



Industrial Relations Commission New South Wales

Case Name: Child Protection (Working with Children) Award 2014

Medium Neutral Citation: [2015] NSWIRComm 8

Hearing Date(s): 3 February 2015

Date of Orders: 19 March 2015

Date of Decision: 19 March 2015

Jurisdiction: Industrial Relations Commission of New South Wales

Before: Walton J, President; Tabbaa C; Newall C

Decision: The Full Bench makes the following orders and directions:
(1) The application for the Child Protection (Working with Children) Award 2014 is dismissed.
(2) The parties may file any submission, in writing, as to the proper title of the applicant on the Notice Motion in these proceedings within seven days of the date of this decision.

Catchwords: Notice of Motion – application for a new award – award to permit payment of allowance – summary dismissal or ‘strike-out’ application – statutory construction – all affected awards varied within current term – subject matter of expense-related allowances addressed at the time of variation – awards validly made – validly made award precludes any residual matters or extra claims – test for summary dismissal – no award can be made in the circumstances – test satisfied – summary dismissal application granted

Legislation Cited: Industrial Relations Act 1996
Industrial Relations (Public Sector Conditions of Employment) Regulation 2014

Cases Cited: Crown Employees Wages Staff (Rates of Pay) Award 2011 and others [2015] NSWIRComm 7
Federated Municipal and Shire Council Employees’ Union of Australia, New South Wales Division v Energy

Australia (1999) 90 IR 311
General Steel Industries Inc v Commissioner for
Railways [1964] HCA 69; (1964) 112 CLR 125
Nagle v Tilburg (1993) 51 IR 8
Public Service Association and Professional Officers'
Association Amalgamated of NSW v Director of Public
Employment [2012] HCA 58; (2012) 250 CLR 343
Secretary of the Treasury v Public Service Association
[2014] NSWCA 138
Re Health Employees Conditions of Employment
(State) Award and other Awards [2011] NSWIRComm
129; (2011) 208 IR 201
Speirs v Industrial Relations Commission (NSW) [2011]
NSWCA 206; (2011) 81 NSWLR 348

Texts Cited:

Category: Principal judgment

Parties: Unions NSW (Applicant on the primary application;
Respondent on the Motion)
Secretary of the Treasury (Respondent on the primary
application; Applicant on the Motion)
NSW Department of Education & Communities
(Respondent on the primary application; Applicant on
the Motion)
Secretary, NSW Ministry of Health (Respondent on the
primary application)
Aged & Community Services Association of N.S.W. &
ACT Incorporated (Respondent on the primary
application)
Ageing, Disability and Home Care (Respondent on the
primary application)
Anti-Discrimination Board of New South Wales
(Respondent on the primary application)
Australian Federation of Employers and Industries
(Respondent on the primary application)
Board of Studies, Teaching and Educational Standards
(Respondent on the primary application)
Corrective Services NSW (Respondent on the primary
application)
Department of Family and Community Services
(Respondent on the primary application)
Director General, Department of Transport
(Respondent on the primary application)
Health Administration Corporation (Respondent on the
primary application)
Health Care Complaints Commission (Respondent on
the primary application)
Leading Age Services Australia NSW – ACT

(Respondent on the primary application)
Local Government and Shires Association of New South Wales (Respondent on the primary application)
Minister for Finance and Services (Respondent on the primary application)
NSW Business Chamber Limited (Respondent on the primary application)
NSW Police Force (Respondent on the primary application)
New South Wales Rural Fire Service (Respondent on the primary application)
NSW Technical and Further Education Commission (Respondent on the primary application)
Roads and Maritime Services (Respondent on the primary application)
State Transit Authority of New South Wales (Respondent on the primary application)
Australian Rail, Tram and Bus Industry Union, New South Wales (Respondent on the primary application)
Australian Salaried Medical Officers' Federation (New South Wales) (Respondent on the primary application)
Emergency Medical Services Protection Association (NSW) (Respondent on the primary application)
Health Services Union NSW (Respondent on the primary application)
New South Wales Independent Education Union (Respondent on the primary application)
New South Wales Nurses and Midwives' Association (Respondent on the primary application)
New South Wales Teachers Federation (Respondent on the primary application)
Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (Respondent on the primary application)
The Broken Hill Town Employees' Union (Respondent on the primary application)
United Voice, New South Wales Branch (Respondent on the primary application)

Representation:

Counsel:

M Gibian of counsel (Applicant on the primary application; Respondent on the Motion)
S B Benson of counsel (Respondents on the primary application (Secretary of the Treasury; Ageing, Disability and Home Care; Anti-Discrimination Board of New South Wales; Board of Studies, Teaching and Educational Standards, Corrective Services NSW; Department of Family and Community Services, Director General, Department of Transport, Minister for Finance and Services; NSW Department of Education

and Communities; NSW Police Force; NSW Technical and Further Education Commission; Roads and Maritime Services and State Transit Authority of New South Wales); Applicants on the Motion)

Solicitors:

Crown Solicitor's Office (Respondents on the primary application (Secretary of the Treasury; Ageing, Disability and Home Care; Anti-Discrimination Board of New South Wales; Board of Studies, Teaching and Educational Standards, Corrective Services NSW; Department of Family and Community Services, Director General, Department of Transport, Minister for Finance and Services; NSW Department of Education and Communities; NSW Police Force; NSW Technical and Further Education Commission; Roads and Maritime Services and State Transit Authority of New South Wales); Applicants on the Motion)

W G McNally Jones Staff (Applicant on the primary application; Respondent on the Motion)

NSW Ministry of Health (Respondents on the primary application (Secretary, NSW Ministry of Health and Health Care Complaints Commission))

Local Government and Shires Association of New South Wales (Respondent on the primary application)

File Number(s):

IRC 585 of 2014

Publication Restriction:

DECISION

- 1 In the substantive matter, Unions NSW seeks the making of a new award pursuant to s 10 of the *Industrial Relations Act 1996* ("the Act"). The proposed new award is styled the Child Protection (Working with Children) Award 2014.
- 2 Under the proposed new award, employees employed under some 75 awards of the Commission covering the public sector would be entitled to reimbursement of monies paid by them individually to obtain what is known as a 'working with children check clearance'. The awards affected do not presently provide for reimbursement of monies paid for this purpose.
- 3 By way of Notice of Motion filed on 12 December 2014, the Secretary of the Treasury seeks that the application for a new award be dismissed, or alternatively, permanently stayed, for want of jurisdiction.
- 4 It was submitted by the Secretary of the Treasury that the Motion was sought on the basis that all employees who would be covered by the proposed new award had been granted award increases in remuneration over the past 12 months. In those circumstances, it was contended, the Commission did not have jurisdiction to hear and determine the application for the new award.
- 5 The Secretary of the Treasury's submission, in this respect, was essentially based on the provisions of s 146C of the Act and the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* ('the Regulation') and was developed in the following way:
 - (1) The effect of s 146C(7) of the Act is that the award making powers of the Commission, contained in s 10 of the Act, are constrained by s 146C and the policies concerning public sector employment which are declared in the Regulation: *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58; (2012) 250 CLR 343 at [17] and [58]; *Secretary of the Treasury v Public Service Association and*

Professional Officers' Association Amalgamated Union of NSW [2014] NSWCA 138 at [34] (*'Secretary of the Treasury v PSA'*);

- (2) The text of cl 6(1)(d) of the Regulation makes clear that the policy that awards providing for increases in “remuneration or other conditions of employment” are to resolve all issues the subject of the proceedings giving rise to the award is a policy to which the Commission is required to give effect;
- (3) Here, each of the 75 awards which would be affected by the making of the award sought in these proceedings had been varied within the last 12 months to provide for “increases in remuneration”. Further, it was put, in oral submissions, that those variations to the awards in each case gave consideration to the subject matter of allowances, including cost-related allowances.

Consideration

- 6 We have handed down a decision earlier today *Crown Employees Wages Staff (Rates of Pay) Award 2011 and others* [2015] NSWIRComm 7 in which s 146C and cl 6(1) of the Regulation were closely considered. (It is convenient to note, at this juncture, that we repeat the observations we made in that decision at [2] regarding the correct title of the applicant on the Motion in these proceedings and will replicate the orders and directions given therein, in that respect, in this decision.)
- 7 It can be observed that the contention advanced by the Secretary of the Treasury in the present case, that is, that the terms of the Act and the Regulation of themselves, without more, prevent the making of an award granting an additional allowance as being, in effect, an extra claim, appear to run contrary to the submissions put by the Secretary of the Treasury in the proceedings just mentioned. In those proceedings it was said that the same statutory provisions actively required the insertion of a ‘no extra claims’ clause in terms in each award to give effect to the policy requirement.

- 8 Be that as it may, the matter before the Commission requires determination on its merits and we proceed to do so.
- 9 We do not propose to restate all that we said in the decision in *Crown Employees Wages Staff (Rates of Pay) Award* earlier today but we shall generally apply the reasoning in that decision to the present matter.
- 10 However, some things may usefully be said again in this context.
- 11 A validly made award or order of the Commission will necessarily, of itself, resolve all issues the subject of the proceedings because an award or order can only validly be made if it so does.
- 12 Accordingly, a validly made award will necessarily extinguish the capacity of any party to agitate the subject matter of that award within, as we address below, certainly a 12 month period from the making of the award.
- 13 All the awards potentially affected by the present application have been varied within the last 12 months in relation to remuneration and allowances. In those variations the issue of allowances was addressed. There is no assertion that any of the awards were not validly made. Accordingly, the subject matter of, specifically, remuneration and allowances has been extinguished in relation to each of those awards for the present time.
- 14 Unions NSW, in opposing the application, submitted that the direction to the Commission imposed by clause 6(1)(d), that is, that an award is to “resolve all issues subject of the proceedings”, could not be construed as directing the Commission to resolve all issues relating to an employee or group of employees whether the subject of proceedings before it or not.
- 15 That submission misses both the words of the Regulation and the factual situation here. The Regulation relevantly prescribes that an award must resolve all issues which were the subject of the proceedings giving rise to the award. In so prescribing, it does not address, as Unions NSW submitted,

matters which were not the subject of the proceedings. Secondly, in the factual circumstances of this application, its subject matter – wages and allowances – was very much the subject matter of the proceedings giving rise to the awards which would be affected by the present application.

- 16 Secondly, Unions NSW contended that it was immaterial to the policy underlying the Regulation, which is directed at constraining increases in employee-related costs, whether increases in wages or conditions are made at one time or progressively.
- 17 That submission fails when read against the clear words of the Regulation which, as we say above, actively requires that an award, in order to be validly made, must deal in entirety with the subject matter of proceedings before it. Matters cannot be dealt with ‘progressively’ once a valid award has been made which addressed those subject matters. What was said in *Re Health Employees Conditions of Employment (State) Award and other Awards* [2011] NSWIRComm 129; (2011) 208 IR 201, called in aid by Unions NSW, does not go to that point.
- 18 It was then submitted that the Regulation itself envisaged circumstances in which additional claims may be made, for example, in circumstances where employee-related costs savings are achieved. Whether that may be so or not, it is manifestly not the basis of this application and does not take the matter further.
- 19 It was also contended by Unions NSW that the conferral on a court or tribunal of a statutory power to make orders should be construed broadly, not confined by implications not apparent from the words of the conferral themselves. The judgment of the New South Wales Court of Appeal in *Speirs v Industrial Relations Commission (NSW)* [2011] NSWCA 206; (2011) 81 NSWLR 348 at [89], with which we respectfully agree, was called in aid of that proposition.
- 20 Here, however, s 146C of the Act and the words of the Regulation impose in clear terms a limitation on the Commission’s powers: *Secretary of the*

Treasury v PSA at [44]. That clear statutory and regulatory limitation must be given effect to. The construction of the Regulation we here adopt does not, contrary to Unions NSW's submission, impose a greater constraint on the Commission's jurisdiction than is expressly required by the language of the Regulation.

- 21 A question necessarily arises, then, as to the proper approach to be taken to the present application.
- 22 There was no contest about the principles properly applied to proceedings of the present kind where it is sought that an award application be summarily dismissed or stayed.
- 23 As the respondent submitted, in *Federated Municipal and Shire Council Employees' Union of Australia, New South Wales Division v Energy Australia* (1999) 90 IR 311, a Full Bench of the Commission, having referred to the approach in *Nagle v Tilburg* (1993) 51 IR 8 and *General Steel Industries Inc v Commissioner for Railways* [1964] HCA 69; (1964) 112 CLR 125, observed at 319:

Thus, for the Commission to grant a motion seeking the preliminary dismissal of an application for an award for want of jurisdiction, the Commission would need to be satisfied that no relevant award or order could be made in the circumstances of the case. To paraphrase the approach in *General Steel*, there must be "no possibility that there can be a good cause of action". This is the criterion which must be satisfied for a motion seeking the preliminary dismissal of an application for want of jurisdiction to succeed.

- 24 That statement of the law needs no additional gloss.

Disposition of the matter

- 25 If, as the Secretary of the Treasury contended, the Commission has no jurisdiction at all to make the award sought, that fact would furnish a proper basis for the summary disposal of the application.

- 26 In our view, the submission that the Commission lacks jurisdiction to make the award sought by Unions NSW is correct. The effect of the statutory scheme is that the award sought cannot be presently made.
- 27 It follows that, in the particular circumstances of this matter, the order properly made is to grant the Motion and thereby dismiss summarily the application for an award. We propose to make orders to that effect.
- 28 Before turning to those orders, however, there is one further matter which, although it does not in terms require resolution to dispose of the question before us, warrants address. That is, the concern raised by Unions NSW that the reading of the Regulation propounded by the respondent, if accepted, would mean that only one proceeding could be agitated in relation to any given award in any 12 month period. We do not read the Regulation to have that effect. We observe that, as the respondent conceded in its written submissions, any limitation would be confined to the circumstances expressly caught by s 146C so that a claim brought within a 12 month period that did not touch on employee-related costs would not be excluded by the Regulation.
- 29 We further note, notwithstanding the respondent argued that the 'term' of an award may continue until the award is formally rescinded (an issue which we do not decide), the limitation said to apply to claims which touch on employee-related costs was said to be for no longer a period than 12 months in any case.
- 30 As foreshadowed in [6] above we will make provision in the orders below to deal with any issue arising as to the proper title of the applicant. In the event that any submission filed indicates the need to adjust the name of the applicant, the Commission will make any necessary adjustments administratively in Chambers with a resultant variation to the published version of this decision.

Orders and Directions

31 The Commission makes the following orders and directions:

- (1) The application for the Child Protection (Working with Children) Award 2014 is dismissed.
- (2) The parties may file any submission, in writing, as to the proper title of the applicant on the Notice of Motion in these proceedings within seven days of the date of this decision.
