

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s70(1) appeal against an order

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

and

Greg Tredinnick

PRESIDENT P L LEARY
COMMISSIONER J P MCALPINE
COMMISSIONER M A GAY

HOBART, 12 January 2011

**Industrial dispute - appeal against an order issued in T13631 of 2009 (DP Abey)
- appeal upheld - order revoked in part - new order issued**

REASONS FOR DECISION

[1] In an application [T13631 of 2009] by Greg Tredinnick, made pursuant to s.29(1A) of the *Industrial Relations Act, 1984* (the Act), in respect to an industrial dispute arising out of his termination of employment by the Royal Society for Prevention of Cruelty to Animals (Tasmania) Inc (RSPCA), Deputy President Abey determined as follows:

Remedy

I have no hesitation in concluding that the employment relationship has irretrievably broken down. Mr Tredinnick conceded as much although he made it clear that the breakdown was not of his making.

Had the course of action suggested above been followed I consider a period of three months would have been realistic to determine whether or not the employment relationship would have had an enduring quality. I have also taken into account Mr Tredinnick's relatively short period in the CEO role. Accordingly I determine that the amount of compensation should be the equivalent of thirteen weeks salary.

Order

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] The decision and order have been appealed by the RSPCA citing some ten grounds of appeal.

[3] The RSPCA sought a stay order be issued pursuant to s.71(4) of the Act [T13678 of 2010] .

[4] The Full Bench determined:

"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."

[5] In the appeal proceedings the RSPCA was represented by Mr Rinaldi, of Counsel, and Mr Tredinnick represented himself. The parties provided written submissions in accord with Directions issued by the Full Bench. Mr Tredinnick's written submissions were provided by Mr Molnar, Solicitor.

[6] The appeal grounds:

Appeal Ground 1:

"The Deputy President erred in holding that Mr Tredinnick should have been given a (further) ultimatum before the termination was effected (paragraph 70 of Decision)."

Appeal Ground 2:

"The Deputy President erred in giving weight to his finding that 'the requested particulars had not been provided' (paragraph 71 of decision) when he had correctly noted that Mr Tredinnick had conceded that 'there were sufficient particulars for him to respond to 92/3 of the 15 allegations contained in the letter' (paragraph 19 of Decision), a matter to which he gave no or insufficient weight."

Appeal Ground 3:

"The Deputy President erred in holding that Mr Tredinnick was not afforded procedural fairness (paragraph 72 of Decision)."

Appeal Ground 4:

"The Deputy President erred in holding that the termination of employment was unfair (paragraph 73 of Decision)."

Appeal Ground 5:

"The Deputy President erred in holding that a realistic period for a procedurally fair course of action to occur in relation to the termination would have been three months (paragraph 76 of Decision)."

Appeal Ground 6:

"The Deputy President erred in holding that 'a period of three months would have been realistic to determine whether or not the employment relationship would have an enduring quality' (paragraph 76 of Decision) when he had correctly concluded (as conceded by Mr Tredinnick) that the employment relationship had irretrievably broken down (paragraph 75 of Decision)."

Appeal Ground 7:

"The Deputy President erred in determining that Mr Tredinnick should receive compensation of the equivalent of thirteen weeks salary (paragraph 76 of Decision)."

Appeal Ground 8:

*"The Deputy President erred in failing to give any or sufficient weight to the matters in existence at the time of the termination, but not known to the Appellant until after the termination, which were the subject of evidence and submissions, as to which the Appellant referred to and relied on *Byrne v Australian Airlines Ltd (1995) 185 CLR 410 at 467.*"*

Appeal Ground 9:

"There is fresh evidence upon which the Appellant will seek to rely on appeal, which the Appellant will contend supports a finding that Mr Tredinnick engaged in serious misconduct and could lawfully have been summarily dismissed by the Appellant."

Appeal Ground 10:

"Such further or other grounds as may be advanced at the hearing of the appeal."

[7] The RSPCA advised that it no longer wished to present further evidence so appeal ground 9 was not pursued.

[8] Section 70 of the *Industrial Relations Act 1984* provides:

"(1A) A Full Bench is not to uphold an appeal under subsection (1) unless in its opinion –

(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; or

(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."

[9] It was submitted by the RSPCA that the two main grounds of appeal relate to whether Mr Tredinnick was provided the opportunity to respond to the allegations made by the RSPCA which were the reasons relied upon for his termination; and what was an appropriate period of time to enable him to provide a response.

[10] We address the appeal grounds as follows:

- Appeal grounds 1,2,3 and 4 relate to issues of procedural fairness/opportunity to respond which we address together.
- Appeal grounds 5,6 and 7 relate to the period of time in which it was considered appropriate for Mr Tredinnick to respond to allegations made resulting in his termination and we consider those appeal grounds together. These grounds address the compensation awarded by the Deputy President.
- Appeal ground 8 we address further in this decision and appeal ground 9 was not pursued.

[11] The Deputy President found that a valid reason existed for the termination; in general terms the appeal grounds address issues of procedural fairness.

The appellant:

[12] The RSPCA submitted that the grounds of appeal *“distil down to two main areas and two perhaps, more minor areas...”*

[13] Mr Rinaldi said that the appeal grounds in respect to the broad terminology of *opportunity to respond* are grounds 1,2,3 and 4.

[14] He said that the Deputy President had found there was a valid reason for the dismissal and at para 58 of the decision said:

“I conclude that the combination of Mr Tredinnick’s acknowledged shortcoming in financial management, together with the totality of the proven allegations referred to above, amount to a valid reason for termination based on capacity and performance.”

[15] The Deputy President set out in his decision the following useful chronology of events which was not challenged:¹

“9 November.

Ms Cass sends email to Mr Tredinnick advising that the Board had appointed a “human resources/industrial relations specialist who will be in Launceston on Thursday and Friday to deal with a number of matters, including the one raised with Fair Work Australia.” The email further advised that the board meeting scheduled for 15 November would now be held on 13 November, at a different but unspecified location.

11 November.

Ms Ayling advises Mr Tredinnick that she had been appointed Hon. Operations Consultant.

11-13 November.

Mr Tredinnick on sick leave.

13 November.

Board meeting.

Ms Cass steps down as A/President and Dr Swiatkowski elected President. Two new directors appointed. Mr Mike Allan (Hon HR Workplace Relations Consultant) reports on his investigation. Decisions

¹ Decision T13631 of 2009 (Decision) para 16

taken to suspend Mr Tredinnick and change locks on his office. Decision made to effect head office redundancies.

13 November.

Mr Tredinnick suspended on full pay. The suspension correspondence states: - 5 -

'The Board has made this decision based on a number of performance issues relating to the management and operations of RSPCA Tasmania Inc.'

13 November.

Mr Tredinnick's solicitor (Mr Molnar) writes to RSPCA challenging the suspension.

16 November.

Mr Molnar again writes to RSPCA seeking reasons for suspension and particulars of any allegations against Mr Tredinnick.

17 November.

Dr Swiatkowski responds, advising, *inter alia*, that the Board does not consider it appropriate to discuss performance concerns with anyone other than Mr Tredinnick himself.

18 November.

Mr Molnar responds.

18 November.

Mr Tredinnick, accompanied by Mr Swanton (ASU), attends a meeting with Dr Swiatkowski, Mr Allan and Mr Burch. A letter is handed to Mr Tredinnick inviting him "to show cause why your contract of employment with the Society should not be terminated." (allegations letter) A meeting was proposed for the following morning for Mr Tredinnick to respond. However after discussion it was agreed that this time frame was unreasonably short. There was some discussion regarding matters raised in the letter, together with the possibility of a deed of release being prepared for Mr Tredinnick's consideration. Mr Tredinnick was advised that his personal belongings had been packed in a box. The meeting concluded without a firm date being set to reconvene.

20 November.

Mr Molnar emails RSPCA seeking "precise facts, dates and times before our client can answer the allegations." Dr Swiatkowski responds the same day, stating that the request will be forwarded to "our representative. We will consider our response ASAP."

3 December.

Mr Burch leaves a telephone message asking that Mr Tredinnick be available the following day (4 December.) Mr Tredinnick contacts Mr Burch advising that he is unavailable due to parental responsibilities, but would be available on Tuesday 8 December.

4 December.

According to Mr Tredinnick, Ms Ayling telephoned at 4.55pm advising that:

- (i) 'I was dismissed for serious misconduct':
- (ii) a final 12 weeks payment would be made subject to the return of all RSPCA property; and
- (iii) the above would be put in writing.

A letter of termination was apparently sent per post that same day."

[16] Mr Rinaldi said that Mr Tredinnick was informed that his failure to attend the meeting may result in the termination of his employment.

[17] It was submitted that the RSPCA waited until 4 December, 2009 but had received no further response from Mr Tredinnick and in the absence of any proper response to the allegations, as well as having agreed to a further period of time for him to respond, decided to terminate his services.

[18] It was acknowledged that at the same time there were discussions taking place between the parties about possible terms of settlement.

[19] The RSPCA submitted that the Deputy President seemed to rely on the fact that, although an extension in time was granted, no final date had been provided for Mr Tredinnick to respond, as a basis for the finding of a lack of procedural fairness.

[20] It was argued that in extending the time in which to respond the RSPCA had provided procedural fairness to Mr Tredinnick and it contested the finding of the Deputy President. Further it was submitted that the Deputy President had erred by giving weight to his finding that the *"challenging operating environment"* in which Mr Tredinnick was working had any relationship to whether there existed a valid reason for termination or that he was provided with procedural fairness.²

[21] The RSPCA said that the operating environment was an irrelevant consideration when assessing procedural fairness and it was relevant that the Deputy President had found that a valid reason existed for the termination.

[22] Mr Rinaldi noted that in paragraph 76 of his decision the Deputy President found that the particulars relied on for the termination were provided to Mr Tredinnick in clear enough terms and with sufficient particularity to enable him to respond to 9 2/3 of the 15 allegations in the letter of 18 November, 2009.³

[23] In respect to Mr Tredinnick being provided an opportunity in which to respond to the allegations Mr Rinaldi referred to the decision in *National Jet Systems Pty Ltd v Mollinger* (AIRC Print R3130 at 21-22) where the Full Bench said:

"There is no doubt that the Vice President's finding that there was no relevant opportunity for Mr Mollinger to respond to the case for his dismissal prior to 31 December was not only open on the evidence but correct.

Lack of opportunity to respond irrelevant

The appellant submitted that if there was no opportunity to respond it was irrelevant because an actual opportunity for Mr Mollinger to put forward his case was afforded to him at the meeting on 29 January, which he spurned. It was further submitted that no explanation Mr Mollinger could have given would have had any effect on the position because of the nature of his misconduct.

We think this submission has some merit. Regardless of the appellant's 'state of mind' on 29 January, Mr Mollinger was given an opportunity to put his side of the story which he rejected. There seems little doubt he

² Decision para 73

³ Decision paras 19 and 68, evidence of Mr Tredinnick

perceived some risk that he would lose his employment. The failure to co-operate was never satisfactorily explained but no doubt Mr Mollinger thought that silence would best serve his interests. Equally it might be said that any further information which Mr Mollinger had furnished would not have assisted him because it would not have added to information already available or would have been so incredible as to cause the appellant's officers to form the view that he was untrustworthy."

[24] The RSPCA submitted that there was no denial of procedural fairness when *"the termination of Mr Tredinnick's employment with its clear prior notification of valid reasons, opportunity to respond and the opportunity to have union assistance when responding is taken into account."*⁴

[25] It was submitted that the decision is internally inconsistent inasmuch as the Deputy President found that the employment relationship had irretrievably broken down (this was based to some degree on the admission of Mr Tredinnick) so to suggest that a period of three months *"would have been realistic to determine whether or not the employment relationship would have an enduring quality"* was contradictory as well as being unreasonable and unjust.

[26] The RSPCA said that at most, if it is accepted that there was some denial of procedural fairness, compensation should be no more than the equivalent of two weeks pay.

[27] It was argued that leaving the response open-ended does not convert a procedurally fair termination into a procedurally unfair termination or is unfair overall given that the Deputy President found that there was a valid reason for the termination.

[28] If, the RSPCA submitted, it was found by the Full Bench that there was an element of procedural unfairness by not providing Mr Tredinnick with a finite date then the award of the Deputy President that 3 months was a reasonable time for the process to be properly undertaken was simply unreasonable and unsupportable.

[29] Any consideration that further time was appropriate for Mr Tredinnick in which to respond should be balanced against his own admission that he was able to respond to most of the allegations raised. Further the decision was inconsistent inasmuch as it was found that the employment relationship had *"irretrievably broken down"* and that this had been conceded by Mr Tredinnick⁵ but the Deputy President had then determined that had the process he suggested been followed that a period of three months would have *"been realistic to determine whether or not the employment relationship would have had an enduring quality"* when in fact he had declared the relationship *irretrievably broken down*.⁶

[30] In regard to the period of time to provide procedural fairness Mr Rinaldi referred to the decision of the Industrial Relations Court in *Nicholson v Heaven and Earth Gallery* (Nicholson) where Wilcox J said:

"But I think Mr Nicholson had another problem that would have been more difficult to resolve. It is clear that, by the date of his dismissal, Mrs Norton had formed a strong view that he was not the person for the

⁴ Written submission

⁵ Decision para 75

⁶ Decision para 76

job...In his position it was essential that he be in tune with the artists and be capable of conveying the essence of their work to others. If he did not have this capacity, the company, acting regularly, would have been entitled to dispense with his services. I think it would soon have done so.”⁷

[31] Mr Rinaldi said that on the authority of *Nicholson* that Mr Tredinnick could have been terminated within a limited time in a manner which was not unfair. He referred to a recent decision of Senior Deputy President Drake of Fair Work Australia in *Leigh aka Wilson v Nestle Australia Limited trading as Uncle Toby's* where she found a valid reason for termination existed but noted that “*Uncle Toby's was a procedural fairness free zone in relation to Mr Wilson*” as he was not notified of the reason for his termination and was not given any opportunity to respond. Further it was determined that had procedural fairness been applied “*an appropriate time to allow Mr Wilson to present his arguments...would have been, at the most, four weeks...*”⁸

Appeal ground 8:

[32] Appeal ground 8 claims that the Deputy President failed to give any, or sufficient weight, to matters in existence at the time of the termination but not known to the appellant until after the termination. The RSPCA referred to the decision of the High Court in *Byrne v Australian Airlines Ltd*⁹ where their Honours McHugh and Gummow say:

“His Honour said it would be astonishing if the employer could not resist an allegation that the Byrne v Australian Airlines dismissal was harsh, unjust or unreasonable within the meaning of the relevant award by pointing to those facts discovered after the dismissal so long as they concerned circumstances in existence when the decision was made.”

[33] Their Honours concluded that:

“The above propositions should be accepted as applicable to the present appeals.”

[34] The Deputy President has referred to the circumstances but has made no finding in regard to them. The appeal ground is possibly academic, as was submitted by Mr Rinaldi, as the Deputy President had made the finding that there was a valid reason for the termination so there was no need for him to rely on that information. We need address appeal ground 8 no further and reject it.

Appeal ground 9:

[35] The RSPCA rejected the presentation of fresh evidence by the respondent which was not pursued in any case. Accordingly we do not need to consider appeal ground 9.

The respondent:

[36] In submissions on behalf of the respondent to the appeal it was submitted that the appellant argues that provided an employee is given an opportunity to respond then procedural fairness has been provided. It was said that:

⁷ *Nicholson v Heaven and Earth Gallery* (1994) 126 ALR 233 at 24

⁸ 2010 FWA 4744

⁹ (1955) [185 CLR 4120 at 467]

*"...the obligation to provide procedural fairness is broader than simply providing an opportunity to respond" and "if there is to be an opportunity to respond, the obligation in subsection 30(7) is greater than simply providing an opportunity to respond, no matter how poorly detailed are the reasons or how many reasons the employee has to respond to."*¹⁰

[37] Section 30(7) provides:

"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."

[38] The respondent referred to s.30(2) of the Act and argued that:

"...the obligation to provide procedural fairness is broader than simply providing an opportunity to respond."

[39] S.30(2) of the Act provides:

"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."

[40] The Act further provides at s.30(5) and (6):

"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."

"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."

[41] We are of the view that provided an employer gives an employee reasons relied on for the termination and that the employee is given an opportunity to respond to those reasons or allegations then the legislation is satisfied. An employee can decide whether to avail himself or herself of that opportunity to respond but the legislation is satisfied once the opportunity is offered.

[42] We do not read into the Act any broader requirement as suggested by the respondent. Nonetheless each matter would turn on its own circumstances and the specific standard of compliance with the provision of the Act.

[43] In this matter the Deputy President has identified a lack of procedural fairness and found that Mr Tredinnick should have been provided a nominated date by which to respond to the allegations made and relied upon for his termination.

[44] The Deputy President found that it was the:

¹⁰ Written submission

*"...combination of Mr Tredinnick's acknowledged shortcoming in financial management, together with the totality of the proven allegations referred to above, amount to a valid reason for termination based on capacity and performance."*¹¹

[45] Accordingly the basis for his award of compensation relates to his finding of a lack of procedural fairness due to the RSPCA's failure to provide Mr Tredinnick with a date by which he must respond. The failure to nominate a date for response was accepted by the RSPCA but it was argued that a reasonable time to respond had already been provided and that *"procedural fairness, natural justice doesn't go that high, doesn't require the giving of a further deadline..."*¹²

Findings:

Appeal grounds 1,2,3 and 4:

[46] We find that there was a denial of procedural fairness inasmuch as Mr Tredinnick was given insufficient time, and perhaps detail, in which to respond to all of the allegations made against him, albeit some extension of time had been agreed.

[47] There was no final date provided to Mr Tredinnick in which he had to respond and his termination was effected following a telephone message from Mr Burch on 3 December asking him to be available the following day (4 December). Mr Tredinnick advised he would not be available that day due to parental responsibilities but would be available 8 December. This does not appear to have been given any consideration by the RSPCA.

[48] He was then advised by telephone on 4 December that he had been dismissed.¹³

[49] We consider the process of termination procedurally unfair, unprofessional and poorly executed.

[50] Mr Tredinnick held the very senior position of Chief Executive Officer (CEO) with the RSPCA. The Deputy President noted that:

*"From the evidence and documentation tendered, 2008/09 appeared to be a difficult, perhaps even controversial year, for the RSPCA."*¹⁴

[51] Further he recorded a number of incidents which revealed that *"the operating environment for the RSPCA in the period immediately prior and subsequent to the September AGM was difficult to say the least"* and in particular noted that the somewhat toxic environment did not assist Mr Tredinnick in his role. There was a lack of communication within the organisation, considerable media coverage and public announcements about operational changes and publicly aired aspirations of at least one individual to take over the CEO role.

[52] The Deputy President also noted that a number of the allegations made against Mr Tredinnick *"could be described as minor, or perhaps trivial."*¹⁵

¹¹ Decision para 58

¹² Transcript page 11 line 32

¹³ Decision para 16

¹⁴ Decision para 9

¹⁵ Decision para 41

[53] We find no error by the Deputy President in his finding that there was a denial of procedural fairness in respect to Mr Tredinnick.

[54] Accordingly we reject appeal grounds 1,2,3 and 4.

Appeal grounds 5,6 and 7:

[55] The Deputy President found that the employment relationship had "irretrievably broken down". On the evidence this was open to him and we agree with his finding. The relationship between Mr Tredinnick and the RSPCA was unlikely to be restored.

[55] In light of the Deputy President's finding that the employment relationship had "irretrievably broken down" and that Mr Tredinnick accepted his own shortcomings in regard to the job he was performing, we consider the period of thirteen weeks awarded was inconsistent with that finding and was unreasonable and unjust. Accordingly we have concluded that the Deputy President has erred. The Full Bench intends, having the advantage of the detailed submissions presented by the parties, to resolve the matter.

Having regard to all of the circumstances prevailing, the very senior role performed by Mr Tredinnick, the fact that Mr Tredinnick, given the pace of events, was never able to provide his further response to the RSPCA and the unfortunate consequence of what appears to be the internal chaos within the organisation at the time, we are of the view that a period of 4 weeks would have been appropriate for Mr Tredinnick to be able to fully respond to the allegations made against him.

[56] We therefore uphold appeal grounds 5, 6 and 7 and revoke that part of the Deputy President's order for the RSPCA to pay Mr Tredinnick the sum of \$17,500.00 and replace the Order with the following:

ORDER

Pursuant to the powers conferred on the Commission by Section 71(13)(b) of the *Industrial Relations Act 1984* WE HEREBY ORDER that the Royal Society for the Prevention of Cruelty to Animals (Tasmania) Inc. pay to Mr Greg Tredinnick an amount of five thousand, eight hundred and thirty four dollars (\$5834). We further order that such payment is to be made within fourteen (14) days from the date of this decision.

P L Leary
PRESIDENT

Appearances:

Mr G Tredinnick representing himself, with Mr Molnar, Solicitor.

Mr M Rinaldi, of counsel, representing the Royal Society for the Prevention of Cruelty to Animals (Tasmania) Inc.

Date and place of hearing:

2010

October 22

Hobart