

**APPEAL AGAINST THE DECISION NOT TO PAY EMPLOYEE ENTITLEMENTS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2021 WAIRC 00141

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G BROWN - BOARD MEMBER
MR R DAVENPORT - BOARD MEMBER

HEARD : THURSDAY, 22 APRIL 2021 (ON THE PAPERS)

DELIVERED : THURSDAY, 20 MAY 2021

FILE NO. : PSAB 37 OF 2020

BETWEEN : MICHAEL COE
Appellant

AND

DEPARTMENT OF EDUCATION
Respondent

CatchWords : Public Service Appeal Board – Redundancy – Section 94 decision –
Appeal dismissed for want of jurisdiction

Legislation : *Industrial Relations Act 1979* (WA): s 80H & s 80I

Public Sector Management Act 1994 (WA): s 78(4), s 78(5), s 94 &
s 95

*Public Sector Management (Redeployment and Redundancy)
Regulations 2014* (WA)

Result : Appeal dismissed for want of jurisdiction

Representation:
Appellant : On his own behalf
Respondent : Ms S Young (as agent)

Cases referred to in reasons:

Crowley v Chief Executive Officer, Department of Commerce [2017] WAIRC 00262

*Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia
(Association of Workers) & others* (1986) 67 WAIG 466

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Mr Coe was employed by the Director General, Department of Education (**Director General**) as a Level 7 Public Service Officer. On 23 September 2020, the Director General made Mr Coe an offer of voluntary severance by letter and informed Mr Coe that:

If you accept this offer of voluntary severance and nominate an effective date of resignation, which is less than 4 weeks after the date you accept this offer, you will receive an incentive payment as calculated below:

 - less than 1 week after acceptance, receives an additional 12 weeks' pay
 - more than 1 week and less than 2 weeks after acceptance, receives an additional 8 weeks' pay
 - more than 2 weeks and less than 3 weeks after acceptance, receives an additional 4 weeks' pay
 - more than 3 weeks and less than 4 weeks after acceptance, receives no additional pay.
- 3 On the second page of the letter, it says 'should you wish to accept this offer of voluntary severance, please sign the attached copy of this letter and return it to [name and email address omitted] by **no later than Monday 16 November 2020.**' (original emphasis)
- 4 Mr Coe subsequently wrote to the Department of Education to clarify by what date his resignation should be effective in order to receive the full incentive payment of 12 weeks. The Department of Education informed him that 'if your intention is to claim the 12 week incentive payment then the acceptance will need to be dated 5 October 2020 and emailed through on Monday 5 October 2020.'
- 5 Mr Coe signed an offer of voluntary severance on 5 October 2020, stating that his resignation would be effective one week from that date. He appeals to the Board against a decision that he says took place on 1 October 2020.
- 6 In his notice of appeal, Mr Coe says:

To ensure that as part of the severance that I would receive the 12 week incentive I was advised in writing that to achieve this I needed to provide my response back to the Department by the 5 October 2020 and date this acceptance the 5 October 2020 which I believe is contrary to the Offer which stated a response is required by 16 November 2020.

I queried this advice on several occasion [sic] and again received conflicting advice by the HR department and felt that I was pushed into having to accept this advice and in turn I missed out on several weeks of pay (2.5 pays), between 5 October and 16 November 2020.
- 7 The Director General raises two preliminary matters in relation to Mr Coe's appeal. She argues that the Board does not have jurisdiction to hear and determine his appeal and that in any event, his appeal has been filed out of time. The Director General says that even if the Board decides it has jurisdiction to hear and determine Mr Coe's appeal, it should not accept his appeal out of time.
- 8 It is not in dispute that Mr Coe's appeal centres around a 'section 94 decision' and whether the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) were fairly and properly applied in relation to him.

- 9 The parties agree that the Board should deal with the jurisdictional objection first and on the papers.

What the Board must decide

- 10 The Board must decide whether it has jurisdiction to hear and determine Mr Coe's appeal. In essence, to answer that question the Board must consider whether it can hear and determine an appeal in relation to a 'section 94 decision'.

Relevant legislation

- 11 Mr Coe has filed his appeal to the Board under s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**). That section deals with appeals to the Board 'by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers'. Other relevant legislative provisions are set out below.

Director General's submissions

- 12 The Director General says that the Board does not have jurisdiction to hear and determine any appeal against a decision made under s 94 of the *Public Sector Management Act 1994* (WA) (**PSM Act**) because of s 80I(3) of the IR Act, which says:

A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A.

- 13 The Director General concedes that in some circumstances, a 'section 94 decision' may be referred to the Commission, but not the Board, under s 95 of the PSM Act.
- 14 Under s 95(1) of the PSM Act, a 'section 94 decision' is defined as 'a decision made or purported to be made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)).' The regulations referred to in s 94 of the PSM Act are the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (**Regulations**).
- 15 The Director General says that her decision to require Mr Coe's 'acceptance of the offer of voluntary severance before 5 October 2020 in order to qualify for the maximum incentive payment of 12 weeks' was made in accordance with the Regulations, and so is a 'section 94 decision'.
- 16 The Director General also draws the Board's attention to s 95(6) of the PSM Act which says:
- The Industrial Commission does not have jurisdiction in respect of a section 94 decision if the employment of the employee concerned is terminated.
- 17 Finally, the Director General relies on the reasoning in *Crowley v Chief Executive Officer, Department of Commerce* [2017] WAIRC 00262 at [26] and says that Mr Coe 'was not an employee when this application was filed' and so his appeal is incompetent.
- 18 The Director General asks that the Board dismiss Mr Coe's appeal for want of jurisdiction.

Mr Coe's submissions

- 19 Mr Coe, relying on s 95(5) of the PSM Act, says that the Board has jurisdiction 'to hear and determine any appeal against a section 94 decision if the regulations referred to in section 94(4)

of the [PSM Act] were not fairly and properly applied to, thereby allowing the Board jurisdiction by way of s 80I of the [IR Act].’

- 20 Mr Coe argues that the regulations referred to in s 94 of the PSM Act were not fairly and properly applied to him.
- 21 Further, Mr Coe says that his employment was ‘not terminated with reference to section 94(6) of the [PSM Act] and should not be read as such’. He argues that his employment was not terminated at all.
- 22 Mr Coe says that *Crowley v Chief Executive Officer, Department of Commerce* deals with sections of the PSM Act which ‘are irrelevant to the case at hand’. The PSM Act ‘specifies termination and redundancy at different points without defining the terms. The concepts are legally vastly different and should never be used interchangeably.’
- 23 Mr Coe also argues that the Board has jurisdiction to hear and determine an appeal against a section 94 decision under s 78(4) and s 78(5) of the PSM Act because ‘the directions were not capable of being complied with’ and the Director General ‘failed to comply with the rules of procedural fairness.’
- 24 Mr Coe says that the Commission’s website directed him to lodge the appeal that he did, and says that the Acting Senior Registry Officer ‘provided information and guidance by way of email to the Applicant on initiating a Form 8B – Notice of Appeal – Government Officers, Public Service Officers (**Form 8B**) in accordance with published information.’
- 25 In his submissions, Mr Coe says:

[23] By way of the Western Australia Industrial Relations Commission website, in its own terms:

Types of applications that can be made

Employees who are not government officers, but are (or were) employed under the Public Sector Management Act 1994 (WA) can make an application to the Commission to appeal the following decisions or findings of their employer in relation to their employment:

the decision of their employer made or purported to be made under the Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA) concerning their employment; and

the termination of their employment while their status was that of a registered employee. A "registered employee" is an employee who is surplus to the resource requirements of a State government department and has been formally registered by their employer for redeployment, retraining or redundancy in accordance with the requirements of the Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA).

- 26 He says in any event, there is no alternative option to appeal the decision he wishes to appeal.

Director General’s submissions in reply

- 27 The Director General filed brief submissions in reply, adding:

Crowley v Chief Executive Officer, Department of Commerce was specifically concerned with the meaning of “terminated” as used in section 95(6) of the *Public Sector Management Act, 1994*. It includes termination at the election of either employer or employee: [26]. The decision also affirmed that the Commission has exclusive jurisdiction to review section 94 decision: [69]. The Public Service Appeal Board does not have jurisdiction.

Consideration

- 28 It is clear from Mr Coe's submissions that his appeal relates to whether the Regulations were fairly and properly applied to him. In effect, Mr Coe appeals a section 94 decision to the Board.
- 29 Fundamentally, Mr Coe does not appear to appreciate the distinction between the Commission and the Board. The Board is not the Commission. The Board is a constituent authority of the Commission: s 80H(1) of the IR Act. The Board does not have all of the Commission's jurisdiction and powers.
- 30 Relevant to this matter, the Board's jurisdiction is set out in s 80I of the IR Act:

80I. Board's jurisdiction

- (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
- (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
 - (b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;
 - (c) an appeal by a government officer under the *Health Services Act 2016* section 172 against a decision or finding referred to in subsection (1)(b) of that section;
 - (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,
- and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).
- [(2) *deleted*]
- (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A.

[Section 80I inserted: No. 94 of 1984 s. 47; amended: No. 32 of 1994 s. 14; No. 1 of 1995 s. 29; No. 39 of 2010 s. 109; No. 8 of 2014 s. 6; No. 11 of 2016 s. 295(6).]

- 31 It is clear that s 80I does not confer on the Board jurisdiction to hear appeals in respect of section 94 decisions.
- 32 Section 95(2) of the PSM Act provides that a section 94 decision may be referred to the Commission.
- 33 The Full Bench in *Crowley v Chief Executive Officer, Department of Commerce* held at [69]:
- [T]here is only one power conferred to hear and determine a claim by a government officer, including a former government officer, that he or she has not been paid a severance payment in accordance with the requirements of the Redeployment and Redundancy Regulations. The sole

power of the Commission to hear and determine such a claim and the power of a government officer to refer such a claim is confined to a referral made pursuant to s 95 or s 96A of the PSM Act.

34 Mr Coe has not referred such a claim to the Commission. Instead he has brought an appeal to the Board.

35 In the Board's view, it is unnecessary to consider arguments about the effect of s 78(4) and s 95(6) of the PSM Act. Those sections do not apply to the Board. Arguments about whether the Commission, a separate authority, would have jurisdiction are not relevant to the question of whether the Board has jurisdiction to hear and determine Mr Coe's appeal.

36 Mr Coe relies on s 78(5) of the PSM Act. It provides:

- (5) If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner's instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board —
- (a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or
 - (b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

[Section 78 amended: No. 39 of 2010 s. 95.]

37 Perhaps that section may be considered if the Board were hearing a substantive appeal. It is not relevant to the question of jurisdiction. Further, it cannot confer jurisdiction where none exists.

38 That the Commission's website directs users to Form 8B in certain circumstances does not assist Mr Coe. The website contains information, not advice. It is intended to assist users. The website cannot confer, or have any bearing on, jurisdiction.

39 In any event, some of the information on the website Mr Coe refers to is not relevant to these circumstances. The website states simply:

Employees who are not government officers, but are (or were) employed under the Public Sector Management Act 1994 (WA) can make an application to the Commission to appeal the following decisions or findings of their employer in relation to their employment:

...

- the decision of their employer made or purported to be made under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) concerning their employment; or
- the termination of their employment while their status was that of a registered employee. A "registered employee" is an employee who is surplus to the resource requirements of a State government department and has been formally registered by their employer for redeployment, retraining or redundancy in accordance with the requirements of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

It provides information for employees who are not government officers.

- 40 Mr Coe concedes that he was a public service officer. Public service officers are government officers: s 80C(1) of the IR Act.
- 41 Contrary to Mr Coe's submission, the Board has not yet considered the issue of whether it should extend the time for Mr Coe to appeal. First the Board must be satisfied that it has jurisdiction to hear and determine Mr Coe's appeal: *Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) & others* (1986) 67 WAIG 466, 30.
- 42 That Mr Coe perceives 'there is no alternative option to appeal such a decision' does not bear on whether the Board has jurisdiction to hear and determine his appeal.
- 43 For these reasons the Board does not have jurisdiction to hear and determine Mr Coe's appeal.
- 44 This appeal is dismissed for want of jurisdiction.