TASMANIAN INDUSTRIAL COMMISSION

***Industrial Relations Act* 1984**
s29(1a) application for hearing of an industrial dispute

Anne-Marie Assiri
(T14449 of 2016)

and

Minister administering the State Service Act 2000

PRESIDENT D BARCLAY HOBART, 28 SEPTEMBER 2018

Alleged Unfair Dismissal – fixed term employee – whether state service employee can be a casual employee - reasonable expectation of ongoing employment – ability of Commission to revisit interlocutory decision as to jurisdiction – decision reviewed – no reasonable expectation of ongoing employment – application dismissed

DECISION

[1] This decision relates to the outcome of an application brought by the Applicant for a remedy in respect to an alleged unfair termination. This decision should be read in conjunction with the decision of Wells DP dated 25 July 2017 (First Decision). Wells DP deals is detail with the facts of the matter. The reader of this decision will find it necessary to have reviewed the First Decision to aid in the understanding of these reasons.

[2] The First Decision dealt with two matters:

1. Whether the Applicant had a reasonable expectation of ongoing employment; and

2. Whether there was a termination at the initiative of the employer.

A Brief Summary of the Facts and the First Decision

[3] The statutory framework and the facts of the matter are dealt with in the First Decision. However, in summary, the Applicant was employed on a series of yearly employment contracts as an employee carrying out work of a casual nature. The employees employed on such yearly contracts are contracted to fill gaps in rosters.

[4] From 13 August 2010 the Applicant had been contracted as an employee carrying out duties of a casual nature on yearly fixed term contracts until she resigned on 15 June 2015. In early September 2015 after making contact with the manager of Roster Shift Support, Mr Bester, she entered into another fixed term contract as a casual employee for the period 13 August 2015 until 31 August 2016.

[5] There was some dispute about whether the Applicant had signed another contract for 2016/2017. However Wells DP found[1] that a contract was signed for 2016/17. I should add that in this decision I accept the findings of fact made by Wells DP. I did not hear any evidence and did not have the advantage of seeing the witnesses. Wells DP found that the contract was entered into on 8 August 2016. Whilst she made no finding about the end date of the contract, consistent with the other evidence that contracts were for 12 months, the contract would have ended sometime between 8 August 2016 and 31 August 2017.

[6] Prior to entering into the 2016/2017 contract some issues arose regarding four complaints which had been made about the Applicant. The Applicant was advised that she would not receive any further shifts until the matters had been investigated.

[7] The matters had not been resolved by the time the Applicant entered into the contract for 2016/2017. It appears that the Applicant was not offered any work for the duration of the 2016/2017 contract. It seems she last carried out work in about May 2016. Around that time the Applicant raised issues of bullying.

[8] The Respondent wrote to the Applicants lawyer on 27 October 2016 asserting that the Applicants contract was to expire at the end of August 201. The Respondent advised that having regard to previous issues including vexatious conduct, the Applicant was advised that no new contract would be provided to the Applicant.

[9] Consistent with the finding of Wells DP there was however another fixed term contract on foot with an expiry date of August 2017. Accordingly the 27 October 2016 letter amounted to a termination of that 2016/2017 employment contract.

[10] The Deputy President also found that the employment of the Applicant as a casual was contrary to the *State Service Act* 2000 (the Act) and the *Nurses and Midwives (Tasmanian State Sector) Award* (the Award).

[11] She found that the Act provided for fixed term and permanent employees. She noted that there appeared to be no legislative remit to employ causal employees[2]. Having considered the matter she determined[3] that there was no power to appoint casual employees.

[12] Whilst it is not completely clear Wells DP appears to determine that the Applicant was a fixed term employee.[4] She also appears to suggest that as the Applicant was treated as a casual there would be no end date to the appointment.[5]

[13] Notwithstanding that finding the Deputy President then dealt with the issue of reasonable expectation of ongoing employment. She decided that the Applicant had

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[1] First Decision paragraph 97
[2] First Decision paragraph 86
[3] At paragraph 91
[4] At paragraph 93
[5] At paragraph 93

a reasonable expectation of ongoing employment and was therefore protected from unfair termination of her employment.[6]

Issues arising from the First Decision

[14] As a result of the Deputy President ceasing to be a Commissioner I assumed carriage of the matter. It became apparent to me that there were issues regarding the correctness of the findings in respect to reasonable expectation of ongoing employment and the issue of the Applicant being employed as a permanent employee as there was no ability to employ causal employees.

[15] I sought further submissions as to whether I could reach my own conclusions on these matters if I determined that the First Decision was wrong.

Can I revisit the issues?

[16] It is clear from the submissions that the question of whether I can revisit the matters depends on the construction of the *Industrial Relations Act* 1984 (the IR Act).[7] Additionally section 20(a) of the *Acts Interpretation Act* 1931 supports the proposition that a statutory authority prima facie has power to vary or reverse a statutory decision. That section provides:

> "Where an Act confers a power or imposes a duty, the power may be exercised and the duty shall be performed –
>
> (a) from time to time as occasion may require."

[17] Evans J noted in *Purton v Jackson*[8] the prima facie position I have referred to above. The question is whether the IR Act is inconsistent with my reaching my own conclusions.

[18] It is also significant that the First Decision is not a final decision capable of being appealed. Where there are final decisions and legislation provides for appeals, these are indicators that a tribunal cannot revisit the matter and the only recourse is to appeal in accordance with the provisions of the particular legislation. That is, that it is not permissible for the tribunal to revisit the matter.

[19] It is clear that a finding that there is jurisdiction is not capable of being appealed. For the purposes of unfair termination cases only an order after a hearing is appealable. Section 70 of the IR Act deals with appeals, and relevantly provides that a party may appeal an order made by a Commissioner under section 31(1) after a hearing relating to an industrial dispute in respect of the mode, terms or conditions of employment or any termination of employment. In this matter the hearing has not been completed.[9]

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[6] At paragraph 102
[7] See for example *Purton v Jackson* [2012] 21 Tas R 310, *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597
[8] [2012] 21 Tas R 310 at 312. Also Blow J (as he then was) at 318
[9] See also *Bennett v Minister Administering the State Service* [2009] 19 Tas R 210

[20] In my opinion there are also no provisions in the IR Act which are inconsistent with my power to revisit a decision incapable of appeal and interlocutory in nature.

[21] Section 20 and 21 of the IR Act deal with the procedure of the Commission. The question is whether these provisions are inconsistent with the prima facie position that I am able to revisit the decision and determine the issues afresh if I regard the First Decision as wrong. They provide:

"20. Commission to act according to equity and good conscience

(1) In the exercise of its jurisdiction under this Act, the Commission –

(a) shall act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms;

(b) shall do such things as appear to it to be right and proper for effecting conciliation between parties, for preventing and settling industrial disputes, and for settling claims by agreement between parties;

(c) is not bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and

(d) shall have regard to the public interest.

(2) The Commission has the power to deal with an industrial dispute referred to it in accordance with the Commonwealth Act .

(3) In the exercise of its jurisdiction under this Act, the Commission is not restricted to the specific claim made or to the subject-matter of the claim.

(4) Where the Commission, in deciding any matter before it, proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.

21. Procedure of Commission and associated matters

(1) Subject to this Act, the Commission may regulate its own procedure.

(2) Without prejudice to the generality of subsection (1) , the Commission may, in relation to a matter before it –

(a) at or before the commencement of proceedings before the Commission, ascertain whether all private employers referred to in section 66 (1) who, and all organizations the members of which, in the opinion of the Commission, may be subject to an award made by the Commission, have been summoned to attend the proceedings, or have been given notice of those proceedings;

(b) direct that organisations or persons be summoned to attend those proceedings;

(c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –

(i) that the matter or part is trivial;

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) . . . . . .

(iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;

(d) take evidence on oath or affirmation;

(e) proceed to hear and determine the matter or any part of the matter in the absence of any party to it who has been duly summoned to appear or been duly served with notice of those proceedings;

(f) sit at any place;

(g) adjourn to any time and place;

(h) direct any person, whether a witness or intending witness or not, to leave the place in which those proceedings are being conducted;

(i) refer any matter to an expert and accept his report as evidence;

(j) permit the intervention, on such terms as it thinks fit, of an organization which, in the opinion of the Commission, is sufficiently interested in that matter;

(k) allow the amendment, on such terms as it thinks fit, of those proceedings or a document relating to that matter;

(l) correct, amend, or waive any error, defect, or irregularity;

(m) extend any time –

(i) prescribed by or under this Act, except a time prescribed in relation to an appeal; or

(ii) fixed by an order of the Commission; and

(n) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of that matter."

[22] Of particular significance to interlocutory orders incapable of appeal is s21(1)(a) requiring me to act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms. In addition s21(2)(l) enables me to correct, amend, or waive any error, defect, or irregularity.

[23] While s21(1)(l) may not authorise correction of final decisions capable of appeal, in my view the section, when coupled with s21 of the IR Act enables me to revisit the issue of jurisdiction. There is nothing inconsistent with the prima facie case referred to by Evans J in *Purton v Jackson*. Indeed the IR Act, in cases of interlocutory decisions incapable of appeal, is consistent with a power to revisit the matter if it is apparent that the decision is in error.

[24] I should also add that in matters of jurisdiction, that is, whether the Commission has jurisdiction to deal with a matter, such a decision is a jurisdictional fact. If the decision is in error and a tribunal exercises or fails to exercise

jurisdiction, subject to the terms of the particular legislation, the decision is of no legal effect.[10] In my opinion there is nothing in the IR Act which provides to the contrary.

[25] Accordingly, as I believe the First Decision is wrong as to jurisdiction, I will revisit the issue.

Was the First Decision Correct – Continuing expectation of employment

[26] Whether or not there was a reasonable expectation of ongoing employment was regarded by the parties as a jurisdictional fact the existence of which was necessary to enable the Applicant to maintain her application for relief. Given the way the parties proceeded with the matter I will proceed on that basis.

[27] As the Respondent has pointed out in its written submissions[11] Wells DP correctly set out at [103] of the First Decision that the test of reasonable expectation of ongoing employment was objective and not subjective. The Respondent submits however that the Deputy President misapplied the test.

[28] I agree. In my view the First Decision is in error in that it fails to adequately take account the fact of the resignation and its effect to the expectation of ongoing employment. Further, in reality the evidence relied on by the Deputy President to find a reasonable expectation of employment in fact related to subjective matters.

[29] Taking the second of the matters referred to above first the Deputy President relied on the following matters of evidence to support a reasonable expectation of employment:

(a) The fact that the Applicant always intended to return to work;[12]

(b) The fact that the Applicant has not been told her employment may be terminated so her belief of ongoing employment was justified.[13]

[30] These matters are clearly subjective matters relating to the belief of the Applicant. The subjective matters do not assist in the assessment of a reasonable expectation of ongoing employment of themselves. They might, where for example, there is evidence that the employer may have held the same belief. That is not the case here. The reliance on the subjective matters also lead to a failure to appreciate the significance of the effect of the Applicants resignation.

[31] Resignation is a unilateral act. It does not require acceptance by the employer. Only in special circumstances (such as a resignation being given in the heat of anger) is an employer not able to accept a resignation at face value.[14] A resignation brings to an end the employment relationship once and for all.

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[10] *Minister for Immigration v Bhardwaj, supra*
[11] Supplementary Submissions dated 15 May 2018
[12] First Decision at [96]
[13] First Decision at [101]
[14] See for example *Sovereign House Security Services Ltd v Savage* [1989] IRLR 115; *Vallence v Darlea Pty Ltd* [2015] FWC 1267

[32] In the present case the letter of resignation dated 2 June 2015 was as follows (omitting salutations):

> "Please accept this as my official notice of resignation today 2nd of June 2015, to be effective last day 15th June, 2015. I wish to further concentrate on my studies and finish my degree this year. I have found the bullying in the Department of Psychiatry that has led to false accusations in writing and industrial action making pursuing my studies difficulty, and having an impact on my health that led to me being on Workers Compensation.
>
> I wish to take this opportunity to thank you for all your kindness and support over the years of my employment at the Royal Hobart Hospital since July 2010. Also, I wish to thank James Lloyd who also was very helpful in assisting me with casual duties and requirements when acting in your position at various times.
>
> I wish the team every success in the future and have been grateful for my time spent at the Royal Hobart Hospital."

[33] There is nothing in the letter to suggest the employer should not have taken it for what it was, a resignation from employment. There is no hint of a wish to return to work, or that the termination was only to be for a short time.

[34] In light of that, I conclude that the Respondent was correct in its submission that it is impermissible to look back before the 2015/2016 contract in determining objectively whether there was an expectation of ongoing employment. The Applicant drew a line under her past employment due to her resignation. The Respondent did not know what the Applicant intended about going back to work. In my view in deciding whether there was a reasonable expectation of ongoing employment one looks to the period commencing from 13 August 2015 until 17 October 2016 the date of the termination letter. In addition one must look at the fact that there was a dispute relating to four complaints and the Applicants complaint. The Applicant also did not carry out any shift after approximately May 2016.

[35] Objectively the Applicant was in dispute with her employer. She had just entered into a second fixed term contract before her lawyer received the 17 October 2016 letter. She had completed little work in the months leading up to the 17 October letter. The employer had made it clear that it did not propose to offer another contract. Although Wells DP found that one had been entered into between the parties, in my view that does not ameliorate from the significance of the dispute between the Applicant and Respondent and that in all likelihood a further contract would not have been forthcoming after the expiry of the 2017 contract.

[36] In my opinion the Applicant did not have, objectively, a reasonable expectation of ongoing employment. Accordingly the Respondent does not need a valid reason for the termination connected with the capacity, performance or conduct of the Applicant.

Was the First Decision correct – no end date to the employment

[37] Properly understood, the finding that the Applicant's employment had no end date meant she had an ongoing expectation of employment because the employment would be permanent in nature. However, as will be seen that conclusion was in error.

[38] The Applicant was not a casual employee as understood in the award. Rather the Applicant was appointed for a specified term within the meaning of s37(3) of the Act. The appointment was subject to a specific contract of employment namely a "Fixed Term Instrument of Appointment[15]". Notwithstanding that the instrument under its heading said "(Casual Work)" that phrase is not a phrase referred to in the Act. That phrase is also not referred to in the Award. The award relates to casual employees. As pointed out by Wells DP a person appointed under an Instrument of the type the Applicant was, cannot be a casual for the purposes of the Award. That however does not change the fact that the Applicant was employed for a fixed term by the Instrument.

[39] Accordingly, the appointment was a valid appointment within the meaning of the Act. That the phrase "Casual Work" appears in the document does not change the nature and meaning of the Instrument. It is a fixed term appointment. The Applicant is a fixed term employee within the meaning of the Award.

[40] There is nothing in the Act which prevents a fixed term employee carrying out the duties of a casual employee. That employee however is not a casual employee within the meaning of that definition in the Award. The Applicant was a fixed term employee as defined by the Act, carrying out casual duties, but was not a casual employee as defined by the Award. Such an arrangement is not prohibited by the Act or the Award. Indeed without such arrangements it may be very difficult for the state service to operate.

[41] In light of my finding in this regard the Applicant's employment had a fixed end date, she was a fixed term employee, carrying out work of a casual nature. Nor did the Applicant have a reasonable expectation of ongoing employment beyond the current Instrument of Appointment.

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[15] The Instrument is at [22] of the First Decision

Outcome

[42] I have concluded that the Applicant has no reasonable expectation of ongoing employment beyond her 2016/2017 Instrument of Appointment. Accordingly the Respondent does not have to have a valid reason for termination. As such, consistent with the way in which the parties advanced the matter the Commission is without jurisdiction to determine the Application.

[43] Accordingly the Application is dismissed.

David Barclay
PRESIDENT

Appearances
Mr Indi Gunadasa, for the applicant
Mr Matthew Johnston for the respondent

Date and place of hearing:
15 May
2017
Hobart