DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00292
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 25 JULY 2018, FRIDAY, 7 FEBRUARY 2020, WEDNESDAY, 26 FEBRUARY 2020
DELIVERED	**:**	TUESDAY, 26 MAY 2020
FILE NO.	**:**	CR 15 OF 2018
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Industrial law (WA) – Unfair dismissal claim made on behalf of applicant's member – Dismissal on medical grounds found to be unfair by decision published 28 August 2018 – Return to work found to be impracticable by decision published 28 August 2018 – Money award ordered 30 August 2018 – Appeal to Full Bench of Western Australian Industrial Relations Commission against decision that a return to work impracticable successful – Remedy at first instance quashed - Remitted by Full Bench of the Western Australian Industrial Relations Commission for further hearing and determination as to remedy – Cannot revisit whether dismissal unfair as remittal only in relation to remedy – Parties agree return to work to be addressed in relation to schools other than Busselton Senior High School - Applicant's member medically fit for employment at school other than Busselton Senior High School – Order made in relation to financial loss resulting from dismissal made - Money award reduced due to applicant's member's failure to make efforts to mitigate loss - Money award reduced due to applicant failing to disclose document at first instance hearing – Application for matter to be dismissed pursuant to s 27 *Industrial Relations Act 1979* dismissed
Legislation	:	*Industrial Relations Act 1979* s 27, s 44
Result	:	Order that the applicant's member be returned to work at a school other than Busselton Senior High School; Money award made

Representation:

Counsel:

Applicant	:	Ms R Cosentino (of counsel)
Respondent	:	Mr J Carroll (of counsel)

Solicitors:

Applicant	:	Fogliani.Lawyer
Respondent	:	State Solicitor's Office

Reasons for Decision

1 By a decision published on 28 August 2018 I found that the applicant's member had been unfairly dismissed but that his return to work would be impracticable. By order made 30 August 2018 I awarded the applicant's member 20 weeks of his salary as a form of compensation for the financial loss suffered by him as a result of his dismissal.

2 The applicant successfully appealed my decision that the return to work of its member was impracticable.

3 The respondent's appeal against the award of compensation was dismissed.

4 The Full Bench of the Western Australian Industrial Relations Commission suspended my decision and remitted the matter to me to further hear and determine it according to law, that is, in accordance with its decision.

5 I have proceeded on the basis that the Full Bench of the Western Australian Industrial Relations Commission suspended the *whole* of my decision. That is both my decision that the applicant's member not be returned to work and my decision that the applicant's member be awarded money. This seems logical to me given the relationship between the two decisions.

6 I consider that the Full Bench of the Western Australian Industrial Relations Commission requires me to revisit the question of remedy. In relation to the question of the applicant's member being returned to work the Full Bench of the Western Australian Industrial Relations Commission expressly requires me to consider "Mr Kilner's capacity to return to work, the practicability of being reinstated or alternatively re-employed at a school other than Busselton SHS."

7 The matter was further heard before me on the remittal on 7 February 2020 and 26 February 2020.

8 The applicant and respondent agreed that I should consider the practicability of the applicant's member being "re-employed at a school other than Busselton Senior High School." That is, the parties did not require me to consider whether or not the applicant's member should be returned to work at Busselton Senior High School.

9 In relation to the capacity of the applicant's member to return to work the applicant called evidence from a psychiatrist, Prof Aleksandar Janca. Prof Janca's evidence was the applicant's member is fit for work at a school other than Busselton Senior High School. As the respondent informed me that she did not intend to return the applicant's member to that school Prof Janca's evidence becomes evidence that the applicant's member is fit for work.

10 Prof Janca's evidence was given in a calm and considered manner. Upon review it is cogent and credible and was not undermined in any way by cross-examination nor competing evidence. I have no reason to not believe it and no reason to not accept it.

11 The only expert evidence I have is that the applicant's member is fit for work. That evidence was not impugned.

12 I find the applicant's member is fit to return to work, with work meaning work as a teacher at a school other than Busselton Senior High School.

13 I expressly reject any argument that the applicant's member is unfit to return to work, or that a return to work would be impracticable, because the applicant's member may suffer a relapse of

a medical condition at work because he cannot be quarantined from stressors like those that led to the development of a medical condition when he worked at Busselton Senior High School.

14 I am not obliged to simply accept everything a witness says, even one as well credentialled and well presented as Prof Janca. However, Prof Janca's analyses that the problems of the applicant's member were to some extent related to issues peculiar to Busselton Senior High School was compelling. Further, I note that Prof Janca gave his expert opinion that the applicant's member is fit to work while accepting that stressors may impact upon the applicant's member at another school.

15 The respondent asks me to speculate about what might happen at a school other than Busselton Senior High School. I do not consider it useful or appropriate to do so. I have no evidence upon which to conclude that the applicant's member is not fit for work and credible expert evidence that he is fit for work. There is only one possible conclusion left open on this matter.

16 I note that the respondent opposed Prof Janca giving his evidence, and his report going into evidence, on the basis that the applicant had not run a case at first instance that contended it's member was fit for work so long as that work was not at Busselton Senior High School and so should not, on the remittal, be allowed to run such a case.

17 If the applicant may not fairly run such a case, the argument goes, it cannot lead the evidence of Prof Janca because it is irrelevant.

18 The respondent says that the applicant made a 'strategic decision' to not lead evidence similar to that of Prof Janca at first instance, being a report of Dr Ng referred to in more detail later in these reasons, and is therefore, as matter of fairness to the respondent, locked into a position where it cannot lead such evidence on the remittal.

19 I rejected the argument at the further hearing and allowed the evidence of Prof Janca to be given and admitted his report into evidence.

20 The matter has been remitted to me for further hearing and determination. The Full Bench of the Western Australian Industrial Relations Commission requires me to consider the matters I have referred to at [6] above. If the applicant had not called a witness such as Prof Janca I think I would have had to have acted under section 27(1)(i) *Industrial Relations Act 1979* to comply with the direction of the Full Bench of the Western Australian Industrial Relations Commission. I thank the applicant for obviating the need for me to do this.

21 The evidence of Prof Janca was plainly relevant and admissible given the nature of the remittal. I do not see how I could have possibly complied with the requirement upon me to consider the applicant's member's capacity to return to work without evidence like it.

22 The respondent also argues that the return of the applicant's member to work is impracticable because "Mr Kilner has a 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."

23 In this regard, the respondent relies 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.

24 I have read the documents closely. In number, context, content and tone they do not come anywhere near demonstrating what the respondent contends they demonstrate.

25 There are not many documents or communications at all, especially given the time period they straddle.

26 The context of the documents and communications are that they relate to concerns that, whether ultimately found to be correct, were not unreasonable for the applicant's member to hold.

27 The concerns were all expressed to relevant people. It is not as if the documents in question are letters to the editor or social media posts or group emails to everyone the applicant's member could think of to try and maximise pressure on the powers that be.

28 The contents of the documents relate to real events and real concerns in relation to those events. None of the content reads like the work of someone who is paranoid or who has become an unhinged conspiracy theorist.

29 The tone of the documents and communications is, in my view, fine. There is no abuse or offensive language.

30 The applicant's member could have been far more straight forward about what he meant by some of the things written in the documents when giving his evidence. His refusal to accept what were plainly the messages contained in his communications reflects badly upon him. For instance, his insistence that Exhibit 12 contained only 'facts' and not complaints was ridiculous and wholly unbelievable. There were other examples. Nonetheless, reading the documents as a reasonable person would, unaffected by the puerile efforts of the applicant's member to have me read them otherwise, they do not sustain the respondent's argument that they reveal such a loss of trust of the applicant's member in his employer as to make his return to work problematic.

31 There is nothing upon which to reasonably base a finding that it is impracticable for the applicant's member to work in a school other than Busselton Senior High School.

32 In relation to the money to be awarded to the applicant's member as part of the remedy for what happened to him, he admitted that he had made no effort to mitigate his loss. He had not done things that he could reasonably have tried, like private tutoring or obtaining work in the private education system or even obtaining work outside of the education sector. This will result in a discount.

33 The respondent says that there should also be a discount because the applicant did not fully comply with the requirement upon it to provide discovery prior to the conclusion of the hearing at first instance.

34 In particular, the respondent says that the applicant failed to discover an email from its member to an industrial officer of the applicant attaching a medical certificate from a Dr Buckeridge dated 1 March 2018 and also did not volunteer the existence of a medical report of Dr Ng dated 29 June 2018, while accepting that the applicant could have resisted disclosure of the latter document on the basis of legal professional privilege.

35 The respondent says that if the first document had been provided to her it would have made it difficult for the applicant to argue at the hearing at first instance, as it did, that it's member was not suffering from a medical condition and was fit for work. The respondent says if she had the first document before the hearing concluded she could have, relying upon it, run an argument that it was impracticable to return the applicant's member to work with her because he was not medically fit to work as a teacher.

36 It is now, of course, impossible to know what course the proceedings would have taken if both or either of the documents had been in the respondent's hands prior to the hearing concluding. Certainly, they could have been relied upon in support of an argument that the applicant's member was unfit to work at Busselton Senior High School. That would have brought into sharp focus whether I could order a return to work at another school or not and, if so, whether he was fit to work at another school.

37 On these matters I note that the matter came before me through section 44 *Industrial Relations Act 1979* and not section 23A *Industrial Relations Act 1979*. For this reason, I am not sure that the reinstatement versus re-employment distinction clearly made in section 23A *Industrial Relations Act 1979* would have become material here.

38 The memorandum of matters seeks "an order that the respondent redeploy Mr Kilner to a school other than Busselton Senior High School in consultation with the applicant and Mr Kilner."

39 Without needing to decide the matter of whether I would have needed to step through the reinstatement and re-employment issues, and whether a return to work at another school is reinstatement or re-employment, I think what may be said is that a lot would have had to have gone right for the respondent for reliance upon the documents not discovered to have had a material impact on the outcome of the matter.

40 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.

41 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.

42 It is also what the Full Bench of the Western Australian Industrial Relations Commission has ultimately asked me to consider and I must assume that this is because it is of the opinion that it would be in accordance with the law for me to so place the applicant's member.

43 Nonetheless, the respondent's argument that the applicant's failure to do the right thing should sound in a discount in the monetary award has some force. It is really the only way, putting to one side the respondent's unsuccessful argument relying on section 27 *Industrial Relations Act 1979,* that the failure can sound somewhere.

44 The applicant does not strongly oppose the argument on this, saying that the award of money to the applicant's member is "a discretionary matter and we would say it is within the Commission's power to [discount]."

45 I will make an order that the applicant's member be paid the money to which he would have been entitled had he been employed since the date of his dismissal to today's date to be discounted by 50%, 25% because of the failure of its member to mitigate his loss and 25% because of the document issue at first instance.

46 There are a couple of other matters that I need to deal with.

47 The first is the respondent's submission, elaborated upon in written submissions filed 24 October 2019, that I should, upon the remittal of the matter, decide whether the dismissal was unfair.

48 I did not hear from the applicant on the matter and informed the parties by letter signed by my associate dated 29 October 2019 that I would only consider remedy, and not the fairness or otherwise of the dismissal, upon the remittal, and that I would give reasons as part of my reasons on remedy.

49 The matter was remitted to me with the status of the matter, at law, being that the applicant's member had been unfairly dismissed but that I had erred in relation to remedy. I was directed to hear more on that matter and then decide it, taking into account what the Full Bench of the Western Australian Industrial Relations Commission said in its decision. I could not possibly, if my decision is to accord with the law, come up with a result that the dismissal was fair.

50 The fairness of the dismissal was not remitted to me for further hearing and determination. I am not really sure how it could have been given that my finding in that regard was not the subject of appeal. In any event, it was not.

51 The respondent's argument that it is necessary to revisit fairness as part of a further hearing on the question of remedy cannot succeed.

52 All of what the respondent asked me to consider and accept in her submissions lodged 24 October 2019 were matters the respondent needed to address before the Full Bench of the Western Australian Industrial Relations Commission so that, if it wanted to do so, it could make comment for my benefit in further hearing and determining the matter.

53 The final matter is the respondent's application that I dismiss the matter pursuant to my power under section 27 *Industrial Relations Act 1979*.

54 The respondent says that the documents issue discussed above had the result that she suffered a prejudice that cannot now be remedied, the applicant has abused the Western Australian Industrial Relations Commission's processes and wasted the Western Australian Industrial Relations Commission's time and resources and the applicant does not have clean hands in seeking a remedy.

55 The documents issue argument, as I understand it, is slightly different, or more elaborate, on the section 27 *Industrial Relations Act 1979* application than on the money award issue. The respondent seeks that the applicant suffer a consequence of running a case that was different from that which the documents allowed, whether or not both documents were discovered (or indeed discoverable).

56 The respondent says the applicant argued that its member was not suffering from a medical condition at the time of his dismissal or at the time of the original hearing and says the applicant was wrong to have run such an argument given the contents of the documents in its possession.

57 On the section 27 *Industrial Relations Act 1979* application the respondent says that not only has it been prejudiced by its inability to make use of the Dr Buckeridge medical certificate but that the applicant should also suffer a consequence for its conduct in running a case that was contradicted, or at the very least affected, by both that document and the report of Dr Ng, both of which were in its possession.

58 In relation to the lost opportunity said to relate to Dr Buckeridge's medical certificate, I have above held that it was not much of an opportunity to lose. The respondent has not demonstrated sufficient prejudice to have me dismiss the matter altogether.

59 In relation to the proper characterisation of the applicant's conduct, I find it very difficult to undertake such a task on the basis of what I know.

60 The respondent says that her "submissions are not intended to, nor should they be taken to be, a criticism in any way of the legal representatives for the applicant or the conduct of those representatives".

61 I find myself confused as to where the alleged conduct of the applicant is said to start and finish and where the conduct of others might take over or be relevant.

62 I am not sure how to deal with a submission that the applicant's legal representatives at the original hearing were beyond reproach yet the applicant ran its case in such a way as to amount to an abuse of process and so contumeliously that I should dismiss it with all the prejudice to the applicant's member this would entail.

63 Further, the respondent would have to demonstrate something extremely serious on the part of the applicant for it to be appropriate for me, in the public interest or some other interest, to deny its blameless member a remedy to which he is otherwise entitled as a result.

64 In my view, despite the respondent's submissions in writing and orally on the point, it 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.

65 There is an issue about the disclosure of one document, a short medical certificate from a general practitioner. I do not know why it was not disclosed and I do not know who made the decision not to disclose it.

66 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.

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.

68 The dismissal of a matter where a person has been found after hearing to have been unfairly dismissed and deserving of a remedy likely, after success on appeal, to be that sought, even where the person is not a party to those proceedings, would be an extraordinary event. It could only occur in extreme circumstances.

69 The respondent has not come anywhere near demonstrating that those circumstances are present here. The application under section 27 *Industrial Relations Act 1979* will be dismissed.