APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 66/2016 GIVEN ON 19 JUNE 2017
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00988
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 24 NOVEMBER 2020
DELIVERED	**:**	TUESDAY, 15 DECEMBER 2020
FILE NO.	**:**	FBA 10 OF 2020
BETWEEN	**:**	MR LESLIE MAGYAR Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

---

ON APPEAL FROM:

Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER T EMMANUEL**
Citation	**:**	**2017 WAIRC 00286**
File No	**:**	**APPL 66 of 2016**

CatchWords	**:**	Industrial law (WA) – Application to file appeal out of time – Application to receive fresh or new evidence – Appeal against a decision of the Commission – Teacher – Breach of discipline – Lawful direction disobeyed — Credibility of witness undermined – No evidence submitted to support application – No explanation for inordinate or lengthy delay – No arguable case – Application to file appeal out of time dismissed – Application for new evidence to be received dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA)

Result	**:**	Application for appeal to be filed out of time dismissed Application for new evidence to be received dismissed

Representation:

Counsel:

Appellant	**:**	Mr N Marsh (of counsel)
Respondent	**:**	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Cousins v YMCA of Perth [2001] WASCA 374; (2001) 82 WAIG 5

Director General, Department of Education v United Voice WA [2015] WASCA 195

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited (1990) 70 WAIG 3040

Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services v Jeremy Freeman [2014] WAIRC 00488; (2014) 94 WAIG 803

Edward Michael v Director General, Department of Education and Training [2008] WAIRC 00331; (2008) 88 WAIG 592

Underdown v Dowford Investments Pty Ltd [2005] WAIRC 01243; (2005) 85 WAIG 1437

Reasons for Decision

THE FULL BENCH:

1 Mr Magyar seeks two things:

(a) Leave to file this appeal out of time; and

(b) that the Full Bench receive new or fresh evidence which is said to underpin the grounds of appeal.

2 At the conclusion of the hearing on 24 November 2020, the Full Bench indicated that it would dismiss the applications. These are our reasons for doing so.

Background

3 Mr Magyar was employed by the Department of Education as a teacher. In 2015, the respondent found that he had disobeyed a lawful direction and imposed a penalty on him. Mr Magyar referred that matter to the Commission in application number APPL 66 of 2016. On 19 June 2017, Commissioner Emmanuel issued Reasons for Decision ([2017] WAIRC 00351; (2017) 97 WAIG 769) and an order dismissing the application.

4 Mr Magyar was dismissed in 2018. The reasons for that dismissal include the disobedience of the lawful direction. Mr Magyar currently has before the Commission a claim of harsh, oppressive or unfair dismissal (application number U 124 of 2018, which is currently part-heard). Mr Magyar now seeks to have this disciplinary matter removed from the justification for his dismissal by appealing to the Full Bench against the decision made in 2017, more than three years ago.

5 Mr Magyar's grounds of appeal are said to be based on his having received approximately 300 pages of documents in October 2019, in response to a Freedom of Information request. Those documents are said to undermine the evidence of a witness where the Commissioner preferred that evidence to Mr Magyar's evidence. This is the basis for his application that the Full Bench receive the fresh evidence.

The disciplinary action

6 The Director General found that Mr Magyar had disobeyed a lawful order to not alter his classroom without consulting his line manager. He was reprimanded and fined one day's pay.

7 The circumstances behind that order were reflected in a letter to Mr Magyar dated 5 July 2014, from the school Principal, Ms Katherine Ward. The letter said:

> Dear Les
>
> I understand from Michelle that you have collected school keys and a pass code as you intend to return to work next term. That is good to hear.
>
> Brian has also forwarded to me an email where you have asked about the competency that you will need to know about to commence the term. As you know, Mark Nickels is also teaching a Cert II course and he will be able to assist you in your transition back into the school. As luck would have it, Gavin Chadwick will also be on site for the first two weeks of school as he is doing relief for the Aviation teachers who are on tour at that time. You may already be aware that I am also going on the Aviation tour so won't be able to welcome you back in person until week three. Gavin will be able to ensure that all necessary documentation is available for you to resume your teaching duties.

In the meantime, please note the following:

- You are most welcome to enlist the support of the gardeners to move any of your belongings from the office down near room 62 up to the office near room 1. I am mindful that your personal items were not relocated in your absence.
- Our RTO (Registered Training Organisation) for the Cert II that you will be delivering was audited in term two. They passed their audit and we have a certificate stating that the facilities in room 1 comply with the RTO requirements as they presently stand.
- The curriculum for the entire Certificate II has been locked in with the RTO. Brian has this information and will be able to provide you with what needs to take place in second semester.
- Given the above information, I direct you not to make any alterations to room 1 without full and proper consultation with your direct line management – Lyn Diver and Brian Gould. It is imperative that this room maintains a standard of occupational health and safety. I am aware that there is no power source in the centre of the room at this stage. Do not reinstate the second computer screens currently located in your office or the stand alone hub until consultation with your line management has been undertaken and infrastructure, if required, has been put in place to ensure that any machines located there are placed safely and ensure that you are well positioned to maintain your duty of care.

You should have received this information in an email from me on 5 July 2014. I am forwarding a hard copy on letterhead so that you are fully aware of the importance to follow the directive provided above.

Yours faithfully

Mrs Kath Ward

Principal

8 The learned Commissioner at first instance found that:

(1) Ms Ward directed Mr Magyar not to alter his classroom without consulting his line manager [10];

(2) Where there was conflict between Ms Ward's evidence and Mr Magyar's evidence, she preferred Ms Ward's evidence. This was 'because Ms Ward's evidence was consistent and undisturbed whereas Mr Magyar contradicted himself by disputing Ms Ward's account of what he had said even though he agreed twice in cross-examination that he had said it' [19];

(3) Ms Ward 'found Mr Magyar difficult to manage, that he had not followed a clear direction she had given him in late 2012 and that concerned her. I accept that those circumstances led Ms Ward to give Mr Magyar the direction in writing on 5 July 2014' [20];

(4) In the circumstances of the classroom being refitted and audited and the school having been issued with a 'certificate stating the facilities in Mr Magyar's classroom complied with the RTO's requirements as they presently stood and Ms Ward wanted the two computer classrooms to mirror

one another, it was reasonable of Ms Ward to direct Mr Magyar not to alter his classroom without consultation with his line manager' [22];

(5) It was reasonable in the circumstances that Ms Ward did not issue the same direction to the other computer teacher as it was not necessary;

(6) The direction was well within Ms Ward's rights to give; it was lawful under the *School Education Act 1999* (WA) and at common law, and it was lawful and reasonable [24]; and

(7) Contrary to Mr Magyar's arguments about the interpretation of the direction and his actions, he disobeyed the lawful order.

Grounds of appeal

9 Mr Magyar says that the documents he received in 2019 included documents that he did not know existed. One was called 'Resource Checklist', which is explained later. His grounds of appeal are:

> 2. The Commissioner erred in law and or fact in finding that the Appellant's conduct constituted misconduct because she was unaware of fresh evidence that has emerged:
>
> a) The computer that the Appellant placed in the classroom was a part of the "specialised equipment" as specified in Document #01 under the heading "Specialized equipment" called "servers for file storage".
>
> b) The Respondent required the Appellant to maintain the room in the state that the auditors found it on 11 March 2014 as stated in Document #03 page 2.
>
> c) Placing the computer in the room made the classroom comply with the Resource Checklist requirements as specified in Document #03 and therefore could not constitute a breach of a lawful order.
>
> 3. The Commissioner erred in law and or fact in finding that the Respondent's witness, Mrs Kath Ward was a credible witness because she was unaware of false statements made by Mrs Ward with respect to ergonomic chairs that can now be disproven on the basis of fresh evidence that has emerged:
>
> a Document #08 is an extract of Mrs Ward being cross-examined on whether the Appellant could bring an extra chair in to the classroom without asking permission from a line manager.
>
> b Mrs Ward states that placing a standard non-ergonomic chair into that classroom would be a "breach of the RTO's regulations".
>
> c) Document #05 shows standard non-ergonomic chairs that were placed in the room by the school administration about one year after the hearing of Appl 66/2016.
>
> d) Document #06 shows a photograph of the Appellant's classroom in 2013. All the students are sitting on plastic non-ergonomic chairs.
>
> e) The footer in Document #03 page 2, shows that the room was first audited in March 2013. In 2013 the room did not have ergonomic chairs. The "specialised equipment" requirements list does not mention a requirement for ergonomic chairs.
>
> f) Document #07 is the resource checklist for 2017. That resource checklist does not mention a requirement for ergonomic chairs.

g) Document #09 is an extract of Mrs Ward being re-examined on the alleged requirement that ergonomic chairs are required for "RTO certification".

10 Mr Magyar made submissions about the circumstances relating to the application to file the appeal out of time and to receive fresh evidence, but did not support them with evidence. Rather, the applicant makes submissions about them.

The new or fresh evidence

11 The new or fresh evidence is made up of nine documents attached and referred to in the Grounds of appeal.

12 Document #01 is a handwritten note with what appears to be Ms Ward's signature, although there is no evidence regarding this note. The respondent accepts that it appears to be by Ms Ward and that it is self-explanatory. It says:

> Note: Principal attended the Central TAFE audit meeting @ KSSHS on Mon 23 June @ 2pm. Just prior to the meeting officially commencing, I asked the auditor to comment on the designated classroom – room 1 – in view of its suitability to deliver the Cert II. In the presence of Brian Gould, Mark Nickels, Maureen T. from CIT, the auditor Julie Large, stated that the room appeared standard and typical of her experience as an auditor.
>
> (Signature) 24/6/14
>
> On 24/6/14 Brian Gould indicated that he would ask Helen Burgess to return to KSSHS at a later date to undertake a Cert II Resource requirements check. It was then realised that Helen had completed this in March 2014 to the satisfaction of CIT.
>
> (Signature)

13 Document #02 appears to be an email from Brian Gould to Katherine Ward dated 24 June 2014. It notes:

> Hi Kath
>
> Central Institute viewed our facility in March and signed off on it (attached). Where any particular aspects of the cert could not be done under an SOE4 environment they could be completed using a small stand-alone network of PCs not connected to the department network and Central have approved of that arrangement.
>
> regards
>
> Brian Gould

14 Document #03 is on the letterhead of Central Institute of Technology, is headed *VET in Schools Auspicing - Program Resource Checklist* and is two pages in length. It bears the signatures of E H Burgess and B Gould as Institute staff member and School representative respectively, and is dated 11 March 2014. It might be inferred that this is the Program Resource Checklist for the school for the Certificate II in Information Digital Media and Technology. It sets out certain equipment, materials, strategies and specialised equipment. It may be the checklist referred to in and attached to Document #02.

15 Document #04 is the email from Brian Gould of 24 June 2014 contained within Document #02 but also contains an email from Ms Ward to Kerry Wright at South Metro Regional Ed Office dated 25 June 2014, the subject being 'Cert II IT Resource requirements'. There is reference to an attachment, 'Resource checklist 2014'.

16 The email says:

> Dear Kerry
>
> I attended a meeting with the staff from Central Institute (Our RTO for the Cert II in IT) and their auditor on site in room one on Monday 23 June. I took the opportunity prior to the commencement of the meeting to ask the auditor, Julie Large, about the suitability of the designated classroom to deliver Cert II. She was in the room at the time and, looking around, stated that it was pretty standard, noting that we have a promethean board and data projector.
>
> After the meeting, Brian Gould informed me that Central undertake a resource requirements check and that Helen Burgess from Central Institute had done exactly this in March of this school year. Her findings are attached. It was noted that where some aspects of the course might not be able to be delivered under SOE4, they could be accommodated using a stand-alone network of PCs not connected to the network.
>
> I thought that this might be useful for your briefing to Julie Woodhouse.

17 Documents #05 and #06 are photographs, the first being of a chair and the second being of a classroom. There is dispute between the parties as to when the photographs were taken.

18 Document #07 is headed AICT Resource Checklist and contains what appear to be annotations. It is not clear if the heading is on the original document or has been added.

19 Document #08 is two brief extracts from the transcript of Ms Ward's evidence during the hearing before the Commission at first instance. The first extract is a hypothetical question about Mr Magyar bringing an extra chair for a student and whether he would need to consult with his line manager about that. The second is in cross-examination of Ms Ward regarding that hypothetical matter and Ms Ward's response relating to the RTO's demand that ergonomic chairs be used.

20 Documents #05, #06, #07 and #08 have what may be annotations in the original documents, or these annotations may have been made by Mr Magyar or someone else for the purposes of this application.

Mr Magyar's submissions

21 In his submissions, Mr Magyar says that the list of 'Specialised Equipment' (scanners, cameras, servers for file storage) were never located in Room 1 but were only ever located in Room 2. He taught in Room 1 and none of the items of 'Specialised Equipment' were in Room 1 when he returned to work in September 2014 having been absent since November 2013. He says that:

> The handwritten notes of Ms Ward dated 24 June 2014 page 19 of the Appeal Book and the email of Brian Gould dated 24 June 2014 are referring to Room 2 and not Room 1 however, the directive not to alter Room 1 was predicated on maintaining the requirements of the audit when, in fact, Room 1 had not been audited.

22 He says that given the terms of the directive, it was unlawful and wrong. Mr Magyar also notes that the Resource Checklist does not mention a requirement for ergonomic chairs. He says:

> Appeal Book page 25 shows an image taken from CCTV footage showing students sitting on plastic classroom chairs. The RTO did not indicate that the plastic chairs need to be replaced by ergonomic chairs.
>
> Appeal Book page 24 shows a photograph of a non-ergonomic chair placed in Room 1 in 2017 by the school administration.

See page 83 of the transcript in relation to the evidence concerning ergonomic chairs.

23 Mr Magyar says that the documents reveal that Ms Ward's evidence was false and incorrect because it was based upon wrong or false suggestions that:

(a) He was operating in breach of the audit requirements of the RTO;

(b) The directive given by Ms Ward to him was unlawful because, by issuing that direction, she was causing him to breach the RTO audit; and

(c) Commissioner Emmanuel found Ms Ward to be a credible and reliable witness in preference to himself.

24 In those circumstances, Mr Magyar says the prospect of the success of the appeal is strong.

25 Mr Magyar does not dispute that he brought equipment into his room but says there was never specialised equipment in Room 1, it was only ever in Room 2. He says that Ms Ward's notes and her direction were based on the false assumption that Room 1 was audited when in fact it was Room 2.

The law – appeal out of time

26 It is necessary to consider, as a first step, whether there ought to be an extension of time in which to file the appeal. An appeal is to be brought within 21 days of the decision appealed against the *Industrial Relations Act 1979 (*WA) (the Act) s 49(3). The Full Bench has discretion to extend time in which to institute an appeal (***Director General, Department of Education v United Voice WA*** [2015] WASCA 195). Section 27(1)(n) of the Act empowers the Commission to grant an extension of time to bring an appeal. However, it is not an automatic grant and each case turns upon its particular facts. Discretion is conferred for the sole purpose of enabling the Commission to do justice between the parties and it is necessary to consider the prospects of success of the applicant (***Cousins v YMCA of Perth*** [2001] WASCA 374; (2001) 82 WAIG 5 [46] or [33] (Kennedy J, with whom Scott and Parker JJ agreed). In that matter, Kennedy J said:

> The fact that the respondent had filed its appeal on the twenty-first day after the decision was handed down is no doubt a factor which can be taken into account in determining whether or not to grant an extension of time. In ***FDR Pty Ltd v Gilmore*** (1996) 76 WAIG 4434, the Full Bench granted an extension of time in such a situation. However, as the learned President pointed out in that case, at 4447, the granting of an extension of time is not automatic, and each case turns upon its particular facts. The discretion is conferred for the sole purpose of enabling the court to do justice between the parties and it is always necessary to consider the success of the applicant. See also ***Ryan v Hazelby & Lester t/a Carnarvon Waste Disposals*** (1993) 73 WAIG 1752.

27 His Honour went on to note that:

> In ***Gallo v Dawson*** (1990) 64 ALJR 458, McHugh J said, at 459, in relation to an extension of time for appealing from a single Justice under the *High Court Rules*:
>
> > "The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the

> parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263-264; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice."

> There is, in my opinion, a significant problem in the decision of the Full Bench in the present matter. It arises from an apparent failure to appreciate the distinction between the principles governing the granting of an extension of time for complying with a particular rule of procedure, of which ***Jackamarra v Krakouer*** *(supra)* is an example, and the seeking of an extension of time for appealing against a judgment, of which ***Gallo v Dawson****(supra)* is an example. The present case falls into the latter category.

> As was emphasised by McHugh J in ***Gallo v Dawson*** (supra), the discretion to extend time is given for the sole purpose of enabling the Court (or, in this case, the Industrial Relations Commission) to do justice between the parties, and the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon him. One of the relevant factors relates to what the consequences will be of the grant or refusal of the application for an extension of time. Another relevant factor for granting an extension of time is that the proposed appeal has some prospects of success, whilst conceding, as Brennan CJ and McHugh J said in ***Jackamarra v Krakouer***, that an appellate court can only assess the merits in a fairly rough and ready way, because otherwise the court would have to conduct a full rehearsal for the appeal.

28 There are then four factors – the length of the delay; the reason for the delay; whether the appellant has an arguable case, and whether there is any prejudice to the respondent. The purpose of receiving an application out of time is to enable the Commission to do justice between the parties.

The length of the delay

29 The length of the delay in this case is more than three years. In the context of the time prescribed in the Regulations of 21 days, it is an inordinate delay. The new evidence that Mr Magyar seeks to provide to the Full Bench appears to have been provided to him in October 2019. The appeal was lodged more than a year after the information which grounds the appeal was discovered, also a very lengthy delay.

Reason for the delay

30 The reason for the delay appears to be that until Mr Magyar was dismissed and the breach of discipline the subject of the decision at first instance became an issue in Mr Magyar's dismissal, the matter did not arise. We have no explanation of why it has taken Mr Magyar until close to the conclusion of his unfair dismissal case to seek to utilise fresh evidence obtained in 2019 and thereby attempt to bring Ms Ward's evidence into question.

An arguable case?

31 The next question is whether the applicant has an arguable case. This brings the fresh evidence application into consideration.

32 In ***Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited*** (1990) 70 WAIG 3040 (3 August 1990), President Sharkey set out the test for the receipt of fresh evidence. His Honour noted:

> Fresh evidence which is admissible on appeal is evidence which was not available to the appellant at the time of the trial and which reasonable diligence in the preparation of the case could not have made available.
>
> Secondly, the evidence must be such that it would have had an important influence on the result of the trial, and it must be credible, but not necessarily beyond controversy (see *Ventura v Sustek* (1976) 14 SASR 395, *Orr v Holmes* 76 CLR 632, and *Bristow Helicopters v Global Marine Drilling Co* [1981] WAR 108).

33 In ***Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services v Jeremy Freeman*** [2014] WAIRC 00488; (2014) 94 WAIG 803 at [806], the Full Bench noted at [15], by reference to ***Underdown v Dowford Investments Pty Ltd*** [2005] WAIRC 01243; (2005) 85 WAIG 1437 [8], that the test regarding that 'the evidence would have an important influence on the result of the trail' had become that 'the opposite result would have been reached' a more stringent one.

Consideration of fresh evidence

34 As we noted earlier, there is no evidence before the Full Bench, only submissions and documents. There is no evidence about why Mr Magyar took a year to review 300 pages of documents and to discover their purported significance. Three hundred pages is not a large number of pages to be reviewed by a person applying diligence to the task. We do not know why it took him so long. There is no evidence as to the circumstances under which he sought those documents, particularly given that he had already, at least a year before, filed his claim of harsh, oppressive or unfair dismissal.

35 Further, there is no basis for the argument that if Ms Ward was wrong, the outcome would be different. The learned Commissioner found, correctly in my respectful view, that the reasons given by Ms Ward in the direction to Mr Magyar did not rely merely on compliance with the certificate, but also on occupational safety and health and duty of care grounds, and on the desirability of the two computer classrooms mirroring one another [22]. Even if she was wrong, and Mr Magyar could have installed a stand-alone computer in his room, her instruction was lawful. It was to not change the room *without full and proper consultation* (emphasis added). He did change the room and he did so without consultation.

36 Mr Magyar appears to accept that the direction was lawful but says that it was based on erroneous information. That does not alter the fact that it was a lawful direction and that he was obliged to comply, but he did not.

37 In any event, it was not Mr Magyar's position at any time until these applications, that he made the change to be compliant with the audit findings. Mr Magyar says that what he did by bringing a stand-alone computer into the classroom was, in his counsel's words, to 'unwittingly' comply with the requirements of the audit certificate. However, until this point, Mr Magyar's reasons for changing the room had nothing to do with maintaining compliance

with the audit certificate. Further still, there is no evidence before the Full Bench to verify what Mr Magyar asserts ought to be inferred from the new documents.

38 If he had thought that he was required to make the change, then Mr Magyar was still required to consult before he made that change.

39 In our view, there is no prospect that allowing the fresh evidence would have the desired effect of affecting Ms Ward's credibility. Even if it did, Mr Magyar's evidence would not necessarily prevail over Ms Ward's evidence because the learned Commissioner found Mr Magyar contradicted himself and 'did not seem to appreciate that by his own admissions, he disobeyed the clear direction he was given' [19].

40 In relation to the ergonomic chairs, the respondent correctly argues that while the photographs themselves may be fresh evidence, the circumstances behind them were known to Mr Magyar. Further, we are not satisfied that this issue is relevant to the appeal. It arose in the hearing by a hypothetical question to Ms Ward about ergonomic chairs being required by the RTO.

41 This leads us to the conclusion that, even if the evidence is fresh evidence, and it was attended to with reasonable diligence, its receipt would not change the result. Therefore, the basis for the appeal is completely undermined.

Prejudice to the respondent

42 The respondent has proceeded to dismiss Mr Magyar, taking into account the matters relating to the decision at first instance. It has proceeded to defend the unfair dismissal claim taking account of this issue. It is now too late for Mr Magyar to seek to undo all of this without the respondent being significantly prejudiced.

Conclusion

43 In our view, none of the tests for the appeal to be received out of time favour the applicant. An extension of time would not serve the purpose of doing justice between the parties. We will dismiss the applications to receive new evidence and that the appeal be received out of time.