APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 15 OF 2018 GIVEN ON 17 APRIL 2020
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00927
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 8 SEPTEMBER 2020
DELIVERED	**:**	FRIDAY, 20 NOVEMBER 2020
FILE NO.	**:**	FBA 5 OF 2020
BETWEEN	**:**	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION WESTERN AUSTRALIA Appellant AND STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED) Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**The Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner D J Matthews**
Citation	**:**	**2020 WAIRC 00300; 2020 WAIRC 301**
File No	**:**	**CR 15 of 2018**

Catchwords	**:**	Industrial law (WA) - Appeal against decision of Commission - Whether leave to appeal a finding should be

		granted in the public interest - Application to dismiss proceedings at first instance - Principles applied - Whether reasons for decision adequate - Principles applied - Whether Commission obliged to notify party of matters to be taken into account - Reinstatement - Fitness for work - Trust and confidence - Principles applied
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 26(3), 27(1)
Result	**:**	Appeal dismissed

Representation:

Counsel:

Appellant	**:**	Mr J Carroll of counsel
Respondent	**:**	Ms R Cosentino of counsel

Case(s) referred to in reasons:

Adam v East Metropolitan Health Service (2019) 99 WAIG 556

Australian Federal Police v Kalimuthu [2015] WASC 376

Australian Liquor, Hospitality and Miscellaneous Workers Union v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Australian Rail, Tram and Bus Industry Union v Public Transport Authority of Western Australia [2017] WASCA 86; (2017) 97 WAIG 431

BHP Billiton Iron Ore Ltd v The Transport Workers Union of Australia, Union of Workers, Western Australian Branch [2006] WAIRC 03908; (2006) 86 WAIG 642

Bucu v Midland Brick Co Pty Ltd (2002) 82 WAIG 743

Chief Executive Officer, Department for Child Protection and Family Support v IGR [2019] WASCA 20; (2019) 54 WAR 222

Colson v Barwon Health [2013] FWC 8734

Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2004) 143 IR 354

House v R [1936] HCA 40; (1936) 55 CLR 499

Marshall v Lockyer [2006] WASCA 58

Mt Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273

Nguyen Le v Vietnamese Country Community Ethnic School South Australian Chapter [2014] FWCFB 7198

Perth, Fremantle and Suburban Bread Carters' Industrial Union of Workers v Coastal District Master Bakers' Industrial Union of Employers (1903) 2 WAAR 71

Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees [2016] WAIRC 00236; (2016) 96 WAIG 408

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union [2017] WAIRC 00452; (2017) 97 WAIG 1329

Rainbow Coast Neighbourhood Centre Inc v Kylie Wood [2011] WAIRC 00821; (2011) 91 WAIG 1831

Ruane v Woodside Offshore Petroleum Pty Ltd (1991) 71 WAIG 913

Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2007) 69 NSWLR 198

Scaffidi v Chief Executive Officer, Department of Local Government and Communities [2017] WASCA 222; (2017) 52 WAR 368

State School Teachers Union v Director-General Department of Education (2018) 98 WAIG 1157

State School Teachers Union v Director-General Department of Education (2019) 99 WAIG 336

The Australian Rail, Tram and Bus Industry Union of Employees v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) 97 WAIG 1689

Warren v Coombs [1970] HCA 9; (1979) 142 CLR 531.

X v The Commonwealth (1999) 200 CLR 177

Reasons for Decision

SCOTT CC:

Introduction

1 I have had the benefit of reading the reasons for decision of the Senior Commissioner. I agree with those reasons and the conclusion that the appeal ought to be dismissed. However, there are two matters I wish to comment on.

Adequacy of the reasons

2 As the Senior Commissioner notes, the reasons at first instance are brief. The reasons do not set out the sorts of recitation of evidence and analysis both of facts and the law that are regularly included in such reasons. The question is, though, whether the requirements of the law regarding adequacy of reasons have been met.

3 In considering whether they are adequate it is necessary that the Full Bench is able to discern why the learned Commissioner concluded as he did. It is also desirable that the reasons explain why the losing party's case failed. In this case, the Senior Commissioner has been able to discern why the learned Commissioner formed his various conclusions by going back to the evidence and arguments before the Commissioner rather than from explanation or analysis behind those conclusions contained in the reasons.

4 One example is where the learned Commissioner dealt with the issue of Mr Kilner's purported lack of trust making reinstatement impracticable. At [23], the Commissioner referred to the respondent relying:

> "…upon some documents the applicant's member produced and some communications from the applicant's member to parliamentarians and office holders within the Department of Education."

5 At [24], the learned Commissioner stated "I have read those documents closely". There was no identification of what the documents were or what Mr Kilner said in them.

6 In [27], the reasons for decision say that the concerns expressed by Mr Kilner in the documents and communications "were all expressed to relevant people". The people to whom they were expressed were not identified. There is no explanation as to why they were "relevant" people.

7 At [29], the learned Commissioner said "the tone of the documents and communications is, in my view, fine". It appears from the next brief sentence that the reason that the tone was fine was because there was "no abuse or

offensive language". However, there was no identification or analysis of what was said, whether it was reasonable, or the tone and why it was fine.

8 A further example is the lack of analysis of Professor Janca's evidence other than that the Commissioner found that it was cogent and credible.

9 It was upon the identification and analysis undertaken by the Senior Commissioner in his reasons, that it may be concluded, based on the material before the Commission at first instance, that the conclusions drawn by the Commissioner at first instance were open, and that in light of the analysis done by the Senior Commissioner, that those reasons were adequate.

10 Therefore, while, as a matter of law, the reasons may be sufficient, they would be enhanced for the purposes of a better understanding of them if they provided more detailed explanations and analysis rather than brief or imprecise references and conclusions.

Trust and confidence

11 It was quite clear from the history of Mr Kilner's correspondence with his employer and others that he was someone who expressed his concerns and complaints, and his desire for improvement. His correspondence with the Director General could be viewed as challenging the competency and good faith of the Director General, the Department, various sections within it and individual principals, deputy principals and district directors over particular, identified issues. Whilst expressing his dissatisfaction, concerns and grievances, Mr Kilner's correspondence with the Director General was expressed in a manner that was not disrespectful or discourteous. She responded with courtesy and thanked him for drawing those things to her attention, and she pointed out areas of change that were being effected. The Director General's letters were expressed in typical public sector language and tone. There is nothing to suggest that Mr Kilner's correspondence was viewed by her as evidencing a breakdown in trust and confidence. It is true that throughout an extensive period, he was disgruntled, could be described as agitating and being an activist, and in some cases was over-exuberant. However, there appeared to be no malice in his communications albeit that by the time he was communicating with the Director General, the Minister and others, he was deep in the throes of the dispute leading to this claim.

12 In his correspondence, Mr Kilner pointed to other cases where teachers employed by the Director General had been treated unfairly and in that sense his complaints had some validity. He also made complaints about the Department not accepting the umpire's decision. Whilst that was his view, it ignored the right of any litigant to avail themselves of an appeal within the "umpiring" process. However, that is not enough to demonstrate a breakdown in trust and confidence.

An employee is entitled to raise complaints and grievances and to express their views, provided that they do so in a reasonable way, and without malice or mischief. Employees are not expected to be meek and compliant in all things.

13 Although there may have been an escalation in Mr Kilner's expressions of concerns, tone and the scope of the people to whom he complained, he did not express a breakdown of trust and confidence. It is one thing to have complaints and be disgruntled and another to express them in the sorts of allegations raised in *Vimpany*. I would dismiss this ground of appeal.

KENNER SC:

Background

14 The proceedings relating to the present appeal have some history. The appellant's former employee, Mr Kilner, was employed as a teacher at Busselton Senior High School (BSHS). He had been employed by the appellant since May 1982. In February 2018, his employment by the appellant as a Senior Teacher was terminated on the grounds of ill health. The respondent, on behalf of Mr Kilner, made an application under s 44 of the *Industrial Relations Act 1979* (WA) alleging that Mr Kilner's dismissal by the appellant was harsh, oppressive, and unfair. Given the circumstances of Mr Kilner's dismissal on ill health grounds, the respondent sought an order that Mr Kilner be reinstated or re-employed at a school other than BSHS.

15 The Commission found at first instance that the dismissal of Mr Kilner was unfair but declined to reinstate him or order he be re-employed. An order for the payment of compensation was made: ***State School Teachers Union v Director-General Department of Education*** (2018) 98 WAIG 1157; 1162. On appeal to the Full Bench, the Full Bench suspended the Commission's decision and remitted the matter back to the Commission for further hearing. The issue to be determined by the Commission on the remittal was Mr Kilner's current state of health, given the paucity of clear evidence on the issue in the proceedings at first instance: ***State School Teachers Union v Director-General Department of Education*** (2019) 99 WAIG 336. The matter to be considered by the Commission was "Mr Kilner's capacity to return to work, and the practicability of being reinstated or alternatively re-employed at a school other than BSHS": at [120].

16 On the remittal proceedings, the learned Commissioner concluded on the evidence, including medical evidence obtained by the respondent, that as at the time of the remittal, Mr Kilner was fit for work at a school other than BSHS. The

Commission also dismissed an application brought by the appellant under s 27(1) of the Act, that the proceedings should be dismissed because the respondent failed to disclose a medical certificate, and a medical report in the respondent's then solicitor's possession, at the first instance hearing. The Commission discounted the amount to be paid to Mr Kilner for remuneration lost by 50 per cent, with 25 per cent being for Mr Kilner's failure to mitigate his loss and a further 25 per cent, in recognition of the respondent's failure to disclose the documents at the first hearing: ***State School Teachers Union v Director-General Department of Education*** [2020] WAIRC 00292; (2020) 100 WAIG 371. From this decision the present appeal is brought. Whilst there are 13 separate grounds of appeal, they can be grouped into three main issues, they being the dismissal of the s 27(1) application; the fitness for work reinstatement issue; and the lack of trust and confidence reinstatement issue. There are further matters raised by the grounds of appeal and they are that the learned Commissioner's reasons for decision at first instance were inadequate and second, two matters relating to the Commission's duty under s 26(3) of the Act.

Appeal principles

17 Given the decision at first instance was a discretionary one, the Full Bench can only intervene if satisfied that error is established in the sense discussed in ***House v R*** [1936] HCA 40; (1936) 55 CLR 499. The Full Bench may draw its own inferences from facts as found and is not limited to those drawn by the Commission at first instance: ***Warren v Coombs*** [1970] HCA 9; (1979) 142 CLR 531.

Public interest

18 An appeal does not lie to the Full Bench from a "finding", unless the Full Bench is satisfied that the matter is of such importance that in the public interest it should entertain the appeal: s 49(2a) Act. As was said by the Full Bench in ***Rainbow Coast Neighbourhood Centre Inc v Kylie Wood*** [2011] WAIRC 00821; (2011) 91 WAIG 1831 at [24]:

> Is the matter of such importance that in the public interest an appeal should lie?
>
> 24 The principles that apply when considering the importance of an appeal in the public interest was settled in ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (***1989) 69 WAIG 1873. In that matter the Full Bench unanimously held that the words 'public interest' are not to be narrowed to mean 'special or extraordinary circumstances'. An application may involve circumstances which are neither special nor extraordinary. It may involve circumstances which, because of their very generality, are of great importance in the public interest. Each matter will be a question of impression and judgment whether the

> appeal has the required degree of importance. Also important questions that may have effect in other industries, and substantial matters of law affecting jurisdiction, can give rise to matters of sufficient importance in the public interest to justify an appeal: ***Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** (2005) 86 WAIG 247 (Ritter AP) [13] – [14].

19 See too: ***The Australian Rail, Tram and Bus Industry Union of Employees v Public Transport Authority of Western Australia*** [2017] WAIRC 00830; (2017) 97 WAIG 1689 per Smith AP at [68].

20 The appellant contended that the matters relevant to the s 27(1) application are of such importance that an appeal should lie. In referring to the above ***PTA*** Full Bench decision, the appellant submitted that the public interest was served because the application at first instance related to the standards of conduct that should have to be met by parties to proceedings before the Commission. This includes the oversight of such standards; ensuring parties are not unfairly prejudiced by the conduct of an opposing party; that the procedures of the Commission are not brought into disrepute and that the obligation on the Commission to act according to equity and good conscience is sustained. It was further contended that the Commission's errors in relation to determining the s 27(1) application were "substantial and egregious". Finally, the submission was made that given the substantive proceedings were dealt with and determined with the s 27(1) application, no delay would be occasioned by entertaining an appeal from this interlocutory decision. The respondent opposed the grant of leave and contended that the matters raised in the grounds of appeal are not of sufficient moment. It was submitted that the matters do not involve issues of wider importance to other parties to proceedings before the Commission.

21 It is not without some hesitation that I consider that leave should be granted on this occasion. The matters the subject of these grounds of appeal do go to allegations of improper conduct of a registered organisation under the Act, both towards the appellant in these proceedings and more important, in relation to the respondent's obligations to the Commission. And the grounds of appeal raise matters about the proper test to apply in exercising the s 27(1) discretion.

Section s 27(1) application

22 This issue is dealt with in grounds 3, 4 and 5 of the grounds of appeal. These grounds of appeal are in these terms:

> 3. In dismissing the s 27 Application, the Commissioner erred in law by mistaking the facts in finding at [40] and [41] of the reasons for decision that Exhibit 4 only related

to Mr Kilner's fitness to work at Busselton Senior High School **(BSHS),** and not any other school.

(a) Exhibit 4 related to all schools, and not just BSHS, and

(b) the mistake led the Commissioner to materially misunderstand the prejudice occasioned the Director General by the failure to disclose that document (see [58]).

4. The Commissioner erred in law by constructively failing to exercise his jurisdiction according to law when purporting to deal with the s 27 Application. In particular:

(a) to deal with the s 27 Application according to law, it was necessary for the Commissioner to:

(i) identify the matters which were relevant to the public interest (whether those matters weighed for or against dismissing the proceedings),

(ii) make findings of fact in relation to each of those matters, and

(iii) weigh and balance the matters relevant to the public interest in order to determine if further proceedings were necessary or desirable in the public interest, however

(b) the Commissioner failed to undertake the above steps when purporting to deal with the s 27 Application.

5. In dealing with the s 27 Application, the Commissioner made an error of principle in implicitly finding that it was for the Director General to prove "who did what and when" ([64] and [65]) in circumstances where:

(a) the conduct of the Union was objectively improper and the failure to disclose the medical evidence it held caused prejudice to the Director General and wasted time and resources of the Director General and the Commission,

(b) the Union is bound by the acts of its officers and counsel, regardless of who engaged in such conduct or when they engaged in such conduct, and

(c) the question of "who did what and when", in relation to the matters raised in the s 27 Application, are matters wholly within the knowledge of the Union (and not the Director General).

23 To understand the basis for these grounds of appeal, some consideration of the factual background to these proceedings is necessary. As a preliminary to this, I should make some comment on the law, although it is well known. The power to dismiss or refrain from hearing a matter under s 27(1) was considered by me in the ***PTA*** Full Bench noted above, where I said at pars 137 - 138:

137 Section 27(1)(a) is a power to dismiss an application or refrain from further hearing an application. This power is broad in scope and should be exercised with caution. It is in the following terms:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied—
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
>
> And
>
> …

138 In ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2013] WAIRC 00754; (2013) 93 WAIG 1431, in considering an application under s 27(1)(a)(ii) to dismiss a matter before the Commission in the public interest, I said at pars 22 and 23:

> 22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:
>
> > 35 Given the construction I have placed on s 36A(1) of the Act, it is for the PTA to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:

> "The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1]* (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."

23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

24 Given that the s 27(1) power enables the Commission to terminate a proceeding otherwise validly commenced, and there is no other jurisdiction in which the respondent's claim on behalf of Mr Kilner could be pursued, the burden on the appellant to persuade the Commission to exercise its powers under s 27(1) was a weighty one. This is particularly so as in the proceedings then to date, Mr Kilner had been found to have been unfairly dismissed and had been awarded compensation for loss. Whilst the remedy had been suspended on the first appeal for reconsideration on the remittal, the finding of unfairness remained undisturbed. The grant of the s 27(1) application would have effectively left Mr Kilner without a remedy. An important consideration for the Commission at first instance in considering the appellant's s 27(1) application, was where the

equity and good conscience lay under s 26(1)(a) of the Act. This involved the learned Commissioner's good conscience based on all the material before him: ***Perth, Fremantle and Suburban Bread Carters' Industrial Union of Workers v Coastal District Master Bakers' Industrial Union of Employers*** (1903) 2 WAAR 71: per Parker J.

25 Underlying the appellant's grounds of appeal and submissions on this issue was an assertion of improper conduct by the respondent in failing to alert the appellant and the Commission at the time of the first hearing leading to the Commission's first decision in August 2018, of a further medical certificate from Mr Kilner's general practitioner, Dr Buckeridge, dated 1 March 2018. It was said that this second medical certificate also related to Mr Kilner's fitness for work. This second medical certificate, a copy of which is at AB 331, formal parts omitted, said:

> This is to certify that Bill Kilner will be unable to attend work from 01/03/2018 to 01/07/2018 inclusive due to a medical condition.
>
> He is making progress in his psychological treatment plan and should be fit for work at another school once he has dealt with the charges brought against him and had time to process this.
>
> There should be no reason why Mr Kilner could not continue teaching at another school in term four.

26 It was submitted that had this medical certificate been disclosed by the respondent, it may have had a material impact on the issue of Mr Kilner's fitness for work at a school other than BSHS, and the conduct of the appellant's case.

27 Mr Kilner gave evidence in the first hearing that by January 2018, his health was improving, and he expected to return to work as a Senior Teacher in September 2018 or by Term 4 at the latest: AB 218 - 219. In his evidence, on the remittal proceedings, Mr Kilner said the reference he made at [78] of his original witness statement in the first hearing, was based on what his general practitioner, Dr Buckeridge, had told him. He also said the reference to "RTW" meant any school other than BSHS: AB 600.

28 The medical evidence, as background to the present issue, was canvassed in some detail in the first Full Bench decision at [21] - [47], [90] - [95] and [100] - [107]. The Full Bench also commented at [86] on the inadequacy of the parties' cases put in the first hearing, and that in some respects, the medical evidence before the Commission was "contradictory and incomplete". I note in particular that before the controversial 1 March 2018 medical certificate from Dr Buckeridge in the possession of the respondent, Dr Lai, the appellant's occupational physician,

wrote to Dr Buckeridge on 6 December 2017, to seek his opinion as to Mr Kilner's return to work "in his substantive position at Busselton in the foreseeable future? i.e. within the next 1 to 2 years": AB 298. Dr Mowat, Mr Kilner's psychologist, received a similar request from Dr Lai: AB 299.

29 On 8 December 2017, Dr Mowat responded to Dr Lai. In his letter, Dr Mowat, as to Mr Kilner's prognosis, said "Based on my meetings with Bill, I do not think he is likely to regain medical capacity to return to Busselton Senior High School in the foreseeable future": AB 301. Dr Buckeridge, by a medical certificate dated 15 December 2017, certified Mr Kilner as medically unfit to attend work from 15 December 2017 to 1 July 2017 [sic] inclusive. Dr Buckeridge said "At this stage I do not know whether Bill is likely to regain work capacity. I will assess this midway through next year": AB 302. As Mr Kilner was still employed at this stage, this medical certificate was in the possession of the appellant. Therefore, the appellant must have been taken to have known this broad assessment by Dr Buckeridge of Mr Kilner's fitness for work and it was available to the appellant's counsel for the hearing in the first proceedings. As referred to by the first Full Bench at [93], Dr Lai then provided his medical report dated 20 December 2017 to the appellant, in which he referred to both Dr Mowat's and Dr Buckeridge's responses.

30 Besides the second Dr Buckeridge medical certificate, a medical report dated 29 June 2018 from Dr Ng to the respondent's then solicitors, was also provided to the appellant by way of informal discovery, before the remittal proceedings. The appellant accepts that this medical report at the time of the first hearing, and before its production by the respondent to the appellant, was privileged: AB 332. In this medical report, Dr Ng expresses the opinion that given the prior history at BSHS, Mr Kilner should not return to this school. However, importantly, Dr Ng expressed the opinion that Mr Kilner's psychiatric condition had improved and he could commence a graduated return to work programme at another school, with low levels of violence, aggression or intimidation of staff. Dr Ng opined that Mr Kilner's psychiatric condition was most likely to continue to improve: AB 344 - 345.

31 Thus, based on the second medical certificate of Dr Buckeridge, along with the then privileged medical report from Dr Ng, the prognosis for Mr Kilner's recovery and return to work at a school other than BSHS was more positive. The second medical certificate from Dr Buckeridge was more, and not less, optimistic, of a return to work by Mr Kilner to his Senior Teacher duties, but at a school other than BSHS. Whilst Dr Buckeridge made some general mention of the "charges" against Mr Kilner, the overall conclusion of Dr Buckeridge, whilst the medical certificate was briefly expressed, was Mr Kilner's fitness for work

should be achieved by Term 4 of 2018, that being by about early October of that year.

32 On any view of the combined effect of Dr Buckeridge's second medical certificate and the June 2018 medical report of Dr Ng, as at the time of the first hearing before the learned Commissioner in July 2018, the prognosis for a return to work by Mr Kilner was more favourable than as set out in Dr Buckeridge's first medical certificate of 15 December 2017. Thus, it is against this factual background that the appellant's arguments in relation to prejudice and the dismissal of the s 27(1) application must be considered.

33 First, the appellant contended that the learned Commissioner erred in his assessment of the s 27(1) application because he mistook the scope of the second Dr Buckeridge medical certificate (exhibit 4) at [40] and [41] of his reasons. At [40] and [41] the learned Commissioner said:

> Without having to decide the issue, I think that if the documents had been discovered they may have led to a finding that the applicant's member could not be returned to work at Busselton Senior High School but could be returned to work at another school.
>
> I think the likely result would have been, going back and pretending that I had decided to return the applicant's member to work, I would have simply ordered his return to work at a school other than Busselton Senior High School. It was, after all, a remedy squarely sought by the memorandum of matters.

34 The appellant submitted that the learned Commissioner wrongly concluded that the second medical certificate related only to BSHS. It was submitted that this meant that the Commission did not consider the real prejudice to the appellant, based on the assumption (mistaken) that the second medical certificate did not pertain to other schools. Thus, according to the appellant, this deprived the appellant of the opportunity to argue that as at July 2018 (the date of the first hearing), Mr Kilner was not fit for a return to work. The disciplinary matter referred to by Dr Buckeridge in the second medical certificate was not resolved and was argued to be a further basis to resist reinstatement. The appellant submitted that had this material been in evidence at the time of the first proceedings, the Commission would not have reinstated Mr Kilner as it did.

35 Read with other parts of the learned Commissioner's reasons, taken in their context, in particular pars [34] to [39], I do not consider that the learned Commissioner made the factual error as asserted by the appellant. First, it is clear from [40] of his reasons, he referred to "documents" and not just to Dr Buckeridge's second medical certificate. This was in reference to both the second medical certificate and the medical report from Dr Ng referred to at [34] and [36]. Second, there is no reference to any timing at [40] of the reasons and it

is clear from preceding paragraphs in the learned Commissioner's reasons at [36], [38] and [39], that whether Mr Kilner was fit for work at another school, and whether the Commission had jurisdiction or power to make an order under s 44 of the Act in the terms sought by the respondent, was a live issue. Consideration of an alternative school, and a return to work programme, was an issue considered by Dr Ng, in his medical report, referred to above.

36 Read as a part of the entire medical record for Mr Kilner as at July 2018 the appellant would have been on stronger ground to resist reinstatement (given it bore the onus of establishing this), from Dr Buckeridge's first medical certificate of December 2017, which was very broad in scope, which she did have in her possession, but did not raise or seek to have tendered into evidence at first instance.

37 Also, given that the views expressed by Dr Buckeridge in exhibit 4 were very brief, it would be difficult to reach any firm conclusions as to Mr Kilner's fitness for work without further evidence. This was the very issue identified by the first Full Bench in its decision and the reason for the remittal for reconsideration of remedy, with the benefit of up-to-date medical evidence, to deal with practicability of reinstatement in a fulsome manner. Even Professor Janca on the remittal, could not be specific about what Dr Buckeridge meant by his second medical certificate, other than Dr Buckeridge used "standard" language in it that Mr Kilner had a "medical condition". Professor Janca then said that it was important in his view, that Mr Kilner was making progress in his treatment, and that he would be fit to teach at another school: AB 662 - 663.

38 In relation to ground 4, it was contended that the learned Commissioner "constructively failed" to exercise his jurisdiction according to law in dealing with the s 27 application. I have set out the approach to be taken in examining a matter under s 27(1) as referred to in the ***PTA*** case.

39 In summary, the appellant contended that to determine the matter before him, it was necessary for the learned Commissioner to identify matters relevant to the public interest; make relevant factual findings in relation to these matters; and then weigh those matters in the balance to decide, as a matter of discretion, whether to dismiss the proceedings. In the present context, the appellant contended this should have at least involved the Commission considering several factors, including that of a right of a union to have a claim heard under the Act; the access of a relevant employee to relief if so entitled; a requirement on the Commission to act in accordance with equity, good conscience and the substantial merits of the case; that the proceedings before the Commission need

to be conducted fairly and justly and the Commission to ensure that its proceedings are not subject to abuse.

40 Whilst accepting that the learned Commissioner acknowledged Mr Kilner's right to access relief if entitled, the appellant submitted that none of the other factors were considered as a part of assessing the public interest in determining the s 27(1) application. Further submissions were made by the appellant in relation to the "rules and procedures for litigation" and obligations on litigants in proceedings before the Commission, and that proceedings can be conducted "improperly" regardless of whether they are knowingly and intentionally so conducted, if a party conducts proceedings below an objective standard which would be reasonable to expect in proceedings before the Commission. In these respects, it was contended that at the time of the first proceedings, Mr Kilner knew of the second medical certificate from Dr Buckeridge which referred to his unfitness for work at any school, at least until Term 4 2018. Further, that submissions were made on behalf of the respondent to the effect that Mr Kilner was not suffering a medical condition either when he was forced to retire or at the time of the hearing and submissions made as to the effect of Mr Kilner's evidence in chief as to why he did not want to return to BSHS. The contention was put that the matters referred to were only sought to be corrected in January 2020, which was not only after disclosing Dr Buckeridge's second medical certificate, but also after the first appeal to the Full Bench, where it was put to the Commission that the respondent did not recant from its position put in the initial proceedings.

41 The upshot of this was, according to the appellant's submissions, that Mr Kilner either knowingly participated in the misrepresentation of his position to the Commission or did not try to correct the record. The submission was made that Mr Kilner's conduct fell below an objectively reasonable standard of behaviour and he could not be regarded as innocent or blameless. It was submitted by the appellant that the responsible officer of the respondent, Ms Macliver, who was handling Mr Kilner's matters on behalf of the respondent, must have known of the existence of the second medical certificate, but did not try to disclose it. Thus, the respondent was knowingly involved in not disclosing what could be prejudicial to its case on behalf of Mr Kilner, or at least was negligent in not doing so.

42 The appellant contended that contrary to the observations of the learned Commissioner, the respondent was at fault and that fault prejudiced the appellant in the conduct of the proceedings at first instance. It was contended that the Commission's failure to adequately consider all these matters demonstrated that he constructively failed to exercise his jurisdiction under s 27(1) of the Act.

43 I am not persuaded that the learned Commissioner failed to exercise his jurisdiction under s 27(1) of the Act according to law. The power to dismiss or refrain from hearing a matter is a very broad power to be exercised with caution under s 26(1) of the Act. The learned Commissioner commenced his consideration of the s 27(1) application at [53] of his reasons. He identified the application as being one to dismiss the substantive proceedings under s 27(1) of the Act. Both the appellant and the respondent had filed detailed written submissions and materials on the s 27(1) application: AB 33 - 188 and 189 - 199. Both parties also made further oral submissions in connection with the application at the resumed hearing on 7 February 2020. The substance of the appellant's grounds of its s 27(1) application were summarised at AB 42 - 43. The essence of the appellant's position was set out at [54] - [57] of the learned Commissioner's reasons: AB 210.

44 Reference was made to the appellant's contention that she suffered an irredeemable prejudice by reason of the failure to disclose the second Dr Buckeridge medical certificate (and the Dr Ng medical report, albeit accepting at the time of the first hearing it was subject to legal professional privilege); that the respondent engaged in an abuse of the Commission's proceedings and wasted time and resources; and that the respondent did not come before the Commission with clean hands. These were the public interest issues to be decided as relied on by the appellant. The learned Commissioner referred to arguments by the appellant that the absence of Dr Buckeridge's second medical certificate (and also Dr Ng's medical report) not only led to prejudice to the appellant but also that the respondent should suffer a consequence for its conduct: see [55] and [57] reasons at first instance. Also, the learned Commissioner referred to the fact that the respondent had put a case that Mr Kilner did not suffer a medical condition at the time of the original hearing or at the time of his dismissal, and that the respondent was wrong to have put arguments to the contrary, and running a case different to the documents in its possession: at [55] and [56].

45 In assessing the s 27(1) application, the Commission had to consider the interests of the parties and those directly affected. The learned Commissioner considered the impact of failing to disclose the second Dr Buckeridge medical certificate and concluded it was "not much of an opportunity to lose": at [58]. This referred to the learned Commissioner's conclusions on the impact of the second Dr Buckeridge medical certificate considered at [34] - [41]. At [35] he referred to the appellant's contentions as to the alleged impact on the case of the respondent if this medical certificate had been available and made the argument of the respondent that Mr Kilner did not suffer a medical condition problematic, and would enable the appellant to put a case for impracticability of reinstatement. At [36] the learned Commissioner considered, correctly, that it was impossible to

know (in retrospect) the impact of the possession by the respondent of the second Dr Buckeridge medical certificate or the Dr Ng medical report, but acknowledged reliance could have been placed on them, that Mr Kilner was not fit for work at BSHS, and whether the Commission could consider an order for a return to work at another school and whether, and if so, "whether he was fit to work at another school".

46 Given the burden on the appellant to make out its s 27(1) application, and to establish, and not just seek to infer, improper conduct on behalf of the respondent, it was wholly unsurprising of the learned Commissioner to say as he did at [59], that he found it "very difficult" to undertake the assessment of the respondent's conduct, based on what was before the Commission. This is particularly so, given the submissions of the appellant at first instance, that she sought to attribute no blame or accountability for failing to disclose the documents on either the respondent's then solicitors or counsel appearing. It was open for the appellant to call evidence from the respondent to make good her claims as to the respondent's conduct, but she did not avail herself of that opportunity. With respect, it is not to the point to contend that such persons are in the "respondent's camp". An officer of the respondent summonsed to give evidence in a matter before the Commission would have to tell the Commission what he or she knows about a relevant matter, under their oath or affirmation. As to the arguments by the appellant regarding what Mr Kilner may have known, by sitting through the proceedings at first instance, and the assertion he was complicit in failing to disclose the second medical certificate, this is with respect, a long bow to draw. There was no direct evidence about this matter and Mr Kilner was not called to give evidence about his knowledge in the remittal proceedings.

47 This no doubt led to the conclusion expressed by the learned Commissioner at [62] - [64] and [68], that it would be necessary for the appellant to demonstrate (and by inference establish), serious misconduct by the respondent to warrant the summary dismissal of the proceedings to the great prejudice of Mr Kilner. The learned Commissioner plainly weighed in the balance the competing contentions, albeit, in brief terms, and concluded that he should not exercise his power of dismissal of the application under s 27(1).

48 And while the appellant made submissions as to the conduct of parties and the "rules" and "procedures" for litigation, proceedings before the Commission are conducted under the Act, the *Industrial Relations Commission Regulations 2005* (WA) and relevant Practice Notes. Principally, the Commission's procedural powers are set out in s 27 of the Act. Discovery and production of documents are not available as a right in this jurisdiction. The Commission must be satisfied

that an order for discovery, production and inspection, is just: ***Australian Liquor, Hospitality and Miscellaneous Workers Union v Burswood Resort (Management) Ltd*** (1995) 75 WAIG 1801 at 1805. If an order for discovery and production is made by the Commission, whether informally or on affidavit, as opposed to those civil jurisdictions where discovery is dealt with by Rules of Court, it is doubtful whether the obligation to discover is a continuing obligation, absent an order providing for it (see B. Cairns *Australian Civil Procedure* 10th Ed at par [10.260]).

49 I am not persuaded that the grounds of appeal in relation to the s 27(1) application have been made out.

Adequacy of reasons

50 Ground 1 challenged the adequacy of the learned Commissioner's reasons for decision. Although particular (a) was not pressed, ground 1 is:

> **Insufficiency of reasons**
>
> 1. The Commissioner made an error of law in failing to provide sufficient reasons for his decisions.
>
> **Particulars**
>
> (a) In dismissing the Director General's application made under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) **(s 27 Application),** the Commissioner failed to: (i) explain the law he applied when considering that application, or (ii) identify or explain the matters which he considered to be of relevance to the question of whether the proceedings should be dismissed as not being necessary or desirable in the public interest.
>
> (b) In finding that Mr Kilner was "fit for work" (at [15]), the Commissioner failed to explain the relevant law that he applied as it relates to determining whether a person is able to fulfil the inherent requirements of a position.
>
> (c) In finding that reinstatement or re-employment was practicable, the Commissioner failed to explain the findings of fact that he made as to what are Mr Kilner's beliefs, concerns, or views in relation to the Department of Education **(Department)** and its officers.
>
> (d) In finding that Mr Kilner's concerns set out in his emails to the Director General were not "unreasonably held" (at [26]), the Commissioner failed to set out: (i) the evidence which he relied upon for that finding, and (ii) the reasoning process which led him to that finding.

51 In a recent decision of the Court of Appeal in ***Chief Executive Officer, Department for Child Protection and Family Support v IGR*** [2019] WASCA 20; (2019) 54 WAR 222 Quinlan CJ, Murphy and Beech JJA summarised the legal principles as to the adequacy of a judge's reasons at [112]:

Adequacy of reasons for decision: legal principles

112 Principles relevant o an evaluation of the adequacy of reasons include the following:

(1) Reasons for decision need not be lengthy or elaborate.

(2) Reasons should disclose the intellectual process that led to the decision in sufficient detail and with sufficient certainty to enable the litigant to know why they were unsuccessful and to enable an appeal court to determine whether the decision involved appellable error.

(3) It is not necessary to refer to every submission advanced by a party. However, a tribunal or court must engage with the central element(s) of a losing party's case and explain why that case fails.

(4) In determining the adequacy of the reasons, the reasons must be read as a whole, and, if necessary, considered in the context of the evidence. An appellate court may take into account what can legitimately be inferred from the reasons. Whether reasons are adequate will depend upon the circumstances of the case and the matters that arose for the judge's or tribunal's consideration.

52 (See too ***Mt Lawley Pty Ltd v Western Australian Planning Commission*** (2004) 29 WAR 273; ***Marshall v Lockyer*** [2006] WASCA 58; ***Scaffidi v Chief Executive Officer, Department of Local Government and Communities*** [2017] WASCA 222; (2017) 52 WAR 368 at 409 – 410; ***Bucu v Midland Brick Co Pty Ltd*** (2002) 82 WAIG 743; ***Ruane v Woodside Offshore Petroleum Pty Ltd*** (1991) 71 WAIG 913)

53 In ***Marshall,*** McClure JA referred to the obligation on a judge to give reasons and at [247] - [249] and said:

Adequacy of reasons

247 The trial Judge was under a duty to give reasons. In determining the adequacy or sufficiency of the reasons, it is necessary to look at the reasons as a whole, and if necessary in the context of the evidence, to see if they give the sense of what was intended in a way that achieves the required function and purpose of reasons: ***Garrett v Nicholson*** (1999) 21 WAR 226 at 248 per Owen J. The function of reasons is to allow an appeal court to determine whether the decision was based on an appealable error and to provide procedural fairness to a litigant who is entitled to know why it is that he or she has been successful or unsuccessful. It is sufficient if the reasoning process which led to the result is disclosed with sufficient certainty to enable a litigant to know why it is that the result ensued and to ensure that the statutory right of appeal has been secured: ***Garrett v Nicholson*** at 248.

248 However, reasons need not be lengthy and elaborate nor do they require reference to all of the evidence led in the proceedings or every submission advanced by the

> parties: ***Mount Lawley Pty Ltd v Western Australian Planning Commission*** (2004) 29 WAR 273 at [28]; ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247.
>
> 249 Further, as the Full Court stated in ***Mount Lawley Pty Ltd v Western Australian Planning Commission*** at [29], inadequacy of reasons does not necessarily amount to an appealable error; an appeal court will only intervene when the inadequacy or insufficiency in the reasons are such as to give rise to a miscarriage of justice.
>
> (Footnotes omitted)

54 With this ground of appeal, the appellant advanced several arguments. In summary as to particular (b) the submission was that whether a person can fulfill the inherent requirements of a position is a mixed question of fact and law. Thus, it was submitted that the Commission had to state what is meant by the inherent requirements of a position as a question of law, then apply the facts to that conclusion. The appellant contended that the learned Commissioner did not state as a conclusion of law what the inherent requirements of Mr Kilner's position were, especially in the present case, where the question of Mr Kilner's ability to teach at a school other than BSHS was a crucial matter to be determined. Absent a relevant finding, the learned Commissioner erred in law and given that the respondent was not provided with an opportunity to close its case, an inference is not open to the Full Bench that the Commission simply accepted the respondent's submissions on this point.

55 As to particular (c), in summary the appellant submitted that the learned Commissioner's reasons were inadequate to explain the views or concerns Mr Kilner expressed or held, especially where he relied upon his assessment of those views or concerns, in concluding that it would not be impractical for Mr Kilner to return to teach at a school other than BSHS. Thus, the appellant submitted that it is impossible to understand how the learned Commissioner concluded as he did and whether an error of fact or law has been made. This is especially so, given the importance of Mr Kilner's views or concerns to the question of the practicability of re-employment, as the submission went.

56 Finally, as to particular (d), the appellant contended that the Commission's finding that Mr Kilner's views and concerns were "not unreasonable" for him to hold, was a statement of bare conclusion with no reasoning as to how the Commission reached that view. No consideration was given to the evidence to sustain such a finding and absent reference to such evidence, or a reasoning process shown leading to the finding, the appellant maintained this to be an error of law.

57 Whilst especially in this jurisdiction conciseness of reasons for decision is a virtue, and brevity is not a ground on which to set aside a decision, the reasons of a Commissioner must enable an unsuccessful party to understand why they failed. Importantly also, the Full Bench on appeal must be able to discern from a Commissioner's reasons, the existence of appellable error. And as observed in ***Scaffidi*** at [202] by Buss P, Mitchell and Beech JJA, it is necessary for a Commissioner:

> …to engage with the central element(s) of a losing party's case and explain why that case fails. Considering that party's submissions is an aspect of what procedural fairness requires. Ordinarily, that involves something more than a statement that the case is rejected.

58 As to the inherent requirements of the position of a secondary school teacher, this is a question of fact. It is also a matter of common sense, given the pervasive role of schoolteachers in the community and our system of compulsory primary and secondary education. Most members of the community have been to school and to varying degrees, been exposed to the work of teachers in the classroom. I consider that the learned Commissioner was able to take some judicial notice of this as a matter of common knowledge in the community. Despite this however, there was ample evidence that the duties and responsibilities of a secondary school teacher was in evidence before the Commission. The respondent's solicitors, in their letter of request to their expert, Professor Janca, of 1 August 2019, included copies of materials in relation to the responsibilities of a schoolteacher.

59 It is to be noted that in his first report of 15 August 2019 (exhibit 18: AB 478) Professor Janca was provided with a copy of extracts of the *School Education Act 1999* (WA) and the Teachers (Public Sector Primary and Secondary Education) Award 1993, setting out the core responsibilities of a classroom teacher, which include supervision of students and to "maintain proper order and discipline" (s 64(1)(e)(e) Act) and "supervision of students" (cl 12(1)(b) Award). In the second paragraph of Professor Janca's report (AB 478) he refers to the documents provided in the respondent solicitor's letter of 1 August 2019, requesting the fitness for work assessment, which included the extracts of the SE Act and the Award as above.

60 It was in the knowledge of this material, that Professor Janca provided his opinion as to Mr Kilner's fitness for work to teach at a school other than BSHS. Professor Janca is well qualified in his field. A copy of his curriculum vitae was exhibit 16: AB 367 - 401. He is the Winthrop Professor of Psychiatry at the University of Western Australia and is a consultant psychiatrist at the Osborne Park Hospital in Perth. Professor Janca also engages in some medico-legal work

for a private practice, involving Workers Compensation claims, fitness for work assessments and motor vehicle accidents etc. For these purposes, Professor Janca is an approved medical specialist.

61 As the learned Commissioner observed at [11] of his reasons, Professor Janca's evidence was the only expert evidence before the Commission, on Mr Kilner's fitness for work. The appellant led no evidence. The Commissioner referred to Professor Janca's evidence commencing at [9] of his reasons. Professor Janca acknowledged the above material was given to him in his instructions: AB 640 - 641. It was open to the learned Commissioner to conclude that Professor Janca had regard to this material in his assessment of Mr Kilner's fitness for work. Nothing in the appellant's cross-examination of Professor Janca suggested to the contrary and as I have said, the appellant led no evidence on the point.

62 The learned Commissioner considered Professor Janca's evidence at [9] - [11] and [14] of his reasons. I accept that the learned Commissioner's reasons were brief. I think with respect, it would have been preferable had he referred to Professor Janca's evidence in more detail. Notably however, Professor Janca's evidence was uncontroverted, it was from an acknowledged expert in the field, he thought Mr Kilner was fit for work, and no other evidence to the contrary was before the Commission. The Commission found that Professor Janca's evidence was "cogent and credible" and "was not undermined in any way by cross-examination or competing evidence". The learned Commissioner, at [10], said he had "no reason to not believe it and no reason to not accept it". He accurately stated at [9] of his reasons that Professor Janca's evidence was that Mr Kilner was fit for work at a school other than BSHS. The learned Commissioner concluded on that basis, correctly, at [11], that the only expert evidence before the Commission was that Mr Kilner was fit for work and the evidence was not impugned.

63 Based on the finding set out above, it was plainly open on the evidence to reach the conclusion, which was the only conclusion reasonably open, that Mr Kilner was fit to return to work as a teacher, at a school other than BSHS, and the learned Commissioner so found at [12] of his reasons. Then at [13] - [15] of his reasons, the learned Commissioner dealt with the central plank of the appellant's case, that Mr Kilner may suffer a relapse of a medical condition, as Mr Kilner could not be quarantined. This was a line of questioning put by the appellant to Professor Janca in his evidence: AB 646 - 647. And this was the subject of an exchange between the learned Commissioner and Professor Janca at AB 658. The Commission then, in the context of this line of argument put by the appellant, at [13] and [14] of his reasons, adverted to Professor Janca's evidence on the point and, that Mr Kilner's prior medical problems to an extent, were

related to difficulties he experienced at BSHS. The learned Commissioner found this analysis by Professor Janca to be "compelling": at [14] of the reasons. He also acknowledged the evidence of Professor Janca that, even though his opinion was Mr Kilner was fit for work to teach, "stressors may impact upon the applicant's member at another school" at [14] of the reasons. This was an accurate summary of the evidence.

64 I am not persuaded this sub-ground is made out.

65 As to sub-grounds 1(c) and (d) these may be dealt with together. In summary, the appellant contended that the Commission failed to explain what were Mr Kilner's "beliefs, concerns and views" in relation to the Department of Education, and did not describe how Mr Kilner's views and concerns etc were not "unreasonably held". It was submitted by the appellant that given that these matters were relied upon by the Commission in concluding that re-employment of Mr Kilner was not impracticable, then the Commission needed to explain the basis for such findings. It was said that the learned Commissioner's reasons did not state what Mr Kilner's views or concerns were, and in failing to do so, it is impossible to understand from his reasons, his decision, thus constituting an error of fact or law. So too, in failing to explain how Mr Kilner's views were "not unreasonable" to hold, a similar error was committed.

66 At [22] of his reasons, the learned Commissioner states the issue raised by the appellant at first instance as being Mr Kilner's "deep-seated lack of trust for the Department, and that deep-seated lack of trust is such that it would be impracticable for Mr Kilner to be reinstated or re-employed". At [23] of his reasons the learned Commissioner referred to "some documents the applicant's member produced and some communications from the applicant's member to parliamentarians and office holders within the Department of Education".

67 The respondent in its submissions pointed out that exhibits 12 to 15, tendered by the appellant, were not the only documents before the Commission involving communications between Mr Kilner and others. Several other documents were tendered by the respondent at first instance, including exhibits 6 to 11, some of which involved communications to and from the then appellant, and others to a member of Parliament and to the ERG panel, raising issues about difficulties identified at BSHS. The respondent submitted these documents show that Mr Kilner has engaged in the communications with the appellant and others, without difficulty, that the appellant now complains about in exhibits 12 to 15. It was therefore submitted that given this prior and accepted pattern of communication between Mr Kilner and the then appellant, there was no basis to say that trust and confidence had been lost.

68 The respondent submitted that, given this material before the Commission, the learned Commissioner at [23] to [31] of his reasons considered the issues raised in them and concluded there was no basis to reach the view that re-employment was impracticable. The respondent further submitted that the Commission's consideration in this part of his reasons was clear and logical.

69 The documents referred to by both the appellant and the respondent, and which were tendered as exhibits 6 to 15, largely speak for themselves. They represent a course of conduct engaged in by Mr Kilner over many years, from 2011 to 2019. There are only some nine exhibits. Given the content of the documents is largely self-explanatory, it was open for the Commission to state that the matters raised in them did concern "real events and real concerns" and were directed to, and responded by, in several cases, the appellant herself. Whilst it would, again, have been preferable for the learned Commissioner to have set out in more detail in his reasons the content of these communications and documents, this is a case where the Commission's reasons can be read and their adequacy considered in the context of the evidence to which they refer: ***CEO v IGR*** at [112]. When read in this way, I consider that the Commission's reasons, with respect, were overly brief, they were adequate, given the specific matter he had to address.

70 Similarly, as to the statement of the learned Commissioner regarding the "reasonableness" of Mr Kilner's views, at [26], this needs to be read in the context of all the passages of his reasons at [23] to [31] and not taken in isolation. And they need to be read with the evidence, being the documents and communications themselves. As noted by the respondent, the correctness or otherwise of the issues raised by Mr Kilner in these various communications and documents, was not in issue and the learned Commissioner acknowledged this at [26]. For example, several of the documents and communications related to the ERG and its aftermath, a subject that Mr Kilner obviously felt strongly about, as recognised by the appellant herself in her replies to his correspondence. The learned Commissioner said that having considered the documents and the communications, in context, there was no basis to conclude that it would be impracticable for Mr Kilner to work at a school other than BSHS.

71 If I am wrong and it could be concluded that the Commission's reasons were inadequate, I am far from persuaded that it could also be concluded that a miscarriage of justice has occurred, having regard to the circumstances before the Commission. I am not persuaded that these sub grounds have been made out.

Section 26(3) point

72 This ground of appeal is:

2. The Commissioner erred in law by failing to notify the Director General of matters which were not raised before him on the hearing of the matter but for which he intended to take into account, and the Commissioner failed to provide the Director General with an opportunity to be heard in relation to such matters, and thereby contravened s 26(3) of the *Industrial Relations Act.*

Particulars

(a) In relation to the s 27 Application, the Commissioner failed to raise with the Director General that he considered that it was for the Director General to establish "who did what and when in such a way as to demonstrate a serious ethical failure on the part of the [Union] or its officers" (see [64]).

(b) The Commissioner failed to raise with the Director General that it may be said that the concerns set out in Mr Kilner's emails to the Director General were not "unreasonably held" (at [26]).

73 Particular (b) was not pressed by the appellant. As to particular (a), it was submitted that the learned Commissioner at [64] of his reasons said it was for the appellant to demonstrate "who did what and when in such a way as to demonstrate some serious ethical failure on the part of the applicant or its officers". The appellant submitted this must mean the need for her, as a part of her s 27(1) application, to call evidence from union officers, Mr Kilner or the union's solicitors, as to its failure to reveal material documents in the initial proceedings. The submission was made that given these matters are wholly within the knowledge of the respondent and its officers, and they would not be in the appellant's "camp", it would not be reasonable to expect the appellant to do so. Given that the Commission did not raise this matter with the appellant, then this constituted a failure to comply with s 26(3) of the Act.

74 The issue raised by this ground of appeal is not one about s 26(3) of the Act. The observation was made by the learned Commissioner in his reasons at [64] that the appellant "has not really undertaken the task of demonstrating who did what and when in such a way as to demonstrate some serious ethical failure on the part of the applicant or its officers". This comment was plainly made in the context of the case put by the appellant at first instance, that the respondent, through its officers, misconducted itself by failing to disclose the second Dr Buckeridge medical certificate (and possibly also the Dr Ng report), which misconduct irretrievably prejudiced the appellant.

75 The appellant bore the onus of making out her s 27(1) application. In making the above comment, the learned Commissioner was doing no more than saying, especially as the appellant made no criticism of the respondent's solicitors or counsel, that the appellant had failed to make out its case and discharge the burden on it. The learned Commissioner was highlighting what he saw as a deficiency in the appellant's case on her s 27(1) application. Accordingly, the

Commission did not consider any matter or information not raised before it on the hearing of the matter. Rather, it was the absence of evidence or information that the Commission considered relevant to the s 27(1) application, that the Commission was highlighting. This ground of appeal is not made out.

Reinstatement - fitness for work

76 This issue is raised in grounds 6 and 7 of the grounds of appeal in these terms:

> **Impracticability of reinstatement - Fitness to fulfil the inherent requirements of the Position**
>
> 6. In holding that Mr Kilner was "fit for work", the Commissioner applied the wrong test, and thereby made an error of law. In particular, where:
>
> (a) to be able to fulfil the inherent requirements of a position, the employee needs to be able to perform their duties safely (that is, without an unreasonable risk to themselves),
>
> (b) in determining whether the person can perform their duties safely, it is necessary to have regard to both to the degree of the risk, and the consequences of the risk being realised, and
>
> (c) despite the evidence before the Commission that Mr Kilner suffered risk of relapse if he returned to teach at another school, due to the risk of there being students who are "difficult to manage", the Commissioner failed to assess the degree of risk and the seriousness of the harm that may ensue if the risk was realised, the Commissioner failed to apply the correct test law.
>
> 7. In the alternative to ground 6, in holding that Mr Kilner was "fit for work", the Commissioner failed to take into account a material relevant consideration, namely, whether Mr Kilner was able to perform the inherent requirements of the position safely.

77 As made plain by s 23A(3) and (4) of the Act, the primary remedy on a finding that a dismissal is unfair, is reinstatement, unless the Commission concludes that reinstatement is "impracticable". For the purposes of the statutory remedy, this means that reinstatement or re-employment by an employer is "not reasonably feasible or reasonably capable of being accomplished on the facts and in the circumstances of the particular case": ***Australian Rail, Tram and Bus Industry Union v Public Transport Authority of Western Australia*** [2017] WASCA 86; (2017) 97 WAIG 431 per Buss and Murphy JJ at [30]. This involves a "bespoke" evaluation of the circumstances of possible reinstatement or re-employment of a former employee, in a common-sense fashion: ***PTAWA*** per Kenneth Martin J at [148] citing ***Nicholson v Heaven and Earth Gallery Pty Ltd*** (1994) 1 IRCR 199; (1994) 57 IR 50 and ***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186.

78 In the present matter, as noted in the first Full Bench decision at [116] - [119], in the case of a referral for hearing and determination under s 44(9) of the Act, the remedy to be granted by the Commission is conditioned by the memorandum of matters referred for hearing and determination and enables the Commission to resolve the particular dispute, which is not limited to the terms of s 23A of the Act: ***BHP Billiton Iron Ore Ltd v The Transport Workers Union of Australia, Union of Workers, Western Australian Branch*** [2006] WAIRC 03908; (2006) 86 WAIG 642; ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union*** [2017] WAIRC 00452; (2017) 97 WAIG 1329. The order made by the learned Commissioner that the appellant re-employ Mr Kilner at a school other than BSHS, was plainly an order within power as a matter contained in the s 44(9) referral and an order that resolved that part of the dispute referred for hearing and determination.

79 In assessing these grounds of appeal, I first consider an overview of the evidence before the Commission as to Mr Kilner's fitness for work. It is important to state at the outset, that given the order of the first Full Bench, the issue for the learned Commissioner to determine was Mr Kilner's fitness for work as at the time of the proceedings on the remittal, and not any prior time. Evidence came principally from Mr Kilner himself and Professor Janca.

80 Since the matter was before the Commission in the first instance hearing, Mr Kilner testified that in the intervening two years he worked with his doctor and psychologist and felt in much better health. Mr Kilner testified that in relation to his capacity to work, that he had been undertaking some volunteer work at the Busselton Shire in teaching difficult students and did not experience anxiety or panic attacks any longer. He considered himself able to contribute and to have capacity to go back to work on a 0.8 basis as a teacher. Mr Kilner said that he no longer has irrational thoughts or fears he had in 2017, from the student attacks etc that he experienced. Mr Kilner felt able to return to a school other than BSHS, where he spent 29 years and said he probably stayed too long at that school, as he became emotionally involved in the school environment. Mr Kilner said that he tried to make the school a better place, which led to his breakdown in 2017. He testified that he felt much more positive about working at other schools.

81 Mr Kilner was also taken to a part of his witness statement tendered in evidence in the first hearing where at [78] Mr Kilner said that he could return to work by September 2018 or in Term 4 2018. He said this came from his general practitioner, Dr Buckeridge. Dr Buckeridge advised him this was the period needed to get over what had been happening and, the reference to a return to work, was a reference to a return to work at other than BSHS. Mr Kilner also

said that he had provided his curriculum vitae to other schools in the Bunbury area, however, he did not discover that he had been "red flagged" by the appellant, until sometime later. This "red flagging" meant that he was not to be re-employed in any government school. Mr Kilner also testified that if he did commence at another school "next week", and he encountered difficult students, he would be much better placed to deal with the issues because since 2017, he had built strength of character to deal with any trauma.

82 As I have mentioned above, Professor Janca was an expert witness called by the respondent in relation to Mr Kilner's fitness for work. At the request of the respondent's solicitors, Professor Janca prepared a medical report dated 15 August 2019 regarding Mr Kilner's fitness for work as a Senior Teacher at a school other than BSHS. A copy of the medical report was exhibit 18: AB 478 - 485. Professor Janca's report canvassed Mr Kilner's recent history of psychiatric problems since early 2017 and the difficulties experienced at BSHS. This included consideration of various medical reports prepared by Dr Lai, the appellant's occupational physician, Mr Kilner's treating general practitioner, Dr Buckeridge and his psychologist, Dr Mowat. And the medical report prepared by Dr Ng was also included. Professor Janca's medical report also canvassed Mr Kilner's past medical and psychiatric history and other matters. The "Mental State Examination" section of his report was based on Professor Janca's interview with Mr Kilner, and was the substance of the report dealing with Mr Kilner's fitness for work and answered the specific questions posed by the respondent's solicitor's letter of request.

83 In terms of past illness affecting his capacity to work as a Senior Teacher, Professor Janca concluded from the information provided by Mr Kilner and his prior medical information, that Mr Kilner had suffered an adjustment disorder with anxiety. As to whether at the time of the interview with Mr Kilner, Mr Kilner suffered any illness, Professor Janca said at AB 483:

> "At the time of my interview with Mr Kilner, he did not suffer from the above-mentioned or any other psychiatric condition. Over the past year his symptoms of anxiety significantly improved and currently have no impact on his overall functioning".

84 In answer to whether Mr Kilner's medical condition needed further investigation or treatment, Professor Janca said that it did not: AB 483. In answer to whether Mr Kilner has any incapacity to work as a Senior Teacher, Professor Janca said at AB 483:

> "Mr Kilner is currently not incapacitated either totally or partially for work as a Senior Teacher".

85 And Professor Janca said that Mr Kilner was able to work as a Senior Teacher, but, consistent with the opinion from Dr Ng, this should be at a school other than BSHS: AB 484. Finally, Professor Janca opined that Mr Kilner should return to work at an alternative school environment gradually, to enable him to adjust to a new school: AB 484.

86 Professor Janca prepared a supplementary medical report dated 21 November 2019 tendered as exhibit 20: AB 526 - 527. In it, Professor Janca expressed the view that based on his interview with Mr Kilner and the medical information provided to him, Mr Kilner "likely achieved fitness to work at an alternative school in mid-2018": AB 526. As a clarification of his answer to a question in his first medical report that Mr Kilner should undertake a graduated return to work, Professor Janca said that it was best for Mr Kilner to start work four hours per day, three days per week, and increase to a 0.8 FTE over four to six weeks. He said this was not for any medical reason, but "would facilitate Mr Kilner's adaption to a new school environment", given his prolonged absence from teaching and his preoccupation with his prior work problems and the ongoing legal process: AB 527.

87 In cross-examination, Professor Janca said that the recommendation for a return to work at a school other than BSHS, was because of the possibility of a relapse due to past experience and a potential for higher levels of aggression, violence or intimidation of staff. When put to him that managing intimidating or aggressive students may cause Mr Kilner to be re-traumatised at another school, Professor Janca said this would be "highly speculative" and, added that Mr Kilner's problems at BSHS were not just the management of difficult students, but also the lack of support from the school and school authorities: AB 647.

88 When a list of events prepared by Mr Kilner, that occurred between 2001 and 2017 (exhibit 12: AB 359 - 361) was raised with Professor Janca, he testified that he could not conclude this had any contribution to Mr Kilner's mental state because at the time of his interview with Mr Kilner, Professor Janca was not aware of this document. Whilst part of a history of prior issues, exhibit 12 was not a part of Professor Janca's mental state assessment: AB 649 - 650. Also when questioned about Standards and Integrity processes, Professor Janca expressed the view that Mr Kilner did not display signs of anxiety because of this and on the contrary, Mr Kilner displayed the predominant emotion of being pleased with the outcome of the Commission proceedings, where he succeeded: AB 653.

89 Professor Janca was also asked about the Standards and Integrity process and the reference to it in the second medical certificate from Dr Buckeridge, referred to earlier in these reasons. In response, Professor Janca said that he did not have the medical certificate before him at the time of his interview with Mr Kilner, but his assessment of his mental state examination and his conclusion that Mr Kilner did not have a mental disorder, was based on the "here and now": AB 654. When Professor Janca was asked by the learned Commissioner whether there could be any quarantining from any similar stressors or triggers to those Mr Kilner experienced at BSHS, he said there could be no guarantee of this: AB 658.

90 As to ground 6, the appellant contended that the learned Commissioner erred in law in applying the wrong test as to whether Mr Kilner met the inherent requirements of the position of a Senior Teacher. The submission was made that for the Commission to be satisfied that it was reasonably feasible for an order of re-employment to be made, in the present case, meant that a person must be able to fulfil the inherent requirements of a position, which includes the performance of work safely, without risk to themselves or to others. This latter submission referred to and relied upon a decision of the High Court in ***X v The Commonwealth*** (1999) 200 CLR 177. The appellant contended, in reliance on ***X,*** that for a person to perform work safely, an assessment needs to be made of risk involved and the consequences if the risk is realised.

91 ***X*** arose in the context of Commonwealth anti-discrimination legislation, and another case relied on by the appellant, ***Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union*** (2004) 143 IR 354, involved a different issue as to whether employees were "unsuitable" to be given preference in employment under a preference in employment order made by the Australian Industrial Relations Commission in the coal industry. Therefore, both cases may be said to be distinguishable. However, despite this, I think it is a matter of common sense, that in an unfair dismissal case where reinstatement or re-employment is sought, if a former employee has suffered a medical condition leading to termination of their employment, that the "reasonable feasibility or reasonable capability" of accomplishing reinstatement or re-employment should involve, as a part of the calculus, the need for the employee to meet the inherent requirements of a position, without an unreasonable risk of recurrence of illness or injury. Such an assessment must, however, it seems to me, be based on cogent evidence, and involve a real and not remote or fanciful level of risk, nor one based on mere conjecture.

92 The learned Commissioner referred to Professor Janca's expert evidence and report commencing at [9] of his reasons. He accepted Professor Janca's evidence as cogent and credible and accepted it as evidence that Mr Kilner was fit for

work. This was plainly a finding open on the evidence as that was Professor Janca's opinion as a well-credentialled expert, and as expressed in both of his medical reports and in his oral testimony. Notably too, there was no evidence to the contrary. The learned Commissioner observed at [11] and [12], that Professor Janca's evidence was not impugned and supported a finding that Mr Kilner was fit for work to teach at a school other than BSHS.

93 In terms of the appellant's argument as to the inherent requirements of the position of a teacher, as I have mentioned at [45] above, Professor Janca was provided with a copy of extracts of materials setting out the core responsibilities of a classroom teacher, which he said he reviewed. It thus must be accepted that Professor Janca's opinion was given in full knowledge of these matters. In any event, as I have also mentioned, and which seemed accepted in the proceedings at first instance, such matters would be taken as a given, based on the commonly understood responsibilities of any schoolteacher.

94 The crux of the appellant's contentions in relation to this ground of appeal was directed at the prospect of a relapse of Mr Kilner's prior adjustment disorder and the learned Commissioner's failure to consider the risk of this, given Mr Kilner's prior history. I am not persuaded that the learned Commissioner failed to have regard to the matters he should have considered in assessing the practicability of the re-employment of Mr Kilner at a school other than BSHS. At [13] of his reasons he considered and rejected the appellant's arguments at first instance, that the possibility of Mr Kilner suffering a relapse of his prior medical condition because he could not be "quarantined" from stressors similar to those that led to his suffering the medical condition arising from his time as a teacher at BSHS, meant he could not return to work. The learned Commissioner was plainly alive to this issue, and he raised this matter with Professor Janca when the professor was giving his evidence. At AB 658 to 659, an exchange took place between the Commission and Professor Janca, where the learned Commissioner asked about the possibility of triggers such as stressors experienced by Mr Kilner from his experience at BSHS from past events, and there can be no guarantee against such, but they were higher at BSHS.

95 In further cross-examination, arising from these questions, Professor Janca testified that if at another school Mr Kilner experienced similar problems, including an unsupportive principal etc, then Professor Janca could not exclude the possibility that Mr Kilner may react in the same way. However, as with all such matters, Professor Janca's evidence at that point must be considered in the context of all his testimony. As I have mentioned, earlier in the cross-examination, at AB 647, when asked similar questions by the appellant's counsel, Professor Janca said, as to the possibility of any relapse at another

school, if Mr Kilner had to handle aggressive and intimidating students, whether this may cause Mr Kilner to suffer a relapse, the professor described this as "highly speculative". He also noted that Mr Kilner's past problems were not just because of problematic students, but also the perceived lack of support and understanding from school authorities.

96 At [14] of his reasons, the learned Commissioner considered Professor Janca's evidence as to problems experienced by Mr Kilner and that they related, to a degree, to matters particular to BSHS and also noted his evidence that the same stressors may be evident at another school. Despite this, Professor Janca's evidence was that Mr Kilner was fit for work. At [15] the learned Commissioner referred to the appellant's case there may be the possibility of a relapse at another school and considered it speculative. On all the evidence, this conclusion was plainly open. The learned Commissioner then found on the evidence that Mr Kilner was fit for work and again, on all the evidence, such a conclusion was open and, indeed, was the only reasonable conclusion that could be reached. Also, based on Professor Janca's expert medical reports, Mr Kilner's mental state during the assessment supported the conclusion that Mr Kilner was fit for work; that the prior issues had been resolved and did not impact on his health; and that at the time of the remittal, Mr Kilner suffered no psychiatric condition.

97 As to the appellant's complaint in ground 7, put in the alternative to ground 6, that the learned Commissioner did not consider a relevant consideration, that being whether Mr Kilner fulfilled the inherent requirements of his teaching position safely, this must be rejected. Largely for the reasons set out above in dealing with ground 6, the expert opinion of Professor Janca was given in the context of the inherent requirements of a teaching position, which were made known to him. The learned Commissioner accepted Professor Janca's opinion and his evidence that Mr Kilner was fit to teach at another school and could do so safely, with the risk of a relapse being "highly speculative". The Commission's reasons at [9] to [15] discussed above, in their totality and in the context of all of the evidence, albeit expressed briefly, did consider and rejected the contention that Mr Kilner could not perform the inherent duties of a teacher safely. These conclusions were all open on the evidence and the findings the learned Commissioner made, should have been made.

98 These grounds of appeal are not made out.

Reinstatement - trust and confidence

99 This matter is the subject of grounds 8 to 13 of the appeal. These appeal grounds, some of which are expressed in the alternative, are:

8. In considering whether it was practicable for Mr Kilner to be reinstated or re-employed on the basis of a loss of trust and confidence, the Commissioner erred in law by constructively failing to exercise his jurisdiction. In particular:

    (a) to deal with the question of practicability as it related to the question of trust and confidence, it was necessary for the Commissioner to:

        (i) make findings of fact as to what are Mr Kilner's beliefs, concerns, and / or views in relation to the Department and its officers, as evidenced in Exhibits 12, 13, 14 and 15 and his evidence given under oath,

        (ii) make findings as to whether, and to what extent, such views, concerns and / or beliefs, established that Mr Kilner had lost trust or confidence in the Department and / or its officers, and

        (iii) consider and make findings as to whether any such loss of trust or confidence meant that the re-establishment of the employment relationship was not reasonably feasible.

    (b) the Commissioner failed to undertake the above steps when purporting to deal with the issue of practicability of reinstatement or re-employment from a trust and confidence perspective.

9. In considering whether it was practicable for Mr Kilner to be reinstated or re-employed on the basis of a loss of trust and confidence, the Commissioner erred in law by taking into account an irrelevant consideration, namely, whether the concerns held by Mr Kilner, as evidenced by the "documents and communications" were "not unreasonable" to hold (at [26]).

10. In the alternative to ground 9, the Commissioner erred in law in finding that Mr Kilner's concerns set out in his emails to the Director General were "not unreasonable" to hold because such finding was not open on the evidence. In particular:

    (a) Mr Kilner's views, concerns and / or beliefs set out in his emails included, but were not limited to:

        (i) that the Department's officers engaged in a "misogynistic abuse of power to subvert the truth and trample over people without real legal support" (Exhibit 14),

        (ii) that there are "'dark places' in Royal Street" (by which Mr Kilner meant head office of the Department) (Exhibit 14), and

        (iii) there is a cultural problem in the Department where the bureaucrats "run the show" (Exhibit 15),

    (b) the Commissioner rejected Mr Kilner's attempts to explain way what are the plain messages in these documents (see [30]), and

    (c) there was no evidence explaining the basis for holding of such views, let alone how such views could be "not unreasonable" to hold.

11. The Commissioner's finding that the tone of the communications to the Director General was "fine" (see [29]) is a manifestly unreasonable conclusion. In particular, by:

    (a) making bald and unsubstantiated allegations of a misogynistic abuse of power and that there are "dark places" in head office,

    (b) making the implicit assertion that the Director General does not foster trust, and

    (c) making the explicit assertions that the Director General is unable to control her staff, and therefore that her staff "run the show",

    the tone of the comminutions was not of an "appropriate" tone when directed to the Director General herself, copying the Minister for Education and also an Independent Parliamentary Committee, such that no reasonable decision make could form such a conclusion.

12. The Commissioner's finding that the documents and communications do not sustain a finding that Mr Kilner has such a loss of trust and confidence in his employer as to make his return to work problematic is manifestly unreasonable such that no reasonable decision maker could form such a conclusion. In particular, where:

    (a) Exhibits 12, 13, 14 and 15, demonstrate that Mr Kilner has lost trust and confidence in the Department generally, and lost trust and confidence in the ability of the Director General to manage her Department in an ethical and appropriate manner,

    (b) Exhibit 12 demonstrates that Mr Kilner considers that the Department's issues exist at all levels of the Department, including within BSHS, and extending outside of BSHS to include the regional director (referred to as the "District Director"), the Standards and Integrity unit, and the Director General,

    (c) Mr Kilner's evidence under oath included, but was not limited to, that:

        (i) he considers that the Department has a cultural problem and needs to change,

        (ii) he considers that the Department uses Standards and Integrity "as a stick to terrify" its employees,

        (iii) he named three members of the "executive" or "leadership group" within the Department who he considered to be problematic "bureaucrats" in "Silver City",

    (d) the Commissioner rejected Mr Kilner's attempts to explain away what are the plain messages in Exhibits 12, 13, 14 and 15 (see [30]), and

    (e) there was no fact or matter relied upon by the Commissioner to undermine the full force and effect of Mr Kilner's views,

    the only reasonable conclusion was that it was not reasonably feasible for the employment relationship to be re-established in light of Mr Kilner's lack of trust and confidence in the Director General, senior office holders with the Department, specified Directorates within the Department, and the culture of the Department as a whole.

13. In considering the question as to whether reinstatement was impracticable due to a loss of trust by Mr Kilner, the Commissioner erred in law by failing to consider a material considerations, namely, whether the oral evidence given by Mr Kilner in the proceedings established a lack of trust by Mr Kilner in the Department such that reinstatement or re-employment was impracticable. In particular, Mr Kilner's oral evidence included:

    (a) he considers that the Standards and Integrity branch of the Department of Education is "used as stick to terrify you" (Transcript, 69.9),

    (b) the bureaucrats he refers to in his emails were within the senior executive leadership, and included a Deputy Director General and the Executive Director of Workforce (Transcript, 70.9), and

    (c) that he considers the Department continues to have a cultural problem (Transcript, 68.4).

100 I have already discussed the approach to the practicability of an order for reinstatement or re-employment at [77] above. The bespoke evaluation requires the Commission to consider the specific dismissal situation and to evaluate the underlying facts: ***PTAWA*** at [120] to [121] per Kenneth Martin J. This assessment must be undertaken in a common-sense fashion. In the decision under appeal to the Industrial Appeal Court in ***PTAWA***, the Full Bench considered the role of an alleged loss of trust and confidence in determining whether an order of reinstatement should be made: ***Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees*** [2016] WAIRC 00236; (2016) 96 WAIG 408 per Smith AP and Scott ASC with Beech CC in dissent.

101 In considering the broad matters of principle, endorsed by the Industrial Appeal Court on the appeal to it, Smith AP and Scott ASC observed at [104] and [105]:

104. The Full Bench in ***Nguyen*** at [24] also considered the observation of Gray J in ***Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd*** ([2000] FCA 627 [42]) that with the emergence of corporate employers, the importance of trust and confidence in the employment relationship has diminished. The Full bench in ***Nguyen*** at [25] adopted the remarks made by Gostencnik DP in ***Colson v Barwon Health*** ([2013] FWC 8734) about the point being made by Gray J. In ***Colson*** Gostencnik DP observed [21] – [22]:

> I do not take his Honour's comments to mean that trust and confidence as an element of the employment relationship is no longer important. It is merely recognition that in many cases it will be important to have regard to the totality of the employment, and that in the case of a corporate employer, the loss of trust and confidence in the employee will be by a manager or managers of the corporate employer. But as his Honour observed, in such cases the 'critical question must be what effect, if any, a loss of trust by the manager in an employee is likely to have on the operation of the workplace concerned' ([2000] FCA 627). It is important to understand that his

Honour's observations were made in the context of an interlocutory application while His Honour was considering 'balance of convenience' arguments against reinstatement on an interlocutory basis. His Honour's observation about the effect of the shift from a personal to a corporate employment relationship were made as an introduction to his conclusion that the respondent did not provide any evidence on the 'critical question' as identified. So much is clear from the following passage:

> … It might be more significant, for instance, to know the name of Mr Voss's immediate supervisor and to know the attitude of that person towards him. If the immediate supervisor had no trust in Mr Voss, it might also be relevant to know whether it would be possible to place Mr Voss in another part of the workplace, under another supervisor, who did have such trust. It would also be relevant to know what effect any lack of trust by any manager or supervisor in a particular employee might have on the conduct of operations in the workplace. There is no evidence as to any of these matters.
>
> [43] Resort to an assertion that trust and confidence in a particular person have been lost cannot be a magic formula for resisting the compulsory reinstatement in employment of the particular person ([2000] FCA 627).

In my view, His Honour is merely saying that it is not enough to simply assert that trust and confidence in an employee has been lost. Where this is relied upon then there must be evidence from the relevant managers holding that view and an assessment must be made as to the effect of the loss of trust and confidence on the operations of the workplace. In short, all of the circumstances must be taken into account. This seems evidence and is hardly controversial.

105. The Full Bench in ***Nguyen*** then distilled the following principles from the decided cases concerning the impact of trust and confidence on the question whether reinstatement is appropriate [27] – [28]:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement (*Tenix Defence Pty Ltd v Galea* [2003] AIRC (11 March 2003) at [7] – [8]).

- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).

- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).

- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).

- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).

Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.

102 Evaluating trust and confidence can involve either or both the employer's trust and confidence in the prospective employee or vice versa. Regardless of which emphasis is considered, the focus should be on the circumstances of the workplace into which it is proposed to reinstate or to re-employ the former employee. This is simply part of assessing the underlying facts.

103 These grounds of appeal principally relate to several documents in evidence, they being exhibits 12, 13, 14 and 15 and Mr Kilner's oral evidence in relation to them. The first document is a "List of Events" that Mr Kilner maintained contributed to his psychiatric problems (see exhibit 12: AB 359-361). Mr Kilner referred to systematic bullying he had raised with the former Director-General of the Department of Education. The list, dated 10 April 2018, contains 23 items referring to various incidents that have occurred over the period from 2001 to March 2017, at BSHS and Mr Kilner's interactions with the Standards and Integrity Division and the District Directorate of the Department. In the main, the list of items makes various factual assertions and allegations arising from these incidents. These also include correspondence with members of Parliament and the then appellant, in relation to what Mr Kilner regarded as legitimate grievances. At the end of a several paragraphs in exhibit 12, Mr Kilner wrote "NO ACTION". In several others, he wrote "ACTION".

104 Mr Kilner was taken to several items in his cross-examination. He accepted that if he was re-employed at another school, he may need to contact the District Director to resolve issues, despite having made criticisms. Correspondence to the then appellant in relation to the culture of the Department and to the District Director, regarding the culture at BSHS, was referred to. When cross-examined in relation to the "NO ACTION" comments, Mr Kilner said that he did not mean this to be critical of the appellant, but to record the fact that matters had not changed: AB 620. However, as mentioned, the learned Commissioner, in his reasons at [30], did not accept this, despite concluding overall that the documents and communications did not establish such a loss of trust and confidence to make a return to work a difficulty.

105 Exhibit 13 (AB 362) was an email from Mr Kilner to the appellant dated 4 April 2019. It referred to earlier correspondence of 31 January 2019, which congratulated the appellant on her then appointment as the Director-General of the Department. It referred to the prospect of a change of management style along with a new Minister. The email then referred to the Full Bench appeal and Mr Kilner's information that the Department may have been appealing the decision. Mr Kilner referred to "a waste of taxpayer funds" if such were to occur and he referred to other cases that have come before the Commission, involving teachers. A reference was made to an "adversarial culture exhibited by Human Resources". When he was cross-examined on this, Mr Kilner said that he was not intending to criticise the Department, but to point out there were funds being wasted on "some of these things": AB 623. In re-examination, Mr Kilner said that he had no day to day dealings with the Human Resources section of the Department as a teacher: AB 634.

106 Exhibit 14 (AB 363) was an email to the appellant from Mr Kilner dated 13 July 2019. It commenced by commending the appellant on her recent address given to the State Council of the respondent. Some comment was then made on Mr Kilner's proceedings in the Commission and that "bureaucrats (of the Department) will process my case through the WAIRC and the Department will receive more negative press". Mr Kilner also mentioned his daughter witnessing "rude officers" of the Department in court (seemingly in the first hearing) and a reference to his daughter, as a reason for her to leave the practice of the law, being "the misogynistic misuse of power to subvert the truth and trample over people without real legal support". Also, mention was made by Mr Kilner to him not arguing with this comment by his daughter and saying further, that he has been a "whistle-blower" who has witnessed and documented much of this behaviour displayed by the Department over the years. A further comment was made by Mr Kilner that he hoped that the appellant could use her "good moral compass" to "navigate the 'dark' places in Royal St" and he hoped that the

appellant would use her ethical and accountable decision making to restore trust in the teaching profession. Mr Kilner further said there would be instant recognition of the appellant's actions, in circumstances "where currently there is no demonstration of empathy or care".

107 In his oral testimony, Mr Kilner was asked about the content of exhibit 14. In cross-examination, Mr Kilner said that he was not being critical of the appellant but that the "bureaucrats" in the Department do not create trust. Also, he referred to a meeting at the respondent where the Education Minister attended and was said to have referred to the need for the culture of the appellant to change: AB 626-627. Mr Kilner also said that recent changes introduced by the Minister and the appellant have "made a tremendous difference in the last year and a half, two years": AB 628. As to the comment about "misogynistic misuse of power", Mr Kilner testified this was something his daughter had said. Mr Kilner said that he did not adopt his daughter's description but added, he had witnessed some of this conduct: AB 630.

108 Mr Kilner was questioned about his reference to a "10 point plan" to deal with violence in schools which has now required the appellant to take responsibility and Mr Kilner acknowledged the Minister and the appellant as being responsible for these changes: AB 635 to 636.

109 The final specific document referred to by the appellant in these appeal grounds, was exhibit 15 (AB 365). This was an email dated 11 November 2019 to Minister Templeman about another case before the Commission involving a teacher. It referred to Mr Kilner's unfair dismissal case before the Commission and to school violence and an unsupportive workplace. Mr Kilner referred to the Minister for Education '"trying to address cultural problems in DET'" but it seems like a "Yes Minister" scenario where the bureaucrats run the show! DET seems hell bent on opposing judicial decisions and making a mockery of the Industrial Commission that is supposed to deliver justice to workers". Mr Kilner was also cross-examined on this email. He testified that although the Minister for Education was trying to make changes, there was a cultural problem in the Department because it was not following the "Code of Conduct": AB 632 - 633.

110 The learned Commissioner considered the documents in exhibits 12, 13, 14 and 15 at [23] to [31] of his reasons without, however, specifically identifying each. This was in the context of the appellant's argument that the return to work of Mr Kilner would be impracticable because of Mr Kilner's "deep-seated lack of trust", referred to at [22] of the reasons. The learned Commissioner said at [22] that having read the documents closely, "in number, context and content and tone they do not come anywhere near demonstrating what the respondent contends

they demonstrate". The Commission then observed at [26] there were few documents and that "the context of the documents and the communications relate to concerns that whether ultimately found to be correct, were not unreasonable for the applicant's member to hold". The learned Commissioner also noted at [27] that the documents were addressed to the relevant people, were not made on social media or in newspapers or broadly distributed to "maximise pressure on the powers that be". Also, the learned Commissioner said at [28] that the content of the documents related to "real events and concerns in relation to those events". He also found at [29] that the tone of the documents was "fine" and there was no use of offensive or abusive language. As noted the learned Commissioner was somewhat critical of Mr Kilner's attempts to downplay the content of some documents and communications, but read as a reasonable person would read them, concluded at [30], that they did not "reveal such a loss of trust of the applicant's member in his employer as to make his return to work problematic".

111 As to ground 8, the appellant submitted that it was necessary for the Commission to undertake several steps as a part of fact finding and its consideration including making findings of fact as to what were Mr Kilner's beliefs and concerns in relation to these documents and his evidence; to what extent such views and concerns established any loss of trust or confidence; and whether any loss of trust or confidence sustained was such that the employment relationship could not be reasonably feasibly re-established. It was submitted that these steps were necessary for the Commission to make findings as to a lack of trust and confidence and failing to do so, amounted to a constructive failure to exercise jurisdiction.

112 The proper approach to whether there should be the reinstatement or re-employment of an unfairly dismissed employee has been referred to earlier in these reasons. This does not involve a formulaic approach to the assessment of the merit of restoring an employment relationship. This assessment is based on the specific facts, as to whether an employment relationship should be restored. The focus of the assessment should be on the restoration of an employment relationship in the particular workplace concerned: ***Nguyen Le v Vietnamese Country Community Ethnic School South Australian Chapter*** [2014] FWCFB 7198; ***Colson v Barwon Health*** [2013] FWC 8734 as cited by the Full Bench in ***PTA*** at [104]. In the present context, this means primarily a classroom in a local school environment. Mr Kilner did express some strident views, directed to the culture of the Department; past problems at BSHS (and there were problems); interactions with the Standards and Integrity section and some District officers. The task for the Commission, was to assess the documents and communications referred to by the appellant, in the context of all the evidence. A judgment was required as to whether, given most documents and communications were

historical, they meant an employment relationship could not reasonably feasibly be established for the future.

113 The learned Commissioner said that he had read the documents closely. He considered that the content of the documents related to specific events and sometimes, identified individuals. He was satisfied that the views and opinions expressed by Mr Kilner were not canvassed publicly or otherwise at large, such as to cause embarrassment or to undermine the appellant. The content of the documents spoke for themselves. It was unnecessary to repeat the matters raised as a matter of fact. The content of them was not controversial. There was no dispute by Mr Kilner he authored the communications, although he did attempt to qualify some of his responses, which as I have mentioned, the learned Commissioner did not accept.

114 I am not therefore persuaded that the Commission failed to constructively exercise its jurisdiction.

115 In relation to ground 9, the appellant submitted in summary, that the absence of trust and confidence may be between employer and employee and, also between employee and employer. Reference was made to a decision of Rothman J in ***Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*** (2007) 69 NSWLR 198. The submission was made that as a matter of logic, whether a person's views were reasonable or rationally based, was irrelevant to whether there is a sufficient level of trust and confidence to re-establish an employment relationship. Thus, the submission was that if the learned Commissioner referred to the reasonableness of Mr Kilner's views, this was an error and involved an irrelevant consideration.

116 There is no doubt that a relevant lack of trust and confidence may be between either the employer in a prospective employee, and a prospective employee in the employer, or both. Whomever has a demonstrated lack of trust and confidence, whether it be the prospective employee or the employer, if sufficiently serious, and made out based on a credible foundation, that can undermine the relationship between the parties to a prospective re-established contract of employment. Based on the evidence, the bespoke evaluation by the Commission of a claim of losing trust and confidence by either party to a prospective employment relationship, involves an objective assessment by the Commission, having regard to s 26(1)(a) and (c) of the Act, and the formation of the requisite opinion, that reinstatement or re-employment is, or is not, reasonably feasible or reasonably capable of being accomplished.

117 I have set out at [101] above, extracts of the Full Bench majority decision in ***PTA*** at [104] and [105]. At [105], at the bottom of the par, the Full Bench said that in

assessing whether a viable and productive employment relationship can be restored, it is relevant to consider the *rationality* of any attitude taken by a party. Furthermore, at [106], the majority said that in terms of the *attitude* that may be expressed by an applicant about an employer or other employees, or the employer about an applicant, an issue to consider is whether those attitudes as expressed "have a *reliable foundation* …". (My emphasis).

118 Accordingly, I consider that the reasonableness of the view held by an employee or an employer may be a relevant consideration in assessing whether such views are rational or reliable, as part of the Commission's overall assessment. This ground of appeal is not made out.

119 In the alternative to ground 9, as to ground 10, the appellant contended that if "reasonableness" was a relevant consideration in the Commission's assessment of Mr Kilner's views and opinions, there was no evidence before the Commission to support the conclusion that his views were "not unreasonable". Specific reference was made to exhibit 14 and the observation as to "misogynistic abuse of power…" to the "dark places in Royal Street" comment, also, in exhibits 14 and 15, the comment that "bureaucrats run the show". The submission was made that absent evidence, an error of law was committed.

120 As a starting point in considering this ground, as noted above, in relation to ground 8, the content of exhibits 12, 13, 14 and 15 largely speak for themselves. Despite the onus being on the appellant to establish that reinstatement or re-employment is impracticable, other than the cross-examination of Mr Kilner, no other evidence was led by the appellant to resist it. The question arising is whether based on the content of these documents themselves, in the context of all of the evidence, especially Mr Kilner's, whether the conclusion of the Commission that the concerns of Mr Kilner were not unreasonable to hold, was open.

121 This ground of appeal appears to focus the appellant's challenge on this issue to the two emails to the appellant in exhibits 14 and 15. As such, I generally confine consideration of the appellant's submissions to these two documents, although it appears from the learned Commissioner's reasons, that he considered the documents and communications more widely. I will, however, comment on several other of Mr Kilner's communications, as set out in the respondent's submissions.

122 As already noted, exhibit 14 was an email to the appellant of 13 July 2019 in which he commended the appellant for her address to the respondent in relation to ethical and accountable decision making and the creation of trust. As also noted above, Mr Kilner referred to his case before the Commission in the first

hearing and the comments made by his daughter, reportedly referring to "misogyny" in the Department. Whilst such comments are technically hearsay, and as reported, were irrelevant to the proceedings before the Commission at first instance, it is apparent from the email that Mr Kilner did not adopt this statement as his own, but referred to it in the context of the ERG review of BSHS in May 2011. A copy of the report of the ERG was an annexure to Mr Kilner's witness statement in the first hearing: AB 221-228. And Mr Kilner gave evidence about it at AB 611-616. Comments were made in the ERG report as to staff relationships and a lack of recognition and a perception amongst staff members at BSHS, that their views were not valued or considered: AB 223. Also in the cross-examination of Mr Kilner, in an exchange between Mr Kilner and the learned Commissioner, Mr Kilner referred to his role as a "whistle-blower" and his observations about misogyny, where he said he had seen many examples of it at Busselton and that it was a problem at the Department: AB 630.

123 As to the assertion by Mr Kilner in exhibit 14 that negotiations in relation to his case had reached a stalemate and that "bureaucrats" would process his case through the Commission and that negative press would follow, this statement is largely innocuous. It reflected Mr Kilner's views that the proceedings were likely to be contested further (as they have been). And a copy of an article in the local newspaper in Busselton about Mr Kilner's unfair dismissal case, was also supportive of the view he expressed: AB 518 – 519.

124 As to the "dark places" in Royal Street comment, it is difficult to see how much meaning could be attached to such a broad statement. No reference is made to specific individuals or those that Mr Kilner may work with or have direct dealings with as a teacher, in a specific teaching workplace. The context appears to be Mr Kilner's hope for the appellant to restore what he described as building trust back into the teaching profession, and some systemic change in the Department's approach.

125 The reference to the cultural problem in the Department and "that the bureaucrats run the show" appeared in exhibit 15, the email to Minister Templeman. This email referred to another case involving a teacher, Mr Buttery. Again, the comment of Mr Kilner is non-specific, is generalised and referred to efforts by the Education Minister at reform. As with the "dark places" comment, it appears to carry little real meaning, other than to be encouraging of reform, but it being resisted.

126 While the appellant did not specifically single out other comments or expressions of view by Mr Kilner in this ground of appeal, as I have mentioned, the respondent in its written submissions did refer to several others in exhibits 13, 14

and 15. Before turning to them, the learned Commissioner dealt with the documents and communications globally at a higher level of abstraction. No specific comments or documents were singled out.

127 I do not propose to recite all the other statements and expressions of view made by Mr Kilner, as set out at [96] - [99] of the respondent's written submissions, additional to those separately considered above. I generally accept the respondent's characterisation of them as "banal" and reasonable, in the context in which the statements were made. Most, for example, those commenting on the Human Resources Department's pursuit of Mr Kilner's case on appeal, were simply statements of fact. They do not approach such a "deep-seated lack of trust for the Department" that re-employment of Mr Kilner by the appellant would not be reasonably feasible or reasonably capable of being accomplished.

128 Ground 11 complains that the learned Commissioner's conclusion that the "tone" of the documents and communications considered above, were "fine" was a manifestly unreasonable conclusion. The reference to this issue is at [29] of the reasons. Importantly, the learned Commissioner said in the same paragraph that "there is no abuse or offensive language". The first sentence of the Commission's reasons must be read in the context of the whole paragraph and not in isolation. The appellant submitted that the communications that the learned Commissioner relied upon for these purposes included the "misogynistic abuse of power to trample over people" and the "dark places in head office" reference (exhibit 14: AB 363); an implicit assertion by Mr Kilner that the appellant did not engender trust (said to arise from exhibit 14); and that the appellant's staff "run the show" (exhibit 15: AB 366).

129 It was submitted by the appellant that the effect of these communications challenged the competence and integrity of the appellant to undertake managing the Department, especially when Mr Kilner copied other persons into such correspondence, including the Minister for Education. This ground of appeal relies on substantially the same documents and communications as is the subject of the earlier grounds of appeal. The upshot of the submission being that the integrity of the appellant was questioned by Mr Kilner. As to the "misogynistic abuse of power" contention, as noted at [106] above in connection with ground 10, this statement was made not by Mr Kilner but by his daughter. The reference in exhibit 14 in the header to "What Does Trust Look Like" is plainly a reference to the subject of the appellant's speech to the Council of the respondent, which is referred to in the first paragraph of Mr Kilner's email. I think it is a fair observation, as the respondent contended in its written submissions, that the appellant has focused on those parts of exhibits 14 and 15 in this respect, without regard to the whole of the other communications and

documents in evidence. It is the whole context of the documents and communications overall, that the learned Commissioner had regard to.

130 It is fair to say too, as I have already noted, that some comments made by Mr Kilner, were ill advised comments to make to the appellant in her capacity as the Director-General of the Department. However, I do not consider that taken in context, the documents or communications made by Mr Kilner were motivated by ill-intent. Several of them are complimentary of the appellant and attempts made to reform the work environment for teachers generally. I consider that many of the documents and communications, not just those referred to by the appellant in these grounds of appeal, reflect a genuinely held view by Mr Kilner of the need for a positive change and a commitment to BSHS, over many years, both as a person representing teachers in the workplace and as an advocate for broader reform and improvement. Mr Kilner had been thanked for raising issues in the past in connection with the ERG, with the then appellant in September 2012 doing so (see exhibit 9: AB 354 - 355). In response to further correspondence with the Director-General in January 2013, in reply, the then appellant commended Mr Kilner for his level of passion for BSHS: exhibit 11: AB 358.

131 I therefore consider that the learned Commissioner, taken in the context of an overall consideration of the various documents and correspondence, both by and from Mr Kilner and to him, it was open to reach the view that the tone of them was not inappropriate. There was no evidence of a response by the appellant to Mr Kilner's correspondence in exhibit 14 for example, where she could have objected to the manner of Mr Kilner's communications with her, even though Mr Kilner was not an employee of the appellant, as the proceedings were still before the Commission and not yet concluded. What was required by the Commission was a balanced assessment of all the material, not just some of it. Having reviewed all the material in evidence, I consider it was open for the learned Commissioner to conclude as he did, as to their general tone and character.

132 As to ground 12, again in reliance on exhibits 12, 13, 14 and 15, the appellant submitted that overall, the Commission's finding that the documents and communications did not support a conclusion of a loss of trust and confidence, was manifestly unreasonable. The appellant repeated its view as to the effect of the exhibits and referred to Mr Kilner's oral evidence in relation to them. It was submitted that the oral evidence given by Mr Kilner supports the view he does not have trust and confidence in the appellant and her capacity to manage the Department appropriately or ethically, to provide a safe work environment for teachers or to manage taxpayer funds effectively. The submission was further made that Mr Kilner's views extend to all levels of the organisation including

past principals of BSHS, district officers, previous Director-Generals and other divisions within the Department including Standards and Integrity, Human Resources, amongst a few more.

133 The net effect of this, according to the appellant, was that the only conclusion reasonably open from these expressions of views, was that the re-establishment of an employment relationship between Mr Kilner and the appellant would not be reasonably feasible.

134 As to this ground generally, the contentions advanced were somewhat of a culmination of the complaints raised in grounds 9, 10 and 11. Given the conclusions reached in relation to those grounds, I consider that it was not open for the Commission to conclude on the evidence, including exhibits 12, 13, 14 and 15, read as a whole, that a loss of trust asserted by the appellant was established. None of the material relied on by the appellant went to the establishment of a case of a loss of trust and confidence in the workplace of a school teacher in a classroom setting, or in the interaction with other teachers or principals, with whom Mr Kilner may have direct and regular involvement, in the future. The reference specifically to BSHS, and the comments made by Mr Kilner about the difficulty at that school, had to a considerable extent, a foundation, as revealed by the subsequent ERG report.

135 The matters raised and complained of by the appellant in relation to these documents and communications, stand in stark contrast to the facts before the Commission in the case before the Full Bench in ***PTA*** for example. There, as summarised by the Full Bench at [114] - [124], the former employee made and maintained throughout the proceedings at first instance and also on appeal, very serious allegations against co-workers that she would have to work directly with, including that they had conspired against her in relation to a particular workplace incident; that some had committed perjury when giving evidence before the Commission; and that credible doubts remained about the employee's reliability to recount and record events, as an important part of the job into which she was seeking to be reinstated. These workplace-specific matters were found by the Full Bench to be directly relevant to whether the employer legitimately maintained a loss of trust and confidence, to resist reinstatement.

136 To the contrary in this case, no such workplace-specific circumstances arise. Mr Kilner had in several respects, legitimate concerns as to the difficulties experienced at BSHS. These concerns were to an extent, borne out by the ERG report in evidence (see AB 221 - 228). Some of its findings and recommendations were consistent with the views expressed by Mr Kilner before and during the review (see exhibits 7, 8, 9, 10 and 11: AB 349 - 358). The fact that the Minister

for Education and the appellant, then took initiatives to remedy some problems identified, is consistent with the legitimacy of several issues raised by Mr Kilner in his past correspondence. In some of this correspondence, he has acknowledged and supported these initiatives. In all the circumstances, it was open for the Commission to conclude that Mr Kilner was well-intended, to improve not just BSHS, but also the work environment for teachers generally.

137 Whilst the appellant referred to some of Mr Kilner's oral evidence at [131(e)] of her written submissions, this evidence was plainly supplementary to an explanation of his views, as expressed in exhibits 12, 13, 14 and 15, as these documents were introduced into evidence by the appellant at first instance, in her cross-examination of Mr Kilner. None of the views in that evidence, again in the context of the evidence before the Commission, including that complimentary of the efforts of the appellant at reform, in particular to address what were perceived to be the "cultural problems" within the Department, went to the specific environment of a teacher in a classroom and within a school. More particularly, Mr Kilner also confirmed that of those areas identified by the appellant in her grounds of appeal, those being Human Resources, Standards and Integrity and the senior management of the Department, none would have any direct contact or involvement with him as a teacher in a classroom regularly. The only exception seemed to be where Mr Kilner said, "if you have done something wrong" (in the case of Standards and Integrity) or in the conduct of an Expert Review Group (senior management): AB 633 - 635. Mr Kilner was also conciliatory and positive in relation to the "10-point plan" which in part at least, appears to have arisen from past difficulties at BSHS: AB 636.

138 By ground 13, the appellant complained that the learned Commissioner failed to have regard to Mr Kilner's oral evidence referred to above, in concluding that the appellant had not established a sufficient lack of trust and confidence by Mr Kilner in the appellant, to resist re-employment. The submission was made that in effect the Commission only relied on the documentary evidence as to these matters. It is apparent however, as noted above, that the basis for much of the cross-examination and re-examination of Mr Kilner on these issues, was the documents tendered in evidence as exhibits 12, 13, 14 and 15. It was the appellant who introduced them into evidence. The views expressed in relation to these matters are primarily to be obtained from the documents. The appellant's submissions in closing at first instance (AB 676 - 689), referred largely to these exhibits. It seems tolerably clear from a review of the appellant's closing submissions, that the primary focus of the appellant's case was the documents themselves, which, as I have noted, were largely self-explanatory. The appellant made three references to Mr Kilner's oral testimony, but seemingly only to emphasise what the appellant maintained the documents themselves said.

139 The learned Commissioner referred to Mr Kilner's testimony as to these documents and communications at [30] of his reasons. This paragraph is plainly to be read in the context of his prior comments at [23] - [29]. As noted above, the Commission did not accept Mr Kilner's attempts to explain away some of his comments made in exhibit 12, but was not, overall, persuaded by the appellant's case to resist re-employment. The learned Commissioner also referred to "other examples" but did not mention them specifically. It is clear however that regardless, the primary focus of the appellant's challenge was the content of the documents and communications in exhibits 12, 13, 14 and 15. The documents themselves were the best evidence of their content, not what Mr Kilner may have said about them, in some cases many years after the event.

140 It was thus hardly surprising, and it was appropriate, that the learned Commissioner placed his principal focus on the documents themselves, and not be distracted by what Mr Kilner may have said about them in retrospect.

141 I am not persuaded that any of these grounds of appeal are made out.

Notice of contention

142 A Notice of Contention was filed by the respondent. Several issues raised in some grounds and submissions made by the respondent on the Notice have been touched on above in dealing with the grounds of appeal.

143 The respondent submitted that further reasons support the Commission's decision to dismiss the s 27(1) application made by the appellant, set out in grounds 1(a) and (b) of its Notice. These grounds are:

> **Section 27(1)(a)(ii) application for dismissal of matter**
>
> 1. The Appellant's application for dismissal of the matter pursuant to section 27(1)(a)(ii) ought to have been dismissed because:
>
> a. In order to find that the further proceedings were not desirable in the public interest, the Appellant needed to persuade the Commission that:
>
> i. The Respondent's conduct in not disclosing Dr Buckeridge's Certificate dated 1 March 2018 ("the Certificate") prior to the hearing of 25 July 2018 was improper; or
>
> ii. The respondent's conduct in making closing submissions to the effect that Mr Kilner did not suffer from a medical condition and was fit for work at the date of dismissal was improper; or
>
> iii. The combination of (i) and (ii) was improper conduct; and
>
> iv. Because of that improper conduct, the public interest weighed against further proceedings.

b. The non-disclosure of the Certificate was not improper conduct because:

i. In the absence of specific orders by the Commission, there was no automatic right to discovery of documents, nor an obligation to give discovery of document, (sic) prior to the hearing;

ii. There was no evidence before the Commission that the Appellant had made any request to the Respondent for discovery of medical records or medical certificates.

iii. There was no evidence of any deliberate decision on the part on the Respondent to withhold the Certificate.

144 I have earlier in these reasons dealt with the general principles to apply concerning s 27(1) of the Act and those applicable to discovery, production and inspection in this jurisdiction. I accept that demonstrating serious misbehaviour or improper conduct by a party to proceedings may be a basis for the Commission to exercise its powers to dismiss a matter under s 27(1) of the Act. I accept too the respondent's submission that, as discussed by Alanson J in ***Australian Federal Police v Kalimuthu*** [2015] WASC 376 at [44], non-disclosure should be regarded as an irregularity, unless it is deliberate or fraudulent. Here, there was no evidence to establish that failing to disclose the second medical certificate of Dr Buckeridge was other than inadvertent conduct by the respondent.

145 There was no obligation to disclose the Dr Ng medical report, as it was subject to legal professional privilege. As the respondent noted in its submissions, until the last medical certificate from Dr Buckeridge, which issued after the notice of termination of employment had been given by the appellant to Mr Kilner, Mr Kilner had provided all his medical certificates to the appellant as his employer, as a part of his taking extended sick leave. I accept that it would be a reasonable assumption for the respondent to make, if it turned its mind to this issue, that Mr Kilner also did so on the last occasion of receiving a medical certificate from Dr Buckeridge. It was not established to the contrary.

146 The respondent accepted, properly in my view, that it ought to have disclosed the existence of Dr Buckeridge's second medical certificate to the appellant at the time of the first hearing. However, absent anything before the learned Commissioner to establish deliberate conduct by the respondent, which would be a serious matter, to dismiss the application in toto, when a finding of an unfair dismissal had been made and a compensation order had issued, would be a harsh and unjustified response. As to the appellant's submission there had been a finding of implicit misconduct by the Commission, in reducing the remuneration lost to be paid to Mr Kilner, I do not think that the matter can be put so highly. The learned Commissioner was not satisfied that the respondent's failure to

disclose the second medical certificate of Dr Buckeridge was sufficiently serious to dismiss the proceedings. He was however, of the view that the respondent's failure, falling short of an abuse of process, should have consequences, hence the discount in his order for remuneration lost. It was a question of degree.

147 Also, having regard to the evidence before the Commission at first instance in the initial hearing, including the reports from Dr Lai, the first Dr Buckeridge medical certificate, and even having regard to the content of Dr Ng's medical report, had it been put before the Commission, the learned Commissioner was correct to observe that any lost opportunity to the appellant, taken in the context of all of the material, caused by the absence of the second medical certificate from Dr Buckeridge, was minimal.

148 As to grounds 1(c) and (d) of the Notice, these are as follows:

> c. The Respondent's submissions to the Commission to the effect that Mr Kilner was not suffering from a medical condition and was not unfit for work as at the date of his dismissal was not improper conduct because:
>
> i. Whether or not the Certificate was discovered, it was at best an opinion which was expressed in uncertain terms and without setting out the facts or assumptions on which it was based. Accordingly, the Respondent was not bound to limit its submissions by reference to what was contained in the Certificate.
>
> ii. The submissions were made in closing and after the close of the Appellant's case;
>
> iii. The submissions were appropriately qualified in the course of closing submissions, as reflecting the evidence that was before the Appellant at the time of the dismissal.
>
> d. The public interest weighed against the dismissal of the proceedings because:
>
> i. In exercising its discretion under section 27(1)(a)(ii) the Commission was bound to consider the interests of Mr Kilner as a person immediately concerned in the industrial matter.
>
> ii. Disclosure of the Certificate, and the absence of the submissions complained about, on their own or in combination, would not have altered the finding that the termination of Mr Kilner's employment was harsh, unjust or unreasonable;
>
> iii. Mr Kilner had no other remedy for the harsh, unjust or unreasonable termination of his employment, other than a remedy determined by way of the proceedings;

iv. The Appellant was not prejudiced by the non-disclosure, or the making of submissions (in isolation or combination) in a manner that could not be remedied because it had the opportunity to present its case in relation to remedy at the remitted hearing.

(Footnotes omitted)

149 It was submitted by the respondent that in the circumstances, the submissions made on Mr Kilner's behalf at the first instance hearing that Mr Kilner was not suffering a medical condition and was not unfit for work, at the time of his dismissal, was not improper conduct. This was because, as I understood the submission, the second medical certificate was brief and uncertain; the issue was always Mr Kilner's fitness for work at a school other than BSHS; that the respondent's then submissions reflected the evidence before the appellant at the time of Mr Kilner's dismissal; and having regard to the medical evidence before the Commission, and the Dr Ng report (not in evidence but known to the respondent), the respondent's counsel's submissions to the Commission should be seen as an invitation to find Mr Kilner was fit, despite some evidence to the contrary. The respondent contended that the appellant, in the initial hearing, was alive to the contradictory nature of some of the evidence before the Commission and made submissions on the point: AB 83. It was contended that the Commission was not led into error by the course taken and the appellant, by the submissions just referred to, was aware of the issue too.

150 In terms of the position adopted before the first Full Bench, the respondent submitted that it was put before the Full Bench in the double negative, that the learned Commissioner had not found Mr Kilner was not suffering a medical condition. Further, that on this basis, the respondent maintained its position before the Full Bench that in the context of all the evidence, Mr Kilner was not unfit to work at a school other than BSHS. The result of this was said to be there was no impropriety in the above submission, and the second Dr Buckeridge certificate, even if it were in evidence, would not have precluded the maintenance of this position. In these circumstances, the respondent said it would be contrary to the interests of Mr Kilner for the s 27(1) application to have succeeded. And even having regard to the second medical certificate, when taken with all the other medical evidence, Mr Kilner had or would shortly have recovered from his medical condition and could work at another school. For the appellant, it was submitted that Mr Kilner was complicit in the non-disclosure and even if not, the submission was made that the wrongs of the agent should be brought to bear on the principal.

151 In dealing with this aspect of the Notice, I observe that the learned Commissioner reached no conclusion on whether there was an inconsistency between the

submissions made by counsel for the respondent and the content of the second medical certificate, and also the Dr Ng report. This is dealt with at [65] - [67] of his reasons. At [66] the learned Commissioner said:

> There is also an issue about the making of certain submissions by the applicant's counsel where the applicant held two documents, the medical certificate referred to in the previous paragraph and the report of Dr Ng.

152 The learned Commissioner then said at [67]:

> I have no idea how, if it is the case that there is an inconsistency, how the inconsistent submissions came to be made. The respondent tells me she does not blame counsel. That is unhelpful to me in determining whether anyone was at fault and, if so, who and why.

153 A further complication is a lack of reference in the learned Commissioner's reasons, to the timing of any return to work. I have referred to this above at [35], in dealing with the grounds concerning the s 27(1) application. On the evidence before the Commission at first instance, even assuming the second medical certificate had been tendered, along with the Dr Ng report, it would have been open for the learned Commissioner to have concluded that Mr Kilner would soon be fit for work at a school other than BSHS. That was the substance of Dr Ng's report and the second medical certificate from Dr Buckeridge, albeit, in very brief terms, he said that Mr Kilner should be able to return to work by Term 4. The reference by Dr Buckeridge to the "charges" and "processing" of them was somewhat ambiguous and uncertain. I also note that Professor Janca commented, as mentioned at [37] above, that he was unclear as to the meaning of Dr Buckeridge's second medical certificate.

154 None of the medical evidence then before the Commission, or known to the respondent, suggested that Mr Kilner would never be fit for work at any school.

155 I do not consider, on these further bases, that the conduct of the respondent could be regarded as improper, so Mr Kilner should have been denied any remedy by granting the s 27(1) application. In the circumstances too, I am not persuaded that the appellant would have been prejudiced in the manner suggested, or that Mr Kilner was complicit in any impropriety.

156 Ground 2 of the Notice is:

> **Impracticability of Reinstatement: Mr Kilner's Fitness for Work**
>
> 2. The Commission's conclusion that Mr Kilner was fit to work in a school other than Busselton Senior High School should be upheld because:
>
> a. in relation to the relationship between medical incapacity and practicability of reinstatement, the pertinent enquiry was as to Mr Kilner's fitness to perform

the inherent requirements of the relevant role prospectively from the date of the hearing.

b. The onus was on the Appellant to establish credible reasons why reinstatement of Mr Kilner was impracticable.

c. The Appellant did not adduce and did not rely upon any expert evidence expressing opinions different to those expressed by Professor Janca.

d. Professor Janca's opinion was given after he had examined Mr Kilner on 1 August 2019. He had regard to the medical report of Dr Lai, the report of Dr Ng, and the certificates of Dr Buckeridge and Dr Mowatt, (sic) Section 64(1) of the *School Education Act 1999* setting out teachers' functions and Part 3 of the *Teachers (Public Sector Primary and Secondary Education) Award 1993* which set out teachers' duties.

e. Professor Janca's opinion was:

i. Mr Kilner suffered from an illness in the past that would have impacted on his ability to work as a Senior Teacher. His illness appeared to be psychological and reactive in nature and met DSM-5 diagnostic criteria for an adjustment disorder with anxiety.

ii. At the time of his interview with Mr Kilner, Mr Kilner did not suffer from any psychiatric condition. Over the past year his symptoms of anxiety significantly improved and currently have no impact on his overall functioning.

iii. Mr Kilner's medical condition does not warrant further investigation or treatment.

iv. Mr Kilner is not currently incapacitated either totally or partially for work as a Senior Teacher. He is able to work as a Senior Teacher.

v. His impression was that Mr Kilner likely achieved fitness to work at an alternative school in mid-2018.

vi. While there is no guarantee that Mr Kilner would not suffer a relapse at a school other than Busselton Senior High School, the risk was low.

f. No specific facts were put to Prof Janca that established the risk of relapse at a school other than Busselton Senior High School was other than a low risk.

g. The Appellant adduced no evidence that Mr Kilner was unable prospectively to perform the inherent requirements of the role of Senior Teacher.

(Footnotes omitted)

157 These matters do not essentially raise new issues not already canvassed in the grounds of appeal and the above reasons. In any event, I accept that from the appellant's perspective, as at the time of the proceedings, Mr Kilner was not an employee and the appellant would therefore have not been able to insist upon him submitting to a medical examination. There was no necessity on the appellant to call her own expert evidence and it was open to her to rely upon the expert evidence adduced by the respondent. This would not have precluded however, Professor Janca's medical reports, along with the materials provided to him,

being reviewed by an expert of the appellant's choosing, as to whether, on what was before Professor Janca, any difference of view may be open. It is not uncommon in legal proceedings for the views of an expert witness for one party, to be the subject of review and comment by an expert retained by another party. Absent this course taken by the appellant, the fact is the only expert evidence was that of Professor Janca. He unambiguously concluded that Mr Kilner was fit for work as at the time of the remittal. This must be taken to be a prospective assessment and it was in favour of the respondent's position.

158 As to ground 3 of the Notice, it provides:

> **Impracticability of Reinstatement- Trust and confidence**
>
> 3. The Commission's conclusion that a return to work was not impracticable for trust and confidence reasons should be upheld because:
>
> a. The evidence upon which the Appellant relied to establish Mr Kilner lacked trust and confidence in the Director General was:
>
> i. Correspondence sent by Mr Kilner after his employment had ended and therefore not indicative of his relationship with the Director General as an employee;
>
> ii. Concerned the litigation in which Mr Kilner was involved, and so was not a matter that could be taken into account in relation to trust and confidence.
>
> b. The relevant enquiry was the effect of the loss of trust and confidence on the operation of the workplace. The Appellant led no evidence relevant to this issue.
>
> c. The correspondence relied upon by the Appellant to establish a loss of trust and confidence by Mr Kilner was consistent with Mr Kilner's past conduct in advocating for improvement of conditions for teachers without any adverse consequences for the ongoing employment relationship.
>
> d. The Appellant is a large civil service organisation which has the capacity to deal with and manage Mr Kilner's communications.

159 It was contended that the correspondence relied upon by the appellant to assert a lack of trust and confidence was dated after the termination of Mr Kilner's employment. Thus, it did not go to establishing his relationship with the appellant whilst Mr Kilner was an employee. Second, the respondent contended that the correspondence relied on resulted from these proceedings, both at first instance and in appeal, and could not be considered in establishing a lack of trust and confidence. Third, there was no direct evidence about Mr Kilner's inability to work in the workplace of a teacher. Fourth, the correspondence relied on dealt with concerns Mr Kilner historically had about working conditions for teachers generally whilst he worked as a teacher, some of which were recognized by the

then appellant. Finally, that the Department, being a very large organisation, can accommodate the views expressed by Mr Kilner in his communications.

160 To some extent again, as to this ground, there is an overlap in the respondent's contentions with its responses to the grounds of appeal, which have been considered above. I agree with the appellant's submissions in part, that she did not just rely on correspondence and communications which took place after the termination of Mr Kilner's employment in February 2018. Exhibit 12, Mr Kilner's "list of issues", whilst dated April 2018, related to matters well before his dismissal, in some cases, many years earlier.

161 As to the submission that some of the correspondence concerned Mr Kilner's proceedings before the Commission (see exhibits 13, 14 and 15) I accept that as a general proposition, any tension, discomfort or ill feeling arising between parties resulting from the fact of exercising a statutory workplace right, should not be considered in determining loss of trust and confidence: ***Nguyen.*** To the extent that exhibits 13 and 14 mention the Commission proceedings involving Mr Kilner, which generally adopt the theme of a waste of taxpayers' money and the Department's pursuit of appeals, these matters should not be considered in assessing whether trust and confidence has been lost. The fact is both parties can exercise legal rights, including rights to an appeal. An exception to not taking such matters into account, may include where one party or the other adopts an extreme response, disproportionate to the circumstances of the proceedings concerned.

162 Whilst the appellant referred to ***Adam v East Metropolitan Health Service*** (2019) 99 WAIG 556, it is not apparent from that decision that the conduct of the former employee concerned was only due to taking an unfair dismissal claim. The conduct of the applicant was extreme, accusing the employer of corruption, being untrustworthy, and engaging in "conspiracies and cover-ups": at [22]. And Emmanuel C found the applicant's letters and emails to his former employer to have a concerning tone which could be viewed as "aggressive, abusive and mocking": at [22]. If such statements did arise directly out of and only related to the institution of the proceedings, then I consider they would fall into the extreme and disproportionate category, referred to above. It would be appropriate for the Commission to have regard to them, in considering whether trust and confidence had been lost. The facts in ***Adam*** however, are a far cry from those in the present matter.

163 To the extent that this ground refers to the need to focus on the workplace and those persons and sections of the Department to whom Mr Kilner made reference in the organisation, having little interaction day to day with teachers, these issues

have been dealt with in the grounds of appeal above. Additionally, I do not think the size of an organization alone, should be a disqualifying factor in reaching a view as to whether trust and confidence may be lost.

Conclusion

164 I would dismiss the appeal.

EMMANUEL C:

165 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.