APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 234/2018 GIVEN ON 12 DECEMBER 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00683
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	**:**	BY WRITTEN SUBMISSIONS MONDAY, 30 MARCH 2020, FRIDAY, 10 APRIL 2020, TUESDAY, 21 APRIL 2020
DELIVERED	**:**	THURSDAY, 6 AUGUST 2020
FILE NO.	**:**	FBA 1 OF 2020
BETWEEN	**:**	ADRIAN MANESCU Appellant AND BAKER HUGHES AUSTRALIA PTY. LIMITED Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**INDUSTRIAL MAGISTRATES COURT**
Coram	**:**	**INDUSTRIAL MAGISTRATE D SCADDEN**
Citation	**:**	**2019 WAIRC 00871**
File No.	**:**	**M 234 OF 2018**

CatchWords	**:**	Industrial law (WA) – Appeal against decision of the Industrial Magistrate – Appellant claimed to be denied fair hearing – Jurisdiction of Full Bench to deal with entitlements from award under *Fair Work Act 2009* (Cth) and National Employment Standards – Commission not an eligible State or Territory court to exercise jurisdiction under *FW Act* – Full Bench has no power to review decision of IMC exercising jurisdiction under *FW Act* – Appeal dismissed – Respondent seeks costs – Appeal frivolously and vexatiously instituted – Not in public interest for matters to proceed merely because they commenced – Lay person – Application for costs dismissed
Legislation	**:**	Industrial Relations Act 1979 (WA), s 27 Part VID, s 84(5), s 86(2) Fair Work Act 2009 (Cth), s 12, s 565; Fair Work Regulations 2009 (Cth)
Result	**:**	Appeal dismissed. Application for costs dismissed

Representation:

Appellant	**:**	Mr A Manescu (on his own behalf)
Respondent	**:**	Mr M Stutley (of counsel)

Case(s) referred to in reasons:

Commissioner of Police of Western Australia v AM [2011] WAIRC 00021; (2011) 91 WAIG 6
Ghimire v Karriview Management Pty Ltd (No 2) [2019] FCA 1627
Rogers v J-Corp Pty Ltd [2015] WAIRC 00862; (2015) 95 WAIG 1513

Case(s) also cited:

Attorney General v Wentworth (1988) 14 NSWLR 481
General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125
Hatchett v Bowater Tutt Industries Pty Ltd (No 2) [1991] FCA 188; (1991) 28 FCR 324
Heidt v Chrysler Australia Ltd (1976) 26 FLR 257
Hutchison v Bienvenu (Unreported, HCA, 19 October 1971) 11
Jones v Skyring [1992] HCA 39; (1992) ALJR 810
Matthews v Cool or Cosy Pty Ltd [2003] WASCA 136
Mudie v Gainriver Pty Ltd (No 2) [2002] QCA 546; [2003] 2 Qd R 271
Re Williams and Australian Electoral Commission (1995) 21 AAR 467
Re Vernazza [1960] 1 QB 197
Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22
Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark (1995) 62 IR 334

Reasons for Decision

THE FULL BENCH

1 Adrian Manescu appeals to the Full Bench of the Western Australian Industrial Relations Commission against the decision of the Industrial Magistrates Court (IMC) of 13 December 2019, dismissing his claims. His ground of appeal asserts that during the course of the hearing, the Industrial Magistrate denied him a fair hearing.

Background

2 Mr Manescu's claims before the IMC arose from his employment with a national system employer, and sought, at least in part, to enforce entitlements alleged to arise from an award issued under the *Fair Work Act 2009* (Cth) (FW Act) and entitlements said to arise under the National Employment Standards (NES), also set out under the FW Act.

3 Mr Manescu also suggests in his submissions that one of the matters he pursued related to an employer-employee agreement and therefore fell under the *Industrial Relations Act 1979* (WA) (IR Act). However, Mr Manescu appears to use the term employer-employee agreement in a generic way to simply mean an agreement between himself and his employer, not one that meets the requirements of and is registered under Part VID of the IR Act.

4 Therefore, there is no element of the IMC's decision relating to matters within the Commission's jurisdiction.

5 Mr Manescu recognises that the Full Bench has no jurisdiction to deal with the substance of his claims that arise under the FW Act. However he says that the Full Bench has the characteristics of a court and therefore it can deal with his appeal as it relates to procedural fairness. If the Full Bench upholds the appeal, it can remit the matter to the IMC to deal with according to law.

6 Mr Manescu refers to the decision of the Full Bench in *Rogers v J-Corp Pty Ltd* [2015] WAIRC 00862; (2015) 95 WAIG 1513, where Smith AP (with whom Scott ASC and Harrison C agreed), set out the law regarding the characteristics of a court. Her Honour said at [21]:

> Thus, it appears the clear characteristics of a court and thus performing judicial functions are:
>
> (a) impartiality and independence in decision-making;
>
> (b) a requirement to provide procedural fairness;
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> (c) general principles of open hearings;
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> (d) the provision of reasons for decision.

7 Her Honour went on to examine the jurisdiction and powers, and the procedures and processes of the Commission. Her Honour concluded at [45] that:

> When all of these matters are considered it is clear that the Commission is a court of a state, as it has institutional integrity, it is an independent and impartial tribunal, conducts its hearing in public and has all of the defining characteristics of a court.

Consideration and conclusion regarding appeal

8 To understand the limits of the Full Bench's jurisdiction relating to matters under the FW Act, it is necessary to look at the scheme of that act. The FW Act provides that specified State and

Territory courts have jurisdiction to deal with a claim of contravention of an award made under that act or of the NES. They are described as *eligible State and Territory courts*, and they are identified in s 12 - The Dictionary of the FW Act. They include "(b) a magistrates court" and "(d) any other State or Territory court that is prescribed by the regulations".

9 The *Fair Work Regulations 2009* (Cth) (the FW Regulations) define only one other "eligible State or Territory court" for the purposes of that definition in s 12(d) of the FW Act. It is the South Australian Employment Court.

10 The Western Australian Industrial Relations Commission is not mentioned in s 12 of the FW Act or in the FW Regulations.

11 When it comes to appeals against decisions of those eligible State or Territory courts, s 565(1) of the FW Act specifies that "an appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act". This is the avenue of appeal described by Colvin J in *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 at [19].

12 Although Mr Manescu referred to A/President Smith's decision in *Rogers v J-Corp,* that the Commission has the characteristics of a court, her Honour used that as a step in finally determining that the Commission is not an eligible State or Territory court for the purposes of the FW Act (see paragraph [94]).

13 Therefore, although the Full Bench of the Commission has particular characteristics, its jurisdiction is excluded by the FW Act in respect of appeals against decisions of the IMC exercising jurisdiction under the FW Act.

14 The Full Bench does not have the power to review the decision of the IMC exercising jurisdiction under the FW Act, whether for the purpose of examining whether procedural fairness applied or for any other purpose.

15 Therefore, the appeal is to be dismissed for want of jurisdiction.

Costs

16 The respondent seeks costs in accordance with s 84(5) of the IR Act. The respondent says that the appeal was frivolously and vexatiously instituted when the Full Bench has no jurisdiction to deal with it. The respondent says it alerted Mr Manescu to the Full Bench's lack of jurisdiction, pointed him to the Federal Court of Australia and invited him to discontinue the appeal "to avoid the unnecessary costs, time and resources being deployed for the appeal which is unable to proceed". This information and invitation was provided to Mr Manescu in a letter dated soon after the appeal was filed. In the letter the respondent put him on notice that if Mr Manescu did not discontinue, it would seek to rely on the letter to seek costs, on an indemnity basis, from the date of the letter.

17 Mr Manescu submits that the "Full Bench of the Western Australian Industrial Relations Commission appeal process does not have [a] withdraw option" (Appellant's Submission in Reply) [88] and that "there is no way out without a Full Bench decision" (Appellant's Submission in Reply) [89].

Consideration and conclusion regarding costs

18 The Full Bench has the power to award costs set out in s 84(5) of the IR Act:

> **84. Appeal from industrial magistrate's court to Full Bench**
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> …
>
> (5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

19 In the ***Commissioner of Police of Western Australia v AM*** **[2011] WAIRC 00021; (2011) 91 WAIG 6**, the Industrial Appeal Court (IAC) examined the meaning of the phrase "frivolously or vexatiously" used in s 86(2) of the IR Act as it relates to the IAC's jurisdiction to award costs. Section 86(2) provides:

> **86. Jurisdiction of Court**
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> …
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> (2) In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

20 In essence, in respect of the costs for the services of a legal practitioner or agent, the powers of the Full Bench and the IAC are the same.

21 In ***Commissioner of Police v AM***, Buss J, with whom Pullin and Le Miere JJ agreed, set out the law regarding awarding costs under s 86(2) of the IR Act and the meaning of the terms frivolous and vexatious. His Honour said:

> 24 Three general observations may be made about this court's power under s 86(2) to order the unsuccessful party to an appeal to pay the costs of any other party for the services of, relevantly, any legal practitioner of that party.
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> 25 First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party.
>
> 26 Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. See ***Heidt v Chrysler Australia Ltd*** (1976) 26 FLR 257, 275 (Northrop J); ***Hatchett v Bowater Tutt Industries Pty Ltd (No 2)*** (1991) 28 FCR 324, 326 (von Doussa J).

> 27 Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. See ***Re Vernazza*** [1960] 1 QB 197, 208 (Ormerod LJ); ***Hutchison v Bienvenu*** (Unreported, HCA, 19 October 1971) 11 (Walsh J); ***Jones v Skyring*** (1992) 109 ALR 303, 309 310 (Toohey J).
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> 28 The words 'frivolously' and 'vexatiously', in the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), are adverbs. They relate to the verbs 'instituted' or 'defended'. The Act does not define 'frivolously' or 'vexatiously'.
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> 29 The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. See the *Shorter Oxford English Dictionary*, (5th ed) 1038, 3529; ***Mudie v Gainriver Pty Ltd (No 2)*** [2002] QCA 546; [2003] 2 Qd R 271 [35] [37] (McMurdo P & Atkinson J), [59] [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.
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> 30 The words 'frivolous' and 'vexatious' have been considered extensively in the context of the exercise by the courts of their summary powers to strike out a pleading, or an action or defence, on the ground that the pleading, action or defence is frivolous or vexatious. The word 'vexatious' has also received consideration on numerous occasions in the context of proceedings to restrain vexatious litigants.

22 His Honour went on to examine the terms by reference to their use in proceedings to strike out or dismiss matters. He referred to Barwick J's observations in ***General Steel Industries v Commissioner for Railways (NSW)*** **[1964] HCA 69; (1964) 112 CLR 125**; to those of the Administrative Appeals Tribunal (Matthews J, Hill and Beaumont JJ) in ***Re Williams and Australian Electoral Commission*** **(1995) 21 AAR 467**, and of Roden J in ***Attorney General v Wentworth*** **(1988) 14 NSWLR 481**.

23 His Honour continued that:

> 34 In ***Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22, ***Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark*** (1995) 62 IR 334 and ***Matthews v Cool or Cosy Pty Ltd*** [2003] WASCA 136, this court adopted, in relation to the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), the various expressions of the test referred to by Barwick CJ in ***General Steel Industries*** for deciding whether a claim or defence in pending proceedings should be summarily terminated on the ground that it does not disclose a reasonable cause of action or defence. It was unnecessary in those cases for this court to consider the broader connotation of 'vexatiously' compared with 'frivolously'.
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> 35 As Kennedy, Rowland & Nicholson JJ noted in ***Tip Top Bakeries***, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In ***Clark***, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).

> 36 It is plain from the earlier decisions of this court to which I have referred that something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. So, relevantly to the present case, not every appeal which is determined to be without merit, either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

24 As to Mr Manescu's argument that having filed his appeal he had to see it through, that argument is not valid. The Full Bench has the powers set out in s 27 of the IR Act. These include that:

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

25 As with all matters before the Commission and other tribunals and courts, there will be occasions when it is not appropriate for a matter to run the full course. That consideration might be raised by an applicant or appellant seeking to discontinue or a respondent seeking that the matter be dismissed before it has been substantively dealt with.

26 There was nothing preventing Mr Manescu from seeking leave of the Full Bench for the hearing to be discontinued or for the appeal to be withdrawn or dismissed. It is not in the interests of the parties, the Commission or the public for matters to proceed to their conclusion merely because the matter had been commenced.

27 Mr Manescu had the issue of the problem of the Full Bench's jurisdiction, along with guidance to the proper avenue of appeal, drawn to his attention early in the appeal process. To have continued on with no real prospect of success has put the respondent to unnecessary costs.

28 However, as Buss J noted in the ***Commissioner of Police v AM***, the general policy in this area is against awarding costs for legal practitioners and that it will only be on very rare occasions that such costs are awarded in this field.

29 There is no suggestion that the appeal was instituted with the intention of troubling, annoying or embarrassing the respondent. Nor was it pursued for a collateral purpose. However, is it vexatious because it is "so obviously untenable or manifestly groundless as to be utterly hopeless"? It must be something substantially more than either a lack of success or the prospect of a lack of success. Not every appeal which is determined to be without merit, either because a court does not have jurisdiction or otherwise, will necessarily have been instituted or pursued frivolously or vexatiously.

30 Mr Manescu was advised by his opponent's lawyers that there was no jurisdiction and pointed him to the Federal Court. However, Mr Manescu says that he thought he was required to pursue the appeal to determination. He did so apparently as a lay person looking for an avenue to challenge what he says was an unfair process and to have the matter remitted to the IMC. With the benefit of an examination of the law, his case was hopeless from the start. However, the law creates a less than straightforward appeal arrangement, from a State court to a Commonwealth one, which may not be readily navigable for a lay person.

31 In all of the circumstances we conclude that, in the context of a "no costs" jurisdiction, this matter does not meet the tests for the awarding of costs for representation, even though the respondent has been put to costs for the sake of an appeal which has been unsuccessful and which had no prospect of success from the outset.

32 The application for costs will be dismissed.