



Industrial Relations Commission
of New South Wales

CITATION: Depa v Blue Mountains City Council [2004] NSWIRComm 216

PARTIES: NOTIFIER
Development and Environmental Professionals Association

RESPONDENT
Blue Mountains City Council

FILE NUMBER: IRC 3400 of 2004

CORAM: Boland J

CATCHWORDS: Notification of dispute under section 130 of Industrial Relations Act - Complaint against executive officer - Conciliation - Challenge to Commission's jurisdiction - Local Government Act - Held no jurisdiction

LEGISLATION CITED: Industrial Relations Act 1996
Local Government Act 1993

CASES CITED: Taudevin v Egis Consulting Australia Pty Limited (2000) 97 IR 165
Younan Sedrak v State of New South Wales (Department of Public Works and Services) (unreported, Hungerford J, 19 August 1999)

DATES OF HEARING: 21/07/2004

DATE OF JUDGMENT: 30/07/2004

LEGAL REPRESENTATIVES: NOTIFIER
Mr I Robertson
Development and Environmental Professionals' Association

RESPONDENT
Mr C Towner - Local Government Association
for Blue Mountains City Council

**INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES
IN COURT SESSION**

CORAM: BOLAND J

Friday 30 July 2004

Matter No IRC 3400 of 2004

**NOTIFICATION UNDER S 130 BY THE DEVELOPMENT AND
ENVIRONMENTAL PROFESSIONALS ASSOCIATION OF A DISPUTE WITH
BLUE MOUNTAINS CITY COUNCIL RE COMPLAINTS AGAINST MEMBER**

JUDGMENT

[2004] NSWIRComm 216

- 1 On 10 June the Development and Environmental Professionals' Association ("depa") notified, pursuant to s 130 of the *Industrial Relations Act* 1996, the existence of a dispute with the Blue Mountains City Council. The dispute concerned an investigation carried out by the Council into complaints made by a ratepayer about a member of depa, Mr Warwick Winn.
- 2 Apparently Mr Winn, an executive officer with the Council, in his private capacity had lodged an objection to an application filed with the Council by a neighbour. The neighbour had complained that Mr Winn had improperly used his position as a Council officer.
- 3 Mr Winn was concerned that he had not been advised by the Council of the nature and extent of the complaint against him and contended that in the absence of that information he was being denied natural justice and was being disadvantaged in defending himself against the allegations.

4 The matter was listed for compulsory conference on 15 June 2004. However, the Commission was advised by letter dated 11 June 2004 that the Acting General Manager of the Council, Mr Martini, had written to depa advising that:

- 1 Council agrees to put on hold the investigation regarding Mr Winn until discussions are held with the General Manager and DEPA;
- 2 Council will meet with DEPA to discuss the Council's protocol for investigation of complaints against employees;
- 3 Council undertakes not to carry out investigations with other DEPA members until the matter is resolved and confirms that there are no other investigations being undertaken involving DEPA members.

We will be in contact regarding suitable date for a meeting with DEPA when the General Manager returns from leave early next week.

5 Mr I *Robertson* for depa asked that the compulsory conference be adjourned until 28 June 2004 for report back and the Commission agreed to this request.

6 On 28 June 2004 the Commission was advised that:

- 1 The investigation into the complaint against Mr Winn was not put on hold and instead Mr Winn was advised in an email from Mr Michael Willis the General Manger of the Council, dated 21 June 2004, that "on the basis of information supplied so far, my preliminary view is that those allegations lack evidence to support them" and that "I have also decided to agree to your request referred to above, and that you also be given an opportunity to respond to the allegations, and that your response form part of the preliminary report. A copy of the allegations will be personally forwarded to you shortly ..."

2 Mr Willis had not met with depa in accordance with the earlier undertaking to do so. Mr Willis had indicated to Mr Robertson there was no obligation on him to meet with depa and the undertaking to do so had not been given by him.

3 Mr Winn met with Mr Willis on Friday 25 June when Mr Winn was advised that he would be provided with a letter to the effect that investigations into the complaint against Mr Winn had concluded and found not to have been substantiated.

7 Mr *Robertson* expressed his organisation's annoyance and concern about the failure of the Council, and in particular, Mr Willis to comply with undertakings to suspend the investigation and to meet in accordance with the terms of Mr Martini's letter of 11 June. The Commission decided, however, in light of the foreshadowed letter from Mr Willis to Mr Winn not to grant Mr *Robertson's* request to direct Mr Willis to attend a Compulsory Conference. The matter, however, was listed for report back on 7 July to allow time for depa and Mr Winn to consider the implications of Mr Willis' letter.

8 Mr Willis advised Mr Winn in a letter dated 29 June 2004 that:

1 That he had reviewed the findings of the preliminary enquiries in to the allegations against Mr Winn and thanked him for his response to the allegations "concerning your conduct, which have been detailed to you."

2 The findings did not "support any allegation that improper influence was brought to bear by you on officers in their dealing of matters to do with the subject property. Importantly, the preliminary enquiries found no evidence that you were involved directly or indirectly in the enforcement action" and that "As you are aware other allegations and/or inferences were made about you but the preliminary enquiries concluded that such were vague, based on hearsay and/or insufficient to warrant further action. I support those findings."

- 9 Mr *Robertson* indicated in relation to this latter point that it was too ambiguous and he was looking for a more straightforward exoneration of Mr Winn. He also said Mr Winn had never been given the full details of the complaint made against him.
- 10 The Commission recommended that a meeting occur between Mr Willis, Mr Winn and Mr *Robertson* to clear up all outstanding issues and to put all matters to rest. The Commission asked the parties to report back on 11 August 2004.
- 11 The Commission was subsequently advised that Mr Willis had refused to accept the Commission's recommendation to meet and finalise any outstanding issues. Consequently the matter was relisted for Monday 26 July 2004. On that day Mr *Robertson* sought certain directions including a direction pursuant to s 132(1) of the Act that Mr Winn attend at the Compulsory Conference. However, the Commission was advised by Mr C *Towner* of the Local Government Association, representing the Council that the Council did not consider the Commission had the necessary jurisdiction to make recommendations in respect of the dispute and, further, that as Mr Winn had resigned from the Council's employ effective in August 2004 there were no outstanding issues to be dealt with.
- 12 The jurisdictional objection was based on the terms of ch 11 of the *Local Government Act 1993* and, in particular, s 340, which is in the following terms:

340 Industrial arbitration excluded

- (1) In this section, a reference to the employment of the general manager or another senior staff member is a reference to:
- (a) the appointment of, or failure to appoint, a person to the vacant position of general manager or to another vacant senior staff position, or

(b) the removal, retirement, termination of employment or other cessation of office of the general manager or another senior staff member, or

(c) the remuneration or conditions of employment of the general manager or another senior staff member.

(2) The employment of the general manager or another senior staff member, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the Industrial Relations Act 1996.

(3) Subsection (2) applies whether or not any person has been appointed to the vacant position of general manager or another vacant senior staff position.

(4) No award, agreement, contract determination or order made or taken to have been made or continued in force under the Industrial Relations Act 1996, whether made before or after the commencement of this section, has effect in relation to the employment of senior staff members.

(5) No proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, lie in respect of the appointment of or failure to appoint a person to the position of general manager or to another senior staff position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment.

It was not in issue that Mr Winn held a senior staff position in the Council.

13 Section 130 of the *Industrial Relations Act* provides that:

130 Notification of industrial dispute to Commission

(1) Any of the following may notify the Commission of an industrial dispute for the purpose of resolving the dispute:

- (a) an industrial organisation of employees or employers,
- (b) an employer who is or is likely to be affected by the dispute,
- (c) a person who is or is likely to be the subject of a secondary boycott in connection with the dispute,
- (d) a State peak council.

(2) The Commission may act on its own initiative to resolve an industrial dispute.

Section 134 provides for the conciliation of the industrial dispute.

14 "Industrial dispute" is defined in the Dictionary to the Act as follows:

industrial dispute means a dispute (including a question or difficulty) about an industrial matter, and includes the following:

- (a) a demarcation dispute,
- (b) a threatened or likely industrial dispute,
- (c) a situation that is likely to give rise to an industrial dispute if preventative action is not taken.

15 It may be seen that an "industrial dispute" is a dispute about an industrial matter. It is clear from the terms of s 340(2) of the *Local Government Act* that any matter, question or dispute relating to the employment of a "senior staff member" is not an industrial matter for the purposes of the *Industrial Relations Act 1996*. The power of the Commission, therefore, to deal with this current dispute by way of conciliation or arbitration is precluded by s 340(2) of the *Local Government Act*.

16 Mr Robertson contended that there were other issues involved beyond those impacting on Mr Winn that did give the Commission the necessary jurisdiction. The other issues seem to me to be very much at the margin of the matters concerning Mr Winn and do not warrant any direction to Mr Willis to attend a Compulsory Conference, at least at this stage. If Mr Robertson wished to pursue those other issues it would be more appropriate to do so under a new dispute notification, but in that respect I note that those issues are still under discussion between the parties.

17 I do not consider the approach taken in *Younan Sedrak v State of New South Wales (Department of Public Works and Services)* (unreported, Hungerford J, 19 August 1999) and *Taudevin v Egis Consulting Australia Pty Limited* (2000) 97 IR 165 is applicable here:

- 18 Whilst the Commission may be precluded from dealing with the issues relating to Mr Winn I would make the observation that the Council and, in particular, Mr Willis, has handled the whole affair very poorly. Mr Willis has demonstrated a marked reluctance to engage in any discourse with Mr Winn's organisation; indeed it seems to me he actively avoided it. If he had met in accordance with the undertaking given on 11 June 2004 and followed the course proposed by Mr Martini, I consider the dispute could have been resolved quickly and to everyone's satisfaction.
- 19 I do not consider the Council gave Mr Winn a fair go. He should have been provided from the outset with the details of the allegations made against him. Instead, he was forced to make an application under the relevant freedom of information provisions. Mr Winn should also have been given the opportunity of being represented by his organisation, depa, from the outset and any letter exonerating him from wrongdoing should have been spelt out in unambiguous terms.
- 20 As I do not have jurisdiction to deal with the notification by depa I do not propose to proceed any further with it. The report back listed on the 11 August is vacated. The file is closed.
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