

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1) application for hearing of an industrial dispute

Bruce Alan Ludeke
(T14392 of 2016)

and

Minister administering the State Service Act 2000/Tasmanian Fire Service

COMMISSIONER M A GAY

HOBART, 15 September 2016

Industrial dispute – application pursuant to s29(1) – car parking entitlement – s31 of the Industrial Relations Act 1984 – s19(1) of the Industrial Relations Act 1984– s38 of the State Services Act – jurisdictional limitation

EX TEMPORE DECISION

[1] The decision set out below was given in transcript at Hobart on 20 July 2016 immediately upon the conclusion of proceedings relating to the application made by Bruce Alan Ludeke, pursuant to S29(1) of the Industrial Relations Act 1984 (the Act). That sub-section provides the capacity, inter alia, for an employee to apply to the President of the Tasmanian Industrial Commission (the Commission) in respect of an industrial dispute.

[2] As will be set out below, the subject of the dispute sought to be raised by Mr Ludeke was said to be the failure of the employer, Tasmanian Fire Service, to continue to provide Mr Ludeke with a car parking space at the place of employment or to meet his reasonable costs in substitution.

[3] The dispute had earlier been the subject of conciliation proceedings on 21 April 2016 when Mr Ludeke appeared on his own behalf and Ms R Pearce appeared, both then and at hearing, for the Minister administering the State Service Act 2000.

[4] In indicating to the parties that it was proposed to provide them with an outcome to the application without the delay that would occur if recourse was had to the transcript, I advised that this entailed not dealing as fully as otherwise one might with the details of the case. Essentially this meant not repeating the argument put before the Commission or the Commission's detailed consideration of those submissions. As the contentions of the parties had been the subject of close interaction with the parties during the course of the proceedings, in large part by reason of Mr Ludeke's status as a self-represented applicant, and because much of Ms Pearce's case was not put into contest, I was content to take this approach.

[5] As will be seen from the decision below, now edited and supplemented, it was necessary to first deal with an objection to jurisdiction.

[6] "I do say by way of introduction that this is a claim – and again I'm not going to recount its history, it being a dispute the details of which the parties are painfully aware, but it involves a claim by Mr Ludeke, the Finance Manager, with very broad responsibilities, engaged at Band 8 of the Tasmania State Services Award as a finance manager with responsibilities extending not only to the

Tasmanian Fire Service, but also to the SES and to the Police Service. It is work, as Mr Ludeke mentioned a few minutes ago, which extends to the provision of very high-level advice and responsive materials for Ministers of the Crown and the claim has been treated, certainly by the Commission and, I believe, by the employer, as being most conscientiously raised.

[7] That is to say that this is not – this cannot be considered to be a claim that is in some sense a bold one, or a try-on, or having some ambit – quite the opposite: it is a claim which relies on Mr Ludeke's belief that at the point of engagement, the chief or one of the interviewing panel present at the interview indicated to him that that a car parking place 'came with' the position. And one can express that in different ways. There is no evidence as to this, other than Mr Ludeke's unsworn statement to this effect, which is in most respects accepted by the employer. I have no reason to doubt the fundamentals of Mr Ludeke's account. The effect of the statement is of course in hot dispute. There is a statement which, while in the materials, has not been sought to be tendered, but I've seen – read the statement of Mr Gallagher. Mr Gallagher was at the time a member of the selection panel and the official who proffered the information that Mr Ludeke was to enjoy a car parking place.

[8] In a broad way, I think it is right to say, the employer does not contest Mr Ludeke's view of the interview. But Mr Ludeke now says that he did, and he had every right to, place particular emphasis on that offer, that is, that a car parking spot 'came with the job'. Ultimately it is not going to be necessary for me to deal with this element of the claim, but it's Mr Ludeke's contention that it was indeed a decisive – possibly together with other aspects – but it was a very, very important part of the considerations which led to him taking up the employment. So it can be perhaps appreciated by a feeling person, that someone in Mr Ludeke's position, who had that right of passage withdrawn, would thereafter feel very much aggrieved.

[9] It has not been possible, and I must say this is a matter about which I have some real regret, for the parties to arrive at a proper basis which would go to salve Mr Ludeke's concern on this point and, even in some part, the particular expense that he now has to meet.

[10] For the Minister, Ms Pearce mounts what I think really must be described as a well-rounded argument in relation to the jurisdictional deficit which is said would attach to an order of the Commission were I to take it that car parking comes within the purview of s31(1) of the Industrial Relations Act of 1984, because – and I'm not going to read it; I know the parties have it in front of them as do I – because car parking, on the authorities, can't be said to be a matter which pertains to the relations of employers and employees in the requisite fashion.

[11] And this is now well understood; that it has to be the relations of employers and employees in a particular way - that is, as to the relationship in their respective roles, as employers or employees; I won't say "modes". I'm not so sure about modes. As that section of the Act goes on, it does so in a way which does not include, or, properly understood, it can't be taken to include, car parking.

[12] The Minister relies then on a range of cases where there has been consideration given to the scope of industrial matters, what could be considered to be 'in' under that rubric, and, equivalently, those excluded.

[13] I was reminded that industrial matters, as provided for at s19(1)and(2) of the act, has a meaning and for those uncertain, that meaning can be gleaned from various decisions, particularly in the matter of *Public Service Association (SA) Inc v*

South Australia and Ors [2012] SACFC 66 (PSA) in the Supreme Court of South Australia, which related to car parking. Further reliance was had for decisions of the Commission in several cases, one of the Full Bench of the Commission in *T14386 of 2016 Minister Administering the State Service Act 2000 v Tasmanian Salaried Medical Practitioners' Society and The Community and Public Sector Union (State Public Services Federation Tasmania) Inc* and one of then President Abey in *T14112 of 2013 Tasmanian Salaried Medical Practitioners' Society application to vary the Medical Practitioners (Public Sector) Award*. In that matter then President Abey declined the application before him, commenting on car parking not being a matter which in the President's view was appropriate for award inclusion.

[14] A further key element of the submission put today is that there is a limitation to jurisdiction properly to be found in the State Service Act 2000, where, at s38, there is an exhaustive provision, to the effect that terms and conditions of employment of employees under that Act are those specified in an award - and, it was submitted, only those.

[15] So the argument then, is that something which isn't, which doesn't fall within that capacity or that heading, that is a term or condition of employment of a state employee found within an award is, necessarily, beyond jurisdiction. In summarising the case for lack of jurisdiction in that way, I hope it is sufficiently coherent, but it really means that for me to act in a way which is within power, I have to be satisfied as to jurisdiction. And one has a fundamental obligation, which rests on any statutory decision-maker, to act within jurisdiction.

[16] Having regard for all these considerations I am unable to come to the conclusion that the matter in issue today passes, or is capable of passing any of these necessary hurdles. As a consequence of coming to the view that a dispute as to car parking previously conferred as a benefit, but not by award provision, and subsequently withdrawn can not be considered as grounding a dispute given the arguments set out above, I conclude that I do not have jurisdiction to make an order which bears relevantly on the complaint of Mr Ludeke. For that reason, I am unable to further deal with the matter and must now dismiss the application for want of jurisdiction. I will now adjourn."



Michael Gay
COMMISSIONER

Appearances:

Mr B Ludeke for the Applicant

Ms R Pearce for the Respondent (Tasmania Fire Service)

Date and place of hearing:

At Hobart

Conciliation Conference- 21 April 2016

Hearing- 20 July 2016