

[2020] WASCA 176

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL
APPEAL COURT

CITATION : DIXON -v- DIRECTOR GENERAL,
DEPARTMENT OF EDUCATION [2020] WASCA
176

CORAM : BUSS J
MURPHY J
LE MIERE J

HEARD : 3 AUGUST 2020

DELIVERED : 29 OCTOBER 2020

FILE NO/S : IAC 1 of 2019

BETWEEN : COLIN R DIXON
Appellant

AND

DIRECTOR GENERAL, DEPARTMENT OF
EDUCATION
Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL
RELATIONS COMMISSION

Coram : P E SCOTT CC
S J KENNER SC
T B WALKINGTON C

Citation : [2019] WAIRC 00716

File Number : FBA 13 of 2018

Catchwords:

Industrial relations - Appeal from the Full Bench of the WA Industrial Relations Commission - *Industrial Relations Act 1979* (WA) s 90(1) - Whether the Full Bench erred in the construction or interpretation of any Act - Full Bench made no error in the construction or interpretation of the *Teacher Registration Act 2012* (WA) or the *Public Sector Management Act 1984* (WA) - Appeal dismissed

Legislation:

Industrial Relations Act 1979 (WA), s 90

Public Sector Management Act 1984 (WA), s 79

Teacher Registration Act 2012 (WA), s 3, s 6, s 7, s 10, s 15, s 16, s 20, s 23

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : In person

Respondent : Mr A Sefton

Solicitors:

Appellant : In person

Respondent : State Solicitor for Western Australia

Case(s) referred to in decision(s):

Colin R Dixon v Director General, Department of Education [2018]
WAIRC 795

Colin R Dixon v Director General, Department of Education [2019]
WAIRC 716

JUDGMENT OF THE COURT:

Summary

- 1 The appellant was dismissed from his employment as a teacher by the respondent, the Director General of the Department of Education, on the ground that his performance as a teacher was substandard. The appellant applied to the Western Australian Industrial Relations Commission (Commission) claiming that his dismissal was harsh, oppressive or unfair. His application was dismissed by Commissioner Matthews.
- 2 The appellant appealed to the Full Bench of the Western Australian Industrial Relations Commission against the decision of Matthews C on a number of grounds. The Full Bench dismissed the appeal: ***Colin R Dixon v Director General, Department of Education***¹ (Full Bench Decision).
- 3 The appellant has appealed to this court on the ground that the Full Bench erred in the construction or interpretation of the *Teacher Registration Act 2012* (WA) or the *Public Sector Management Act 1984* (WA) (PSM Act). For the reasons which follow, the appeal should be dismissed on the ground that the Full Bench made no error in the construction or interpretation of either Act.

Appellant's teaching history

- 4 The appellant qualified as a teacher in around 1980 and taught for almost seven years before he resigned in September 1986. He then ran a business for 23 years.
- 5 In 2009 the appellant returned to teaching in Western Australia. He was employed under a number of fixed term contracts for a total of 219 days. On 18 July 2016, the appellant's employment with the respondent became permanent with a placement at a district high school.

¹ *Colin R Dixon v Director General, Department of Education* [2019] WAIRC 716 [32].

- 6 During his employment with the respondent the appellant was provisionally registered as a teacher with the Teacher Registration Board of Western Australia (Board) under the *Teacher Registration Act*.

Teacher Registration Act

- 7 A person must not teach in an educational venue unless the person is a registered teacher.²

- 8 The Board is not an employing authority. The respondent is the relevant employing authority. A person must not appoint or employ another person to teach in an educational venue unless the other person is a registered teacher.³

- 9 A person may apply to the Board for registration as a teacher in one of four categories: full registration; provisional registration; limited registration; or non-practising registration.⁴ A person is eligible for provisional registration if the person: has an appropriate teaching qualification; meets the professional standards approved by the Board for provisional registration; and meets other requirements.⁵ The period of provisional registration is three years or such shorter period as is approved by the Board.⁶ A person is eligible for full registration if the person: has an appropriate teaching qualification; meets the professional standards approved by the Board for registration; and meets other specified requirements.⁷

- 10 The term 'professional standards' in the *Teacher Registration Act* refers to the professional standards developed by the Board and approved by the Minister under s 20 of the *Teacher Registration Act*.⁸ Professional standards are to be developed by the Board and approved by the Minister.⁹ The purpose of the professional standards is to detail the abilities, experience, knowledge or skills expected of registered teachers.¹⁰

² *Teacher Registration Act 2012* (WA) s 6.

³ *Teacher Registration Act 2012* (WA) s 7(1).

⁴ *Teacher Registration Act 2012* (WA) s 10(1).

⁵ *Teacher Registration Act 2012* (WA) s 16.

⁶ *Teacher Registration Act 2012* (WA) s 23(2).

⁷ *Teacher Registration Act 2012* (WA) s 15.

⁸ *Teacher Registration Act 2012* (WA) s 3.

⁹ *Teacher Registration Act 2012* (WA) s 20(1).

¹⁰ *Teacher Registration Act 2012* (WA) s 20(2). The respondent contended (and it appeared not to be in dispute) that these standards refer to 'graduate' and 'proficient' levels, and that their contents were not materially different from the standards referred to in [17] below: respondent's written submissions [25].

- 11 During his employment with the respondent, the appellant was still provisionally registered with the Board. The appellant contended, and it was not in dispute, that he had attained the 'graduate level' and not the 'proficient level' for the purposes of registration.

Public Sector Management Act

- 12 The respondent is an employing authority for the purposes of the PSM Act.

- 13 Part 5 div 2 of the PSM Act deals with substandard performance. Section 79(1) provides that the performance of an employee is substandard if and only if the employee does not, in the performance of the functions that he is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions.

- 14 PSM Act s 79(2) provides:

- (2) Without limiting the generality of the matters to which regard may be had for the purpose of determining whether or not the performance of an employee is substandard, regard -

- (a) shall be had -

- (i) to any written selection criteria or job specifications applicable to; and
- (ii) to any duty statement describing; and
- (iii) to any written work standards or instructions relating to the manner of performance of,

the functions the employee is required to perform; and

- (b) may be had -

- (i) to any written selection criteria or job specifications applicable to; and
- (ii) to any duty statement describing; and
- (iii) to any written work standards or instructions relating to the manner of performance of,

functions similar to those functions.

- 15 Section 79(3)(c) provides, relevantly, that an employing authority may, in respect of its employee whose performance is, in the opinion of the employing authority substandard, terminate his employment.

Appellant's employment terminated

- 16 The appellant had difficulty managing the behaviour of students at school. The school's deputy principal commenced a process of examining and attempting to assist the appellant with difficulties in managing classroom behaviour. Subsequently, a formal process, including an investigation, was established to determine whether the appellant's performance was substandard. An investigation report was prepared.

- 17 The Full Bench found that the respondent measures performance of teachers against the Australian Professional Standards for Teachers administered by the Australian Institute for Teaching and School Leadership (AITSL standards). The AITSL standards set out grades by which to classify teachers at the various stages of their careers, relevantly graduate or proficient. The appellant was assessed against the proficient level. His performance measured against that standard was found to be substandard. His employment was terminated.¹¹

Unfair dismissal application

- 18 The appellant applied to the Commission for reinstatement or compensation. He claimed that he had been harshly, oppressively or unfairly dismissed. The appellant claimed that the process followed to determine that the appellant was performing at a substandard level was flawed and that, in any event, he is not a substandard teacher.¹²

- 19 Matthews C made the following key findings:¹³

- (1) the applicant may have 'known his stuff' but his preferred method of teaching, being to set work and have students work things out for themselves, was totally ineffective;
- (2) the applicant was unable or unwilling to closely monitor the spread of abilities within a class and to tailor work to cater to those different abilities;
- (3) the applicant was a poor communicator with students;

¹¹ Full Bench Decision [7].

¹² *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [2] (Matthews C).

¹³ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [34] (Matthews C).

- (4) related to (1), (2) and (3) above the applicant was incapable of setting a 'tone' of respect in his classroom where he commanded proper authority;
- (5) the applicant blamed others for the problems he encountered in the classroom, or expected others to fix them, rather than confronting them himself; and
- (6) perhaps most tellingly, and this fell from the applicant's own lips, the applicant had a tendency to bunker down and become stubborn and argumentative when things were not going his way rather than being flexible and proactive in tackling problems and, in at least one case, he gave up on trying to teach some students altogether.

20 Matthews C summarised the evidence which led him to each of those findings. The Commissioner then stated:¹⁴

The areas in which the applicant was a bad teacher seem to correspond clearly with those parts of the Australian Professional Standards for Teachers which were identified to the applicant during the substandard performance process undertaken in relation to him, namely standards 1.5, 3.1, 3.2, 3.5, 4.1, 4.2 and 4.3 (with standards 4.4 and 4.5 falling away following the opinion of Mr Purcell that the applicant had met these standards), not that they need do so for me to come to the conclusion that the applicant was a substandard teacher.

21 Matthews C said that the appellant did not 'forensically pursue an argument about the appropriate level to apply in the proceedings'¹⁵ - apparently a reference to the appellant not raising in the course of evidence an issue about whether the appropriate level was the proficient level or graduate level. Matthews C nevertheless referred to the appellant's complaint raised in his closing submissions that he was incorrectly assessed against the proficient level in the standards rather than the graduate level. The Commissioner made the following findings in relation to that submission:¹⁶

... while I have had regard to the Standards (as section 79(2)(iii) *Public Sector Management Act 1994* contemplates) the conclusion to which I have come that the applicant is a substandard teacher relies on all of the matters about which I have made reference in these reasons and my conclusion is not in any way limited only to cross referencing those matters to the Standards. *So as to be clear, I find the applicant to be substandard regardless of whether I had considered him to be a 'proficient' or 'graduate' teacher so far as the Standards are concerned.*

¹⁴ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [99] (Matthews C).

¹⁵ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [101].

¹⁶ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [100].

I rely on the evidence which supports my findings (1) to (6) above and find that a person displaying those deficiencies is substandard. (emphasis added)

Appeal to Full Bench

22 Chief Commissioner Scott summarised the appellant's grounds of appeal to the Full Bench. It is only necessary to refer to Scott CC's summary of the appellant's first ground of appeal:

Mr Dixon's performance was incorrectly assessed against the level of a 'Proficient' teacher in accordance with the AITSL Standards, rather than the lower level of 'Graduate', which he says applied to him[.]

23 Scott CC observed that the appellant had not raised an objection to being assessed at the proficient level in his performance review or in the course of the evidence before Matthews C.¹⁷

24 After referring to the AITSL standards, Scott CC concluded that the Board's levels of provisional registration and full registration are directly linked to the graduate standard and the proficient standard respectively. The Chief Commissioner then made the following finding:¹⁸

... it was open to the learned Commissioner to conclude that [the appellant's] performance was substandard, whether he was assessed at the Graduate or Proficient level.

25 The Chief Commissioner referred to the evidence before the Commissioner and the Commissioner's findings. The Chief Commissioner said that the evidence was, as the learned Commissioner had noted 'all one way' and the evidence was sufficient to enable the Commissioner to draw the conclusion he did.¹⁹

26 The Chief Commissioner went on to make observations to the following effect. First, the appellant had been a teacher for a number of years and believed himself to be proficient. Secondly, the appellant presented himself as being an experienced and competent teacher. Thirdly, (as noted above) the appellant did not during the assessment process object to being assessed at the proficient level. However, those observations were not expressly or by implication a finding that on its proper construction PSM Act s 79(2)(a)(iii) entitled the respondent to assess the appellant at the higher level of proficient under the standards

¹⁷ Full Bench Decision [45].

¹⁸ *Colin R Dixon v Director General, Department of Education* [2019] WAIRC 716 [32].

¹⁹ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [38].

relating to the manner of the appellant's performance rather than at the lower level of graduate.

27 Properly construed, Scott CC found, relevantly for present purposes:²⁰

1. Matthews C had identified the correct statutory requirements under s 79(2)(iii) of the PSM Act.²¹
2. In the application of s 79(2)(iii) of the PSM Act, Matthews C had considered the appellant's performance in terms of both the proficient standards and the graduate standards.
3. On either level of standard, the appellant's performance was assessed to be substandard, and it was open to Matthews C so to find.

28 Scott CC found that none of the appellant's grounds of appeal were made out and the appeal should be dismissed.

29 Senior Commissioner Kenner agreed with the reasons for decision of the Chief Commissioner and added:²²

The appellant has not made out his grounds of appeal. The decision of the learned Commissioner that the appellant was a substandard teacher was plainly open on the evidence and matters raised before the Commission at first instance. No error in the exercise of the Commission's discretion has been demonstrated. The appeal should be dismissed.

30 Commissioner Walkington agreed with the reasons of the Chief Commissioner that the appeal should be dismissed.

Ground of appeal to this court

31 Section 90(1) of the *Industrial Relations Act 1979* (WA) (the IR Act) provides that an appeal to this court from any decision of the Full Bench lies on one or more of three grounds only. The ground relied upon by the appellant, and the only relevant ground, is that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, Regulation, award, industrial agreement or order in the course of making the decision appealed against.

²⁰ Full Bench Decision [32].

²¹ Full Bench Decision [15].

²² Full Bench Decision [92].

32 The appellant's ground of appeal is that in the course of making its decision the Full Bench erred in the construction or interpretation of the *Teacher Registration Act* or the PSM Act.

33 The appellant's case is that the Full Bench erred by finding that the appellant was correctly assessed at the proficient career stage when he should have been assessed at the graduate career stage.

Full Bench made no error of construction or interpretation

34 The appellant contends that the Full Bench ruled that the appellant could be assessed at the proficient level, a career level he had not reached, and this involved an error in the construction or interpretation of PSM Act s 79(2) read with the *Teacher Registration Act*.

35 The appellant did not elaborate upon the erroneous construction of the PSM Act or the *Teacher Registration Act* adopted by the Full Bench and the proper construction which the Full Bench should have adopted. The appellant's contentions appear to proceed in two steps. The first step is that PSM Act s 79(2)(a)(iii) requires the respondent, for the purpose of determining whether or not the appellant's performance is substandard, to have regard to the standards relating to the manner of performance of the functions the appellant is required to perform. The second step is that having regard to those standards, the respondent must assess the appellant at the career level he had attained for the purposes of registration under the *Teacher Registration Act*, that is, the graduate level. The appellant appears to contend that the Full Bench ruled that the appellant could be assessed at the proficient level, a level he had not reached for the purpose of the *Teacher Registration Act*.

36 In our opinion it is not necessary to consider whether or not PSM Act s 79(2)(a)(iii) has the effect contended for by the appellant. That is because the Full Bench did not rule that the appellant could be assessed at the proficient level. Matthews C made findings based on the whole of the evidence that the appellant was a bad teacher, that the areas in which he was a bad teacher corresponded to the standards which were identified to the appellant during the substandard performance process, and that the appellant was substandard regardless of whether he was assessed against the proficient or graduate level. The Chief Commissioner found that it was open to Matthews C to conclude that the appellant's performance was substandard whether he was assessed at the graduate or proficient level. It was unnecessary for the Chief Commissioner to decide whether PSM Act s 79(2)(a)(iii) required the respondent to assess the appellant's

performance at the graduate level in the standards and the Chief Commissioner did not do so.

37 The appellant is dissatisfied with the findings of Matthews C and the Full Bench that the appellant's performance was substandard when measured at the level of graduate in the standards. However, the relevant finding of the Full Bench does not disclose an error in the construction or interpretation of the *Teacher Registration Act* or the PSM Act and does not give rise to a ground on which an appeal lies to this court under s 90(1) of the IR Act.

38 The Full Bench made no error in the construction or interpretation of the *Teacher Registration Act* or the PSM Act. We would dismiss the appeal.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

JM

Research Associate to the Honourable Justice Buss

29 OCTOBER 2020