient weight to a relevant matter, in her decision. Specifically, the Appellant alleges that:

- Deputy President Ellis erred in accepting incomplete evidence. This was untested and had no reflection of the true meaning;
- Deputy President Ellis’ decision was not supported by suitably qualified senior practitioners;
- lack of weight was given to key professional staff and supervisors;
- Deputy President Ellis erred in not referring to s30 of the Act as she did not provide equal consideration to all parties when determining evidence.

Background

[5] On 6 August 2018, the Tasmanian Industrial Commission wrote to the parties, on behalf of the Full Bench, to draw their attention to the decision of *Bennett v Minister Administering the State Service Act 2000*¹ (*Bennett*), a decision of the Full Court of the Supreme Court of Tasmania. The correspondence noted that the Full Court held that:

“(2) Pursuant to the Act, s 70(1)(b) the right of appeal is a statutory remedy and not a common law or equitable right. There is nothing in s 70(1)(b) which authorises an appeal from a dismissal’.

[6] Directions were issued requiring submissions in respect to whether the Full Bench could entertain the Appeal, in light of the decision in *Bennett*. Both parties filed written submissions limited to the jurisdiction issue of this appeal. A hearing was held in Hobart on 12 December 2018.

Jurisdictional issue

[7] The Deputy President’s reasons for decision include the following at [130] and [132] – [133]²:

“[130] I am satisfied that the balance of performance was considered and I concur that the valid reason for the Applicant’s termination of employment and serious nature of the conduct, overrides the previous good performance.

...

[132] I find the Applicant was afforded procedural fairness, throughout the process. Therefore, I find that he was not treated unfairly.

[133] Accordingly, having considered all the matters, the termination was for valid reasons and not unfair. This application is dismissed.”

[9] The Respondent relied on *Bennett* to submit that, as Deputy President Ellis did not make an order under s31(1), or require anything to be done by the parties to resolve the dispute, no right of appeal is conferred by the Act³.

[11] The Appellant conceded that there was no order made, stating at hearing that “the decision that was made was just to dismiss the application so there was no decision, anyway”⁴. The Appellant did not delve further into this jurisdictional issue in his written or oral submissions.

¹ *Bennett v Minister Administering the State Service Act 2000* [2009] TASSC 95 190 IR 202.

² *Meehan v Minister Administering the State Service Act 2000* T14576 of 2018.

³ Minister administering the State Service Act 2000, ‘Submissions for the Respondent’, Submission in *Meehan v Minister administering the State Service Act 2000*, T14602 of 2018, 24 August 2018.

⁴ Transcript of Proceedings, *Meehan v Minister administering the State Service Act 2000* (Tasmanian Industrial Commission, T14602 of 2018, Full Bench, 12 December 2018) P11.

Consideration

[13] The Full Bench is required to determine whether it has jurisdiction to hear and determine an appeal.⁵

[14] The Full Bench has recently followed the decision of the Full Court of the Tasmanian Supreme Court in relation to *Bennett* as a binding authority. This was demonstrated in the decision of *Dudley v Minister administering the State Service Act 2000/Tasmanian Health Service*⁶ (*Dudley*).

[15] The Full Bench of the Tasmanian Industrial Commission in *Bennett* determined:

"16. The only right of appeal relied upon by the appellant is that given by s70(1)(b). It permits an appeal to the Full Bench against "an order made by a Commissioner under section 31(1) after a hearing relating to an industrial dispute in respect of ... any termination of employment ... by ... the party who applied for the hearing ...". The question that arises is whether the order of dismissal that was made by the Commissioner was an order under s31(1). It 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."

17. That provision authorises, for the purpose of preventing or settling an industrial dispute in respect of which a hearing is convened, the making of an order directing that anything required to be done, be done, or that any action required to be taken, be taken. No order of that nature was made by the Commissioner. The language used in s31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used."⁷

[16] The Supreme Court in *Bennett* determined that s70(1)(b) does not authorise an appeal against the dismissal of an application for an unfair termination of employment. Rather, an appeal can only be made against 'an order'. The Respondent submitted that no order was made by the Commissioner and therefore there is no right of appeal. The Appellant also conceded that no 'order' was issued.

[17] We agree with the recent Full Bench decision in *Dudley*, and the previous decisions of this Commission which have applied the decision in *Bennett*. In this matter no order was issued by Deputy President Ellis in her decision and the application was dismissed. Therefore, consistent with the decision in *Bennett*, there is no right of appeal.

⁵ *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC97 at [20] per Crawford J.

⁶ T145282 of 2018.

⁷ [2009] TASSC 95 190 IR 202, [16]–[18].

Conclusion

[18] For the reasons above, we dismiss the appeal as the Tasmanian Industrial Commission is without jurisdiction to hear and determine the appeal.



D Barclay
PRESIDENT

Appearances:

Mr A Meehan appearing as the applicant
Mr M Johnston, Ms C Papworth for the respondent

Date and place of hearing:

2018
12 December
HOBART