TASMANIA

Tasmanian Industrial Commission

State Service Act 2000

Applicant 1 of 2020

and

A Department of the State of Tasmania

PRESIDENT D J BARCLAY HOBART, 30 OCTOBER 2020

Nature of review under section 50 State Service Act explained – Application for appointment without advertising under clause 17.4 of Employment Direction 1 – no error found – application dismissed

REASONS FOR DECISION

[1] On 9 April 2020, the Applicant made an application to the Tasmanian Industrial Commission pursuant to s 50(1)(b) of the *State Service Act 2000* (the Act), for a review of an action by the Department of Justice (the Respondent).

[2] The Applicant has applied for the review of a decision of the Secretary of Justice refusing to promote the Applicant without advertising in accordance with clause 17.4 of Employment Direction 1 (ED 1).

Background

[3] [redacted]

[4] The Applicant had been carrying out the duties since 31 October 2016, and had carried out those duties from that time until 1 April 2020.

[5] On 23 March 2020 the Applicant sought review of her employment status pursuant to clause 17 of ED 1. On 31 March 2020 the Secretary determined that the Applicant would not be promoted to the permanent position. The Secretary determined that the position was not an ongoing position after 1 April 2020 and that the position was not funded past that date. Accordingly the Applicant was not appointed to the role.

[6] It is that decision which the Applicant seeks to review.

The test to be applied for the review of an action

[7] It is to be remembered that the role of the Commission is not to undertake a review of the decision on the merits.

[8] It is generally accepted that there are three types of review of a decision such as this. The first is a review de novo. That is, the review body (in this case the Commission) undertakes a full review of the case, hears evidence afresh and substitutes its own decision for the decision of the decision-maker.[1]

[9] The second is a full merit review, but on the basis of the materials which were before the decision-maker. That is, the Commission reviews all the materials which were before the decision-maker and substitutes its own decision for that of the decision-maker.

[10] The third type of review is a limited review whereby the Commission undertakes a review of the decision to make sure that the process undertaken by the decision-maker was appropriate and did not miscarry. This type of review is not a merit review, but rather a review with an eye to correction if the process miscarried. The only review on the basis of "merit" is where the decision-maker could not properly have reached the decision it did on the basis of the material before it. This type of error on the merits is often referred to as *Wednesbury* error from a case decided in the United Kingdom in 1948.[2]

[11] It is a ground which is often difficult to establish. In the *Wednesbury Case* Lord Greene said:[3]

> "It is true that discretion must be exercised reasonably. Now what does that mean? ... [T]here may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

[12] A little later he said:[4]

> "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind."

[13] The *Wednesbury* Case has been adopted in Australia by the High Court in *Parramatta City Council v Pestell*.[5] In that case, Gibbs J said:[6]

> "If, in purporting to form its opinion, a council has taken into account matters which the Act, upon its proper construction, indicates are irrelevant to its consideration, or has failed to take into account matters which it ought not to have considered, the opinion will not be regarded as validly formed. Even if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it."

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[1] I note that there are limited circumstances where fresh evidence which was not available to the party seeking to adduce it at the hearing may be admitted on the review.
[2] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[3] Ibid, page 229.
[4] Ibid, page 230.
[5] (1972) 128 CLR 305.
[6] Ibid, page 327

[14] It may be that to establish *Wednesbury* error the precise nature and quality of the error must be identified together with the legal principle or statutory provision which established the error.[7] Usually the identification of the error will be that irrelevant considerations were taken into account or that relevant considerations were overlooked.

[15] In Tasmania, the nature of the review is of the third kind. In *Pervan v Frawley*[8] Porter J said the following:[9]

> "I need to say something about the proceedings both before the Commissioner, and in this Court. The application for judicial review seems to have proceeded on the assumption that the Commissioner, in acting under s 50(1) of the SSA, was conducting a review in the sense of "looking it over" with a view to correction, rather than in the sense of carrying out a de novo process. That would seem to be correct. The powers available to the Commissioner under s 51(6) on the determination of an application for review, do not suggest a de novo process. Accordingly, the Commissioner was not required to re-determine the issue under cl 4.1 of the CD5 for himself."

[16] The reference to s 51(6) is a reference to that section in the *State Service Act 2000.* It provides:

> "(6) In the determination of an application for a review, the Tasmanian Industrial Commission may –
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> (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
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> (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
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> (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."

[17] It may be seen that the Commission does not have power to make the decision on behalf of the decision-maker. Rather the Commission makes recommendations as to the manner in which the process ought to be carried out. In this case that means that I cannot direct the Secretary to seek the approval of the Head of the State Service to appoint the Applicant to the position she seeks. If the Applicant were successful I can only identify any errors into which the Secretary fell and determine that she reconsider the Applicants application having regard to the errors identified.

[18] I approach the review of the action in this matter as engaging the third type of review referred to above at paragraph [10] with, as Porter J said, a view to correction.

Employment Direction 1

[19] For the purposes of this matter the relevant part of ED1 is clause 17.4 which provides:

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[7] See *Re Minister for Immigration and Multicultural Affairs; Ex p. Applicant S20/2002* (2003) 198 ALR 59.
[8] [2011] TASSC 27.
[9] Ibid, at paragraph [64].

> "17.4 On application from a permanent employee who satisfies clause 17.2 and who has been assigned fixed term duties at a higher classification level for a continuous period of at least 36 months, a Head of Agency will conduct a review of the employee's status in respect to the currently assigned duties.
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> If all the following criteria are met, the Head of Agency will seek approval from the Head of the State Service for promotion of that employee without advertising:
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> a. The total length of continuous assignments to the same or similar duties has been at least 36 months;
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> b. The employee has been assigned the duties for at least three discrete fixed term periods; and
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> c. There is an ongoing requirement for these duties or substantially similar duties."
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> Following an application, if a Head of Agency does not seek promotion without advertising, the Head of Agency will provide the employee, in writing, justification of reasons for the promotion without advertising not being sought.
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> If the Head of the State Service has already approved a fixed-term assignment of duties in excess of 36 months in accordance with 9.3 of this Direction, that employee will be excluded from making an application through this process.

[20] Clause 17.2 requires the employee to be a permanent employee which the Applicant is.

[21] It is common ground that the Applicant meets the requirements of subclause 17.4(a) and (b). The issue is whether there is an ongoing requirement for the duties.

The Applicants Case

[22] The Applicant makes a case for the ongoing need for the position. She identifies by use of statistics and personal experience the significant number of complaints made to the Agency and notes that the number of complaints is only increasing. Additionally the Applicant identifies [other duties as showing] overall an ongoing requirement for the role.

[23] The Applicant also notes support of the head of the agency for the role.

[24] In regard to clause 17.4(c), the Applicant in essence submits that the ongoing requirement for the duties is to be assessed objectively ignoring the wishes of the Department. If there is an objective need for the role (as demonstrated by such matters to which the Applicant points) then there is an ongoing need for the duties within the meaning of the subclause and the Secretary must seek the approval of the Head of the State Service for appointment to the role.

The Respondents Case

[25] The Secretary in her decision said this:

> "I am advised that you do not meet all the criteria as outlined under clause 17.4 of ED No. I and accordingly, I am unable to seek the approval of the He.ad of the State Service to promote you without advertising.

I am advised that while clauses 17.4 (a) and (b) have been met as outlined in ED No.1, it is not considered that clause 17.4 (c) has been satisfied as the duties to which you are seeking promotion are not ongoing.

The [Agency] establishment clearly shows that the position/s you have been appointed to have been fixed term. The position/s were never part of the permanently funded [Agency] establishment and there was no expectation by the Agency that the role would be ongoing. I also refer to the correspondence of 2 October 2019 where you agreed on permanently transferring to the Department that the fixed term arrangement would end on 1 April 2020 and that discussions would then take place with you regarding future placements at your substantive level of Band 2.

I have also considered whether there are sound operational and/or compelling circumstances that may warrant me seeking to promote you without advertising as per clause 17.1 (c) of ED No 1. I am advised that it is not considered that the duties you have been undertaking are unique or of a highly specialised nature that we would be unable to attract a field of applicants for the role if funding was available to allow the duties to be advertised."

[26] It can be seen that the Secretary relied on the fact the position was never a permanent position and therefore the position to which promotion is sought is not ongoing and the position was not funded on an ongoing basis.

Consideration

[27] The effect of the Applicants submission is that the Department should establish a permanent position to which she can be appointed. She submits that the matters to which she points demonstrate an ongoing requirement for the duties. She submits, by implication if not expressly, that the demonstrated need for the position requires the creation of a permanent position for her to fill.

[28] I do not accept that that is the case. Most applications for permanent appointment will relate to a permanent position. In this case the Applicant is seeking to be appointed to a position that does not exist.

[29] Between 31 October 2016 and 1 October 2019, the Applicant had been appointed to the position by Fixed Term Voluntary Transfer terminable on 2 weeks' notice. From 2 October 2019 until 1 April 2020 the Applicant was permanently transferred to the Justice Department and was assigned varied duties to the role at the conclusion of which time discussions were to be held about her future placement.

[30] The significance of the provision for termination of the transfer and expiry of the final period of assignment is that the creation of positions within a business or enterprise is part of the managerial prerogative. However managerial prerogative may be subject to agreement, statute or award. In this case the appointment to the position throughout was for a fixed term and was to expire finally on 1 April 2020. The effect of that (and the possibility of early termination between 2016 and 2019) is that the maintenance of the position or the creation of a new permanent position is one of managerial prerogative. There is nothing of which I am aware in the legislation, the awards or the agreement reached between the Applicant and the Department that prevents the Department from deciding whether to establish the position within the State Service which the Applicant seeks.

[31] While there may be an ostensible need for the role it does not follow that the Department is obliged to create the role.

[32] Had the Applicant been seeking appointment to a permanent role it seems inevitable that clause 17.4 would have been engaged and met by the Applicant. However that is not the case. The role ceased on 1 April 2020. It is a matter for the Department whether it extends the role and whether that is on a permanent or fixed term basis.

[33] As the Department has chosen not to extend the role there is no position to which the Applicant can be appointed. Having regard to the terms of the appointment of the Applicant to the position, the absence of any award or Agreement which requires establishment of the position it is for the managerial prerogative whether to establish the position moving forward.

[34] In my view clause 17.4 of ED 1 does not require the creation of a permanent position to which an employee can be appointed. It can be seen from what I have said about the managerial prerogative that the ongoing requirement for the duties referred to in clause 17.4(c) is a requirement of the relevant department for the duties. It is not for an employee (subject to award, contract, industrial agreement or statute) to determine the requirements of a department. That falls to the managerial prerogative.

Outcome

[35] I am not satisfied that the decision-making process was in error. I am satisfied that it was open for the Department to make the decision it did. While the decision was couched in terms of funding, in reality what the Secretary was saying is that the role did not exist as it ceased and that it was not funded for the future. In other words there was no ongoing requirement for the duties. That decision has not shown to be affected by error.

[36] The application is dismissed.

D J Barclay
PRESIDENT