**TASMANIAN INDUSTRIAL COMMISSION**

***Industrial Relations Act* 1984**

s70(1) appeal against decision

**Geoffrey Lionel Wolf**

**(T14429 of 2016)**

**and**

**Minister administering the State Service Act 2000/ Department of Justice**

COMMISSIONER M A GAY

COMMISSIONER T LEE

COMMISSIONER N WILSON

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|  | HOBART, 15 November 2016 |
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**DECISION**

**Appeal against a decision handed down by Acting President Wells on 18 July 2016 – T14390 of 2016 – jurisdiction – competency of appeal – threshold issue – decision did not contain an order – decision incapable of appeal – no appeal lies**

1. This is an appeal pursuant to s.70(1)(b) of the *Industrial Relations Act* 1984 (the Act) against a decision of Acting President Wells in Matter T14390 of 2016 issued on 18 July 2016 relating to the alleged unfair termination of Mr Geoffrey Lionel Wolf (the Appellant). The Respondent to both the original application and this appeal is the Minister administering the State Service Act 2000 (MASSA).
2. The Appellant seeks to appeal the Acting President’s decision in which it was determined that there was no jurisdiction for the Commission to deal with his application for unfair termination. The Acting President made this determination based on her finding that the Appellant was unable to “…fulfil the criteria of s.30(1) of the Act.”[[1]](#footnote-2) The Health Services Union, Tasmanian Branch (HSU) filed a Notice of Appeal on behalf of Mr Wolf on 25 July 2016 setting out six grounds of appeal. This Notice of Appeal was filed within the 21 day timeframe envisaged in s.71(1) of the Act.

**Background**

1. On the same day the appeal was lodged, the Respondent raised a jurisdictional objection as to the competency of the Appeal. The basis for the jurisdictional objection is that the decision of the Acting President did not contain an order made pursuant to s.31(1) of the Act and as such is incapable of appeal under s.70(1)(b).
2. Directions were issued on 1 August 2016. The directions provided for the filing of written materials relevant to the jurisdictional objection. The directions also required that the parties advise if they sought a hearing in the matter and if so to advise by 31 August 2016. The Respondent and Appellant filed written submissions in accordance with the directions.
3. HSU advised on 29 August on behalf of the Appellant that their written submissions adequately outlined the Appellant’s position regarding the jurisdictional objection without the need for a hearing. The Respondent to the appeal advised on 21 September that it was content for the jurisdictional matter to be determined on the written submissions filed.

***The jurisdictional objection***

1. The Appellant’s appeal is made under s.70(1)(b) of the Act. The Respondent submits that the jurisdictional objection relies on, in essence, the fact that Acting President Wells did not make an order under s.31(1) of the Act in dismissing the application. The concluding paragraph of the decision of the Acting President is as follows:

*“Having determined that Mr. Wolf is unable to fulfil the criteria of s.30(1) of the Act, there is no jurisdiction for the Commission to deal with this application for unfair termination. I dismiss the application.”[[2]](#footnote-3)*

1. The Respondent submits that it is clear from this part of the decision that the Acting President makes no order under s.31(1) and requires nothing to be done by any party to resolve the dispute.
2. The wording of s.70(1) sets out the various circumstances in which an appeal may be made to a Full Bench of the Commission. S.70(1)(b) provides that an appeal may be made against, “…an order made by a Commissioner under s.31(1)…” Sections (a) and (c) set out other circumstances in which an appeal can be made. However, it is apparent, and it is not submitted by either party that either (a) or (c) is relevant to this matter. It follows that the only basis upon which this particular appeal can be competent is if it satisfies the requirement of s.70(1)(b).
3. The Respondent submits that the wording of s.70(1)(b) is clear and unambiguous in that an appeal can only be made against “an order”. As no order was made by the Acting President then there can be no right of appeal. In support of this particular construction of the terms of the Act, the Respondent refers to and relies on the decision of the Full Court of the Supreme Court of Tasmania in *Bennett v Bartlett Minister Administering the State Service Act 2000 [2009] TASSC 95* (the Bennett decision) and two subsequent decisions of Full Benches of this Commission that have applied the decision in *Bennett*.[[3]](#footnote-4)
4. The Appellant in its submissions acknowledges that for the appeal to have competency it must show, in the circumstances of this matter, that there was an order made by a Commissioner under s.31(1) after a hearing relating to an industrial dispute in respect of the mode, terms and conditions of employment or any termination of employment. As it is not disputed that there was in fact a hearing relating to an industrial dispute in respect of a termination of employment, the Appellant submits the issue to be determined is whether or not there was an “order” pursuant to s.31(1). On this point, the Appellant submits that the “decision” did contain an “order” and indeed should have been entitled as an “order” rather than a “decision”.
5. In pursuing this line of argument, the Appellant submits that it agrees with, subject to a point of statutory construction, the Full Bench of this Commission in *Bennett v Minister Administering the State Service Act 2000* (T13167 of 2008) and submits this decision allows for a construction of the words in s.31(1), taking a broad approach to construction, to “empower the Commission to settle the dispute by dismissing the application by ‘order’ that the application be dismissed.”[[4]](#footnote-5)
6. The Appellant acknowledges that a Full Court of the Supreme Court takes a different view to that of the Appellant. Indeed, Justice Porter overturned the decision of a Full Bench of this Commission in T13167 of 2008, the decision on which the Appellant seeks to rely, and a Full Court of the Supreme Court dismissed the subsequent appeal against the decision of Justice Porter. The Appellant agrees that the Full Court decision of the Supreme Court correctly held “the court’s principal task is to have regard to the provisions of the Act itself”.[[5]](#footnote-6) Having made that concession, the Appellant makes the following submission:

*“Unfortunately, however, Dr. Bennett did not take either Justice Porter, at first instance, or the Full Bench justices to all of the relevant provisions of the Act. The justices of the Full Bench only based their decision on the words of s.70(1)(b) and s.31(1) itself. It is submitted that if they had been taken to and considered all of the relevant sections of the Act their understanding of what was meant by “orders” in s. 31(1) would likely have been very different.*

*In our submission where new argument is raised which wasn’t put before the justices previously considered the matter, the commission in entitled to consider the changed circumstances and argument and make a finding unencumbered by precedent which was established without the benefit of or consideration of the new argument. Effectively new argument may distinguish a matter from precedent.*

*It is noted s.20(1)(a) of the Act requires that the Commission-*

1. *Shall act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms;*

*When considered in complete isolation to the rest of the Act the words of s.31(1) may be seen to be ambiguous or have a meaning ascribed to them by the Justices of the Supreme Court. However in our submission, it is incorrect to isolate the words of a particular section outside the context of entire (sic) Act and all the provisions of the Act (a point agreed to by the Full Bench in Bennett at 15)*

*Once considered in the context of the whole of the Act any ambiguity or uncertainty regarding 31(1) in our submission, falls away and it becomes entirely clear that the interpretation is as we have provided above and that the Commission indeed has no alternative, in dismissing an application in regard to an industrial dispute and termination, but to do so by way of an order, which is then subsequently appealable.”[[6]](#footnote-7)*

1. The Appellant emphasises the importance of interpreting provisions in context and provides authority for the correct approach to construction of industrial instruments. The Appellant then sets out a preferred construction of s.31(1) of the Act, taking into account other provisions of the Act including s.69 and s.70 and s.19. It is not necessary in light of our determination in this matter to deal in detail with that aspect of the Appellant’s submissions. It is sufficient to note that the construction of the relevant terms of the Act, preferred by the Appellant leads back ultimately to what appears to be the central contention of the Appellant. That contention is “the dismissal of the application could necessarily only be by way of (an) order” and “whilst in the current matter the AP did not use such terminology, the effect was the same”.[[7]](#footnote-8)
2. There is also what appears to be an alternate submission put to the effect that if the Commission considers the provision to be ambiguous then we are entitled to refer to extrinsic materials. Reference is made to the decision of a Full Bench of this Commission in *Shepherd v Minister Administering the State Service Act 2000/Department of Justice* (T14400 of 2016) (*Shepherd*) where, after considering the Second Reading speech of the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act 1992,* the Full Bench concluded “quite simply, the expressed intention to have appeal rights expanded to cover virtually any decision was not achieved in the Bill that was enacted”.[[8]](#footnote-9) However, the Appellant submits that “the Bill did achieve the desired outcome - it provided appeal rights for persons or entities that reasonably could be expected to have appeal rights and provided appeal rights to all findings that were jurisdictionally available. In regard to appeal to s.31(1) this could only be by way of an order.”[[9]](#footnote-10)

**Consideration**

1. In line with the authority established in *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC97 at [20] per Crawford J, the Full Bench is obliged to determine whether it has jurisdiction in relation to an Appeal.
2. It is clear that the Acting President did not make an order under s.31(1) and requires nothing to be done by any party to resolve the dispute. S.70(1)(b) provides that an appeal may be made against, “…an order made by a Commissioner under section 31(1)…” It is not in contest that the only basis upon which this particular appeal can be competent is if it satisfies the requirement of s.70(1)(b). The effect of the Appellant’s submissions is that it does, the Respondent’s, that it does not. The decision of *Bennett* in the Full Court of the Supreme Court referred to by both parties is directly relevant to answering the question at paragraphs 16 to 18:

*“16. The only right of appeal relied upon by the appellant is that given by s70(1)(b). It permits an appeal to the Full Bench against “an order made by a Commissioner under section 31(1) after a hearing relating to an industrial dispute in respect of … any termination of employment … by … the party who applied for the hearing …”. The question that arises is whether the order of dismissal that was made by the Commissioner was an order under s31(1). It is in the following terms:*

*“(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.”*

*17. That provision authorises, for the purpose of preventing or settling an industrial dispute in respect of which a hearing is convened, the making of an order directing that anything required to be done, be done, or that any action required to be taken, be taken. No order of that nature was made by the Commissioner. The language used in s31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used.*

*18. By virtue of s30(6), the appellant bore the onus of proving to the Commissioner that his employment was unfairly terminated. If he failed to persuade the Commissioner of that, the Commissioner was authorised by s21(2)(c)(iv) to dismiss the matter. That is what occurred here. There is nothing in s70(1)(b) authorising an appeal from a dismissal.”[[10]](#footnote-11)*

1. Consistent with the submissions of the Respondent in this matter, the Supreme Court determined that s.70(1)(b) does not authorise an appeal against the dismissal of an application for unfair dismissal remedy. Rather, an appeal can only be made against “an order”. As no order was made by the Acting President then there is no right of appeal.
2. We note our determination in this matter is consistent with the approach taken in two relatively recent decisions of Full Benches of this Commission that have applied the decision in *Bennett*.[[11]](#footnote-12) Having regard to the authority in *Bennett*, we are satisfied that no order was issued by the Acting President in her decision in T14390 of 2016 and therefore no appeal lies.
3. It follows that we must reject the submissions of the Appellant. On the first point, the Appellant’s submission that the “decision” did contain an “order” and indeed should have been entitled as an “order” rather than a “decision” is unsustainable for two reasons. Firstly, it is clear enough from the decision that it did not refer to any order. Secondly, even if it did so either implicitly or explicitly, the Full Court of the Supreme Court of Tasmania have made it clear that “The language used in s31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used”.[[12]](#footnote-13) It is important to bear in mind that in the original decision of Commissioner McAlpine that was the subject of the ultimate appeal to the Supreme Court, the decision included the following concluding paragraphs:

***“****[477] The applicant failed to prove the termination to be unfair, as is required by s30(6) of the Act. As a consequence, the applicant was not unfairly dismissed, and I so find.*

*[478]The application is dismissed, and I so Order.”[[13]](#footnote-14)*

1. In the decision of Justice Porter, His Honour found that the order of the Commissioner was not an order under s.31(1) of the Act and His Honour’s findings on this point was not disturbed on appeal by the Full Court.[[14]](#footnote-15)
2. The second point is essentially that a different construction of the Act is to be preferred to that adopted by the Supreme Court. The Appellant argues that this course is open to us asnew argument has been raised in this appeal which was not put before the Full Court previously, and this Full Bench can make a finding unencumbered by precedent which was established without the benefit of, or consideration of the new argument. We reject this proposition. In *Bennett,* consistent with authority, the Full Court searched for the meaning of the Statute, having particular regard to the ordinary meaning of the words in the legislation and having done so, has determined the meaning of the provision. We have been taken to no authority for the proposition that new argument or changed circumstances permits us to depart from judicial consideration so directly on point. While the Full Court of the Supreme Court may not have adverted to various relevant sections of the Act it will be taken that the Full Court has had regard for the Act in its entirety. There is no warrant for us to assume to the contrary. We are not persuaded by the Appellant’s submissions and see no reason not to abide by the principles in *Bennett*.
3. It follows from the above, that we also reject the alternate submission that the Bill that was enacted gave effect to the stated intention in the Second Reading Speech to provide appeal rights to virtually any decision. In this respect we agree with the observation of the Full Bench in *Shepherd* that the expressed intention was not achieved, having regard to the construction of the Act determined in *Bennett*.

**Conclusion**

**[23]** For the reasons above, we dismiss the appeal as no appeal lies against the decision of the Acting President.



Michael Gay

**COMMISSIONER**

***Date and place of hearing:***

Determined on the papers

James Eddington for the Applicant

Mathew Johnston for the Respondent

1. T14390 of 2016 [31] [↑](#footnote-ref-2)
2. T14390 of 2016 [31] [↑](#footnote-ref-3)
3. T14002 of 2012 and T14400 of 2016 [↑](#footnote-ref-4)
4. Submissions of the Appellant [5] [↑](#footnote-ref-5)
5. *Bennett v Bartlett Minister Administering the State Service Act 2000* [2009] TASSC 95 [15] [↑](#footnote-ref-6)
6. Submissions of the Appellant [7] – [8] [↑](#footnote-ref-7)
7. Submissions of the Appellant [39] [↑](#footnote-ref-8)
8. T14400 of 2016 [22] [↑](#footnote-ref-9)
9. Submissions of the Appellant [43] [↑](#footnote-ref-10)
10. [2009] TASSC 95 [16] – [18] [↑](#footnote-ref-11)
11. T14002 of 2012 and T14400 of 2016 [↑](#footnote-ref-12)
12. [2009] TASSC 95 [17] [↑](#footnote-ref-13)
13. T12919 of 2007 [477] [478] [↑](#footnote-ref-14)
14. Minister Administering the State Service Act v Leary and Others [2009] TASSC 24 [↑](#footnote-ref-15)