

**PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA
INCORPORATED v INDUSTRIAL RELATIONS COMMISSION OF SOUTH
AUSTRALIA & ANOR (A7/2011)**

Court appealed from: Full Court of the Supreme Court of
South Australia [2011] SASCF 14

Date of judgment: 15 March 2011

Date application referred to Full Court: 8 June 2011

The Public Service Association of South Australia (PSA) wrote to the Industrial Relations Commission of South Australia (the Commission) in October 2010 notifying it of two disputes. The first dispute related to “security of employment for Public Sector employees”. The second dispute related to “entitlements for Public Sector employees in respect of both recreation leave loading and long service leave entitlements”. In each case the PSA requested the calling of a conference under s 200 of the *Fair Work Act 1994* (SA) (the Act). Commissioner McMahon declined to make any order, holding that the Commission had no jurisdiction. The PSA appealed to the Full Commission, which held in each case that there was no industrial dispute about an industrial matter, and that the Commission did not have jurisdiction:

The PSA then issued proceedings in the Supreme Court of South Australia, by way of judicial review, seeking an order quashing the decision of the Full Commission. The Full Supreme Court (Doyle CJ, Duggan and Vanstone JJ) dismissed the application on the ground that it lacked jurisdiction to make the orders sought. The Court relied on s 206 of the Act which provides:

- (1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.
- (2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction.

The Court applied the decision of this Court in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 (**PSA** case). The PSA submitted that the decision of this Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 meant that the **PSA** case was no longer good law, because the effect of *Kirk* was that s 206 of the Act could not exclude judicial review by the Supreme Court of a decision affected by jurisdictional error. While recognising the force of that submission, Doyle J (with whom Duggan and Vanstone JJ concurred) considered that it was not open to the Supreme Court to hold that the decision in the **PSA** case had been reversed by *Kirk*. Only the High Court could take that step.

The PSA submitted that ss 206(2) applied in this case because the Full Commission mistakenly denied the existence of jurisdiction and had no jurisdiction to dismiss the appeal. The Full Court held that to accept that submission would be to undermine the distinction drawn by the High Court in the **PSA** case. A failure or refusal to entertain an appeal, based on an

erroneous conclusion that there is no jurisdiction to entertain the appeal, will usually result in an order either striking out or dismissing the appeal. To say that the making of that order changes the decision from a decision involving a failure to exercise jurisdiction to a decision involving an excess of jurisdiction is to deny the very distinction that the High Court drew in the **PSA** case. In this case, the Full Commission merely failed to exercise its jurisdiction. The decision that it made could not be challenged.

The application for special leave was, on 8 June 2011, referred to an enlarged bench. The PSA has given notice that this proceeding involves a matter arising under the Constitution within the meaning of s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of the Commonwealth, South Australia, Victoria, Western Australia, Queensland and Tasmania are intervening in this application.

The questions of law said to justify a grant of special leave to appeal include:

- Does the privative provision constituted by s 206 of the *Fair Work Act* 1994 (SA) preclude judicial review by the Supreme Court of South Australia of jurisdictional error and encompassed by the phrase "in excess or want of jurisdiction";
- If so is such section beyond the scope of the South Australian Parliament?