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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.45 appeal against the decision [Print P2889] issued by

Commissioner Blair on 8 July 1997

Mt Alexander Hospital

and

Health Services Union of Australia

(C No. 34754 of 1997)

s.127(2) application to stop or prevent industrial action

Mt Alexander Hospital

and

Health Services Union of Australia

(C No. 31564 of 1997)

Various employees Health and welfare services

SENIOR DEPUTY PRESIDENT MACBEAN

DEPUTY PRESIDENT DRAKE

COMMISSIONER MERRIMAN MELBOURNE, 22 JULY 1998

Application for orders under s.127 in respect of the ***Mt Alexander Hospital***

REASONS FOR DECISION

1. INTRODUCTION

This matter involves an appeal by **Mt Alexander Hospital** (the Hospital) against a decision of Commissioner Blair made on 8 July 1997 [Print P2889]. The decision the subject of appeal relates to a dispute between the Hospital and the Health Services Union of Australia (HSUA) over whether the Hospital was entitled to deduct the wages of employees for an entire shift where the employees concerned were not performing their full range of duties as a result of various work bans and limitations.

The relevant part of the decision is set out as follows [page 4]:

> *"Based on that wording of the Act, the Commission, in accordance with Clause 3 of the Strong Recommendation issued on 24 April 1997 and accepted by both parties determines that the Employer shall only deduct wages for the time that members actually took part in industrial action. They shall not be deducted for any time that they threatened to take industrial action but only when industrial action actually occurred.*
>
> *The Commission therefore believes that VHIA7 is irrelevant in terms of the total hours expressed as times the bans were actually in place.*
>
> *The Commission understands that it is a relatively simple enough exercise to go through the functions performed by each employee involved in industrial action and determine the amount of time they actually did not perform some of their functions as in accordance with their classification."*

The decision of the Commissioner had its origins in a dispute between the Hospital and the HSUA over the application of a 3% increase contained in a certified agreement.

The failure to resolve these differences resulted in work bans being applied by members of the HSUA and an application by the Hospital for s.127 orders against the union. The Commission dealt with the s.127 application on 12 April 1998 and issued the following orders [Print P0099]:

> *"The Commission, under section 127 of the* Workplace Relations Act 1996 *orders that members of the Health Services Union of Australia (`HSUA'), employed by* ***Mt Alexander Hospital*** *and engaged in any form of industrial action as defined by the* Workplace Relations Act 1996 *cease such industrial action as from 10.00 am, Saturday 12 April 1997.*

The Commission further orders that officers of the HSUA including Mr P Elliott, Mr F Carroll, Mr P Verlaan and Ms P Feegan cease from encouraging, advocating or recommending that members of the HSUA employed by ***Mt Alexander Hospital*** *continue to take industrial action.*

The Commission further orders that the HSUA continue to meet with management and or their representatives of ***Mt Alexander Hospital*** *over the issue in question in an environment free from industrial action as defined by the* Workplace Relations Act 1996 *until such time as this matter is resolved."*

Following the orders being issued a conference of the parties was held by the Commissioner on 24 April 1997. As a result of this conference, the Commissioner issued what he described as "a strong recommendation" in the following terms:

"1. The 3% back pay in this matter be paid in accordance with the agreement with the HSUA and the back pay be paid in the next full pay period from today's date.

2. The parties will confer over the total amount of time employees were involved in industrial action.

3. Once the total amount of time employees were involved in industrial action is agreed (if the parties cannot agree the parties shall bring the matter back to the Commission for resolution). Then the employees who took the industrial action shall have deducted from their next normal weekly wage the amount of agreed time (or that amount determined by the Commission)."

In the decision of 8 July, after setting out the above "strong recommendation", the Commissioner went on to state the following [page 2]:

"The matter now that the Commission has to determine is the application of s.187(A) of the Act. There is disagreement between the parties as to the amount of time that industrial action was actually in place and whether or not, now that the dispute is finished, the Employer should deduct payment for hours that industrial bans were in place. In summary, it would be the Union's strong point of view that the industrial action has ceased and the dispute has been resolved, therefore no payments should be deducted for the time that members had industrial bans in place."

2. INTERVENTION

The Commonwealth, pursuant to s.44 of the *Workplace Relations Act 1996* (the Act) intervened in the public interest.

3. THE APPEAL PROCEEDINGS

In the appeal proceedings we considered, as a threshold matter, whether the appeal was competent.

At the conclusion of submissions by the Hospital and the HSUA we gave a decision in transcript. The Commonwealth made no submissions on the competence of the appeal but did submit that it was undesirable, where a breach of a statute is involved, for parties to agree to be bound by recommendations of the Commission as this procedure does not resolve the issue and can lead to confusion and uncertainty.

Our decision in transcript was in the following terms [transcript, p.26]:

> *"MACBEAN SDP: We propose to announce our decision in this matter. In the matter, Mount Alexander Hospital has lodged an appeal under section 45 of the Act against the decision made by Commissioner Blair given on 8 July 1997. As a threshold matter to be determined, we invited the parties to make submissions on whether there is competent appeal before the Commission. After considering these submissions, we have decided there is not a competent appeal and accordingly the application by Mount Alexander Hospital is dismissed and we will publish our reasons subsequently."*

We now give our reasons.

In the appeal proceedings Mr Wood, counsel for the Hospital, submitted that the decision of the Commissioner was made under the powers conferred on him by the procedures for the prevention and settlement of disputes contained in the certified agreement [Doc M5025] at Appendix 2 in particular, paragraph (vi) which states:

> *"(vi) If the grievance still exists the matter shall be referred to the Australian Industrial Relations Commission for decision, which shall be accepted by the parties as ending the matter."*

Mr Wood relied on the provisions of s.170MH of the *Industrial Relations Act 1988 (* the former Act) and s.170LW of the Act which, it was submitted, provided for the granting of power to the Commission by the parties to a certified agreement.

Mr Wood submitted that the Commission was at large in deciding how to determine whether employees should have their entire wages for a shift deducted where they were not fulfilling their full range of duties due to the work bans. The Commissioner, having chosen s.187AA as the benchmark, was bound to apply it. In the submission of Mr Wood, the Commissioner, in deciding that employees should only have wages deducted for the time that members actually took part in industrial action, wrongly applied s.187AA. It was also contended that Commissioner Blair had failed to accord natural justice or procedural fairness. The incorrect application of s.187AA and the failure to accord natural justice or procedural fairness were appellable matters pursuant to s.45 of the Act and the appeal therefore was competent.

The HSUA contended that the appeal was not competent on the grounds that the Commissioner's decision on 8 July 1997 was not an award or order but a recommended determination of a matter in dispute between the parties, made with the agreement of the parties. As a consequence it could not be enforced by either party under s.178 of the Act.

The HSUA also submitted that the Commissioner was not exercising any jurisdiction conferred upon him by the Act. Accordingly, there cannot be any failure on the Commissioner's part to exercise jurisdiction either by failing to accord procedural fairness or by making some

jurisdictional error. It was also put that this position applied even if the Commission, contrary to their primary submission, was acting under the relevant section of the disputes procedure.

4. CONCLUSION

It was put that the Commissioner's decision of 8 July 1997 was made under the provisions of the dispute settling procedures in the certified agreement. This submission is not supported by the facts of the case.

At no time during the proceedings on 10 April 1998 did either the Hospital or the HSUA seek to invoke the dispute settling procedures of the agreement as the means of resolving the dispute. The only reference to the dispute settling procedures occurred at the commencement of proceedings on 10 April. Mr Corboy, for the Hospital, submitted to the Commissioner that the bans were in contravention of the dispute resolution procedures of the certified agreement. The Commissioner concluded the hearing on the s.127 application by making the following statement [transcript before Blair C, p. 16]:

> *"THE COMMISSIONER: Now I cannot deal with it any longer because I have to go to a full bench. All right, the Commission will hear from Mr Elliott at 3 o'clock. As indicated, if the bans are lifted the parties are to confer over the issues in question. If they are unable to resolve the matter they are to come back to the Commission and the Commission will deal with the matter by way of conciliation. But it looks forward to receiving a call at 3 o'clock that the bans have been lifted. The Commission stands adjourned."*

Subsequently, on 12 April the Commissioner issued the s.127 orders reproduced in his decision of 8 July 1997. The recommendation of the Commissioner issued on 24 April 1998 was accepted by both parties. This conclusion is supported by reference to the following pages of transcript dated 2 June 1997 [transcript before Blair C, p.18]:

> *"MR SZLAWSKI: If the Commission pleases, it might be, perhaps, useful just to revisit this matter briefly. The Commission would have been aware of the dispute that took place at* ***Mt Alexander Hospital****, Castlemaine and the orders that were made by the Commission on 12 April. The Commission would also be aware that, as a result of further discussions and various offers that have been put by the parties, the matter was resolved on the basis of a strong recommendation made by yourself on 24 April.*
>
> *Now, the recommendation has three points and if I can, perhaps, just take the Commission through the points. The first point that the 3 per cent back pay in this matter be paid in accordance with the agreement with the HSUA and the back pay be paid in the next full pay period from today's date. That has happened. Secondly, the parties will confer over the total amount of time employees were involved in industrial action and I am sure that letters have been forwarded to the union, informing them of the position that the hospital believes should be the factual position concerning the amount of industrial action that was taken as part of this dispute.*
>
> *And, three, once the total amount of time employees were involved in industrial action is agreed, if the parties cannot agree, the parties should bring this matter back to the Commission for resolution. Then the employees who took the industrial action shall have deducted from their normal weekly wage, the amount of agreed time or that amount determined by the Commission."*

and further on in the same proceedings [transcript before Blair C, p.28]:

> *"THE COMMISSIONER: You cannot come to this Commission, as your union did, and say we cannot reach an agreement on the amount of time that should be deducted for industrial action; we cannot reach an agreement; we do not agree with the numbers that are being put up by the employer. The Commission says as part of a total recommendation, here is the monetary outcome, here is the way which will apply, you accept that, your union accepts that, your members accept that. To overcome the difficulties that you have in not accepting the employer's calculations, go away and have some discussions. See if you can reach an agreement. If you cannot, then come back to the Commission and the Commission will determine it."*

and finally the following exchange took place in proceedings on 19 June 1997 [transcript before Blair C, p.34]:

> *"MR SZLAWSKI: If the Commission pleases, it is my understanding that there is no agreement between the parties and perhaps before I go further if I can just ask Mr Elliott to confirm my understanding and then I will proceed with my submissions in accordance with the recommendations which have been previously made by you. If the Commission pleases.*
>
> *THE COMMISSIONER: Thank you. Yes, Mr Elliott.*
>
> *MR ELLIOTT: Yes, Commissioner, I can confirm that there is no agreement between the parties.*
>
> *THE COMMISSIONER: Mr Szlawski?*
>
> *MR SZLAWSKI: If the Commission pleases. What I would like to do is to call two witnesses today to demonstrate to the Commission what action has been taken to ascertain the amount and take the Commission through the evidence of the parties, relying on the exhibits which again demonstrate that, if that is necessary. And then perhaps to make some brief submissions. I understand from Mr Elliott he tells me that his submissions today are going to be of a duration of about 10 minutes or so. My submissions on the Act are going to be fairly short and succinct as well and then it really is a matter for the Commission to make a decision. If the Commission pleases."*

The parties, having accepted the recommendation of 24 April were bound to accept the Commissioner's decision under point 3. The Commissioner's decision is not an order or award, but a decision involving what might be described as private arbitration agreed to by the parties and as such, is not a decision which is appellable under s.45 of the Act.

The Commissioner's decision came as a result of a process accepted by the parties which formed part of a recommendation. The process undertaken by the Commission differed little from that which was available to parties under s.111AA of the Act in which recommendations by consent are provided for in circumstances where the Commission is exercising powers of conciliation in relation to a particular matter.

Mr Wood, in his submission, conceded that the Commissioner was at large in choosing a benchmark to apply in deciding the matter. Whether, having chosen s.187AA the Commissioner correctly interpreted the section, is not a matter for us to decide.

One matter, while not relevant in deciding that the appeal was not competent requires comment. This concerns the claim made by the Hospital in the proceedings before us that there had been a denial of natural justice in the manner in which the Commissioner conducted the hearing. It was put that the Commissioner, having determined s.187AA as the benchmark, proceeded to apply a different test without informing the parties.

An examination of the transcript discloses that the Commissioner raised with the parties the application of s.187AA and in the proceedings on 19 June 1997 placed before the parties possible interpretations to relevant parts of s.187AA. The employer, along with the union was given the opportunity to make written submissions on the interpretation of s.187AA. This is clearly set out at page 66 of transcript, which is in the following terms:

> *"THE COMMISSIONER: In regards to final submissions, including addressing the questions that the Commission has put in regards to the terminology of 187AA, Mr Szlawski, if you could provide final written submissions by no later than 5 o'clock Wednesday, 25 June to Mr Elliott and a copy to the Commission. And, Mr Elliott, if you could then respond with a copy of your submissions to Mr Szlawski and a copy to the Commission by no later than 5 o'clock Friday, 27 June. The Commission will reserve its decision based on those submissions and will stand adjourned."*

Written submissions by the Hospital were subsequently filed and were considered by the Commissioner prior to the making of his decision, as is disclosed in the decision of 8 July 1997. The fact that the Commissioner's conclusion on the application of s.187AA differed from that put to him by the Hospital cannot constitute a denial of natural justice or procedural unfairness.

In respect of the submission of the Commonwealth, we agree that care should be exercised by parties in binding themselves to recommendations where alleged breaches of a statute are at issue in the dispute. As the Commonwealth correctly pointed out, acceptance of such recommendations may not, as a matter of law, resolve the matter.

It is for the reasons outlined that we decided on 22 April 1998 that the appeal was not competent.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

Appearances:

S. Wood of counsel for **Mt Alexander Hospital**.

J. Bornstein of counsel with *M. Richards* for the Health Services Union of Australia.

S. Amendola of counsel with *D. Bohn* for the Commonwealth of Australia.

Hearing Details:

1997.

Melbourne:

November 11.

1998.

Melbourne:

April 22.

Decision Summary

		Industrial dispute - industrial action - s187AA Workplace Relations Act 1996 - appeal - Full bench - various employees, health and welfare services - orders made under s127 WRA - Commissioner subsequently issued "strong recommendation" to parties to s127 application bearing on approach to be taken to making deductions from wages pursuant to s187AA WRA - recommendation accepted by parties - recommendation included term that parties bring matter back to Commission if unable to agree on amount of time employees involved in industrial action for purpose of making deductions - Commissioner subsequently made decision under that term - whether appeal to Full Bench from Commissioner's decision competent - having accepted recommendation parties bound to accept Commissioner's decision which resulted from process forming part of recommendation - Commissioner's decision not award or order - similar to private arbitration which is not appellable - appeal not competent.
Appeal by **Mt Alexander Hospital** against decision of Blair C on 8 July 1997 [Print P2889]		
C No 34754 of 1997		Print Q3874
MacBean SDP Drake DP Merriman C	Melbourne	22 July 1998

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