

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1A) application for hearing of an industrial dispute

Karen Shanahan

(T14901 of 2022)

and

Minister administering the State Service Act 2000/Department of Health/Ambulance Tasmania

PRESIDENT BARCLAY

HOBART, 9 NOVEMBER 2022

Application in relation to termination of employment – whether termination is on the basis of operational requirements – whether application should be dismissed pursuant to s 21(2)(c)(iv) of the Industrial Relations Act 1984

DECISION

[1] The Applicant has made an application in respect to the termination of employment which occurred on 31 October 2022.

[2] The Applicant had been employed on a permanent full-time basis as a business support officer, equipment and logistics. The Applicant is one of the employees who fell within the scope of the Director of Public Health Directions relating to COVID-19 made pursuant to s 16 of the *Public Health Act 1997*¹.

[3] There were a number of iterations of the Public Health Direction throughout the relevant period. On 31 October 2021 the Secretary of the Department of Health wrote to the Applicant noting that the Applicant had not provided evidence that she was sufficiently vaccinated as required by Public Health Direction No. 7 "Mandatory Vaccination of Certain Workers". That letter included notification that the Applicant was stood down from duties from 31 October 2021 because she was unable to carry out those duties as a result of failing to comply with the Public Health Direction.

[4] The letter also contained a direction that the Applicant provide evidence of being sufficiently vaccinated as required by the Public Health Direction. I should note that on 29 October 2021 the Applicant wrote a long letter to the Secretary of the Department of Health in which she raised the issues about the Public Health Direction requiring the mandatory vaccination of certain workers. She also made it clear that she would not be receiving the vaccination.

[5] The Applicant accordingly was unable to provide evidence that she was vaccinated as required by the Public Health Direction. As a result by letter of 15 November 2021 the

¹ There were a number of such directions. At the date of the termination of the Applicants employment Direction No. 7 was in force. In this decision a reference to the Public Health Directions is a reference to the Public Health Direction Mandatory Vaccination of Certain Workers No. 7.

Secretary notified the Applicant that she had reasonable grounds to believe that the Applicant may be in breach of the State Service Code of Conduct (Code of Conduct). As a result of that belief the Secretary advised the Applicant that she was going to commence an investigation to determine whether or not the Applicant had breached the Code of Conduct.

[6] On 30 November 2021 the Applicant wrote to the Secretary. The Applicant set out a number of bases upon which she asserted that she was not obliged to be vaccinated and that she would not be vaccinated.

[7] On 22 December 2021 the Secretary wrote to the Applicant providing a copy of the investigation report and advising that, unless otherwise persuaded, the Secretary was going to terminate the Applicant's employment because the Secretary had found that the Applicant was in breach of the Code of Conduct.

[8] On 13 January 2022 the Secretary wrote to the Applicant advising that she had determined to terminate the employment of the Applicant. In that letter the Secretary noted that the Applicant had not responded to the letter of 22 December 2021. It is clear that the reason for termination of the Applicant's employment was because she had failed to provide evidence of being vaccinated as required by the Public Health Direction and that the failure to provide the evidence was a failure to comply with a reasonable direction of the employer thereby amounting to a breach of the Code of Conduct.

[9] The Applicant subsequently filed an application for a remedy in light of the termination of her employment. As a result of filing the application a conference was held between the parties. In submissions provided by the Respondent for the conference the Respondent submitted that whilst the Secretary had relied on the breach of the Code of Conduct as the reason for the termination of the Applicant's employment, it was also open for the Respondent to rely on the termination being based on the operational requirements of the Respondents business (see s 30(3)(b) of the *Industrial Relations Act 1984* (the Act).

[10] This decision deals with the issue of operational requirements.

The legislation

[11] The relevant provision of the Act is s 30 which provides:

"30. Criteria applying to disputes relating to termination of employment

(1) In this section –

continuing employment means employment that is of a continuing or indefinite nature or for which there is no expressed or implied end date to the contract of employment;

employee means a person who is or was engaged to work casual employment, part-time employment, full-time employment or probationary employment and includes a former employee;

relationship status means the status of being, or having been, in a personal relationship, within the meaning of the Relationships Act 2003 .

(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

- (3) The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with –
- (a) the capacity, performance or conduct of the employee; or
 - (b) the operational requirements of the employer's business.
- (4) Without limitation, the following are not valid reasons for termination of employment:
- (a) membership of a trade union or participation, or involvement, in trade union activities;
 - (b) seeking office as, acting as, or having acted as, a representative of employees;
 - (c) non-membership of a trade union;
 - (d) race, colour, gender, sexual preference, age, physical or intellectual disability, marital status, relationship status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except where the inherent nature of the work precludes employment for any of those reasons;
 - (e) absence from work during maternity or parental leave;
 - (f) temporary absence from work because of illness or injury, provided that nothing in this paragraph is to be construed as removing an employer's right to terminate an employee's employment on account of persistent or unjustified absenteeism;
 - (g) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.
- (5) Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer.
- (6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.
- (7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.
- (8) An employee responding to an employer under subsection (7) is to be offered the opportunity to be assisted by another person of the employee's choice.
- (9) The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the

opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable.

(11) In determining the amount of compensation under subsection (10) , the Commission must have regard to all the circumstances of the case, including the following:

- (a) the length of the employee's service with the employer;
- (b) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;
- (c) any other matter the Commission considers relevant.

(12) Where the Commission finds that an employee's employment has been unfairly terminated and has determined that reinstatement or re-employment is impracticable, any amount of compensation must not exceed an amount equivalent to 6 months' ordinary pay for that employee.

(13) The Commission is to take into account any efforts of the employee to mitigate the loss suffered as a result of the termination of his or her employment."

[12] It will be seen that an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for termination connected with the capacity, performance or conduct of the employee or the operational requirements of the employer's business.

[13] It is common ground that the Applicant had a reasonable expectation of continuing employment as she was a permanent employee at the time of her dismissal. Accordingly the Applicant is entitled to the benefit of the protections against unfair termination of employment contained in the Act.

The Respondent's Submissions

[14] It is convenient to set out the Respondent's submissions first in that it is the Respondent who advances the proposition that the Applicant's application should be dismissed on the papers pursuant to s 21(2)(c)(iv) of the Act in that the Respondent asserts that for any other reason (an absence of merit in light of the operational requirements of the employer), the matter should be dismissed.

[15] The Respondent first grapples with the question of valid reason. It reminds us that the question of whether or not there is a valid reason is not to be determined by including a consideration of whether or not the reason is or is not unfair². That is a consideration which comes later. A reason for termination is a valid reason if it is not prohibited by s 30 of the Act. Further, the reason relied on must also be sound, defensible or well-founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason within the meaning the legislation³. So, if the reasons are not capricious, fanciful, spiteful

² See *Costco Holdings Pty Ltd v Thu* (1997) 79 FCR 566.

³ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371.

or prejudiced and are sound, defensible and well-founded and not for a prohibited reason it will be valid. Considerations of fairness may then arise.

[16] It is significant of course that s 30 provides that a reason is a valid reason if the reason is connected with the operational requirements of the employer's business. The question therefore becomes whether or not the particular reason relating to the operational requirements of the employer's business is not prohibited by s 30 (4) which sets out a list of reasons which are not valid, and whether or not that reason is a sound, defensible or well-founded reason.

[17] The Respondent in its written submissions sets out the law relating to operational requirements of an employer's business. I accept those submissions, and I set them out:

- "16. The phrase "operational requirements of the employer's business" is not defined by the *IR Act*. It has, however, been the subject of a number of judicial decisions. In *Tasmania Development and Resources v Martin*, Kiefel J (with whom Lee and Cooper JJ agreed) said:

The term "operational requirements" is not defined in the relevant legislation or Convention. The requirements are expressed to be those of the employer and in that sense the term is taken broadly to refer to the employer's enterprise and undertaking and how it is to function, for reasons which are thought desirable. In *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, Lee J referred to the term (at 373):

The Act does not define the term "operational requirements". Obviously it is a broad term that permits consideration of many matters including past and present performance of the undertaking, the state of the market in which it operates, steps that may be taken to improve the efficiency of the undertaking by installing new processes, equipment or skills, or by arranging for labour to be used more productively, and the application of good management to the undertaking. In general terms it may be said that a termination of employment will be shown to be based on the operational requirements of an undertaking if the action of the employer is necessary to advance the undertaking and is consistent with management of the undertaking that meets the employer's obligations to employees.

It may be accepted, that an employer is entitled to considerable latitude in determining the needs of its undertaking and how it should perform. There is nothing in cl 12.3 which restricts the nature of the strategy or change that is said to amount to operational requirements of [Tasmania Development and Resources]. What is, however, required by the provision is that there be a factual basis for a conclusion that there were requirements arising from the way in which the undertaking operated which, in turn, necessitated the termination of the employment the subject of the contract. It is difficult then to consider that it would ever be sufficient for an employer merely to rely upon the abolition of the position or cessation of the employment as the operational undertaking itself, since it should be able to say what requirements of finance or efficiency dictated the need for the termination. To say that the position of employment the subject of the contract is no longer required, is simply to state the conclusion.

It can therefore be seen that "operational requirements" is neither expressly nor impliedly limited to only redundancies,¹⁷ but is a broad term of wide ambit.

17. *Carter v Village Cinemas Australia Pty Ltd* was a later case decided under the *Workplace Relations Act 1996 (Cth)*. That statute provided for an unfair dismissal remedy, but excluded circumstances where "the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons". The phrase "operational reasons" was expressly defined as:

... reasons of an economic, technological, structural, or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business.

In deciding whether the dismissal at issue in *Carter* was for "genuine operational reasons", the Full Bench of the Australian Industrial Relations Commission said the following:

We agree with Mr Ginnane that the operational reason relied upon by the employer need only be a ground or cause for the termination of the employment of an employee. *It need not be something that demands or brings about an obligation to terminate the employment of a particular employee. The termination of employment of the particular employee does not have to be an unavoidable consequence of the operational reason for the limitation in s 643(8) to operate. Consequently, whether the employer could have done something other than terminating the employee's employment will generally be irrelevant in deciding whether the termination was for genuine operational reasons, or reasons that include genuine operational reasons. To pose the question whether the termination was a "a logical response to" the employer's operational requirements will also not necessarily assist in determining whether the termination was for genuine operational reasons.* This may also be an appropriate question to pose in a consideration as to whether or not the operational reason advanced by the employer for the termination of employment of the particular employee was a sham or not. However, that question does not arise in this application. [emphasis added]

18. These principles were applied in *Acworth v Boeing Australia Ltd*, a decision of the Full Bench of the Australian Industrial Relations Commission. *Acworth* concerned whether Mr Acworth's termination was for "genuine operational reasons", in circumstances where he had been employed on a particular project, which was coming to an end, and he refused a reassignment to another position. The evidence revealed that there would be no work for Mr Acworth to do following the imminent completion of his current project, absent his reassignment to another position. The Full Bench held that the lack of any ongoing role for Mr Acworth to perform was a "genuine operational reason" for his termination:

In our view the reasons advanced by Boeing clearly did include genuine operational ones. While there was undoubtedly a dispute about Mr Acworth's next assignment, in the situation which had developed Mr Robinson believed that there was no ongoing role for Mr Acworth at Boeing. The latter at least was an operational reason. *Where an employer terminates the employment of an employee with*

particular qualifications and experience because no suitable assignment can be found for an employee with those qualifications and that experience, the termination is for an operational reason. The reason is structural in nature. Such a decision is akin to a decision to terminate employment for redundancy arising from technological change, for example. While in this case Boeing's reaction to Mr Acworth's refusal to accept the proffered assignment was no doubt part of the reasons for the decision to terminate his employment, Mr Robinson's belief that there was no suitable assignment was a genuine operational reason, even if it was not the exclusive reason, for the decision. [emphasis added]

Acworth is authority for the proposition that the absence of any duties for an employee to perform is a "genuine operational reason" for termination."

[18] Whilst operational requirements usually relate to considerations of redundancy and whether or not the redundancy is genuine, there is no warrant to limit considerations of operational requirements to cases of redundancy.

[19] As the matter was dealt with on the papers it is convenient to set out the Respondent's submissions as they relate to the question of a valid reason connected with the operational requirements of the Respondents business.

- "29. There is "a" valid reason for the termination. Notwithstanding that the expressed reason for Ms Shanahan's termination was her breach of the Code of Conduct, in the present case the Applicant's termination was nevertheless justified by the operational requirements of the Respondent's business. By virtue of the public health Directions and the factual background set out above, it can be appreciated that the breach of the Code of Conduct and the "operational requirements" of the Respondent's business were, in reality, two sides of the same coin. The Applicant's performance of her duties was rendered unlawful by operation of the public health Direction, yet the only way that the Respondent could ensure that it did not itself aid or abet a breach was to ensure that each of its staff who worked for the Department were "sufficiently vaccinated" by way of a direction that they provide that information.
30. There is a "valid reason" for termination. The reason for termination was that Ms Shanahan's performance of duties was rendered unlawful by operation of the public health Direction, and that the efficient operation of the Respondent's undertaking and the productive use of employees required her termination. That reason is not one of the reasons proscribed by the *IR Act*: s 30(4). It was a genuine reason for the termination. The Secretary's correspondence, extracted above, reveals that best efforts were made to encourage Ms Shanahan's compliance with the public health Direction and ensure the viability of her continued employment.
31. Indeed, the email correspondence adduced by the Applicant in support of her application reveals that the Chief Executive of Ambulance Tasmania was supportive of Ms Shanahan and encouraged her to become vaccinated. On 17 September 2021, the Chief Executive wrote to Ms Shanahan saying in part:

I would encourage you to reconsider your choice about the vaccination. I acknowledge you have concerns and I'm happy to put you in touch with a clinician who can talk these through with you, if you wish.

On 22 October 2021 the Chief Executive wrote to Ms Shanahan saying:

Since you are critical to the work done by Ambulance Tasmania by leading our logistics and uniforms I really hope you take the time to get vaccinated and update your details. If you do not intend to be vaccinated, please let me know as soon as possible.

The supportive approach of the Chief Executive is entirely consistent with the reason for termination being genuinely connected to the operational requirements of the employer's business.

32. There was a valid reason for Ms Shanahan's termination connected with the "operational requirements" of the Respondent's business. By operation of the public health Direction, the Applicant could not perform her duties from 31 October 2021. From that date, she was not paid salary by operation of the 'no work, no pay' principle. Although Ms Shanahan remained an employee, the Respondent was denied the benefit of her service. As in *Acworth v Boeing Australia Ltd*, discussed above, there was no work that she could perform from 31 October 2021. This is an "operational requirement" of the Respondent's business.
33. At the time Ms Shanahan's employment was terminated on 13 January 2022, she had not worked for the Respondent for 2 ½ months. There was no indication from Ms Shanahan that she intended to become "sufficiently vaccinated", such as to enable her to lawfully resume performing her duties for the Respondent in the foreseeable future. Further, there was no suggestion that the public health Direction which rendered her performance of duties unlawful would be rescinded in the foreseeable future; even following Ms Shanahan's termination, a further public health Direction was made regarding the vaccination requirements of workers such as the Applicant. It is an "operational requirement" of the Respondent's business that it employ staff who are lawfully able to render service.
34. Moreover, the Respondent was denied certainty as to the availability of its workforce. As the Chief Executive of Ambulance Tasmania had noted, Ms Shanahan's work in "leading our logistics and uniforms" was "critical to the work done by Ambulance Tasmania". Yet between 31 October 2021 and 13 January 2022, the Respondent had no certainty as to whether, at any given point, Ms Shanahan might change her mind, become "sufficiently vaccinated", and return to work.
35. This uncertainty necessarily impacts on an employer's ability to manage its workforce and ensure that it has the human resources at its disposal to carry out its business. From 31 October 2021, the tasks Ms Shanahan previously performed were either not completed, or completed by other staff who either were taken away from their primary duties, or were recruited to fill the void left by Ms Shanahan's absence. The uncertainty caused by a staff member's unavailability necessarily disrupts long-term planning and disrupts the recruitment, training, and development of other staff. These are significant economic and structural costs which undermine the employer's ability to efficiently conduct its business. The Respondent was entitled to terminate Ms Shanahan's employment in order to have certainty as to the availability of its workforce.

36. For each of these reasons, it was necessary to terminate Ms Shanahan's employment in order to advance the Respondent's undertaking and move forward.
37. Although Ms Shanahan requested a re-deployment out of the Department of Health to another role with the State Service that was not something that could be facilitated by the employer. Nevertheless, that does not deny the validity of the reason for termination. As was observed in *Carter v Village Cinemas Australia Pty Ltd*, "[t]he termination of employment of the particular employee does not have to be an unavoidable consequence of the operational reason". Any suggestion that the Respondent could conceivably have done something other than terminating Ms Shanahan's employment is irrelevant in this analysis.
38. Further, it is of significance that Ms Shanahan was treated no differently to any other employee of the Department of Health who was subject to the public health Direction. That is made plain by the Secretary's clear correspondence to all staff prior to 31 October 2021, which outlined the consequences of any staff member's non-compliance with the Direction.
39. There was a valid reason for Ms Shanahan's termination connected with the operational requirements of the employer's business. To use the language of Northrop J in *Selvachandran*, the reason for termination is "sound, defensible or well-founded", and not "capricious, fanciful, spiteful or prejudiced". It follows that Ms Shanahan is not entitled to an unfair dismissal remedy."

[20] The gravamen of the submission is that as a result of the Public Health Direction it became unlawful for the Respondent to permit the Applicant to carry out the duties. Further it is submitted that there was no indication from the Applicant that she intended to become sufficiently vaccinated within the requirements of the Public Health Direction. At the time of the termination it is also submitted that there was no suggestion that the Public Health Direction would be rescinded in the foreseeable future. It is submitted that it is an operational requirement of the Respondents business that it employ staff who are lawfully able to render their services. The applicant, it is submitted, was not such a person.

The Applicant's submissions

[21] I should note, without any criticism of the applicant, that she was unrepresented. Accordingly the written submissions do not necessarily grapple with the issues which I am required to decide. Rather, the Applicant concentrates on issues relating to whether or not there was a valid reason for termination connected with the capacity, performance or conduct of the employee. That is, whether or not the Respondent could lawfully terminate her employment for a breach of the Code of Conduct.

[22] The Applicant's submissions do not really relate to the question of operational requirements. It is clear from her correspondence to the Secretary that the Applicant was concerned with the material upon which the Director of Health relied for the purpose of promulgating the Public Health Direction, that the effect of the Public Health Direction was to require her to undergo a medical procedure thereby discriminating against her freedom of medical choice and that essentially what she was being asked to do was to participate in a clinical trial. The Applicant also raised issues of legality in light of the *Australian Constitution* and the *Biosecurity Act 2015* (Cth). As I say these issues engage capacity, performance or conduct not presently relevant to this decision.

Consideration

[23] The first issue for consideration is whether or not the Respondent is entitled to rely on the operational requirements of its business as a valid reason for termination of the Applicant's employment.

[24] This issue arises because the Respondent did not rely on that ground as a reason for termination. It is clear however that the employer is entitled to rely on evidence of facts not known to the employer at the time of the dismissal as long as the facts existed at the time of dismissal. Of course in this case the facts relied upon by the Respondent are the same whether or not the Respondent relies on capacity, performance or conduct of the Applicant or the operational requirements of its business. What the Respondent seeks to do is to rely on an alternative valid reason arising out of the same set of circumstances which were known at the time the decision to terminate the employment was made. I do not think there is any impediment from doing so even though the facts relied on were known at the time of the original decision to terminate the Applicant's employment.

[25] The first thing to note is that s 30 (3) of the Act provides that the employment of an employee must not be terminated unless there is a valid reason for termination of that employment. The use of "a" is such that there is no suggestion that Parliament intended that the reason relied on for the termination of employment is the only reason the employer can rely upon.

[26] Secondly the Respondent is entitled to rely on any ground to support the termination as the test for the determination of the existence of a valid reason is whether or not on the evidence before the commission there was a valid reason for dismissal. The commission does not stand in the shoes of the employer. Rather it reaches its own view as to the existence of a reason and whether that reason is valid on the basis of the evidence led before the commission.⁴

[27] Accordingly the Respondent is entitled to rely on the ground that a valid reason for termination of the Applicant's employment was connected with the operational requirements of the employer's business. Of course the facts relied upon must have existed at the time of the dismissal.

[28] As set out above the operational requirement relied on by the Respondent is that, as a consequence of the Public Health Direction the Respondent was unable to continue to employ the Applicant because she had not provided evidence of being sufficiently vaccinated within the meaning of that direction. The Public Health Direction provided that on and from 31 October 2021 certain employees were not permitted to provide health and medical services or treatments unless they were sufficiently vaccinated against COVID-19. The Public Health Direction defined each state service employee as an employee within the meaning of the *Acts Interpretation Act 1931* to whom the Public Health Direction applied. Any person falling within that definition was required to be sufficiently vaccinated. It is clear that the Applicant fell within that part of the Public Health Direction.

[29] What position then was the Respondent put in if the Applicant was not sufficiently vaccinated as required? By virtue of the Public Health Direction if the Applicant was not sufficiently vaccinated she was not permitted to provide her services to the Respondent. Such a situation arose because the Applicant, as was her right, chose not to be vaccinated. The decision not to be vaccinated however was one which had consequences in regard to compliance with the Public Health Direction. It is important to note that the Public Health

⁴ See for example *Lane v Arrowcrest Group Ltd* (1990) 27 FCR 427; *Gates v Blugibbon Pty Ltd* [2021] FWC 6143 at [68] - [71].

Direction did not require the Applicant to be vaccinated. Rather it required the Applicant to be vaccinated if she wished to continue to provide her services to the Respondent.

[30] Accordingly in the absence of vaccination the Applicant was not permitted to work. It was tolerably clear from the Applicant's correspondence that she was not, for the foreseeable future, prepared to be vaccinated. I note that the Applicant had registered in the Australian Traditional Vaccine Trial and that the Applicant was apparently intending to have the traditional protein vaccine when it became available.⁵

[31] I note that registration for the trial did not guarantee that the Applicant would be enrolled in the trial nor when it was to take place.⁶

[32] Further, as at the date that these matters were arising (between October 2021 and the date of termination of the Applicant's employment in January 2022) it was not known for how long the Public Health Direction would remain in place. I think this is important. If, for example it was tolerably clear at the time the employer was considering terminating the employment of an employee in circumstances such as this that the requirement to be vaccinated was shortly to be lifted or was lifted, then the existence of the operational requirements relied on may no longer apply. That is, it would no longer be unlawful for the unvaccinated employee to provide his or her services to the department. Accordingly the basis of reliance of the operational requirements of the employer would no longer exist.

[33] However, in my view, having regard to the Public Health Direction, the fact that it was unclear for how long the direction would be in place, that there was no suggestion at the time of the decision that the requirement to be vaccinated would be lifted, and that the Applicant had made it clear that she was not going to become vaccinated in the foreseeable future, the Respondent had a valid reason for the termination of the Applicant's employment based on operational requirements.

[34] Whilst I have found that the Respondent had a valid reason to terminate the Applicant's employment that is not the end of the matter.

Unfairness

[35] Implicit in the Respondent's submissions is that the question of fairness arises only in respect to questions of procedural fairness. I recently considered a similar submission in *Aitken v MASSA – Department of Education*⁷. In that case I said the following:

"[51] On the question of unfairness, it is the respondent's submission that the only question of fairness is whether or not the dismissed employee has been accorded procedural fairness. In my view there is nothing in section 30 which requires such a narrow reading, especially at the time at which the amendments were enacted. At the time the amendments came into force the Commission retained jurisdiction over private employees. Then as now the definition of employee includes private and state employees. As the Act, when amended, applied to private employees, the jurisdiction of the Commission to review the circumstances of the termination of employment was the first and only time that such an employee could seek a review. As referred to above, it is also the first time an independent body is tasked with reviewing the decision to terminate the employment by the Minister. It could not have been Parliament's intention to limit the question of fairness, in the circumstances, to one of procedural fairness, especially in light of the fact that the amendments were to substantially extend

⁵ Applicant's statement in support of her application dated 1 February 2022.

⁶ Letter from Australian Traditional Vaccine Trial dated 11 November 2021.

⁷ T14912 of 2022.

enacting the existing practice. To do so is in fact inconsistent with past practice. In my opinion if the question of fairness is to be read down, parliament would have provided accordingly. It did not.

[52] I also note such a submission is inconsistent with the ordinary definition of unfair. Unfair is defined as "not fair; biased or partial; not just or equitable; unjust". It is straining the meaning of unfair to limit the consideration of whether there has been unfairness to a question of procedural fairness. Such a contention is also inconsistent with s 31(1B) of the Act which refers to a finding by the Commission that an employee was unfairly terminated. Constraining the meaning of unfair is also inconsistent with the requirement of the Commission to have regard to all of the circumstances of the case."

[36] In my view once the Respondent establishes (as I have found that it has) that there was a valid reason for the termination the Commission is to then consider whether or not the termination is nevertheless unfair. In that regard the onus lies on the Applicant to establish relevant unfairness. The Respondent has made submissions regarding unfairness but primarily limited to issues of procedural fairness. There has been no detailed consideration by the Respondent's submissions and to a lesser extent the Applicant's submissions regarding other circumstances which may render the termination unfair. As a result I am not prepared to dismiss the application without granting the Applicant an opportunity to advance a submission and to provide evidence that the termination was, notwithstanding the existence of a valid reason, unfair.

[37] Accordingly I will hear the parties further regarding disposition of the matter.



Appearances:

Heard on the papers

**HOBART
2022**