THE PUBLIC SERVICE ASSOCIATION & PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED OF NSW v DIRECTOR OF PUBLIC EMPLOYMENT & ORS (S127/2012)

Court appealed from: Industrial Court of New South Wales
[2011] NSWIRComm 143

Date of judgment: 31 October 2011

Special leave granted: 11 May 2012

On 7 March 2011 the Public Service Association and Professional Officers' Association Amalgamated of NSW ("the PSA") applied to the Industrial Relations Commission of New South Wales ("the Commission") for new awards that would increase the salaries of certain NSW public sector employees. A hearing of the application was scheduled to commence on 1 August 2011.

On 17 June 2011 the *Industrial Relations Act* 1996 (NSW) ("the Act") was amended by the insertion of both a new section, s 146C, and a new sub-section, s 105(2). Both amendments were effected by the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 (NSW) ("the Amendment Act"). Section 146C requires the Commission to give effect to certain policies when it makes (or varies) an award or order about the employment conditions of public sector employees. Such policies are those which the NSW government declares (by regulation) to apply to a matter before the Commission. Section 105(2) stipulates that a contract is not unfair (under Part 9 of the Act) merely because a provision in it gives effect to a policy declared under s 146C of the Act.

On 20 June 2011 the *Industrial Relations (Public Sector Conditions of Employment) Regulation* 2011 ("the Regulation") was made. It was declared to be a government policy for the purposes of s 146C of the Act. The Regulation capped public sector salary increases at 2.5% (unless offsetting cost savings were made). The PSA applied for a declaration that the Amendment Act, or alternatively the Regulation, was invalid. Certain types of matter, such as the PSA's application, are heard by judicial members of the Commission sitting as the Industrial Court of New South Wales ("the Industrial Court").

On 31 October 2011 the Full Bench of the Industrial Court (Walton, Kavanagh & Backman JJ) unanimously dismissed the PSA's application. Their Honours held that the Amendment Act was not invalid, as it did not operate upon the Industrial Court's exercising of judicial power. The Full Bench found that the terms of s 146C clearly restricted its operation to the Commission, especially since s 146C(5) states that the section does not apply to the Industrial Court. Their Honours held that s 105(2) merely confines the Industrial Court's pre-existing statutory jurisdiction with respect to unfair contract claims. They further held that nothing in the Amendment Act fetters the adjudicative process undertaken by the Industrial Court in proceedings for the enforcement of Commission determinations (even if s 146C had restricted the Commission

when it made its determination). The Full Bench also found that the Regulation was not invalid, as it was authorised by the Act. This was because s 146C permits the making of such regulations, and the Regulation's purpose is in accordance with that section.

On 18 May 2012 the PSA filed a Notice of a Constitutional Matter under s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of Victoria, Queensland, South Australia and Western Australia have all intervened in this matter.

The grounds of appeal include:

- The Industrial Court erred in finding that the Amendment Act was not invalid by reason that it undermines the institutional integrity of the Commission when constituted as the Industrial Court.

- The Industrial Court erred in finding that s 146C(5) of the Act is a complete answer to the proposition that the Amendment Act undermines the institutional integrity of the Industrial Court.