

## **TASMANIAN INDUSTRIAL COMMISSION**

### **Industrial Relations Act 1974**

S29 application for hearing of an industrial dispute

### **Australian Education Union**

(T14591 of 2018)

and

### **Minister Administering the State Service Act 2000/Department of Education**

DEPUTY PRESIDENT ELLIS

20 June 2018

**Jurisdictional argument - industrial dispute - industrial matter - terms and conditions of employment - review of action - powers of employment directions - application dismissed**

## **DECISION**

[1] On 20 April 2018, the Australian Education Union, Tasmanian Branch (AEU) (the Applicant) applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (Department of Education) (DOE) (the Respondent), arising from a dispute in relation to the Secretary's decision to commence an Employment Direction (ED)<sup>6</sup> investigation and suspend Mr Hay from his duties as a teacher in accordance with ED4.

[2] In this matter the Applicant maintains that the decision to commence an investigation was unreasonable because it is based on the "suspended" decision of the Teacher's Registration Board (TRB) and the suspension was unnecessarily harsh.

[3] A threshold issue arose at the Conference held on 23 April 2018 relating to the jurisdiction of the Commission to hear this matter as an industrial dispute pursuant to s.29(1) of the IR Act and directions were issued on 23 April 2018. Written submissions were received and served on the relevant parties from the Applicant on 1 May 2018, the Respondent on 8 May 2018 and the Applicant's reply to the submissions of the Minister, on 11 May 2018. Further submissions in reply were invited from the Respondent and received on 5 June 2018.

### **Applicant's case**

[4] The Applicant sought a determination from the Commission on "whether the Secretary was acting reasonably and not perversely" and whether he had based the decision on reasonable grounds by relying on the TRB's determination to form the belief that Mr Hay was unable to efficiently and effectively perform his duties and to suspend Mr Hay on full pay, pending the outcome of the investigation and determination.

[5] Mr Hay is a full time teacher and a permanent State Service employee employed by the controlling authority, MASSA.

[6] The Applicant submitted this dispute relates to an industrial matter pertaining to the Applicant's mode, terms and conditions of employment. The outcome and the combined effect resulted in him "...attending the school where he taught to carry out the duties that had been assigned by the Department..."<sup>1</sup> to the suspension from his teaching duties and prohibiting him from entering the school grounds. The Applicant contended this resulted in "...a situation somewhere between a reclassification of his position and his employment being terminated."<sup>2</sup> The industrial dispute arises from the commencement of the investigation and suspension allegedly being unreasonable and unfair.

[7] The Applicant stated that "...there is nothing in the Act or State Service Act that prohibits the Commission from exercising that jurisdiction"<sup>3</sup>

### **Respondent's case**

[8] The Respondent submitted that the Tasmanian Industrial Commission (TIC) has no jurisdiction based on the grounds that there is no industrial dispute; the application is not based on any matter pertaining to the relations of employers and employees as it is an individual dispute without industrial ramifications nor does it concern the mode, terms and conditions of employment.

[9] Furthermore, it was submitted the decisions of the Secretary were relevantly reviewable as State Service actions pursuant to the provisions of s.50(1)(b) of the *State Service Act 2000* (SS Act).

### **Legislative Framework**

[10] The *Industrial Relations Act 1984* is:

"An Act to provide for the establishment of a Tasmanian Industrial Commission having a jurisdiction to hear and determine matters and things arising from, or relating to, industrial matters, including the making of awards, the conduct of hearings and the settling of disputes..."

[11] At s.19(1) the jurisdiction of the Commission is set out:

"Subject to the Act, the Commission has jurisdiction to hear and determine any matter arising from, or relating to, an industrial matter."

[12] Section 3(1) defines an industrial dispute and an industrial matter:

"`**industrial dispute**' means a dispute in relation to an industrial matter –

(a) that has arisen, or

(b) that is likely to arise or threatened or impending.

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<sup>1</sup> P2 Applicant's submission re jurisdiction

<sup>2</sup> P2 Applicant's submission re jurisdiction

<sup>3</sup> Ibid

**'Industrial matter'** means any matter pertaining to the relations of employers and employees and, without limiting the generality of the term includes -

(a) a matter relating to -

(i) the mode, terms and conditions of employment; or

(ii) the termination of employment of an employee or former employee; or

(iii) the reinstatement or re-employment of an employee or a former employee who has been unfairly dismissed; or

(iv) severance pay for an employee or a former employee whose employment is to be, or has been, terminated as a result of redundancy; or

(vi) a dispute under the Long Service Leave Act 1976 or the Long Service Leave (State Employees) Act 1994 relating to an entitlement to long service leave, or payment instead of any such leave, or the rate of ordinary pay at which such leave or payment is to be paid in respect of an employee or former employee; or

(b) a breach of an award or registered agreement -

..."

**[13]** An industrial dispute may be referred to the TIC under s.29(1) by:

"An organization, employer, employee or the Minister may apply to the President for a hearing before a Commissioner in respect of an industrial dispute."

This dispute has been referred by an organisation; the AEU on behalf of Mr Hay.

**[14]** Section 50 of the SS Act, contains provisions to enable a review of an action relating to an individual's employment in the State Service:

**"Review of actions**

(1) Subject to subsections (2) and (3), an employee is entitled to make application to the Tasmanian Industrial Commission for a review-

(a) of the selection of a person or an employee to perform duties other than duties to be performed for a specified term or for the duration of a specified task; or

(b) of any other State Service action that relates to his or her employment in the State Service.

(2) An employee is not entitled to make an application for a review under subsection (1)(a) if that employee was not an applicant for the duties to which the appointment or promotion relates.

(3) An employee is not entitled to make an application for a review under subsection (1)(b) in respect of the termination of the employee's employment.

(4) Notwithstanding anything contained in subsection (1), (2) or (3), disputes in relation to the decision to terminate employment are to be dealt with by the appropriate industrial tribunal in accordance with the legislation under which that tribunal is established."

**[15]** The relevant section of the IR Act is s.19AA which enables the TIC to have jurisdiction to deal with a review pursuant to s.50 of the SS Act, which provides:

**"Commission to review matters under section 50 of the State Service Act 2000**

(1) The Commission is to review a matter in respect of which an application for review has been made to it under section 50(1) of the State Service Act 2000 .

(2) The Commission may refer any matter in respect of which an application for review has been made to it under section 50(1) of the State Service Act 2000 to the Ombudsman, the Integrity Commission or the Anti-Discrimination Commissioner or any other person or body that may be prescribed in the regulations.

(3) A person is not entitled to make application to the Full Bench of the Commission in respect of a matter referred to in section 50(1) of the State Service Act 2000."

**[16]** Section 17 of the SS Act provides for the issue of Employment Directions in relation to the administration of the State Service and employment matters relevant to the Act (unless inconsistent with the Act) and provides:

**"Employment Directions**

(1) The Employer may issue Employment Directions which relate to the administration of the State Service and employment matters relevant to this Act and which have effect according to their tenor unless they are inconsistent with or repugnant to other provisions of this Act.

(2) Employment Directions may be issued under this section—

(a) so as to apply—

(i) to employees generally or to a specified class or classes of employees; and

(ii) to officers generally or to a specified class or classes of officers; and

(iii) generally or in a particular case or class of cases or in particular cases or classes of cases; and

(iv) at all times or at a specified time or at specified times; and

(v) throughout the State or in a specified part or specified parts of the State; and

- (vi) throughout the State Service or in a specified Agency or Agencies; and
- (b) so as to require a matter affected by them to be –
  - (i) in accordance with a specified standard or specified requirement; or
  - (ii) as approved by, or to the satisfaction of, a specified person or body or a specified class of persons or bodies; and
- (c) so as to confer on a specified person or body or a specified class of persons or bodies a discretionary authority; and
- (d) so as to provide that, in a specified case or a specified class of cases, whether on specified conditions or unconditionally, persons or things of a class, or classes of persons or things, may be exempted from the Employment Directions, either wholly or to such extent as is specified; and
- (e) so as to–
  - (i) revoke any Ministerial Directions or Commissioner's Directions in force under this Act immediately before the commencement of the State Service Amendment Act 2012 ;
  - (ii) vary or revoke any Employment Directions.
- (3) In subsection(2) –
  - specified** means specified in the Employment Directions.
- (4) Employment Directions issued under this section are not statutory rules within the meaning of the Rules Publication Act 1953 .
- (5) The Ministerial Directions and Commissioner's Directions in force under this Act immediately before the commencement of the State Service Amendment Act 2012 remain in force until revoked under subsection(2)(e)(i)."

### **The true nature of the dispute**

**[17]** The Respondent characterised the true nature of the current dispute as concerns by the AEU relating to the decisions of the Secretary to commence the ED6 process and suspend Mr Hay under ED4. It was contended:

"These matters do not have the requisite industrial character so as to engage the general part of "*industrial matter*". Nor do they fall within any of that which is set out in paragraph (a) and paragraph (b) of the definition."<sup>4</sup>

**[18]** The Respondent submitted the definition of an industrial matter is "any matter pertaining to the relations of employers and employees..." and stated that this:

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<sup>4</sup> Para 25, P6 Submissions of the Minister

"...connotes something which relates to relations between a group, or a class or employers, and a group, or a class of employees-that is, employers and employees in the plural."<sup>5</sup>

**[19]** In the Acts Interpretation Act, s.24(d) provides that in any Act:

"Words in the singular shall include the plural and words in the plural shall include the singular"

**[20]** It was noted that these provisions do not apply where they are inconsistent with the true intent or context of the Act (s.4(1)(a) and (b)).

**[21]** The words "an employee or former employee" are referred to in all but the first subparagraph, which relates to the mode, terms and conditions of employment. The Respondent submitted it follows that a dispute between an employee and an employer in relation to these issues is not an industrial matter as there are no ramifications beyond the confines of the individual dispute and therefore it does not have the requisite industrial character.

**[22]** In *R v Staples ex parte Australian Communications Commission*<sup>6</sup> the High Court found that the circumstances and precise nature of a particular matter will determine if the dispute falls within the provisions, to enable jurisdiction. The question of fact of an individual employee's dispute will characterise the nature of the dispute and whether it invokes the jurisdiction. Their Honours stated<sup>7</sup>:

"If it appears that a lone employee cannot invoke the jurisdiction of the Commission then we suspect that the reason is that the limited nature of the dispute or matter denies to it an industrial character."

**[23]** The Respondent submitted an industrial matter is understood to refer to matters of an industrial character and not to individual disputes such as referred to above.

**[24]** In *New Town Timber & Hardware Pty Ltd V Gurr and Anor*,<sup>8</sup> (*New Town Timber*) a former employee who had been dismissed, sought monetary compensation rather than reinstatement. Zeeman J found that the dispute had to have an "industry character" and the true nature of the dispute must be recognised.

**[25]** The Respondent concluded that the current dispute only concerns Mr Hay and the employer and therefore the determination of the matters will only have implications for the employee, Mr Hay and the employer, DOE. It was submitted it does not have the requisite industrial character as the ramifications do not go beyond the confines of the dispute between the individual employee and employer.

**[26]** The Applicant responded in reply to these submissions, noting that the true nature of the dispute was not the decision of the Secretary<sup>9</sup>:

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<sup>5</sup> Para 9-10, p3 Submissions of the Minister

<sup>6</sup> (1980) 143CLR 614

<sup>7</sup> Ibid pp 625-626

<sup>8</sup> (1995) 5 TasR 71

<sup>9</sup> Para 1 Applicant's reply to the Submission of the Minister.

"... but the fact that an ED6 investigation has been commenced to determine if Mr Hay is able to efficiently and effectively perform the teaching duties that had been assigned to him by the Department and he was suspended from those teaching duties with pay pending the outcome of the investigation."

**[27]** The Applicant submitted that "... the investigation and suspension is neither lawful nor proper". It was stated there are no legitimate reasons for reading into the word industrial that a dispute has to have an industrial character, involve more than a single employee and employer, nor have broader ramifications.

**[28]** The Applicant submitted Justice Underwood's approach in *New Town Timber* interpreted the provisions of the IR Act as<sup>10</sup>:

- a. "The definition of industrial dispute did not and does not prescribe the ambit of an industrial dispute by reference to the parties to it; and
- b. The provisions in the IRA should be given their ordinary and natural meaning."

**[29]** The Applicant submitted that in 1997, arising from this decision, the definitions of industrial dispute and industrial matter in the IR Act were amended and referred to in the Second Reading speech. It was contended that there was "... a significant change in the language from the plural of person, employer and employee (before) to the singular (after)."<sup>11</sup>

**[30]** Furthermore, it was contended that there are individual dispute applications which can be made pursuant to the IR Act including s.50(4) of the SS Act, relating to the termination of employment. Termination of employment is included in the extended definition of industrial matter and applications are considered under s.29(1B) of the IR Act.

**[31]** The Applicant submitted it would "... fly in the face of the ordinary and natural meaning of the legislation and would be absurd" if hypothetically, Mr Hay's employment is terminated at the conclusion of this investigation, and he could not have the decision reviewed under s.50 of the SS Act as contended by the Respondent, nor could he make an application "... under the IRA unless there is some industrial character/ collective aspect or ramification to his termination."<sup>12</sup>

**[32]** The Applicant submitted the investigation and suspension were clearly matters pertaining to the relations of employers and employees. The Applicant referred to *R v Kelly; Ex Parte Victoria* where the High Court determined, "The words "*pertaining to*" mean "*belonging to*" or "*within the sphere of*" and the expression "*the relations of employers and employees*" must refer to the relations of an employer as employer with an employee as employee."<sup>13</sup>

**[33]** The Applicant submitted that both investigating and suspending Mr Hay from his assigned teacher duties are matters "within the sphere" of the relations of the Minister as employer and Mr Hay as employee.

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<sup>10</sup> Ibid.

<sup>11</sup> Para 8, p 2, Applicant's reply to the Submission of the Minister

<sup>12</sup> Para 11 ibid

<sup>13</sup> Para 21 Applicant's reply to the Submission of the Minister

[34] The Applicant contends the outcome of the complaint may have ramifications for other members of the AEU as employees and not just be confined to one employee, Mr Hay.

### **Consideration and Findings**

[35] The jurisdictional issue for determination is whether the current dispute can be characterised as an industrial dispute. The Respondent argued it must have the necessary collective element required as stated in general terms, in the primary definition of "industrial matter" in s.3 of the IR Act; "...any matter pertaining to the relations of employers and employees..." The alleged requirement is that the dispute needs to be more than just a personal or individual dispute between Mr Hay and the DOE to meet the industrial matter definition.

[36] The first question to be determined is whether a collective element is required, in order to be an industrial matter. The Respondent contended there needs to be a plural requirement relating to relations between groups or classes of either employees and employers for there to be an industrial matter.

[37] The Acts Interpretation Act 1931 at s.24(d) provides (except where inconsistent with ss.4(1)(a) and (b)):

"Words in the singular shall include the plural and words in the plural shall include the singular"

[38] The Respondent referred to *R v Staples*<sup>14</sup>, where the High Court found the question of the facts of the individual employees' dispute and circumstances will characterise the dispute.

[39] Additionally, in *New Town Timber*<sup>15</sup>, Zeeman, J noted a dispute must have an industry character before it can be an industrial dispute. I agree with this position.

[40] The Applicant referred to the *New Town Timber* case and stated in 1997, the IR Act definition of industrial dispute or matter was amended from the plural to singular, as a direct result of this case.

[41] In that decision, Underwood, J referred to the amendments to s.29(1) of the IR Act effected by Act No. 59 of 1992, which conferred on an employee the right to apply for a hearing in respect of an industrial dispute. Before the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992 was proclaimed in March 1993, s.29(1) of the Act provided:

"An organization or a private employer may apply to the President for a hearing before a Commissioner in respect of an industrial dispute that has arisen or the applicant considers is likely to arise."

Section 29(1), as amended by the 1992 Act, now provides:

"An organization, employer, employee or the Minister may apply to the President for a hearing before a Commissioner in respect of an industrial dispute."

[42] This amendment enabled individual employees to make applications for a hearing in respect to industrial disputes before the TIC. In the circumstances where an

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<sup>14</sup> (1980) 143 CLR 614

<sup>15</sup> (1995) 5 TasR 71



employee was terminated, that individual could bring an individual or personal dispute before the TIC. Moreover, the amended s.29(1A) clarified that an individual who has had their employment terminated, can bring a personal dispute not only relating to the termination of employment but also relating to a breach of an award, or a registered agreement involving a former employee and other disputes.

Section 29(1A) of the IR Act now provides:

"A former employee may apply to the President for a hearing before a Commissioner in respect of an industrial dispute relating to -

- (a) the termination of employment of the former employee; or
- (b) severance pay in respect of employment of the former employee terminated as a result of redundancy; or
- (c) a breach of an award or a registered agreement involving the former employee; or
- (d) a dispute over the entitlement to long service leave..."

**[43]** In *T10999 of 2003 CFMEU v Pasminco Hobart Smelter*, Deputy President Shelley found it would be "manifestly absurd" if an individual could only bring a dispute before the TIC, where the Act explicitly makes provision for them to do so and referred to the following example arising from the definitions in s.3(1)<sup>16</sup>:

"At para (b) in the definition of "industrial matter", a dispute about "a breach of an award or a registered agreement" does not refer to "employee or former employee", therefore there is no explicit provision in s.3 for an employee. Yet, at s.29(1A)(c), a former employee is able to bring a dispute before the Commission relating to "a breach of an award or industrial agreement involving the former employee." There is explicit provision for a former employee but not for a current employee."

**[44]** A further issue raised is whether the dispute meets the component of the definition of industrial matter; "pertaining to the relations of employers and employees". The Respondent argued this must relate to a group or class whereas the Applicant's position was focused on "pertaining" meaning "within the sphere" of or "belonging to" (*R v Kelly; Ex Parte Victoria*<sup>17</sup>)

**[45]** The Applicant provided an equally absurd hypothetical example that if Mr Hay's employment was terminated at the conclusion of this investigation and process, he could not have the decision reviewed under s.50 of the SS Act, but as contended by the Respondent, nor could he make an application under the IR Act if there was not an industrial character and/or collective aspect or ramification to his termination. The amendment to the IR Act has clarified this position in s.29(1A).

**[46]** In a decision of the Full Bench of the TIC, following the above amendments, in *Capital Hill v O'Connor (Capital Hill)*<sup>18</sup> the Full Bench referred to Justice Zeeman's decision in the *New Town Timber* case:

"We believe that the intention of Parliament is abundantly clear. In our view, properly construed, the extended definition of "industrial dispute" in

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<sup>16</sup> Para 125 *T10999 of 2003 CFMEU v Pasminco Hobart Smelter*

<sup>17</sup> (1950) 81 CLR 64 at page 84

<sup>18</sup> *Capital Hill Corporation v Terence James O'Connor*; [T6918]; Full Bench of Tasmanian Industrial Commission; October 1997;

the context of Zeeman J's observations (but not forgetting the contrary opinion of Underwood J) no longer requires the presence of a "continuing employer-employee relationship" or involvement "in the dispute of the existing employee or any employee organisation." In other words, in the relevant circumstances, it is now possible for a personal dispute to be an "industrial dispute" within the meaning of the Act. Our conclusion, we believe, draws strong support from the words of Section 29(1A) and the purpose of its introduction as set out in the Second Reading Speech at page 5 above." (emphasis added)

**[47]** In support, Shelley DP in *T10999 of 2003 CFMEU v Pasminco Hobart Smelter* made the following finding and conclusion, in paragraphs 129-130:

"I have read and considered the other authorities provided by the respondent concerning what constitutes an industrial dispute, and agree with the applicant's submission that they deal with considerations that are not relevant to the issues under dispute, which concern the Tasmanian statutory regime. The Metal Trades case concerned the Commonwealth Conciliation and Arbitration Act 1904-1934, the serving of logs of demands and the creation of an industrial dispute under the provisions of that Act, in particular, whether an award was binding on employers who did not employ members of a union as well as those who did. The requirement for the creation of an industrial dispute in the federal jurisdiction in 1934 is not the same as the requirements in this jurisdiction. I do not doubt that under the former there was a requirement for a collective element, however, in my view, under the latter there is not.

After consideration of the decisions of the Supreme Court of Tasmania and the Full Bench of the Tasmanian Industrial Commission, I find that there is no requirement for an "industrial matter" to have a collective element in order to be an industrial matter under the provisions of the Act." (emphasis added)

**[48]** I concur with this finding that individual employees or former employees are entitled to lodge applications to the TIC pursuant to either s.29(1) or s.29(1A) and the nature of the dispute does not need to have an impact on the collective, however, it often does have broader ramifications by nature that the matter is industrial and involves workplace conditions. There does need to be an industrial character to the dispute which will be determined by the individual circumstances of such a dispute.

**[49]** I find that the Respondent's position that the requisite industrial character must have collective ramifications beyond the confines of a dispute between an individual employee and his employer, is not consistent with the definition of industrial matter set out in s.3(1).

**[50]** In light of the determination that a dispute relating to an individual can be an industrial matter and does not need a collective element and before considering if the dispute relates to the mode, terms and conditions, an additional question has arisen; is this current matter able to be reviewed under the SS Act?

**Does an Employment Direction confer power on the Head of Agency or is the Head of Agency acting under delegation?**

**[51]** A further jurisdictional consideration arose from submissions by the Applicant, to which the Respondent was invited to make submissions in response.

**[52]** The Applicant submitted that the Secretary of the Department of Education, the Head of Agency (HOA), was acting as a delegate of the Minister when making the decisions and therefore the dispute must be an industrial dispute as it relates to the action by a delegate of the Minister and therefore, as the Minister is not an "Officer", the SS Act has no application.

**[53]** The Applicant stated<sup>19</sup>:

"... that where an industrial dispute relates to an action by a delegate of the Minister then the SSA has no application because:

- (a) The only matter that can be reviewed under the SSA is a "State Service action"
- (b) A State Service action is an "action by an officer or an employee"
- (c) An officer "is a person appointed as Head of Agency, to a prescribed office or as a senior executive..."
- (d) An employee is a permanent or a fixed term employee
- (e) Whilst the Secretary is a Head of agency and therefore (sic) an officer he commenced the investigation and suspended Mr Hay exercising the functions and powers delegated to him by the Minister and those functions and powers are taken to have been exercised by the Minister by virtue of s. 23AA(4) of the *Acts Interpretation Act 1931*.
- (f) The Minister is neither an officer nor an employee therefore his actions cannot be a State Service action and subject to a review under the SSA"

**[54]** The Respondent submitted the Employment Directions, including ED4 and ED6, were issued by the Minister administering the State Service Act 2000 (MASSA), which is the Premier, pursuant to s.17 of the SS Act. Only the Premier is empowered under the SS Act to issue Employment Directions.

**[55]** The SS Act specifically provides that the Premier (MASSA) is able to delegate certain powers; the power to appoint a person to an SES office (s.31(2)); to terminate such appointment (s.32(2)); to terminate employment of permanent employees (s.44(4)); and to take action(s) under s.48(1) and (2). Delegation to impose a sanction for breaches of the Code of Conduct is found in s.10(2), however the establishment of procedures for investigation and determination of a breach of the Code of Conduct are found in s.10(3) and (4), which form the basis for ED5.

**[56]** For completeness, the Respondent provided that s.20(2) provides:

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<sup>19</sup> Para 34 Applicant's Reply to the Submissions of the Minister, 11 May 2018

"The Head of the State Service is to perform and exercise the functions and powers of the Employer under this Act (other than the power to issue Employment Directions)."

Section 21(a) sets out the power for the Head of the State Service to delegate functions and powers of the Employer.

**[57]** The Respondent submitted there are specific powers of delegation in the SS Act which must not be confused with powers conferred by the Employment Directions. It is the Employment Directions "by their terms and by reason of the statutory regime, directly empower, in the case of ED4 and ED6, the Head of Agency to do various things."<sup>20</sup> It was also submitted Employment Directions do not represent the Minister delegating any powers to another, rather the Minister is empowered to make these directions and in doing so, gives such powers to the Head of Agency.

**[58]** It was submitted that the Head of Agency is not exercising delegated powers in acting pursuant to any ED, rather exercising direct power. The HOA is not a delegate of the Minister in such circumstances. The HOA was acting as "an officer" and the disputed decisions are relevantly State Service actions to which s.50(1)(b) applies.

### **Consideration**

**[59]** The Applicant submitted the Minister has delegated the functions and powers to the Secretary as Head of Agency, however, it was contended that those powers and functions have been exercised by the Minister by virtue of s.23AA(4) of the *Acts Interpretation Act 1931*, which provides:

"A delegated function or power that is duly exercised by a delegate is to be taken to have been exercised by the delegator."

**[60]** The Applicant argued these State Service actions are unlawful and I now turn to consider the relevant State Service actions in this matter. Notification of the ED6 investigation was provided to Mr Hay on 17 April 2018 from the Secretary of the Department of Education, Mr Tim Bullard. As DOE Secretary, Mr Bullard is the Head of Agency and he satisfies the definition of an "officer", pursuant to s.3(1) of the SS Act. It was his decision to suspend Mr Hay, which imposed the temporary cessation of teaching duties, pursuant to ED4 and ED6. There is no dispute that Mr Hay is an employee and subject to the ED processes. The question for determination is now whether the HOA exercised these functions under direct power or delegation from the Minister?

**[61]** Having considered the legislation referred to by the parties, I find that the Head of Agency was acting within the powers pursuant to ED6 issued by the MASSA, the Premier in 2013. In ED6, "*Procedures for the Investigation and Determination of whether an Employee is able to efficiently and effectively perform his/her Duties*" the Directive states:

"Pursuant to Section 17 of the State Service Act 2000, I hereby direct that the arrangements and requirements set out in this Employment Direction are to apply."

**[62]** The definition of "Officer" in ED6 refers to a person appointed as a holder of a prescribed office and the definition of the Head of Agency, "is the person holding that

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<sup>20</sup> Para 13 Further Submissions of the Minister, 5 June 2018

office for the purposes of the Act in accordance with Section 30 of the Act." The Secretary of the Department of Education is the Head of Agency and an Officer.

**[63]** Clause 7 of ED6 provides the direct power to the HOA to decide if there are reasonable grounds to believe that an employee is unable to efficiently and effectively perform his/her duties. Clause 8 grants direct power to make a determination as to whether the employee is able to perform his duties.

**[64]** However, clause 9(1) Action Taken, specifies that the action taken by the Head of Agency following the determination, in accordance with s.48(1) of the SS Act, is delegated by the Minister:

"If the Head of Agency determines that the employee is unable to efficiently and effectively perform his/her duties, the Head of Agency (as the Minister's delegate) may take an action in accordance with section 48(1) of the Act." (emphasis added)

**[65]** ED4, clause 6 gives direct power to the Head of Agency to suspend an employee with full pay if he/she has formed a belief, based on reasonable grounds that it is in the public interest to do so, however the HOA does not have the power to suspend an employee without pay. The HOA also has been given the power to immediately end the suspension in clause 6.9.

**[66]** Section 34 in the SS Act provides the functions and powers of the HOA, which are "subject to any Employment Directions". ED4 and ED6, both issued by the relevant Premier, provide direct powers to the HOA and I find the decisions made by the Secretary of Department of Education were through this direct power and not a delegation and are therefore, reviewable under s.50(1)(b) of the SS Act.

**[67]** In light of the finding that the dispute may be dealt with under the SS Act, I now turn to the question; does this application relate to the mode, terms and conditions of the employee to meet the definition of an industrial matter under the IR Act or is it a reviewable action under the SS Act?

#### **Does the TIC have jurisdiction under the IR Act in this matter?**

**[68]** The Applicant submitted that the test for consideration of an industrial matter is not whether the power exercised by the Secretary has anything to do with the mode, terms and conditions of employment but rather, do the matters in dispute relate to either of the mode, terms and conditions of employment.

**[69]** Referring to *Australian Tramways Employee's; Association v. Prahran and Malvern Tramway Trust (1913) (Tramways) 17 CLR 689 at page 693*, Isaacs and Rich JJ, the Applicant stated that the terms and conditions of Mr Hay are broader than those outlined in the *Teaching Service (Tasmanian Public Sector) Award* (Award) and "...include the duties assigned to him and any reasonable directions that have been given."<sup>21</sup> Those assigned duties included a range of teaching related duties as per his classification under the Award.

**[70]** After notification of the investigation and suspension, those duties ceased. The Applicant relates the investigation and suspension directly to the mode, terms and conditions of his employment.

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<sup>21</sup> Para 29 Applicant's Reply to the Submissions of the Minister, 11 May 2018

[71] The Applicant submitted that there is nothing in the IR Act or the SS Act that prohibits the TIC from exercising jurisdiction and notes that "... there is an industrial dispute because the Applicant contends the investigation and suspension are unreasonable and unfair"<sup>22</sup> and therefore the TIC has jurisdiction to hear this matter.

[72] Finally, it was contended there is nothing in the SS Act which demonstrates Parliament's intent to confine the dispute resolution to be dealt with under the SS Act.

[73] Conversely, the Respondent submitted that s.38(1) of the SS Act provides:

**"Terms and conditions of employment of employees**

(1) The terms and conditions of employment of employees are to be those specified in an award relating to persons engaged in the work for which they are employed or, if no such award is in force, are to be determined by the Employer."

[74] Mr Hay is employed under the *Teaching Service (Tasmanian Public Sector) Award* and the Respondent submitted that none of the provisions of the Award relate to the relevant Employment Directions nor powers of the Secretary under those Employment Directions. The scope of the terms and conditions as clarified in the *Tramways* decision, is covered by the above section and this is exhaustive of the terms and conditions covering Mr Hay as an employee.

[75] Section 17 of the SS Act provides for the issue of EDs and confers on the Secretary a "discretionary authority". In this matter, those powers were exercised by the Secretary to make the two decisions. The Respondent submitted they have nothing to do with the terms and conditions of employment, nor the Award provisions and furthermore, cannot be considered as being a mode of employment which is understood to be the manner or particular form of employment such as being full time, part time, casual or permanent.

[76] The Respondent cited s.50(1)(b) of the SS Act which provides the right for an employee to make an application to the TIC for a review of "any other" State Service action as defined in s.49 of SS Act:

**"action** includes a refusal or failure to act;

**State Service action** means action by an officer or an employee but does not include an action to make an appointment under section 31(1)."

[77] It was submitted that s.50(2) relates to review of selection processes under s.50(1)(a) which is irrelevant for this purpose, however, subsections (3) and (4) "... provide powerful clues about the jurisdiction of the TIC under the IRA."<sup>23</sup> Both subsections (3) and (4), (notwithstanding anything contained in subsections (1), (2) and (3), provide that there is an exclusion to applications relating to termination of employment, which "... are to be dealt with by the appropriate industrial tribunal in accordance with the legislation under which that tribunal is established."<sup>24</sup>

[78] The Respondent submitted that a state servant's entitlement to a review of State Service actions by the TIC, concerns those that do not fall within the definition of "industrial matter", as expanded by sub-s50(1). However that expansion stops short of

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<sup>22</sup> Para16-18 Applicants submissions re jurisdiction. 1 May 2018

<sup>23</sup> Para 40, Submissions of the Minister.

<sup>24</sup> Para 9, Ibid.

providing an entitlement to a review of termination of employment. It was contended that entitlement, depending on the circumstances, must be found elsewhere.

**[79]** Section 51 of the SS Act sets out the procedure for review of State Service actions under the auspices of s.50 and it was noted that there are express powers which are not found in the IR Act for example, s.51(7) states the determination of the TIC is final. It was submitted that s.51(7) acts as a control on the TIC's jurisdiction in relation to s.50(1)(b) applications.

**[80]** Section 50A contains conditions where the TIC is not empowered to determine a matter under s.51 which is being dealt with by other stated jurisdictional bodies, until the finalisation of the matter within that jurisdiction. This is complemented by s.19AA(2) of the IR Act, which empowers the TIC to be able to refer any matter, in respect of an application for review under s.50 of the SS Act to other jurisdictions. Conversely, s.29(1) of the IR Act does not require any separation of these jurisdictions.

**[81]** The Respondent summarised the jurisdiction of the TIC to deal with matters under s.50(1) of the SS Act, arising from the SS Act and not the IR Act, through ss.50(3) and (4), 50A and 51 of the SS Act and s.19AA of the IR Act.

**[82]** The Respondent submitted that<sup>25</sup>:

"... the relevant inquiry is not whether the Secretary's actions to commence an investigation under ED6 and suspend the Applicant on full pay under ED4 are "*industrial matter[s]*" under s.3(1) of the IR Act, but whether they are "*State Service action[s]*" under the SSA."

**[83]** It was submitted by the Respondent, the Secretary of the Department of Education is a Head of Agency (HOA) and clearly satisfied the definition of "officer" which is defined in s.3(1) of the SS Act as "... a person appointed as the Head of Agency, to a prescribed office or as a senior executive under section 31". Mr Hay's actions were State Service actions for the purposes of s.50(1)(b) and if they are to be reviewed, it was submitted, an application for that review is to be made in accordance with ss.50 and 51 of the SS Act and s.19AA of the IR Act and not otherwise.

**[84]** In conclusion, the Respondent submitted there was no industrial dispute as the matter was not one concerning "... the mode, terms and conditions of employment" and the application under s.29(1) of the IR Act is "misconceived". Furthermore, the decisions of the Secretary are relevantly each a "State Service action" and only able to be reviewed pursuant to the provision of s.50(1)(b) of the SS Act. The Respondent submitted that the TIC is without jurisdiction.

### **Consideration and Findings**

**[85]** The AEU's application was made pursuant to s.29(1) of the IR Act on 20 April 2018.

**[86]** The dispute as outlined in the AEU's application is as follows:

"The Applicant asks the Commission to determine the following issue namely was the Secretary of the Department of Education acting reasonably and not perversely when he:

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<sup>25</sup> Para 48 Submissions of the Minister, 8 May 2018.

1. Had reasonable grounds to believe Mr Andrew Hay was unable to efficiently and effectively perform his duties as a teacher and to commence an investigation in accordance with Employment Direction No.6 based on the determination of the Teachers Registration Board; and
2. Decide to suspend Mr Hay on full pay pending the outcome of the investigation."

**[87]** The outlined "decision sought" in the application is:

"The Applicant seeks an order directing the Secretary's (sic) to reverse his decision:

1. To commence the ED 6 investigation;and
2. To suspend Mr Hay."

**[88]** I note that there is further clarification provided in the Applicant's submissions that the true nature of the dispute is not the decision of the Secretary but the fact the ED6 investigation has commenced and Mr Hay has been suspended from teaching duties with pay pending the outcome of that investigation. I am bound to consider the written application as penned in the Application for Hearing of an Industrial Dispute s.29(1) Form, and filed on 20 April 2018. AEU has not sought to vary the application. However, I note the change of wording does not substantially change the nature of the application.

**[89]** The question for determination is whether the dispute as outlined in the above s.29(1) application is an industrial matter giving rise to an industrial dispute as defined in the IR Act or a review of State Service actions, where review mechanisms are found in s.50 and s.51 of the SS Act.

**[90]** Mr Hay is employed as a full time, permanent Teacher, Band 1 Level 1-13 employed by the MASSA and an employee for the purposes of both Acts. The Employer is defined as MASSA in s.3(1) of the SS Act. The SS Act applies to and in relation to officers and all employees in s.5(1).

**[91]** Section 38(1) of the SS Act states;

"The terms and conditions of employment of employees are to be those specified in an award relating to persons engaged in the work for which they are employed or, if no such award is in force, are to be determined by the Employer."

**[92]** The terms and conditions of Mr Hay's employment are expressed in the *Teaching Service (Tasmanian Public Sector) Award*.

**[93]** The Applicant contends that the teaching duties are wider than those outlined in the Award but conceded that the range of teaching and teacher related duties are described by the assigned classification. The classification descriptor for Mr Hay's classification is provided in the Award. No submissions were provided to demonstrate any terms and conditions of employment beyond those contained in the Award.

**[94]** Part III-Salaries and Related Matters, Clause 3 Classification Definitions of the Award describes part of the terms and conditions of the substantive position of Mr Hay:



**"Teacher** means an employee holding one or more of the following qualifications:

5-year trained;

4-year trained;

3-year trained;

2-year trained;

uncertificated;

for the purpose of teaching students Kindergarten to Grade 12 and who is classified within Band 1."

**[95]** The duties are predominantly those of an instructional nature, normally classroom based:

**"Duties of Band 1 Level 12 employees**

**Teacher**

(a) The significant role of this position is an instructional one, classroom-based with some additional curriculum and administrative duties.

(b) The nature of the duties and responsibilities shall be determined at the school/college level by negotiation between the Band 1 Level 12 employee and the school/college planning committee. If agreement cannot be reached, the principal shall make a determination which shall be final.

(c) Where a Band 1 Level 12 employee is allocated non-teaching duties and responsibilities, then non-contact time shall be determined at the school/college level and provided from the individual school/college allocation.

(d) Without limiting their nature and extent, the type of non-teaching duties that may be allocated are responsibility for a small subject department; coordination of the resources in a defined curriculum area; participation in the development of school policy and curriculum; and general education leadership and administrative duties.

(e) A Band 1 Level 12 employee may also be responsible for trainee teachers from tertiary institutions; assisting in the induction programs for new teachers; and teaching or assisting teachers who teach students with learning difficulties/behaviour problems."

**[96]** Mr Hay has been suspended from his duties as a Teacher, on full pay, pursuant to ED4, pending an ED6 investigation. This is a temporary cessation of the performance of his full scope of duties while an investigation is conducted into an alleged inability to efficiently and effectively perform his duties. The relevant Employment Directions have been issued pursuant to s.17(1) of the SS Act. There is no change to his substantive duties or any arising from the Award, rather, he is suspended on full pay pending the outcome of the investigation.

**[97]** The Applicant argued that the test to the industrial nature of the dispute is not whether the powers exercised by the Secretary have anything to do with the mode, terms and conditions but rather do the matters in dispute relate to the mode, terms or

conditions of employment. The matters in dispute are stated in the requested determination; "... was the Secretary of the Department of Education acting reasonably and not perversely", which can only lead to review the decision and grounds used to form the belief by the decision maker, the Secretary, resulting in the investigation and suspension pursuant to the relevant Employment Directions. The matter in dispute, being the decision making by the HOA, is not a term or condition found in the Award.

**[98]** The subject matter of the current dispute is similar in nature to *Pervan v Frawley* [2011] TASC 27<sup>26</sup>, but relates to a review of the HOA's decision making process arising from the ED6 and not the Commissioners Direction 5. The same principle of decision making arises in this review. This was addressed by Justice Porter in *Pervan v Frawley* at 78:

"The question is whether on the basis of the source information provided, there were reasonable grounds to believe that a breach of the Code of Conduct, or breaches, may have occurred. In the context of a not dissimilar statutory scheme for investigations, in *Power v Hammond* [2006] VSCA 25 at 106 Chernov JA (Maxwell P and Ormiston JA agreeing) said that it was not necessary for any *prima facie* case to appear. The exercise upon which the Secretary was relevantly embarked was the formation of a belief on reasonable grounds as to the possibility of a breach." (emphasis added)

**[99]** A formation of a belief and decision making process of an officer can only be described as a State Service action as defined by s.49 of the SS Act. A review of the action that the Secretary acted reasonably and not perversely can therefore, only be through an application for review under s.50(1)(b) of the SS Act. I am satisfied that the nature of this dispute is better characterised as a dispute in relation to a review of action rather than a dispute in relation to an industrial matter, being the mode, terms and conditions of employment as defined in the IR Act.

**[100]** I do not concur that this is a position "somewhere between a reclassification of his position and his employment being terminated" as contended by the Applicant, rather a suspension of his duties on full pay, for a period while the investigation is undertaken. I find that his permanent employment, classification, mode, terms and conditions remain preserved, while the ED6 process is underway. There is no dispute relating to the mode, terms and conditions of Mr Hay's employment.

**[101]** Finally, the nature of the dispute and individual character is found in the wording of the application. It is clear that the dispute relates to a review of the Secretary's decisions and actions. This can only be deemed as a State Service action as it requests a review or determination of the Secretary's decisions arising from the implementation of Employment Directions, which are issued pursuant to the SS Act. The mode, terms and conditions as set out in the Award are not in dispute as Mr Hay is suspended and his industrial employment conditions are preserved. Therefore, I find this application cannot be considered as an industrial matter relating to the mode, terms and conditions of employment.

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<sup>26</sup> *Pervan v Frawley* related to a review of the application of Commissioners Direction 5 which for present purposes is identical to clause 7.1 of ED 5, relating to a possible breach of the Code of Conduct, whereas the current dispute relates to the application of ED6 and the alleged inability to perform.

**[102]** Accordingly, I find there is no jurisdiction to deal with the application under s.29(1) of the IR Act and the application is dismissed.



N M Ellis  
**Deputy President**

**Appearances:**

Mr I Arendt for the applicant and Mr A Hay in person  
Mr P Turner for the respondent

**Date and place of hearing:**

2018  
April 23  
Hobart