TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.71(4) Application to suspend the operation of a Decision

The Royal Society for Prevention of Cruelty to Animals (Tasmania) Inc
(T13678 of 2010)

and

Greg Tredinnick

PRESIDENT P L LEARY
COMMISSIONER J P MCALPINE
COMMISSIONER B DEEGAN

HOBART, 28 July 2010

REASONS FOR DECISION

Application to suspend operation of a decision - application granted

[1] This is an application pursuant to Section 71(4) of the *Industrial Relations Act 1984* (the Act), to suspend the operation of a decision by Deputy President Abey in matter T13631 of 2009 where he ordered:

> *"I hereby Order, pursuant to s.31 of the Industrial Relations Act 1984, in full and final settlement of the matter referred to in T13631 of 2009 that the Royal Society for the Prevention of Cruelty to Animals (Tasmania) Inc. pay to Greg Tredinnick the sum of $17,500 by close of business on 11 June, 2010."*

[2] We indicated to the parties following a hearing on 7 July, 2010 that we would suspend the order of the Deputy President.

[3] We now publish our reasons.

[4] Sections 71(4) and 71(4A) of the Act provide:

> "(4) If a notice of appeal is lodged under subsection (1), the Full Bench may suspend the operation of the award or decision being appealed against."
>
> "(4A) *A suspension of the operation of an award or decision –*
>
> *(a) may be given on any conditions the Full Bench considers appropriate; and*
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> *(b) operates for a period determined by the Full Bench, not extending beyond the determination of the appeal; and*
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> *(c) may be amended or revoked by the Full Bench."*

[5] These sections were inserted into the Act by the *Industrial Relations Amendment Act 2007* and this is the second application to the Commission seeking an Order pursuant to s.71(4).

[6] The first application was settled by the issue of a Consent Order to suspend the decision subject to appeal.

[7] The provision confers discretion on a Full Bench hearing the application to suspend the award or decision the subject of the appeal.

[8] When the amendment to the Act was proposed Hansard records that the following statement was made:

> *"The effect of the proposal is to require argument to justify any suspension. The proposal removes the capacity to lodge frivolous and unrealistic appeals made simply to delay implementation of a commission award or decision."*

[9] There was no further comment or debate about the proposed amendment in the Parliament.

[10] Mr Rinaldi for the appellant submitted that the principles for determining stay or suspension applications are well settled at the Federal level and referred to decisions of the Australian Industrial Relations Commission (AIRC) and Fair Work Australia (FWA) where those principles have been adopted and applied.

[11] Those principles, as submitted by the appellant, are:

- there must be an arguable case in respect of the appeal;
- the balance of convenience must favour the granting of the stay;
- there must be a purpose to be served by granting a stay – it must not be futile or of no practical effect.

[12] Unlike the Federal jurisdiction an appellant does not require the leave of the Commission to pursue an appeal under the Tasmanian legislation.

[13] The appellant referred to the grounds of appeal submitting that there is an arguable case to be determined. It was said that the Deputy President had erred in his consideration of procedural fairness and the compensation awarded was excessive. Further it was submitted that there were contradictions in the decision that required address.

[14] Mr Molnar, for the respondent to the appeal, agreed, in general terms, with the submissions of the appellant in respect to the principles to be considered in an application for a stay or suspension but submitted that s.70(1A) of the Act required an extra, or higher test, than that required in the Federal jurisdiction.

[15] S.70(1A) of the Act provides:

> *"A Full Bench is not to uphold an appeal under subsection (1) unless in its opinion:*
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> *(a) the Commissioner against whose decision the appeal is made in reaching that decision:*
>
> *(i) made a legal error; or*
> *(ii) acted on a wrong principle;*
> *(iii) gave weight to an irrelevant matter; or*
> *(iv) gave insufficient weight to a relevant matter; or*
> *(v) made a mistake as to the facts; or*
>
> *(b) the decision was plainly unreasonable or unjust."*

[16] The section is clearly based on the decision of the High Court in *House v King* which provides guidance for an appeal against a discretionary decision.

[17] *House v King* provides:

> *"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance. In such case although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."*

[18] We note the following comment found in a decision of the High Court of Australia in *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457 where the Court set out the principles relating to interlocutory injunction applications. It was observed:

> *" in all applications for interlocutory injunctions a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages would not be an adequate remedy and has shown that the balance of convenience favours the granting of an injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed."*

Arguable case:

[19] The appellant relied on the 10 grounds of appeal submitting that those grounds *"disclose serious internal inconsistencies in the decision appealed from, in addition to other errors. None of the grounds of appeal on their face can be said to be frivolous or unrealistic."*

[20] Mr Rinaldi referred to a number of authorities.

[21] Both he and Mr Molnar referred to the decision of the Full Bench of the AIRC in *Kellow-Falkiner Motors Pty Ltd; P Edghill v Kellow-Falkiner Motors Pty Ltd* [Print S4216] *(Kellow-Falkiner)* which was an appeal against a decision of Vice President Ross rejecting a stay application. The Full Bench agreed that the Vice President had properly exercised the discretion available to him and did not grant leave to appeal. The Bench agreed with the principles he applied and referred to the following passage from the Vice President's decision:

> *"In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case, with some reasonable prospect of success, in respect to both the question of leave to appeal and the substantive merits of the appeal. In addition, the balance of convenience must weigh in favour of the order subject to appeal being stayed. Each of the two elements referred to must be established before a stay order will be granted.*
>
> *The Commission approaches applications for stay orders on the basis that, unless otherwise established, the order subject to appeal was regularly made."*

[22] Mr Molnar submitted that the test in *Kellow-Falkiner* is the relevant test and requires not only an arguable case be identified but *"it's got to have some reasonable prospect of success in respect of both the question of leave to appeal and the substantive merits of the appeal…."* [Page 11, line 31]

[23] He said that there needs to be more than an arguable case established, as was submitted by the appellant, to take into account the specific wording in the Act which is not found in the Fair Work Act or any of its predecessors and that the appellant had presented nothing going to matters in s.70(1A) that would convince the Bench that there was a reasonable prospect of success of an appeal.

[24] In a decision of His Honour Senior Deputy President Williams in *Swersky & Velos v D McAdam* [Print P3937] *(Swersky),* which was a stay application in respect to an appeal against a decision which awarded an amount of compensation following termination of employment, Williams SDP said:

> *"As to the questions of balance of convenience and purpose, the arguments favour the appellant. In a case such as this, where the order that is subject of the appeal imposes an obligation upon a party, prima facie, the balance of convenience favours the granting of a stay. In the light of the submissions made on behalf of the respondent it is distinctly possible that should a stay not be granted and the amount of money as ordered be paid by the appellant there may be some difficulties in recovering that money if, in the end result, the appeal is successful."*

[25] His Honour granted the stay order.

[26] The appellant submitted that the principles found in *Swersky* have been followed in a number of subsequent decisions and cited the following:

- *Dyno Nobel Asia Pacific Limited* – re Application for stay order PR955309 [2005] AIRC 63 (27 January 2005);
- *Pastoral Industry Award 1998* – re appeal – AW92378 – PR951204 [2004] AIRC 827 (23 August 2004);
- *ANZ Banking Group Limited re G Levendakis v ANZ Banking Group Limited* – PR915580 [2002] AIRC 306 (19 March 2002);
- *J Cusmano v Yarra City Council* – T2921 [2000] AIRC 510 (2 November 2000);
- *Yallourn Energy Pty Ltd v CFMEU & Ors* – T3194 [2000] AIRC 524 (6 November 2000).

[27] In an appeal against a decision to partially stay a decision below a Full Bench of the AIRC in *Coal and Allied Operations Pty Limited v BJ Crawford and others* [Print PR909182] *(Coal and Allied)* said:

> *"The appeal raises some important questions concerning the exercise of the discretion conferred on the Commission by s.45(4). Opportunities for an examination of such questions at Full Bench level are rare."*

[28] And further:

> *"We should point out at the outset of our analysis of the grounds of appeal that the Vice President adopted the conventional tests relating to applications to stay the operation of a decision or act pending the determination of an appeal pursuant to s.45(4). In summary those tests are that before a stay is granted the appellant must demonstrate an arguable case both on the appeal itself and on the question of leave and that the balance of convenience favours a stay of operation. The Vice President found there was an arguable case both as to merits and as to leave."*

[29] The respondent referred to an article found in the Launceston Examiner Newspaper of 25 May, 2010 and submitted that *"there is an acknowledgement that DP Abey's decision is correct, and there is acknowledgement that the RSPCA hasn't properly given Mr Tredinnick a proper chance to address performance issues."*

[30] We place no reliance on the newspaper article, the comments have not been tested and the appellant submitted that *"it's secondary comment, after the event, it's entirely irrelevant."* [Transcript Page 17, line 27]

[31] Mr Molnar also referred to the decision in *Coal & Allied* and in particular where it was said:

> *"Where the balance of convenience lies may sometimes be difficult to discern, but in our view, no purpose is served by formulating generalisations about*

where the balance might lie in particular types of cases. All of the circumstances must be considered."

[32] We agree with that comment.

[33] We disagree with the submission of Mr Molnar that s.70(1A) of the Act requires a more stringent test than the federal legislation.

[34] S.70(S.70 (1A) prescribes the considerations as found in *House v King* and it seems to us that provided an appellant can demonstrate that an arguable case exists a suspension of an order may be granted.

[35] We are of the view that a consideration of whether there is an arguable case requires an examination of the grounds of appeal. An appellant would need to demonstrate that there is some possible error in the decision below requiring address and that the grounds of appeal are on the whole not *'fanciful, frivolous or unrealistic'*.

[36] In this matter the appellant has submitted there is are inconsistencies in the decision below which would justify a review.

[37] We agree that, prima facie, there may be inconsistencies which should be reviewed.

Balance of convenience:

[38] Mr Rinaldi referred to the comments in *Coal & Allied* where the Full Bench said:

"The statements to be found in various decisions that the Commission normally grants a stay to restore the status quo pending an appeal simply recognise that in most cases the balance of convenience favours the grant of a stay. This is because of the difficulty which may be encountered, if a stay is not granted, in restoring the parties to their original position, if the appeal is ultimately successful. Equally, procedures have been developed to protect the interests of beneficiaries during the period in which the operation of an order is stayed. One common method of providing protection is to require that the applicant for a stay pay any moneys due into an interest-bearing trust account."…

"Where the balance of convenience lies may sometimes be difficult to discern but in our view no purpose is served by formulating generalisations about where the balance might lie in particular types of cases. All of the circumstances must be considered."

"An order staying the operation of a decision or an act pending the hearing and determination of an appeal is of its nature a temporary order. And if no stay is granted the operation of the decision or act under appeal is also temporary in the sense that any right it confers on the respondent remain contingent until the appeal is determined."

[39] The bench agreed that:

> *"…as a matter of principle it is unsound to set up a status in interlocutory proceedings which cannot be reversed when the proceedings are finally decided."*

[40] One other matter to have regard to in a balance of convenience consideration should be the time between the hearing of the suspension application and the hearing of the appeal and whether to restore the status quo would be fair and reasonable in light of the length of any delay.

[41] In an application for a stay of a decision Senior Deputy President Polites in *Telstra Corporation Limited v Edwards* [Print Q1246] had regard to the amount of time between the hearing of the stay application and the determination of the appeal in his consideration of whether or not to grant a stay. In that matter His Honour granted a stay of the decision.

[42] In *Coal & Allied* the Full Bench noted the following passage from the judgement of the High Court in *Commonwealth v McCormack* (1984) 155 CLR 273 at 276:

> *"Restitutio in integrum is the right of every successful appellant" : per Lord Field in* Cox v *Hakes (3). An appellant who has satisfied a judgement for the payment of money is entitled, on the reversal of the judgement to repayment of the money paid by him with interest:* Rodger v The Comptoir D'Escompte de Paris *(4);* Merchant Banking Co v Maud *(5), In the former case, Lord Cairns said (6):*
>
> > "…one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case."

[43] In this matter we are of the view that the balance of convenience supports the grant of an order to suspend the decision of Deputy President Abey.

[44] Further, in respect to any delay, the balance of convenience supports the grant of the order as, for reasons beyond the control of any of the parties, there will be a significant period before the appeal can be heard and determined.

[45] This being the first decision considering s70(1A) of the Act we propose to determine the principles to be adopted for all future applications. We agree with the principles and approach adopted over many years by the AIRC and now FWA and accordingly see no reason to depart from those principles or that approach.

[46] We hesitate to introduce a prescribed and formulaic process for considering an application to stay/suspend a decision as each application must be considered in light of its particular circumstances. We think, however, there can be some broad guidelines.

[47] In considering an application pursuant to s70(1A) of the Act regard should be had to the balance of convenience and whether there is an arguable case inasmuch as there exists a serious question to be tried.

[48] Further, in considering the balance of convenience, some regard should be had to any likely delay in proceeding with the substantive appeal.

[49] We suspend that much of the order of Deputy President Abey that requires the payment of the amount of money to the respondent but we adopt the submission of the appellant and require that the monies awarded by the Deputy President be placed in an interest bearing trust account for the period until the appeal is determined.

[50] The following Directions for the hearing of the substantive appeal will apply:

> The appellant is to provide to the Commission for the attention of sam.christensen@justice.tas.gov.au, comprehensive written submissions, any witness statements and material relied upon with copies to the respondent by noon Monday 23 August, 2010.
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> The respondent is to provide to the Commission for the attention of sam.christensen@justice.tas.gov.au, written submissions with any witness statements or other material in response with copies to the appellant by noon Monday 6 September, 2010.
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> A hearing for the purpose of brief oral submissions and the examination of any witnesses, if required, will be listed for Thursday 16 September at 10.00am

P L LEARY
PRESIDENT

Appearances:
Mr M Rinaldi for the Royal Society for the Prevention of Cruelty to Animals (Tasmania) Inc.
Mr Molnar for Mr G Tredinnick

Date and place of hearing:
2010
June 16
July 7
Hobart