**TASMANIAN INDUSTRIAL COMMISSION**

***Industrial Relations Act* 1984**

s70(1) appeal against decision

**Alastair Paul Shepherd**

**(T14400 of 2016)**

**and**

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

ACTING PRESIDENT N WELLS

COMMISSIONER T LEE

COMMISSIONER N WILSON

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|  | HOBART, 26 MAY 2016 |
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**DECISION**

**Appeal against a decision handed down by President Abey on 18/2/16 – T14368 of 2015 – 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 s70(1)(b) of the *Industrial Relations Act* 1984 (the Act) against a decision of President Abey in Matter T14368 of 2015 issued on 18 February 2016 relating to the alleged unfair termination of Mr Alastair Paul Shepherd (the Appellant).

**[2]** The Appellant sought to appeal the President’s decision which held that the Appellant’s termination was not unfair and the application was dismissed. The Appellant filed his Notice of Appeal on 10 March 2016 listing five pages of appeal grounds. This Notice was filed within the 21 day timeframe envisaged in section 71(1) of the Act.

**Jurisdictional point**

**[3]** On 24 March 2016 the Respondent raised a jurisdictional issue as to the competency of the Appeal. On 4 April 2016 the Full Bench wrote to the Appellant notifying him of the jurisdictional point raised by the Respondent and advising of the necessity for a preliminary hearing to hear the parties on the point of jurisdiction.

**[4]** Directions were issued to the parties on 4 April 2016 and the matter was listed for preliminary hearing which took place on 11 May 2016. Submissions in accordance with the directions were filed. The Appellant represented himself. Ms T Banman and Mr B Charlton appeared for the Respondent.

**[5]** Following the hearing of the Appeal the Full Bench identified matters arising from the Second Reading speech of the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992which were considered relevant to the jurisdictional matter to be determined. Submissions were sought, and received, from the parties. Those submissions[[1]](#footnote-1) have been considered by the Full Bench in the determination of this matter.

***Is the Appeal Competent?***

**[6]** The Appellant’s appeal is made under s70(1)(b) of the Act.

**[7]** The respondent submits that 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]](#footnote-2)

**[8]** The Respondent is of the opinion that whilst the President was invested with jurisdiction to make an ‘order in writing’ directing *“that anything should be required to be done, or that any action should be required to be taken, for the purpose of… settling the industrial dispute…”*,[[3]](#footnote-3) he determined that the Appellant’s termination was a decision open to the employer, declined to interfere with that termination and dismissed the Appellant’s originating application.[[4]](#footnote-4)

**[9]** The Respondent contends that the wording of s70(1)(b) is clear in that a right to appeal a matter to a Full Bench of the Tasmanian Industrial Commission only exists if the appeal is *“made against an order made by a Commissioner under section 31(1)”.* It follows, the Respondent says, that as the President did not make an order pursuant to section 31 of the Act, the Supreme Court of Tasmania decision in *Bennett v Bartlett Minister Administering the State Service Act [2009] TASSC 95*, per Crawford CJ, Evans and Tennent JJ (*Bennett*) is relevant.

**[10]** The Appellant submits that he had made an application as to the termination of his employment under both s29(1A) of the Act and also under s50(1)(b) of the *State Service Act 2000* (the SS Act),however only the s29(1A) application under the Act had been progressed.

**[11]** Further the Appellant submits that the hearing before the President under s29 of the Act was a de novo process which required the President to determine afresh the matters involved in the termination of his employment and requiring findings be made which went to the substance of the decision. The Appellant says therefore the appeal is within jurisdiction.[[5]](#footnote-5)

**[12]** The Respondent relies on s50(3) of the SS Actwhich provides:

*“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”.*

**[13]** The Full Bench also notes that s50(4) of the SS Act provides *“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.”* The appropriate industrial tribunal referenced in s50(4) is the Tasmanian Industrial Commission and the appropriate legislation dealing with unfair terminations is s29(1A) of the Act. This is the section of the Act that was used by the Appellant to progress his unfair termination application before President Abey.

**[14]** It follows that we are of the view that the Appellant’s submissions, as they relate to the inference of some error arising due to the non-progression of his s50(1)(b) State Service review, are without merit. There is no jurisdiction vested in the Tasmanian Industrial Commission to hear and determine State Service reviews under s50(1)(b) which relate to terminations of employment.

**[15]** Relevantly the Full Court of the Supreme Court of Tasmania in *Bennett* held 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.

**[16]** Having regard to the authority in *Bennett*, we are satisfied that no order was issued by the President in his decision in T14368 of 2015 and therefore no appeal lies.

**Observation**

**[17]** In *Bennett,* Evans J agreed with the reasons of the Chief Justice and supplemented them, at paragraph 22, as follows:

22. I add that the effect given to the words “an order made by a Commissioner under section 31(1)” in the *Industrial Relations Act* 1984 (“the Act”), s70(1)(b), by the decision that is upheld by this appeal is not novel and accords with some past decisions of the Full Bench of the Tasmanian Industrial Commission. Those words are crucial to the jurisdiction of the Full Bench to hear the appeal in question. They were introduced into s70 by the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992 which came into effect on 1 March 1993. In *Tasmanian Chamber of Commerce and Industry Ltd* (T4774 of 1993), the Full Bench dealt with a number of threshold points raised on an appeal from proceedings that involved a dispute between Harriett Gunn and Fahan School in relation to Ms Gunn’s employment. Deputy President Robinson, who had heard those proceedings, found that Ms Gunn had been unfairly dismissed and ordered Fahan School to pay her a sum of money. In reasons for decision dated 24 March 1994, the Full Bench said that as the appeal provisions dealing with s31(1) orders were relatively new, it was necessary to provide some guidance on them for the future. The effect of the Full Bench’s decision was to recognise that for presently relevant purposes, the right of appeal was confined to orders of a Commissioner under s31(1), and note that there was no provision for an appeal against a decision of a Commissioner in relation to an interlocutory matter, such as the adjournment of a hearing, and there was no provision for an appeal against a finding that a person had been unfairly dismissed. The Full Bench did, however, conclude that where an order based on a finding that a person had been unfairly dismissed had been made pursuant to s31(1), an appeal would lie against that order. The obverse of this decision is that a finding that a person had not been unfairly dismissed could not be the subject of an appeal as no order pursuant to s31(1) could be made arising from that finding. The outcome of *Australian Mines and Metals Association (Inc) for Tasmanian Electro Metallurgical Company Pty Ltd v Paul John Rundle* (T8454 of 1999), a decision dated 18 August 1999, was to the same effect. In that case, an endeavor was made to appeal the decision on an application for an extension of time within which to bring proceedings seeking an order under s31(1). The Full Bench held that until an order under s31(1) had in fact been made, it had no jurisdiction to hear an appeal.

**[18]** The comments of Evans J in *Bennett* have given rise to our consideration of the Second Reading speech to the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992. Relevantly, the Second Reading speech provides at paragraph 46:[[6]](#footnote-6)

46. Section 70 Rights of Appeal

This section has been completely re-written. In general terms, appeal rights have been expanded to cover virtually any decision of a Commissioner sitting alone or by the Registrar. Rights of appeal have been extended to include any organization, party or person who could reasonably claim to be affected by any particular decision.

Of special note, additional appeal provisions are now available in respect of:

1) (1)(b) A decision to order or not order compensation in circumstances of unfair dismissal, retrenchment or redundancy.

2) (1)(c) and (d) An order to reinstate or re-employ, or not, as the case may be… (our emphasis).

**[19]** In *Bennett,* the Full Court has, consistent with authority, searched for the meaning of the Statute, having particular regard to the ordinary meaning of the words in the legislation. Having done so, the Full Court has determined the meaning of the provision.

**[20]** The Second Reading Speech has the status of secondary material. As such it cannot displace the clear meaning of the text of a provision (see *Northern Territory v Collins [2008] HCA 49, at [99], per Crennan J*).

**[21]** However, we note that the Second Reading speech may not have been before the Full Court in *Bennett*. Nor does it appear to have been contemplated by the Full Bench of this Commission in *Australian Mines and Metals Association (Inc) for Tasmanian Electro Metallurgical Company Pty Ltd v Paul John Rundle* (T8454 of 1999).

**[22]** Against that background, it is appropriate for us to note a difference between the stated intent of the legislation as set out in the Second Reading speech and the legislation as passed and construed in *Bennett*. Quite simply, the expressed intention to have appeal rights expanded to cover virtually any decision was not achieved in the Bill that was enacted.

**Conclusion**

**[23]** We dismiss the appeal as no appeal lies against the decision of the President.

N M Wells

**Acting President**

***Appearances:***

*Mr A Shepherd,* the Appellant

*Ms T Banman,* for the Respondent

*Mr B Charlton,* for the Respondent

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

2016

11 May

Fair Work Commission, Hobart

***Further written submissions received:***

2016

20 May

1. Exhibit A2 – Further written submissions of the Appellant; Exhibit R2 – Further written submissions of the Respondent [↑](#footnote-ref-1)
2. Exhibit R1 – Written submissions of the Respondent [↑](#footnote-ref-2)
3. *Industrial Relations Act 1984,* s31(1) [↑](#footnote-ref-3)
4. Paragraphs [143] - [144] of Abey P’s decision T14368 of 2015 [↑](#footnote-ref-4)
5. Exhibit A1 – Written submissions of Appellant [↑](#footnote-ref-5)
6. *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992, Bill number 1992\123, Second Reading speech, paragraph 46 [↑](#footnote-ref-6)