TASMANIA

Tasmanian Industrial Commission

State Service Act 2000

Applicant 2/2018
and

A Department of the State of Tasmania

Decision redacted so as to prevent identification of the Applicant

HOBART, 4 JUNE 2018

Jurisdictional objections- State Service review process, s 50(1)(b)-preliminary decision-issue of 'out of time'- definition of action and event- impact of internal dispute resolution process-found that application was not out of time-jurisdictional application dismissed.

DECISION

Introduction

[1] On 22 March 2018, Health Services Union, Tasmania Branch (HSU) on behalf of the Applicant made an application to the Tasmanian Industrial Commission (TIC), pursuant to s 50(1)(b) of the *State Service Act 2000* (the SS Act), for a review of an action by a Department of the State of Tasmania (the Respondent) to reassign duties of the Applicant arising from a determination and reprimand issued under s.10 of the SS Act.

[2] A conference was listed in Devonport on 20 April 2018. The Parties requested that the matter be adjourned by email, dated 19 April 2018, from the HSU Industrial Officer to enable further negotiations in an attempt to resolve the matter. The email stated "Our reason is that we are persevering in our attempts to resolve the matter without the need for a conference and the extra time may allow this to occur" and it is noted the "respondent is in agreement to this request".

[3] The matter was unable to be resolved and a further conference was listed for 28 May 2018. Prior to the conference, the Respondent made an objection to the application and submitted that the Applicant was 'out of time'. The Applicant then requested that the issue of 'out of time' be determined on the papers.

Respondent's position

[4] The Respondent submitted the application was out of time pursuant to the s.51(1A) of the SS Act and Regulation 38(3) and (4) of the *State Service Regulations 2011* (SS Regs), which states:

"(3) 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 subregulation (1) or (2), 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. (Respondent's emphasis)

(4) For the purposes of this regulation, a timeframe 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 timeframe.

(5) In this regulation –

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

[5] The Respondent contends the date of the occurrence of the event was the date the Department Secretary signed the letter of determination and sanction to the Applicant, on the 5 March 2018. This letter outlined the right to review and included notice of the applicable 14 day time limit for review. The Respondent relied on the particulars in the Application in paragraph 10, titled Action for Review stating, "Dr A has subjected (sic) the Applicant to a reassignment of duties at Mersey hospital"

[6] The Respondent submitted the event is "a State Service action" and in this matter, that the action was the CEO's decision arising from his determination and application of the sanction to reassign the Applicants' duties to Mersey Hospital, resulting from the outcome of an Employment Direction (ED) 5 Investigation.

[7] The Respondent submitted there is no discretion to extend the timeframe past the prescribed fourteen days from the date of the occurrence of the event, and contends this excludes the Applicant's position that the notification and receipt of the letter was the occurrence of the 'event'. The letter was emailed to the Applicant on the 7 March 2018.

[8] The Respondent referred to the matter RO32-2013/14 where Deputy President Wells states (inter alia):

[48]This application fails to comply with the time limit stipulated in the regulations and then reiterated by clause 5.2 of the President's procedures. Consequently, it is not valid. Strict compliance with statutory requirements is regarded as necessary to constitute a valid application for review. An example of this requirement is *McCarthy v Xiong* (1993) 2 Tas R 290. In that case the Full Court of the Supreme Court of Tasmania dealt with an appeal where a Notice to Review a Magistrate's decision had named one of the parties erroneously. A Notice to Review is a statutory review by the Supreme Court of a Magistrate's decision. The primary Judge ordered substitution of the name of the party in question, overruling an objection. That decision was appealed to the Full Court.

[49] In the Full Court, it was argued that the Notice to Review was invalid because a party had been incorrectly named. The Full Court rejected the argument. Underwood J (at page 299) identified the statutory requirements for a valid Notice to Review. His Honour said to be valid the Notice must firstly, set out the grounds of the review (ie the relevant decision to be reviewed); secondly, be filed and served within 14 days; and finally, identify the alleged error.

[50] His Honour then said *"strict compliance with those statutory requirements is necessary to constitute a valid motion to review. There is no power to order amendment of a document that does not comply with the statutory requirements"*. As those requirements were not fulfilled, the appeal was dismissed. (sic)[1]

[51] This principle must apply to an application for review under s50(1) of the SS Act as it is a statutory review with certain requirements. There is no flexibility in the allowable timeframes. Whilst Mr Turner raises a similar but not the same analysis on this point (at [31] – [37] of his submissions), I am of the view that his analysis is equally applicable. The time limit is clearly a jurisdictional fact, of which I must be satisfied. The application was not lodged within the 14 day time limit and therefore the jurisdiction of the TIC is not invoked".

[9] By way of background the following table was submitted by the Respondent:

Monday 5 March 2018	Date of CEO's letter, exercising his delegation and advising his decision	This is the date of the occurrence of the event
Tuesday 6 March 2018	Day 1of the review period commences	Refer- s 29 of the *Acts Interpretation Act 1931*
Wednesday 7 March 2018	Date that CEO's letter was emailed to both HSU and the Applicant	
Monday 12 March 2018	8 Hour Day- Public Holiday	The Parties' agree that public holidays do not count towards the 14 calendar days
Tuesday 20 March 2018	"within 14 calendar days" of 6 March (inclusive of the 6th, but exclusive of the public holiday on the 12th)	The Department submits this represents the last day to lodge a review of action
Thursday 22 March 2018	Date of application	The Department submits this application is out of time

[10] The Respondent submitted that the wording of Regulation 37 in relation to a selection review under s.50(1)(a) is specific; "within 7 days from the date of the written notice given to the employee advising the employee of the selection" and noted that this wording is not utilised in Regulation 38.

[1] For clarity , this PN was not included in the Respondent's submission and PN 51 titled PN 50.

[11] It was also submitted the *Acts Interpretation Act 1931,* s.29 Reckoning of time, states that the period "shall be reckoned exclusively both of the given day or of the day of the specified act or event…" and therefore day one of the review period necessarily falls on the 6 March 2018.

[12] The parties agreed that public holidays do not count in the fourteen days timeframe and there was one public holiday falling within this fourteen day period on 12 March 2018. Therefore the Respondent submitted the fourteenth calendar day inclusive of the public holiday was the 20 March 2018.

[13] In response to the Applicant's position that the Registrar of the TIC advised HSU that 22 March 2018 was the deadline, it was submitted that comments on the accuracy cannot be made as the Respondent was not privy to that discussion, however, the powers deriving from the Act, deem neither the Registrar nor the Commission has the power to alter or extend the timeframes.

[14] The application was lodged on the 22 March 2018 and the Respondent contends that the application is outside the prescribed timeframe. The 14 day reference limits the statutory power of the TIC to hear any application outside that time and therefore the jurisdiction of the TIC is not invoked. The Respondent seeks to have the application dismissed.

The Applicant's position

[15] The Applicant submitted a "counter view" based on three elements. The first issue was the date of the action requiring review, which was submitted to be when the Applicant received their outcome letter by email, on 7 March 2018. It was contended that the "review period cannot be considered to have commenced until the outcome is in the hands of the recipient" and provided a position that "delays could be specifically engineered to ensure that a review timeline is unachievable" setting a dangerous precedent.

[16] The Applicant submitted that clause 5.2 of the Procedure for the Conduct of State Service Review of Actions (Procedure Guidelines) states:

> An application for Review of any Other State Service Action in accordance with Section 50(1)(b) of the Act is made by lodging an "Application for Review of any Other State Service Action" (Form SSA3 attached), within 14 calendar days **(excluding public holidays**)[2] of the occurrence of the event that has given rise to the review. No approval will be given to extend the 14 day time period.

[17] The Applicant submitted the Registrar, provided advice that 22 March 2018 was the deadline for lodgement of this matter and the Applicant had met that timeframe. Furthermore, the position of the Applicant was that the timeline started on receipt of the notification on the 7 March 2018 and 14 days from that date excluding a public holiday was 22 March 2018, the date the application was lodged.

[18] In response to the Respondent's submissions, the Applicant provided further submissions relating to the event and the action. "The plain and ordinary language should

[2] Words inserted by the Applicant

apply". The "State Service action" and the "event that gave rise to making the application" are two different things. In support of this position, the Respondent contended the words would have not been changed and would have remained consistent which may have stated; "An application for a review of a State Service action… is to be made within 14 days of the reviewable State Service action". It was reiterated that the event giving rise was the receipt of the letter on the 7 March 2018. The date of receipt of the email is an agreed fact.

[19] The Applicant referred to *Kucks v CSR LTD* (1996) IRCA 166 (19 April 1996) (sic):

> "Meanings which avoid inconvenience or injustice may reasonably be strained for,….that ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."

[20] Reference to the "Golden Rule" of statutory interpretation which was provided by Lord Wensleydale in Grey v Pearson (1857) HL Cas 61, who stated:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the test of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther."

[21] The Applicant stated it would be "absurd to suggest" that the Applicant has a requirement to comply with a strict 14 day timeline when they are unaware such action has occurred. It was submitted that the matter proceed to avoid an absurdity.

Legislative Framework

[22] This application has been made pursuant to s.50(1)(b) of the SS Act and s.51(1A) of the SS Act states;

> "Timeframes for an employee to apply for a review under section 50(1) are as prescribed by the regulations."

[23] The relevant Regulation outlining the timeframe for lodgement of an application for a review is Regulation 38 (3)-(5) of the *State Service Regulations 2011*

> **38. Timeframes in relation to reviews under section 50(1)(b) of Act**
>
> (3) 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 subregulation (1) or (2) , 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.
>
> (4) For the purposes of this regulation, a timeframe 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 timeframe.
>
> (5) In this regulation –
> application for review means an application for review under section 50(1)(b) of the Act.

Conclusion; Action v Event

[24] The Regulation does not provide any discretion for the Commission to extend the timeframe for an application to be made as found by Wells DP in RO32-2013/14. The matter also dealt with the question of whether an application which was otherwise out of time, could be corrected by a subsequent amendment. DP Wells found that it could not. In this case that question has not been raised.

[25] However, in this matter the question to be determined is the date and the occurrence of the 'event' which gave rise to making the application, from which the 14 day time line commences.

[26] The Respondent contends this was the 5 March 2018, being the date Dr A signed the letter to the Applicant outlining the determination and sanction following the ED5 investigation. The Respondent stated 'the event' is 'a state service action'. The Applicant contends that the date of submission of the application, being the 22 March 2018, was within the prescribed timeframe as the 'event' which led to making the application was the 7 March 2018, the day the Applicant received the letter and notification of the action.

[27] The parties are in agreement, that the 'action' to be reviewed, as stated in the application filed with the Commission, is the application of the sanction of the reassignment of duties at Mersey Hospital, arising from the ED5 Investigation and determination set out in the letter, dated 5 March 2018, from Dr A.

[28] Regulation 38(3) does not state the 14 day timeline commences at the date of the action but:

> "from the date of the occurrence of **the event** that gave rise to the making of the application." (My emphasis)

[29] To make an application for a review of a state service action, the employee has to be aware of such action. Therefore, there must be an 'event' that triggers or gives rise to the decision to make the application. The employee can only make the application if they are aware of the decision or action which adversely affects them. If the action and event are considered the same, as contended by the Respondent, at that stage, the employee is still unaware of the action and could not consider or make an application for a review. In my view, it could not be procedurally fair to commence the timeline to make the application, when the employee is unaware of the action.

[30] However, once the 'event' occurred, it gave rise to the Applicant's consideration of the action and to seek to exercise their right pursuant to s.50(1)(b) of the SS Act. This aligns with the reality that there are a broad range of actions which can be reviewed and a determination, arising from an ED is but one of such actions. Other examples of actions, which may not include written outcomes, arise from, to name a few examples, verbal face to face meetings, the timing and release of rosters and performance review processes which may include subsequent written outcomes. The event giving rise to making the application will be different arising from each action and there may be different timeframes within each scenario. The action and event may occur simultaneously. However, there is no question, it is the 'event', as stated

in the Regulation, which sets the 14 day timeline in action. Strict compliance with this requirement is required for a valid application to the Commission.

[31] It is the breadth of possible reviewable actions which mandate the use of the word 'event', unlike the wording relating to applications for specific action reviews, for example, Reg 38(1) in relation to a review of the appointment of a person without advertising;
"is to be lodged with the Tasmanian Industrial Commission within 14 days after the employee knew, or reasonably ought to have known, of the appointment of the person."

Reg 38(2) in relation to review of the promotion of a permanent employee without advertising, "is to be lodged with the Tasmanian Industrial Commission within 14 days after the date that the intention was so notified in the Gazette."

However, Reg 38(3) in relation to all other reviewable state service actions, cannot specify or define one event due to the enormity of the scope of such potential actions and the differing associated events which would give rise to making such applications.

[32] The Oxford English Dictionary defines 'action' and 'event' with different meanings as follows:

> "Event; A thing that happens or takes place, especially one of importance."
> "Action; A thing done; an act"

These words are not intended to have the same meaning, nor are they interchangeable. The Regulation would have specified the 'action' giving rise to making the application, rather than the 'event'. The plain and ordinary meaning of the words should apply.

[33] Pearce and Geddes in 'Statutory Interpretation in Australia 8ed'[3], summarises the meaning of different words in statutory construction and interpretation:

> "The courts have also long adopted a twofold approach to the interpretation of legislation that is founded on the expectation that words will be used precisely. First, the view is taken that where a word is used consistently in legislation it should be given the same meaning consistently. Second, it is held that, where a legislature could have used the same word but chose to use a different word, the intention was to change the meaning."

[34] In *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75 at 30, Irvine CJ summarised the courts' approach to the use of different words:

> '[T]hough it is not to be conclusive, the employment of different language in the same Act may show that the Legislature had in view different objects.'

[35] In my view, the action (the thing done; the act) occurred on 5 March 2018 and consisted of the signing of the letter outlining the decision (determination and the subsequent sanction) and processes leading to the decision, however the 'event' (a thing that happened or took place, especially one of importance) was the receipt of the letter outlining the Secretary's determination to the employee, which upon receipt, gave rise to the making of the application. If the action of making the decision is not known by the Applicant, therefore the decision

[3] D C Pearce, R S Geddes ' Statutory Interpretation in Australia Eighth edition'(Lexis Nexis, 2014, at p151)

cannot be part of the event, but service of that decision is part of the event to give rise to making the application. There would be no application if the action occurred and the Applicant was not served with notice, ie, without the occurrence of the event, there would be no application.

[36] Accordingly, I find that it was the serving of the letter by email which is the actual 'event' giving rise to making the application and the 14 day timeframe was triggered from the 7 March 2018. Inclusive of one exempted public holiday day, the 14 day period concluded on the 22 March 2018, the day the Applicant filed the application with the Commission.

[37] I note that s 51(1) of the Act requires the President of the Tasmanian Industrial Commission to determine the procedure for a review under s.50(1).

[38] The "Procedure for the Conduct of State Service Review of Actions" (Procedure Guidelines) states:

> "3.4 Heads of Agencies must, in accordance with Section 34(1)(j) of the Act, develop internal grievance resolution systems for their Agencies that reflect the principles of natural justice and procedural fairness.
>
> 3.5 Employees who have a grievance about any matter relating to their employment in the State Service, except a selection decision in relation to a permanent appointment, will normally be expected to utilise internal Agency grievance resolution systems in an attempt to resolve their grievance.
>
> …
>
> 5.5 If an employee seeks resolution of an issue through the Agency's internal grievance resolution system, or otherwise seeks to resolve a matter through direct negotiation or consultation, the event referred to in Clause 5.2 shall be the advice of the outcome of that internal process."

[39] The Commission has also published "Guidance Notes – Lodgement of a Review of Action" which state as follows:

> "Employees who have a grievance about any matter relating to their employment in the State Service (except a selection decision in relation to a permanent appointment), should where possible utilise internal Agency grievance resolution systems in an attempt to resolve their grievance. However, a matter may be brought directly to the TIC where an employee does not have confidence in the internal review process."

[40] This process is supported in the Grievance and Dispute Resolution clause of the Award;

> "(g) Further the operation of this clause does not remove or lesson the right of an employee to seek redress through the provisions of the *State Service Act* 2000 of any other applicable legislation."

[41] These documents clarify that individuals are encouraged to pursue internal processes for review before lodging a formal s.50(1) application with the Commission. All attempts to resolve the dispute internally should be strongly encouraged in the first instance.

[42] The Applicant emailed a letter to the A/Director of HR, THS North West on 16 March 2018, in an attempt to resolve the dispute through utilisation of the Award grievance and dispute resolution process. This letter requested an action arising from the Award process of maintenance of the status quo, until the dispute was resolved:

> "HSU is prepared to meet in order to resolve the dispute. HSU draws your attention to the above sub-clause (e) stating that "the status quo will remain" until the dispute is resolved.
> Please provide your written response confirming you compliance with the above clause by no later than Friday 23 March 2018…"[4]

[43] The Respondent correctly makes the point in the initial correspondence, that on receipt of the 5 March 2018 letter via email on 7 March 2018, it was open to the Applicant and/or HACSU to lodge a s.50(1)(b) application. Furthermore, in response to the above email, Ms MP reminded the Applicant of the strict timeframes to lodge the application. There was no response to the requested confirmation of the maintenance of the status quo but an acknowledgment by the Respondent of the ongoing negotiations and she stated:

> "Please be advised that Dr A will give due consideration to the points raised in that letter, and provide you with a formal response as soon as possible."

The Commission has received no feedback on the final outcome and progress of this internal approach to the dispute resolution to date, however, I note that the parties both consented by email, dated 19 April 2018, to adjourning the initial listed conference due to the stated reason:

> "we are persevering in our attempts to resolve the matter without the need for a conference and the extra time may allow this to occur."

[44] In my view, this process was entirely consistent with the procedures and guidelines referred to above, considering negotiations were underway and appeared to be progressing based on the request to postpone the listed conference date.

[45] President Abey in *RO40-2013/14* (applicant's name withheld) in PN [41] stated:

> "There is good reason for this approach. Apart from formalising a 'dispute' with an individual's employer, a s50(1) application immediately puts in place a chain of events which includes the convening of a conference and requiring the agency to file a written response within 14 days. This of course is avoided if the matter is resolved internally. It is also arguably undesirable to encourage behaviour which might be seen as using a s50(1) application as a 'bargaining chip' in the dispute resolution process. In short, s50(1) should be utilised as the avenue of last resort except in cases where an employee does not have confidence in the internal review process."

[46] HSU made it clear from the outset that the Applicant intended to challenge the employer's decision, however an attempt to resolve this dispute was appropriately pursued.

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[4] Attach 12 Application

[47] Having found that this application is valid and has complied with the statutory timeframe of 14 days of the event giving rise to making the application, I do not intend to determine the application of the Procedure Guidelines as an 'event' as I have not heard detailed submissions from the parties about the above Procedure Guidelines and Guidance Notes. However, if the internal Grievance and Dispute Resolution clause of the Award has been invoked, it might be arguable that the 'event' does not occur until the process has been exhausted and the dispute remains unresolved.

[48] Having found the 'event' included service and notification of the action, and to provide certainty, it would be prudent that an application should be filed within the fourteen days of the action. In many cases, the action is the decision. It should be noted the application can be adjourned while the internal dispute resolution processes are exhausted. The application can then be enlivened, if required. Internal dispute resolution remains strongly encouraged between the parties.

[49] I conclude that the application was lodged within time and the preliminary jurisdictional application is dismissed.

N M ELLIS
DEPUTY PRESIDENT