

**UNFAIR DISMISSAL APPLICATION  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2020 WAIRC 00931

**CORAM** : COMMISSIONER T B WALKINGTON

**HEARD** : TUESDAY, 6 OCTOBER 2020

**DELIVERED** : WEDNESDAY, 25 NOVEMBER 2020

**FILE NO.** : U 103 OF 2020

**BETWEEN** : SIMON COATES  
Applicant  
  
AND  
  
ROTTNEST ISLAND AUTHORITY  
Respondent

**CatchWords** : Unfair dismissal - Jurisdiction of Public Service Appeal Board - Construction of s 78 and s 79 of the *Public Sector Management Act 1994* (WA) - Principles of statutory interpretation

**Legislation** : *Industrial Relations Act 1979* (WA)  
*Public Sector Management Act 1994* (WA)  
*Rottneest Island Authority Act 1987* (WA)

**Result** : Application dismissed

**Representation:**

Counsel:

Applicant : Mr I Sampson  
Respondent : Mr J Carroll

Solicitors:

Applicant : Roundhouse Legal  
Respondent : State Solicitor's Office

**Cases referred to in reasons:**

*Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1

*Bellamy v Chairman Public Service Board* (1986) 66 WAIG 1579

*Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410

*Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244; (2005) 86 WAIG 231

*Gramotnev v Queensland University of Technology* [2015] QCA 127; (2015) 251 IR 448

*Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50; (2012) 287 ALR 315

*Soliman v University of Technology, Sydney (No 2)* [2009] FCAFC 173; (2009) 191 IR 277

*The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection* [2010] WAIRC 00206; (2010) 90 WAIG 214

### *Reasons for Decision*

- 1 This is an application by Mr Simon Coates (**applicant**) pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (**IR Act**). The applicant alleges that he was unfairly terminated from his employment with the Rottnest Island Authority (**respondent**) on 21 July 2020. The respondent denies that the applicant was unfairly terminated.
- 2 The respondent argues that the Western Australian Industrial Relations Commission (**Commission**) does not have the power to deal with this application and that this issue must be decided before the Commission may proceed to conciliate or to hear and determine the matter.

### **Questions to Decide**

- 3 The first issue to decide is whether the Commission as presently constituted has the jurisdiction to enquire into and deal with the applicant's claim made pursuant to s 29(1)(b)(i) of the IR Act.
- 4 The second issue to decide is whether the terms of the applicant's appointment and the dispute resolution procedure of the relevant industrial agreement provides the Commission as constituted with jurisdiction to hear and determine his application.

### **Applicant's Submissions**

- 5 The applicant says the Commission has jurisdiction because the correct construction of s 80I(1)(d) of the IR Act is to be read to preclude a government officer from appealing a decision to dismiss a government officer. The applicant says s 80I(1)(d) of the IR Act expressly excludes the Public Service Appeal Board (**Board**) from hearing an appeal concerning a 'dismissal' of a government officer.
- 6 It follows, the applicant says, that he is a public service officer which is a subgroup of a government officer, and consequently he is precluded from appealing the decision to dismiss pursuant to s 80I(1)(d) of the IR Act. Therefore, he may make an application under s 29(1)(b)(i) of the IR Act and engage the general unfair dismissal jurisdiction of the Commission.
- 7 In addition, the applicant argues that his contract of employment specifies that the Public Sector CSA Agreement 2019 (**CSA Agreement 2019**) provides the capacity for the applicant to make application to the Commission where a dispute remains unresolved. The applicant contends that the CSA Agreement 2019 expressly provides a referral mechanism to this Commission.

### **Respondent's Submissions**

- 8 The respondent asserts that the applicant is a public service officer appointed under s 64(1)(a) of the *Public Sector Management Act 1994* (WA) (**PSM Act**).
- 9 The respondent argues that the Board, which is established under Division 2 of Part IIA of the IR Act, has exclusive jurisdiction to deal with the matter the subject of this application. The respondent maintains that the Commission's ability to hear and determine this matter pursuant to s 29(1)(b)(i) of the IR Act is ousted by the exclusive jurisdiction of the Board as set out under s 80I of the IR Act and as established in *Bellamy v Chairman Public Service Board* (1986) 66 WAIG 1579.
- 10 The respondent argues that the applicant's claims should be dealt with by the Board under s 80I(1)(d) of the IR Act which reads as follows:

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

### **Jurisdiction of the Commission – Principles**

- 11 Section 80C(1) of the IR Act contains a definition of a ‘government officer’ as follows:

...

**government officer** means —

- (a) every public service officer; and
- (aa) each member of the Governor’s Establishment within the meaning of the Governor’s Establishment Act 1992; and
- (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the Parliamentary and Electorate Staff (Employment) Act 1992; and
- (b) every other person employed on the salaried staff of a public authority; and
- (c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984,

...

- 12 The PSM Act at s 79(3) provides for an employing authority who considers an employee’s performance to be substandard to terminate that employee:

- (3) Subject to subsections (4), (5) and (6), an employing authority may, in respect of one of its employees whose performance is in the opinion of the employing authority substandard for the purposes of this section —
  - (a) withhold for such period as the employing authority thinks fit an increment of remuneration otherwise payable to that employee; or
  - (b) reduce the level of classification of that employee; or
  - (c) terminate the employment in the Public Sector of that employee.

- 13 Section 78(1) of the PSM Act provides that where a government officer is aggrieved by a decision made to terminate them under s 79(3)(c) of the PSM Act the government officer may appeal against that decision or finding to the Commission as constituted by the Board:

- (1) Subject to subsection (3) and to section 52, an employee or former employee who —
  - (a) is, or was, a Government officer within the meaning of section 80C of the Industrial Relations Act 1979; and
  - (b) is aggrieved by —
    - (i) a decision made in respect of the Government officer under section 79(3)(b) or (c) or (4); or
    - (ii) a finding made in respect of the Government officer in the exercise of a power under section 87(3)(a)(ii); or
    - (iii) a decision made under section 82 to suspend the Government officer on partial pay or without pay; or

- (iv) a decision to take disciplinary action made in respect of the Government officer under section 82A(3)(b), 88(b) or 92(1),

may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979*, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.

14 The Board is appointed under Division 2 of Part IIA of the IR Act, and that Board has jurisdiction to hear and determine that appeal under and subject to that Division.

15 Section 80I of the IR Act sets out the jurisdiction of the Board.

- (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.

16 Section 80I(b) of the IR Act provides that a government officer may appeal to the Board a decision to dismiss made pursuant to s 78(1)(b) of the PSM Act. That is a decision to dismiss made under s 79(3)(c) of the PSM Act which concerns an employee's performance if the employing authority is of the opinion employee's performance is substandard.

17 Section 80I(1)(d) of the IR Act provides that the Board has jurisdiction to hear and determine an appeal that a government officer be dismissed. This is a decision other than one made under s 78(1)(b) of the PSM Act. This provision provides an ability for a government officer to appeal a decision to dismiss for reasons other than those set out in s 78(1) of the PSM Act.

18 The dismissal of an employee is within paragraph (c) of the definition of an 'industrial matter' in s 7 of the IR Act and s 23(1) of the IR Act provides as follows:

Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

19 The jurisdiction of the Commission to enquire into and deal with any industrial matter is conditioned by the opening words 'Subject to this Act' and s 80E(1) of the IR Act provides as follows:

Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

- 20 The reference to an Arbitrator is a reference to a Public Service Arbitrator. Therefore, a Public Service Arbitrator has the exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer.
- 21 The Western Australian Industrial Appeal Court considered the effect of the words 'exclusive jurisdiction' in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244; (2005) 86 WAIG 231. Justices Wheeler and Le Miere held [27]:

It seems likely, having regard to the considerations mentioned, that the expression "exclusive jurisdiction" in s 80E(1) was intended to do no more than exclude the general jurisdiction of the Commission, pursuant to s 23, to inquire into and deal with industrial matters generally.

- 22 In *Bellamy v Chairman Public Service Board* the full bench of this Commission established that the general powers under the IR Act for the Commission to deal with an application by a government officer alleging unfair termination lodged under s 29(1)(b)(i) of the IR Act cannot be used when specific powers exist under s 80I of the IR Act for the Board to deal with an application of this nature because, adopting the authority of *Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1, the special provisions are intended to exhaustively deal with government officers and prevail over the general powers.
- 23 In *The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection* [2010] WAIRC 00206; (2010) 90 WAIG 214, the full bench affirmed that the Board ousts the jurisdiction of the Public Service Arbitrator on account of the statutory interpretation principle of *generalia specialibus non derogant*. That is where there is a conflict between general and specific legislative provisions, the specific provisions prevail.

### **Jurisdiction of the Commission - Application**

- 24 It was not in dispute that the applicant is an employee as defined in s 3 of the PSM Act. That is, the applicant is a public service officer and a government officer.
- 25 The applicant submitted that the Rottnest Island Authority is not a trading enterprise and not a government department. I find that the Rottnest Island Authority is established by the *Rottnest Island Authority Act 1987* (WA) and s 26(1) provides that staff of the Rottnest Island Authority are to be appointed under the PSM Act:

There shall be appointed, under and subject to Part 3 of the *Public Sector Management Act 1994*, such other officers as may be necessary to enable the Authority to perform its functions.

It was not in dispute that the applicant was appointed under and subject to the PSM Act.

- 26 The applicant's construction of s 80I(1)(d) of the IR Act expressly excludes a government officer from appealing a decision to dismiss is not correct.
- 27 If the applicant was dismissed because the respondent was of the opinion that his performance was substandard, the applicant is able to appeal his employer's decision made under s 79(3)(c) of the PSM Act, to the Board pursuant to s 78(1)(b) of the PSM Act and under s 80I(1)(b) of the IR Act. If the decision to dismiss was made on a basis other than substandard performance the applicant may appeal the decision to the Board under s 80I(1)(d) of the IR Act, which provides a government officer the ability to appeal a decision to terminate on the basis other

than on substandard performance. Section 80I(1)(d) of the IR Act does not negate the entitlement of a government officer to appeal a decision pursuant to s 78(1) of the PSM Act; rather it broadens the scope to enable a government officer to appeal a decision to dismiss based on circumstances other than those set out in s 78(1) of the PSM Act.

- 28 Similar to the circumstances in both *Bellamy v Chairman Public Service Board* and *The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection* the principle of *generalia specialibus non derogant* results in the general jurisdiction of the Commission being ousted and by the jurisdiction of the Board.
- 29 Therefore, the Commission as presently constituted does not have the jurisdiction to enquire into and deal with the applicant's claim.

### Contract of Employment and the Public Sector Agreement

- 30 A second limb of the applicant's contentions are that a terms of the applicant's employment contract incorporated the terms of the Public Service and Government Officers CSA General Agreement 2017 (**CSA Agreement 2017**) and/or the CSA Agreement 2019. Both Agreements provide for unresolved disputes to be referred to the Commission.
- 31 The applicant submits that he has followed the dispute resolution procedure set out in the CSA Agreement 2019. This procedure provides that unresolved disputes may be referred to the Commission. The dispute has not been resolved and he now purports to refer the dispute to the Commission pursuant to s 29(1)(b)(i) of the IR Act.

### Principles

- 32 The terms of an industrial agreement are not automatically imported into a contract of employment: *Soliman v University of Technology, Sydney (No 2)* [2009] FCAFC 173; (2009) 191 IR 277. In *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410, the High Court noted that parties may expressly agree that an industrial agreement forms part of the contract. Language such as 'governed by' and 'subject to' an agreement have been interpreted as merely providing information and do not indicate an intention to incorporate the agreement into the contract: *Soliman v University of Technology, Sydney (No 2)* and *Gramotnev v Queensland University of Technology* [2015] QCA 127; (2015) 251 IR 448.
- 33 Industrial Agreements are decisions of the Commission which when taken in conjunction with the IR Act have the force of law. However, an agreement registered pursuant to s 41 of the IR Act cannot confer jurisdiction on the Commission if the jurisdiction is ousted by other specific provisions of the legislation. Parties cannot, by consent, confer a jurisdiction on the court which it does not possess, see *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50; (2012) 287 ALR 315 [74].
- 34 The only basis jurisdiction can be found is if upon a proper construction of the IR Act and the PSM Act the general jurisdiction of the Commission applies.

### Application

- 35 The applicant's contract of employment at the time of his termination states that:

The terms and conditions of your appointment are as provided in the PSMA and regulations made under that Act, including the disciplinary provisions, the *Public Service and Government Officers CSA General Agreement 2017* (PSOGCSAGA) and any supporting departmental specific industrial agreement.

- 36 The CSA Agreement 2017 was replaced by the CSA Agreement 2019. Both instruments contain dispute resolution procedures that provide for parties to refer unresolved disputes to the Commission. The applicant contends that the dispute resolution provisions that enable a 'party' to refer a matter to the Commission were not limited to the parties to the Agreement itself and included and extended to an individual employee who was in dispute with an employer party. I have not concluded a decision on this issue as it is not necessary to do so given my reasons set out above.
- 37 There would need to be a finding that the terms of the CSA Agreement 2019 are incorporated into the contract of employment for the applicant to succeed. I have not concluded a decision on this issue as it is not necessary to do so given my reasons set out above.
- 38 The applicant's employment is regulated by the PSM Act and IR Act. These laws provide that government officers may appeal a decision to terminate their employment to the Commission as constituted by the Board. The dispute resolution procedure contained in neither the CSA Agreement 2017 nor the CSA Agreement 2019 can confer jurisdiction on the Commission as presently constituted where, as set out above, the jurisdiction is ousted.

### **Conclusion**

- 39 As I have found that the Commission as constituted cannot deal with this application for the reasons set out above, if the applicant wishes to continue to contest his termination he must lodge an appeal to the Board.
- 40 In the circumstances I will make an order dismissing the application.