TASMANIAN INDUSTRIAL COMMISSION
Industrial Relations Act 1984
S 29(1A) application for hearing of an industrial dispute

Dean Jonathon Aitken (No.2)
(T14912 of 2022)

and

Minister administering the State Service Act 2000 – Department of Education

PRESIDENT BARCLAY HOBART, 5 DECEMBER 2022

Application for unfair dismissal remedy – the role or function of the commission in hearing of unfair dismissal applications – whether de novo hearing

DECISION

[1] The Respondent had sought that I determine what it describes as a jurisdictional issue, namely the role or function of the Commission in hearing of unfair dismissal applications.

[2] Obviously the issue is not jurisdictional in the sense that it is common ground that the applicant has standing to bring an application to the Commission seeking a remedy for alleged unfair termination of his employment. Rather the Respondent wishes to determine the procedure which is required to be adopted by the Commission as such a determination will inform the nature and type of evidence to be led on an application for an unfair termination remedy.

[3] I have already written one Decision dealing with this matter.[1] In that Decision I determined that the Commission has power to conduct the hearing required to be conducted pursuant to section 29 of the *Industrial Relations Act 1984* (the Act) in the form of a de novo hearing. When referring to a de novo hearing I intended to refer to a hearing whereby the Commission was empowered to hear any evidence upon which the parties wish to rely to determine for itself with there was a valid reason for termination and whether or not the termination was otherwise unfair. Because it seems I did not make that tolerably clear I am prepared to say something further about the submissions upon which the Respondent relies.

[4] The Respondent's submissions are encapsulated in an email of 4 November 2022 which I set out:

> "Dear Registrar,
>
> The Respondent's position is as follows. A critical jurisdictional issue must be resolved prior to hearing, namely the role or function of the Commission on the hearing of the unfair dismissal application. Only following the determination of that issue will it become apparent what evidence is relevant

[1] *Dean Jonathon Aitken v Minister administering the State Service Act 2000 – Department of Education (No. 1)* T14912 of 2022, 1 September 2022.

to the Commission's task. This jurisdictional argument will likely take some hours to argue and to resolve, and the Respondent proposes that it be argued and determined in Hobart prior to the hearing on 28 and 29 November 2022 in Launceston so as to maximise the available hearing time for oral evidence in Launceston, if such is relevant.

1. The Respondent's primary submission is as put in my correspondence of Tuesday morning, attached. Importantly, the reason for Mr Aitken's termination was the Secretary's determination that he had breached the Code of Conduct. The Commission has no power to conduct a *de novo* review of that decision, and nothing in the Commission's reasons of 1 September 2022 suggests otherwise. The Secretary's decision that Mr Aitken breached the Code of Conduct will stand and provide a valid reason for his termination, regardless of what facts the Commission might find on the evidence it hears. It follows that the only relevant evidence to the Commission's assessment of whether there is a "valid reason" for Mr Aitken's termination are the documents which were before the Secretary, such as the investigation report and Mr Aitken's responses, and related correspondence. The Commission's task is to review the documentary record to ascertain whether the Secretary fell into jurisdictional error in reaching his determination.

2. In the alternative to the above, the Respondent respectfully submits that the Commission ought to follow the Full Bench decision in *Gunston v Commissioner of Police* (T10313 and T10316, 13 February 2003). *Gunston* is the most recent statement by the Full Bench of the Commission's function on the hearing of an unfair dismissal application, and ought to be followed by the Commission in the present case. In *Gunston*, the Full Bench cited with approval and applied the test in *BI-Lo Pty Ltd v Hooper* (1992) 53 IR 224. The following dicta in *BI-Lo* thereby represents the ratio of the decision in *Gunston*. In *BI-Lo*, it was held that

   > Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

   Until *Gunston* is overruled by a decision of the Full Bench, it and the extract from *BI-Lo* above represent the law applicable in Tasmania. Applying *Gunston*, the Commission's role on the unfair dismissal application is to review the documentary record (the investigation report, Mr Aitken's responses, and related correspondence between the employer and employee) and such other evidence as is led, in order to determine (a) whether the employer conducted as full and extensive investigation into the alleged misconduct as was reasonable in the circumstances; (b) whether the employer gave the employee every reasonable opportunity and sufficient time to respond to the allegations; (c) whether the employer

honestly and genuinely believed and had reasonable grounds for believing on the information available at the time that the employee had committed the misconduct alleged; and (d) in light of any mitigating circumstances associated with the misconduct or the employee's work record, such misconduct justified dismissal. On this approach, it is no part of the Commission's role to hear direct evidence of whether or not the employee committed misconduct or make any finding of fact in relation to whether that misconduct occurred based on the evidence heard by the Commission; such further evidence is irrelevant to the Commission's task.

3. If either of the above two submissions are not accepted by the Commission, the Respondent will seek to prove at hearing that there is a valid reason for Mr Aitken's termination connected with his conduct."

[5] The first submission is essentially one of the submissions upon which the Respondent relied when I handed down my decision of 1 September 2022. However it may be that I did not consider that submission in sufficient detail.

[6] In my first decision I determined that, in essence, the role of the Commission determining the nature of the hearing is procedural.[2] I also noted in respect to Parliament's intention, at the time at which some relevant amendments came into force as exposed by the second reading speech that much of what was included in the amendments to the Act set down existing practice and precedents into codified form.

[7] The Respondent however relies on the fact that the decision of the Secretary finding that there was a breach of the Code of Conduct is an exercise of statutory power and that the Commission is not authorised to review that exercise of statutory power.

[8] The Respondent put it as follows during argument:

"So, ultimately, that shows that the reason for termination was the Secretary's finding under s10 of the State Service Act, that Mr Aitkin had breached the State Service Act Code of Conduct, which is contained in s9 of the Act. So, when it comes to the application of the Industrial Relations Act, plainly, we have an application under s 29(1A)(a) for an industrial dispute, a hearing of an industrial dispute, in relation to termination of employment of a former employee. We say that the criteria for a criteria applying to disputes relating to termination of employment in s30 applies, and that the primary issue, if I can put it that way, is whether there is a valid reason for the termination, connected with capacity, performance or conduct of the employee on which the employer bears the onus of proof.

Now, the plain answer is that the valid reason is the reason as provided by the State Service Act, which is that the Secretary, acting as the Minister's delegate, had found Mr Aitkin in breach of the Code of Conduct. That finding of breach of the Code of Conduct is a valid reason for termination connected with the conduct of the employee. And importantly, that exercise of statutory power will stand regardless of whatever decision, with respect to this decision, might otherwise come to on whatever evidence it might hear on an unfair dismissal application.

So, the submission that I'm putting now does not seek to cavil with anything that was put in your reasons of 1 September 2022, with respect, President.

---

[2] Ibid, [39] – [41].

Because, regardless of the Commission's ability to hear further evidence, the ultimate point is that any finding that the Commission might make in relation to the facts on the evidence that it hears will not have operation of setting aside the Minister's finding of breach – or the Secretary's finding of breach, under s10 of the State Service Act, and therefore, there will always be a valid reason for termination, notwithstanding that the Commission might come to a different view on the evidence that it later hears on an unfair dismissal application."

[9] Also, during argument I suggested the task was one of statutory interpretation. That is, the Commission would be permitted to effectively overturn the finding of a breach by the Secretary if the Act made it tolerably clear that it could do so. The Respondent did not, on this occasion accept that proposition. The position now taken is a change of position from that taken by the Respondent in submissions which led to the decision of 1 September 2022. During argument on that occasion, and in its written submissions, the Respondent said that where the legislature had expressly conferred power on a statutory decision maker to make a decision, no implication may be drawn that another statutory decision maker has power to review that decision without clear and unmistakable language of such power.[3]

[10] In my view, however, that contention is correct. If the Act makes it clear that the Commission is permitted to review the issue of a valid reason, then it may do so. In my view, the Act does make it clear that the Commission is permitted to review the decision of the Secretary that there was a valid reason to terminate the employment of an employee.

[11] In the first Aitken decision, I noted that s 30, upon which the Respondent relies, said nothing about the manner in which the Commission is to conduct the hearing under s 29.[4] I also noted that in my view, the purpose and objects of the Act would be best facilitated by a construction enabling the Commission to hear and determine the industrial dispute relating to termination of employment in accordance with procedures laid down elsewhere in the act, in particular section 21. That is that the Commission could hear direct evidence relating to the issues in dispute. I adhere to those views.

[12] An examination of section 31 is of assistance. Section 31 provides as follows:

"31. Orders arising from hearings

(1) Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken.

(1A) Before deciding whether or not to make an order in respect of an industrial dispute relating to termination of employment, a Commissioner is to give effect to the provisions of section 30.

(1B) If a Commissioner, in hearing an industrial dispute relating to termination of employment, finds that an employee or a former employee has been unfairly dismissed, the Commissioner may –

---

[3] Ibid, 16.
[4] Ibid, [36].

(a) if he or she believes it to be appropriate, order reinstatement or re-employment of the employee or former employee; or

(b) if in the Commissioner's opinion reinstatement or re-employment is impracticable, order that the employer pay the employee or former employee an amount of compensation, instead of reinstatement or re-employment, that the Commissioner considers appropriate in the circumstances, subject to section 30(12) .

(1C) A Commissioner, in hearing an industrial dispute relating to termination of employment resulting from redundancy, may make an order in respect of severance pay for an employee or former employee whose employment is to be, or has been, terminated.

(2) A Commissioner shall not make an order under this section –

(a) that is inconsistent with the provisions of any Act dealing with the same subject-matter; or

(b) that makes an award or that varies or creates a provision of an award.

(3) Notwithstanding subsection (2) (b), a Commissioner may make an order requiring that an application be made under section 23 or 43.

(4) An order under this section does not have effect so as to require any person to contravene, or fail to comply with, an award or to commit an offence, or to do an act which, if the order had not been made, would render that person liable to any legal proceedings.

(4A) The Registrar must cause a copy of an order made by the Commission to be served on –

(a) any person to whom the order applies; and

(b) any party to the hearing of the industrial dispute.

(5) A person shall not contravene, or fail to comply with, a direction contained in an order under this section.

Penalty: Fine not exceeding 50 penalty units.

(6) A person is not guilty of an offence under subsection (5) in respect of a direction made under this section unless a notice containing a copy of that direction has been served on him.

(7) An order under this section shall be deemed to have been served on the person to whom it applies if –

(a) where that person is a member of an organization – the order has been served on those office bearers of the organization who attended the relevant hearing; or

(b) where that person is not a member of an organization – a copy of the order has been published in a newspaper circulating in the locality in which that person is employed."

[13] It can be seen that section 31 (1) provides that the Commissioner may, by order in writing, direct that a thing is to be done or an action is to be taken. Directing that a thing is to be done or that the action is to be taken is obviously a direction to the employer. The employer is the Minister[5]. The Head of the State Service performs the functions of the Minister.[6] In respect to investigations into breaches of the Code of Conduct it is the Head of Agency who conducts those investigations and makes those findings on behalf of the Minister.[7] In turn the Head of Agency is permitted to delegate those functions.[8] In respect to investigations into alleged breaches of the Code of Conduct the delegate is often the Secretary of the relevant department.

[14] It may be seen therefore that a decision that there is a breach of the Code of Conduct and the sanction imposed are decisions of the Minister and that the decisions are made by virtue of the statutory powers granted under the *State Service Act*. Accordingly the *Industrial Relations Act* empowers the Commission to direct the Minister to do a thing or take specified action. That is to direct the exercise of statutory power by the Minister (or his or her delegate including the Head of the State Service. That would include taking action in respect to the finding that the Minister made (by him or herself or by his or her delegate) in respect to the investigation into the conduct of the employee or the sanction imposed as a result of those findings.

[15] It is to be noted that section 31 (1B) of the act provides that the Commissioner may order reinstatement or re-employment. It is significant that the provision is discretionary or enabling. That is, "may" is to be construed in accordance with section 10A of the *Acts Interpretation Act 1931 (Tas)* as being discretionary or enabling, as the context requires[9]. Subsection 31(1B) therefore, in addition to any orders that the Commission might make in accordance with section 31(1), empowers the Commission to make the orders of reinstatement, re-employment or compensation as may be appropriate.

[16] Properly understood therefore an order made, for example for reinstatement, is in fact a direction to the Minister pursuant to subsections 1 and 1B of section 31 that the employee be reinstated to his former employment. In my view Parliament has created clear power to the Commission to make an order requiring the Minister to take action even where that action is inconsistent with the finding of a breach of the Code of Conduct.

[17] It follows therefore that the Commission is empowered to undertake a review of the exercise of the statutory power of the Minister to find a breach of the Code of Conduct and that it may do so by a hearing de novo, in the sense of the third option referred to in the Respondent's email (see paragraph 4 above). Such a finding is also consistent with my decision published in these proceedings on 1 September 2022.

[18] I turn now to the second issue raised by the Respondent, namely the applicability of the test in *BI-LO Pty Ltd v Hooper*[10] and the manner in which the Respondent says the Commission is to apply that test. I venture to repeat the test:

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it

---

[5] State Service Act 2000, s 14
[6] Ibid s 20(3)
[7] Employment Direction 5
[8] State Service Act s 21
[9] The amendments to s 30 of the Industrial Relations Act came into effect after the commencement of the Justice Legislation (Miscellaneous Amendments) Act referred to in s 10A of the Acts Interpretations Act.
[10] (1992) 53 IR 224.

demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

[19] The Respondent, without referring to authority, submits that the Commission's role is to review the documentary record and such other evidence as is lead in order to determine the various matters set out the test in BI-LO[11]. The Respondent submits that it is no part of the Commission's role to hear direct evidence of whether or not the employer committed misconduct or make any finding of fact in relation to whether that misconduct occurred based on the evidence heard by the Commission. As I say the difficulty with that submission is that it is without the benefit of authority. Further, it is not what occurred in BI-LO and nor is it what happened in *Commissioner of Police v Gunston*[12] an authority relied on by the Respondent. In both cases at first instance the Commission heard evidence and made a determination for itself as to what occurred. Having made various findings the Commission in each case applied the test in BI-LO on the basis of those findings.

[20] So, for example in *Commissioner of Police v Gunston* the Commissioner at first instance made findings of fact and determined that the behaviour of which the applicant was guilty did not constitute a deliberate flouting of essential contractual conditions (said to give rise to an entitlement to summarily dismiss the employee). As a result of that finding the Full Bench on appeal determined that the test in BI-LO was not met. Further, in Gunston the Full Bench also applied *Selvachandran v Peterson Plastics Pty Ltd*[13] which held that a valid reason for termination of employment will exist where the employer had a sound, defensible or well-founded reason for termination of the applicant's employment. In light of the Commissioners findings on the evidence the full bench determined that the Commissioner of Police had not demonstrated a sound, defensible or well-founded reason for termination.

[21] It seems clear that a consideration of direct evidence lead at a hearing is relevant to the objective part of the test to be applied in BI-LO. So where the employer has made an error in its findings of fact regarding the alleged conduct, it will not have reasonable grounds for believing, on the information available to it, that the employee was guilty of the misconduct alleged. The relevance of direct evidence led before the Commission is that it at least engages the objective component of the test. If the conduct did not occur then objectively there would be no reasonable grounds for the employer to believe the misconduct had occurred.

[22] Direct evidence was also led in a more recent case in Tasmania expressly applying the BI-LO test, namely *McKenzie v Chubb Protective Services*.[14]

[23] It appears therefore that cases applying the BI-LO test have heard direct evidence going to elements of that test. The fact that they have done so does not necessarily mean that procedure is correct. However the reasons I expressed in my

---

[11] Although the reference to other evidence as may be led is inconsistent with later submissions.
[12] T10310; T10316.
[13] (1995) 62 IR 371.
[14] T6816 of 1997.

1 September 2022 decision and my reasons above do not result in a conclusion that it is inappropriate to hear direct evidence even where the BI-LO test is to apply.

[24] In respect to the applicability of the BI-LO test I note that immediately preceding the passage referred to by the Respondent the Full Bench said the following:[15]

> "In a case such as the present one where the employee is dismissed for misconduct in respect of dishonest dealing with the employer's property we do not believe it is a correct test to state as did the learned trial judge that the employer must prove, on the balance of probabilities, on the evidence submitted to the Commission, that the employee actually stole the goods, before it will escape a finding that a dismissal based upon such an alleged theft is to be treated as harsh, unjust or unreasonable.
>
> There can be no doubt that in line with decided authority the ultimate task pursuant to s 31 is for the Commission to determine whether when viewed objectively the dismissal may be properly adjudged to fall within the statutory criteria of harsh, unjust or unreasonable.
>
> An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just." (Thereafter the passage cited by the Respondent appears).

[25] It will be noted that the statutory test that was being applied was one of criteria of harshness, unjustness or unreasonableness. That is not the statutory test in Tasmania which is one of unfairness. Further, the criteria identified by the Full Bench in BI-LO appears to engage the questions of harshness, unjustness and unreasonableness. The Full Bench in Gunston also did not purport to apply the statutory test of unfairness but rather relied on *Selvachandran v Peterson Plastics Pty Ltd.*

[26] In my view the procedure under the *Industrial Relations Act* is no different whether the BI-LO test applies in so far as the Commission is permitted to undertake a hearing de novo as to both the question of valid reason and unfairness. I do not need to decide whether or not BI-LO should be followed in the Tasmania. My inclination is that it may be too narrow in that it is a test engaging with is the question of whether or not the termination was harsh, unjust or unreasonable which, as I have referred to, is not the test applicable in Tasmania. That is not to say that the questions of harshness, unjustness or unreasonableness may not be appropriate as an aid in determining whether a termination is unfair. However it should not limit the circumstances which might amount to unfairness.

[27] In my view, the third alternative set out in the Respondent's submissions is the correct approach and that the Commission has power to hear direct evidence on the questions of whether there was a valid reason for termination and whether the termination was fair. The Commission is empowered to review the exercise of statutory power of the employer and to hear direct evidence whether there was a valid reason for termination and whether the termination was unfair because it can by order direct the employer that a thing is to be done or that action is to be taken noting that the employer is nevertheless exercising statutory power. That is so even if the test to be applied is the test referred to by the Respondent in BI-LO.

---

[15] *BI-LO Pty Ltd v Hooper* (n 5), 229.

[28] I shall hear the parties as to the further disposition of the matter.

D J Barclay
PRESIDENT

Appearances:
R Weiss for the Applicant
M Jehne for the Respondent

Date and place of hearing:
22 November 2022
HOBART