APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 36/2018
GIVEN ON 8 OCTOBER 2018
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2019 WAIRC 00716
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	THURSDAY, 19 SEPTEMBER 2019, THURSDAY, 4 APRIL 2019
DELIVERED	**:**	WEDNESDAY, 18 SEPTEMBER 2019
FILE NO.	**:**	FBA 13 OF 2018
BETWEEN	**:**	COLIN R DIXON Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

---

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner Matthews**
Citation	**:**	**[2018] WAIRC 00784; (2018) 98 WAIG 1240**
File No	**:**	**U 36 OF 2018**

CatchWords	**:**	Industrial law (WA) – Appeal against a decision of the Commission – Leave granted to amend grounds of appeal – Approach to be taken by Full Bench to an appeal – Discretionary decision – Appeal to be heard and determined on the evidence and matters raised at first instance – Errors of fact and law – Procedural fairness – Teacher registration levels and AITSL Standards – Expert Witnesses – Failure to call witness (*Jones v Dunkel* inference) – Appeal dismissed

Legislation	**:**	*Industrial Relations Act 1979*, s 26(1), s 49(4); *Public Sector Management Act* 1994, s 79(2)(iii), s 80(a), the *Teachers Registration Act 2012*, s 7; *Australian College of Teaching Act 2004*
Result	**:**	Appeal dismissed

Representation:

Appellant	**:**	Mr R Skehan as agent
Respondent	**:**	Mr D Anderson of counsel

Case(s) referred to in reasons:

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

House v The King (1936) 55 CLR 499

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission (2000) 203 CLR 194

Norbis v Norbis (1986) 161 CLR 513

Gronow v Gronow (1979) 144 CLR 513

Monteleone v The Owners of The Old Soap Factory [2007] WASCA 79

Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Union, Western Australian Branch [2000] WASCA 386

The Minister for Health in his incorporated capacity under section 7 of The Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in The Metropolitan Health Services Board v Denise Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Metwally v University of Wollongong (1985) 60 ALR 68

Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Jones v Dunkel ((1958-59) 101 CLR 298

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Ridge v Baldwin [1964] AC 40

Case(s) also cited:

Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473

Reasons for Decision

SCOTT CC:

Introduction

1 The appellant, Colin Dixon, was dismissed by the Director General, Department of Education (the Director General) on the grounds that his performance as a teacher was substandard. He claimed the dismissal was harsh, oppressive or unfair.

2 The Commission at first instance found that Mr Dixon's performance was substandard and that the Director General made no error in dismissing him ([2018] WAIRC 00794). Mr Dixon appeals against that decision.

Background

3 Mr Dixon qualified as a teacher in around 1980. He taught for about 3 and a half years at the Rockhampton Grammar School in subjects including computing, mathematics, physics and science. He then worked at Shepparton North Technical School for 3 years and 3 months. He resigned in September 1986. He then ran a business for 23 years.

4 In 2009, Mr Dixon returned to teaching, in Western Australia. This involved a number of fixed term contracts at various high schools throughout Western Australia, for a total of 219 days. On 18 July 2016, Mr Dixon's employment with the respondent became permanent, with a placement at Toodyay District High School (the School).

5 Mr Dixon was having difficulties with managing the behaviour of students at the School. He said that this was a problem inherited from previous teachers and the school's administration. However, after Mr Dixon had spent a number of weeks at the school, the School's Deputy Principal, Mr Innocent Chikwama, commenced a process of examining, and attempting to assist Mr Dixon with, difficulties in managing classroom behaviour.

6 A formal process, including an investigation, was subsequently established to determine whether Mr Dixon's performance was substandard. An investigation report was prepared.

7 The respondent measures performance of teachers against the Australian Professional Standards for Teachers, currently administered by the Australian Institute for Teaching and School Leadership (AITSL). These are known as the AITSL Standards. The Standards set out grades by which to classify teachers at the various stages of their careers, being Graduate, Proficient, Highly Accomplished and Lead. Mr Dixon was assessed against the "Proficient" level. His performance measured against that standard was found to be substandard and his employment was terminated.

8 Mr Dixon brought a claim to the Commission alleging that his dismissal was harsh, oppressive or unfair.

The Decision at First Instance

9 In his reasons for decision ([2018] WAIRC 00795), the learned Commissioner noted that Mr Dixon said that there were cultural and administrative problems at the School which resulted in his not managing student behaviour in his class. Mr Dixon attributed his difficulties in demonstrating his competency by reference to what he described as the administration

team's failures. The Commissioner noted that Mr Dixon said that 'the environment became so bad in some of his classes that he had no real or fair chance to show his wares as a teacher' [21].

10 The Commissioner found that the evidence did not support this characterisation. He then recited some of that evidence, and that the evidence was 'all one way and ultimately overwhelmingly persuasive, that the applicant was a substandard teacher' [32] .

11 The learned Commissioner then commented on the evidence of Mr Shane Stiles, the applicant's direct line manager at another school, and 'Mr William Purcell, the expert who assessed the applicant as part of the respondent's substandard performance process.' [33]

12 The learned Commissioner then set out the key themes that he said emerged from the evidence. They are:

> There are some key themes which emerge from the evidence, and I make a finding of each of them, which may be listed as follows:
>
> (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;
>
> (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 [34].

13 The learned Commissioner then gave details of that evidence in relation to each of the themes he had identified.

14 He then dealt with the issue of the reliability of the witnesses. He said that 'some witnesses suffered light blows under cross-examination and that, on occasion, they gave evidence in general terms without reference to specific examples' [66]. However, he did not identify particular areas where those 'light blows' had been suffered.

15 The Commissioner then noted that the applicant complained in his closing submissions that he had been incorrectly assessed against the "Proficient" level of teacher rather than "Graduate" level. He noted that while he had had regard to the AITSL Standards as contemplated by s 79(2)(iii) of the *Public Sector Management Act* 1994:

> [T]he 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 in 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. I rely on the evidence which supports my findings (1) to (6) above and find that a person displaying those deficiencies is substandard.

> Further on this, I note the applicant did not forensically pursue an argument about the appropriate level to apply in the proceedings, by which I mean the applicant did not articulate an argument about this aspect to such an extent that it could fairly be said the respondent had an opportunity to meet it during the hearing [100] - [101].

16 The Commissioner went on to note that if the argument needed to be dealt with, that it was fair to assess the applicant against the "Proficient" level 'given his years of experience as a teacher' and that he also presented himself to his superiors and the Commission as 'a very good and very experienced teacher' [102].

17 The Commissioner rejected the applicant's contention that the blame for any appearance of substandard performance lay with the administration team at the School for failing to support his attempts to manage classroom behaviour.

18 The learned Commissioner then examined the process that led to the dismissal and said that the applicant was given every opportunity and ample support to improve, but failed to do so.

19 The Commissioner then noted that the applicant, in his closing submissions, 'made much of the fact that Toodyay District High School had been the subject of a "Performance Enquiry Report" prepared by an "Expert Review Group" in May 2015 and that report had identified that case management of students at educational risk had been inadequate in terms of intervention or monitoring' [113]. The Commissioner found this was not relevant as it predated the applicant's employment at the School and that 'no attempt was made during the long hearing of this matter to make anything of it from a forensic point of view.' [114]

20 The reasons for decision proceed to deal with issues of Individual Education Plan; compliance with the Schools Intervention Process by school administration; the allegations of failings by the administration team and the NAPLAN results.

21 The Commissioner concluded that it could not be said that the respondent had acted harshly, oppressively or unfairly in terminating the applicant's employment and he dismissed the application.

Grounds of Appeal

22 The grounds of appeal, in essence, are that the Commissioner erred in that he failed to properly consider issues of significance in relation to whether the termination was fair, including:

1. 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;
2. Mr Dixon was denied procedural fairness because the Director General did not follow the proper procedure in s 80(a) of the *Public Sector Management Act 1994* (WA) (PSM Act) Performance Management Policy;
3. The facts do not support the learned Commissioner's conclusion regarding student behaviour in that:
    (a) the data before the Commission was given very little weight; and
    (b) there were significant inconsistencies in the oral evidence; and
    (c) the objective data ought to have been given greater weight.

4. The Commissioner failed in not considering the improvement in behavioural incidents and Mr Dixon's performance, and Mr Dixon was not given a reasonable opportunity and assistance to improve to a satisfactory standard.

5. During the course of the hearing, Mr Dixon sought and was granted leave to amend his grounds of appeal to challenge the Commissioner's description of Mr Purcell as an expert. The appellant says that Mr Purcell had neither the training nor experience to justify his description as an expert. The appellant says that this was a mistake of fact.

Consideration

23 The approach to be taken by the Full Bench on considering an appeal against a discretionary decision is set out in *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266 from [140] - [143], per Ritter AP, by reference in particular to *House v The King* (1936) 55 CLR 499 and *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194:

> The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:
>
> > 'The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'
>
> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a "decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'". Instead "the decision-maker is allowed some latitude as to the choice of the decision to be made". At [21] their Honours said that because "a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process". Their Honours then quoted part of the passage of *House v King* which I have quoted above.
>
> Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with "caution and restraint". His Honour said this is "because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that

there will only be one admissible point of view". (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).

These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although "error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge". This is because, in considering an appeal against a discretionary decision it is "well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion", and that when "no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight". (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]) [140-143].

24 It is also important to note that in accordance with s 49(4) of the *Industrial Relations Act* 1979 (the IR Act), an appeal shall be heard and determined on the evidence and matters raised in the proceedings before the Commission. The hearing of an appeal is not an opportunity to raise new matters that were not before the Commission at first instance or which were not the subject of particular analysis.

25 As noted by the Industrial Appeal Court in *Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* [2000] WASCA 386, [13]:

> It was submitted on behalf of the union in the appeal before us that the principles laid down in *House v The King* do not apply with full force, if at all, in the case of appeals to the Full Bench of the Industrial Relations Commission. A different approach is appropriate, so it was submitted, because of the peculiar position of the Full Bench as an industrial tribunal having a general supervisory jurisdiction with respect to the settlement of industrial disputes and related matters. Mr Nolan, on behalf of the union, went so far as to submit that it would not be an error on the part of the Full Bench to depart altogether from the principles in *House v The King*; that application of those principles by the Full Bench was optional. I do not accept this submission. Pursuant to s 12 of the *Industrial Relations Act 1979*, the Commission is a court of record. The Full Bench is bound to decide appeals according to law and to act within jurisdiction and its decisions are, of course, subject to appeal to this Court for error of law and excess of jurisdiction: s 90. There is nothing in the Act to support the proposition that when hearing an appeal from an order made in the exercise of a discretionary power, the Full Bench may exercise the discretion afresh. The powers of the Full Bench set out in s 49(4) to hear and determine appeals "on the evidence and matters raised in the proceedings before the Commission" are consistent with the appellate function of the Full Bench being limited to correcting error when the appeal is against the exercise of a discretionary power. Its function is not to give a second opinion, as it were. In my opinion, what was said by Mason and Deane JJ in *Norbis v Norbis* (*loc cit*) is directly applicable to the functions of the Full Bench where it is hearing an appeal in a matter of this kind. Mason and Deane JJ said:
>
> > 'The principles enunciated in *House v The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the

> absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.' (518 - 519)

26 In *The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Services Board v Denise Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203**,** Smith A/P and Beech CC observed that in conducting an appeal, the Full Bench does 'so by reviewing the evidence and matters raised before the Commission at first instance for itself to ascertain whether an error has occurred' [73]. (See also *Metwally v University of Wollongong* (1985) 60 ALR 68, [7], (HC) per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ and *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, [438] per Latham CJ, Williams and Fullager JJ).

Consideration of Ground 1

<u>The AITSL Standards and Teacher Registration Requirements.</u>

27 The AITSL Standards (Exhibit 26.1), say that they are 'professional standards for teachers that can guide professional learning, practice and engagement'. The Standards 'articulate what teachers are expected to know and be able to do at four career stages: Graduate, Proficient, Highly Accomplished and Lead' (page 1).

28 The purpose of the Standards is described as including that:

> The Graduate Standard will underpin the accreditation of initial teacher education programs. Graduates from accredited programs qualify for registration in each state and territory.
>
> The Proficient Standard will be used to underpin processes for full registration as a teacher and to support the requirements of nationally consistent registration.

29 According to the document that sets out the Standards, they were developed and endorsed at a national level under the auspices of the Ministerial Council for Education Early Childhood Development and Youth Affairs, in 2009, and AITSL assumed responsibility for the Standards in July 2010. They relate to registration at State level in respect of initial registration and full registration stages.

30 Also, the letter from the Teacher Registration Board (TRB) to Mr Dixon advising him of the renewal of his Provisional Registration (Exhibit 1) reinforces this, stating that 'to move to Full Registration a teacher must be able to demonstrate that they have met the (AITSL Standard) at the Proficient Level'.

31 I conclude then that the TRB levels of Provisional Registration and Full Registration are directly linked to the Graduate Standard and the Proficient Standard respectively.

<u>Mr Dixon's performance substandard.</u>

32 I have no hesitation in finding that it was open to the learned Commissioner to conclude that Mr Dixon's performance was substandard, whether he was assessed at the Graduate or Proficient level. This is for a number of reasons.

33 Firstly, at [100] the learned Commissioner said that he concluded that Mr Dixon's performance was substandard in relation to all of the evidence before him, not limited to the Standards. He

also said that he relied on the evidence which supported his findings in those six key themes to which he referred. The evidence included evidence of teachers and school administrators who had both observed him and experienced the behaviours emanating from his classroom, as well as his practices in not sufficiently differentiating his teaching.

34 It included evidence of endeavours to assist him, both with the actual management of classroom behaviour and in guiding and encouraging him in terms of professional practice.

35 While it is not beyond controversy, the numbers and regularity of Mr Dixon's reports to administration of classroom behaviour issues demonstrates that it was unusually high. I will also deal with the issue of the evidence regarding the number of such reports later in relation to ground 3.

36 The learned Commissioner also heard evidence from Mr Dixon and others as to Mr Dixon's attitude towards the issue of classroom management - that it was a problem he had inherited, that he was not receiving support, and that there were behaviour management system problems at the School.

37 Mr Dixon suggested that if he had students who were uniformly well-behaved, compliant and eager to learn, then he could successfully teach them. However, a teacher's job includes managing, motivating and encouraging those who do not want to be at school, are distracted, not interested or find it difficult to learn.

38 That evidence was, as the learned Commissioner noted, 'all one way'. Apart from Mr Dixon's own evidence, the evidence heard and considered by the learned Commissioner was sufficient to enable him to draw the conclusion he did.

39 Secondly, Mr Dixon had been a teacher for a number of years, although there had been a very lengthy break between the two periods. He had taught at a range of schools as a casual teacher on fixed term contracts, for a total of 219 days in the last 5 to 6 years. This was more than double the minimum amount of teaching time required for a Graduate teacher to progress to Proficient level. The expectation of the respondent is that a teacher is expected to progress to Proficient within 3 years.

40 Although the evidence is unclear as to when Mr Dixon was first provisionally registered by the TRB, his provisional registration was renewed at least from 20 March 2018 (Exhibit 4).

41 Section 7 of the *Teachers Registration Act 2012* prohibits a person from employing another person to teach unless the other person is a registered teacher. Prior to 2012, the *Western Australian College of Teaching Act 2004* contained similar provisions (see Part 4 - Membership of the College, Division 1. Persons who may teach in schools). In that case it is most likely that Mr Dixon would have been provisionally registered from at least October 2009, when he recommenced his teaching career.

42 According to the letter from the TRB which notified him of his renewal of provisional registration:

> Provisional Registration is generally not able to be renewed unless a teacher can demonstrate to the Board that there are exceptional circumstances for doing so.
>
> Teachers granted Provisional Registration are therefore expected to move to Full Registration prior to the expiry of their Provisional Registration.
>
> To move to Full Registration a teacher must be able to demonstrate that they have met the Professional Standards for Teachers in Western Australia (Professional Standards) at the Proficient Level. (Exhibit 4)

43 While he had not formally attained the Proficient Level Standard and been granted Full Registration, Mr Dixon believed himself to be proficient. He had submitted work to the TRB as part of seeking Full Registration.

44 Thirdly, as the learned Commissioner found, Mr Dixon presented himself at all times as being an experienced and competent teacher. The following are such examples:

(a) Exhibit 6 is a letter from Mr Dixon to the parents of his mathematics students dated 26 July 2016. In it, Mr Dixon introduced himself, saying that he had 'over a decade worth of teaching experience in Western Australia, Victoria and Queensland. During this time I have been employed mostly in Mathematics, Science and IT';

(b) In a document dated 28 October 2016, Mr Dixon said that he had followed the instruction given to him but it was not helping but was making the situation worse. He said:

> I am an experienced maths teacher and know how to teach maths so that students can learn. (Exhibit 16)

(c) In an email to Mr Chikwama dated 10 November 2016, amongst other things, Mr Dixon said 'I am not a novice teacher' (Exhibit 26, document 8);

(d) In his letter to Mr Gillam dated 12 June 2017, Mr Dixon said he was 'a competent, intelligent teacher' (Exhibit 22);

(e) At t 11, on 16 July 2018, Mr Dixon described himself as 'Mr Dixon's a competent teacher who has 15 years - some 15 years' teaching experience'.

45 Fourthly, there was a great deal of correspondence and a considerable number of meetings about Mr Dixon's directed performance management plan, the assessment by Mr Purcell and, finally the investigation report. They included correspondence to Mr Dixon in which it was put to him that his performance was substandard and the standard which was utilised for his assessment was that for a Proficient teacher. At no point in that process did Mr Dixon raise an objection to being assessed at Proficient level. He did not raise it in his own evidence or in the cross-examination of the respondent's witnesses. He raised this objection only in written closing submissions after the conclusion of the hearing, when the matter ought to have been squarely challenged earlier. Having put himself out as a competent teacher rather than someone who ought to be treated as a Graduate, Mr Dixon must live with his course. (*Burswood Resort (Management) Ltd v ALH and MWU* op cit).

<u>The Respondent's Failure to Call Ms Sanders to Enable Mr Dixon to Cross-Examine.</u>

46 Mr Dixon also complains that he did not have an opportunity to cross-examine the investigator, Ms Natalie Sanders, about the issue of the appropriate level for the purposes of the assessment of his performance. He says that a *Jones v Dunkel* ((1959) 101 CLR 298) inference ought to be drawn, that the unexplained failure by the respondent to call Ms Sanders to give evidence was that her evidence would not have assisted the respondent. While the respondent had previously clearly indicated an intention to call Ms Sanders, and that Mr Dixon could have cross-examined her, she was not called.

47 Mr Dixon knew by the time the hearing concluded that the respondent was not going to call Ms Sanders. There was then a period of time for the parties to make closing submissions in

writing. During that time, neither at the conclusion of the hearing when it was obvious that the respondent was not going to call Ms Sanders, nor in the time when closing submissions were able to be prepared, did the applicant raise this and ask for her to be called.

48 In any event, it became clear during the hearing of the appeal that before the hearing at first instance commenced, an email was sent from counsel for the respondent to Mr Dixon regarding the witnesses the respondent proposed to call. This email said that 'The Department will only call Natalie Sanders if the Commission is not willing to simply accept (the Investigation Report) at the hearing.' The respondent says that this was the context which must be given to whether Ms Sanders would be called. The Investigation Report was accepted into evidence and therefore the respondent did not need to call Ms Sanders to deal with the receipt of that evidence. It would have been for Mr Dixon to have made clear to the Commission at first instance that he objected to the Investigation Report being received without there being an opportunity to cross-examine her. He did not do so.

49 In any event during the course of the hearing of the appeal, Mr Skehan for the appellant accepted that this difficulty of not being able to cross-examine Ms Sanders was in fact due to the appellant's unfamiliarity with the process and was not a matter that could be corrected on appeal. At the bottom of page 23 of the appeal transcript, Mr Skehan acknowledged that due to the applicant's unfamiliarity with the process 'we simply got it wrong'.

50 These circumstances do not warrant an inference being drawn that Ms Sanders' evidence would not have assisted the respondent.

The Commissioner not qualified.

51 The appellant also argued that the Commissioner at first instance was not qualified to make an assessment of whether Mr Dixon's performance was substandard at any particular level or at all because he was not qualified as an AITSL assessor.

52 The jurisdiction and powers of the Commission on a claim of harsh, oppressive or unfair dismissal are to hear and determine the matter. It does so in accordance with equity, good conscience and substantial merits of the case (s 26(1) the IR Act). The Commission's role is to assess the evidence and make a determination. The evidence before the learned Commissioner in this matter included documents and oral evidence from qualified and experienced witnesses, including experts in their field. The learned Commissioner must consider that evidence and analyse it. In doing so, he does not need expertise or qualifications in the subject matter.

53 It is quite clear that the Commissioner viewed all of the evidence that was put to him including expert evidence about the Standards that apply to a teacher and the observations of Mr Dixon's performance. He had the benefit of an expert providing insight into that evidence.

The ERG Report.

54 Mr Dixon says that the ERG Report demonstrated that student behaviour was at a crisis level before he arrived. However, it does not say that at all. It does refer to a particular management or administration approach as opposed to a leadership approach being in place at the time of the Report. That took the matter before the Commission at first instance no further because there was no link between that time, 14 months before Mr Dixon's arrival at the School, and the time when Mr Dixon's performance was being assessed. In any event the Investigation Report (p19) says that the issues raised in the ERG Report had been adequately addressed.

55 I also note that in his case at first instance, Mr Dixon had the opportunity to put to witnesses that the ERG Report was relevant, that its criticisms of the School had not been addressed and that this unfairly affected Mr Dixon's ability to perform to a satisfactory standard. However, this was not addressed at first instance, except in closing submissions in writing, filed on 17 September 2018, after all of the evidence was in. It is not appropriate now to address it on appeal.

56 The circumstances here are not dissimilar to those referred to by the High Court in *Metwally v University of Wollongong* ((1985) 60 ALR 68) where their Honours said at [7] that:

> Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he has an opportunity to do so.

57 This was reiterated in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at (438) where Latham CJ, Williams and Fullager JJ said:

> The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. In *Connecticut Fire Insurance Co. v. Kavanagh* (1892) AC 473, Lord Watson, delivering the judgment of the Privy Council, said, " When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below.

58 In that context, as Commissioner Matthews correctly found, the ERG Report was not relevant. I respectfully agree. I would dismiss this ground.

Consideration of Ground 2

59 Mr Dixon alleges that the learned Commissioner erred in not dealing with his argument, that he was denied procedural fairness because the Director General did not follow the proper procedure in s 80(a) of the PSM Act, Performance Management Policy.

60 Mr Dixon did, however, acknowledge, through his representative, at the hearing of the appeal that an area of particular concern was that he was not advised at the time that, what was due to be a performance management process, one which applies to all teachers, was substituted with a substandard performance process without notice. He says that at the first meeting with Mr Chikwama on 14 October 2016, he was not invited to bring a support person.

61 The procedural unfairness also alleged by Mr Dixon was that the Department of Education's Substandard Performance Procedures (Exhibit 26, documents 2, p 73) was not complied with. The particular aspect is set out in clause 3.1 - Substandard Performance. It requires that:

> Subordinates and line managers will:
>
> …
>
> - not commence substandard performance management unless an employee has been:
>   - previously formally advised what aspects of their performance are considered

unsatisfactory;

- formally advised of the possible consequences, which may include a range of sanctions, Including termination of employment, should their performance be found to be substandard; and
- given a reasonable opportunity and assistance to improve to a satisfactory standard.

62 At first instance, Mr Dixon put to the Commission that on 14 October 2016, the School implemented a Targeted Support Plan (TSP) with Mr Chikwama being the Performance Manager. Mr Dixon alleged that he felt pressured into signing the TSP and that it was not explained to him that by signing it he could possibly face his employment being terminated. He says it was not explained to him that he could have a support person present at all meetings until after he had signed the TSP.

63 Mr Dixon contends that prior to the commencement of the substandard performance process, the respondent did not, as required, provide him with an explanation of the process, the associated policies, procedures and legal framework, in a manner that was reasonable for a lay person to understand. He says that he was not advised of the aspects of his performance that were considered unsatisfactory, or the possible consequences if his performance was found to be substandard. He says he was not given a reasonable opportunity and assistance to improve to a satisfactory standard.

64 Mr Chikwama gave evidence about the meeting that was supposed to be a performance management or development meeting which turned into a substandard performance process. He said that Mr Dixon had not been forewarned or invited to bring a support person. Mr Chikwama did not refute either of those things but explained that he did not allow a support person because this was the first substandard performance process he had undertaken (Transcript 429 first instance).

65 These failings are said to be contrary to the requirements of s 79 of the PSM Act that requires that a preliminary view is arrived at that an employee's performance is substandard.

66 The learned Commissioner's findings in regard to this issue are set out at [109] - [110] as follows:

> The applicant also complains about the process that led to his dismissal. The relevance of complaints about process diminish, even if made out, where I have conducted a hearing de novo on the applicant's performance and found it to be substandard. Nonetheless, in any such process, it remains important to identify that a teacher was given an opportunity to improve, with appropriate support and in the knowledge of the possible consequences of not improving.
>
> The applicant was given every conceivable opportunity to improve. By late 2016 he was aware of the alleged deficiencies in his performance and the consequences of not addressing them (T79, T96 and T104). I note it was not the fault of the administration team at Toodyay District High School that his deficiencies were in so many areas.

67 Therefore, while the particular issue was not addressed in detail, the learned Commissioner has dealt with the issue of any denial of procedural fairness, and done so in the context of the question of the general requirements of procedural fairness as they relate to a claim of unfair dismissal.

68 The Industrial Appeal Court in *Shire of Esperance v Mouritz* (1991) 71 WAIG 891, commented on the issue of procedural fairness and how it is to be viewed. Nicholson J noted

that Lord Reid in *Ridge v Baldwin* [1964] AC 40 at 65 said that where there is 'something against a man to warrant his dismissal', it falls within a class of cases which attracted the principles of natural justice (p 898). This entitles the person 'to a hearing and to a detailed statement of the charges to be answered as well as the time to prepare his defence.' However, at (899), Nicholson J went on to conclude:

> For the reasons I have given, I consider the Full Bench was correct in its conclusion that the respondent had not been given a fair hearing by the appellant. That is an element in determining whether the dismissal was harsh or unjust - *Macken, McCarry and Sappideen, "The Law of Employment"* 3rd ed, 277-8. As there explained, the mere fact that the employee did not have a proper opportunity to explain or has not been warned of the possibility of termination does not automatically entitle the applicant to a remedy. No injustice will result if the employee could be justifiably dismissed.

69 The learned Commissioner made clear that from all of the materials, conversations, communications and observations of Mr Dixon's performance assessment process, he had many opportunities to know and understand the issues and a significant amount of support. His performance was, objectively measured, substandard and remained so. If there was any denial of procedural fairness in the way in which Mr Dixon described it, it was very early on in the process. He did not at that point, or until the last hurdle, complain about any denial of procedural fairness.

70 In my respectful view, this ground of appeal is not made out. Even if it were, it is not a matter of such significance as to warrant upholding the appeal, in circumstances where Mr Dixon's performance, reviewed and assessed in such detail, was so clearly demonstrated as being substandard.

Consideration of Ground 3

71 In this ground Mr Dixon complains in particular, by reference to his comment at paragraph 66 about witnesses suffering 'light blows', that the Commissioner erred in his acceptance of the respondent's witnesses' evidence when there was quite clear conflict between the data gathered relating to events of poor student behaviour and the evidence of the respondent's witnesses. Mr Dixon says that the objective data ought to have been given greater weight.

72 Firstly, I think that Mr Dixon has drawn an inference that may not be available, that when the Commissioner referred to some of the witnesses suffering 'light blows', that it related to this particular matter.

73 Even if Mr Dixon is correct, the learned Commissioner heard a very significant amount of evidence about Mr Dixon's performance in the classroom and about his dealings with students, and those students' engagement and learning in his class. The evidence of Mr Purcell in particular makes clear that there were problems with student engagement and behaviour even in the presence of a stranger in the classroom.

74 The inconsistency between the evidence of the school-based witnesses, including Mr Chikwama, and the data relating to the numbers of reports to administration of poor student behaviour, in the scheme of things, is not significant in the light of all of the other evidence.

75 Further it should be noted that the evidence of that data related to the whole of the School at various points and not merely to Mr Dixon's referrals of those matters to the administration.

There is also evidence that after a point in time, Mr Dixon reduced his reporting of incidents, rather than the incidents actually reducing.

76 In the circumstances, I am not satisfied that the learned Commissioner erred in coming to the conclusion that he did regarding the weight he gave to the various elements of evidence such as to warrant the overturning of that conclusion. Matters of weight are part of the discretion afforded to the Commissioner at first instance. I would not be inclined to interfere with his determination in all of the circumstances.

Consideration of Ground 4

77 In this ground it is said that the Commissioner failed in not considering the improvement in behavioural incidents and Mr Dixon's performance and that Mr Dixon was not given a reasonable opportunity and assistance to improve to a satisfactory standard.

78 Mr Dixon says that the behaviour data, the 2017 NAPLAN results and other evidence supporting his claim of an improvement in student behaviour and results were put aside by the learned Commissioner, and he has given greater weight to Mr Chikwama's unreliable evidence.

79 Once again, this is a ground of appeal challenging the weight given by the learned Commissioner to competing and conflicting evidence. It is also an alternative to Mr Dixon's main argument that his performance was of a satisfactory standard.

80 I am unable to find sufficient evidence to demonstrate that the evidence before the learned Commissioner showed a real improvement in Mr Dixon's performance. The data is not specific to Mr Dixon's classes.

81 As to the ERG Report, firstly, it does not say what Mr Dixon says it does. The Report was made well before he started at the School and there is no evidence of any systemic problem in relation to the issues at the heart of Mr Dixon's performance. Secondly, any issues identified in the ERG Report were said in the Investigation Report to have been addressed.

82 However, I note in passing that in his letter to Mr Gillam dated 12 June 2017 (Exhibit 22) Mr Dixon did identify some areas of improvement. This letter was a response to Mr Gillam having advised Mr Dixon that he had received a report from Mr Grant Brown, the School's principal, alleging that Mr Dixon's performance was substandard. Mr Dixon claimed that there have been improvements in student behaviour. He attributes some of this to '3 of the worst offenders have left the school'; that of the Year 8 group, five or more of the 10 named students attend, 'frequently most of them are away'; and that 'once (certain students) are removed I can teach the rest of the class'. He describes how 'the entire Year 8 group is at risk, and not just in Mathematics, but this is not being addressed by the admin, although the situation is improving slightly through attrition.' Therefore, the inference is clear, that the improvement in classroom behaviour was because the students who caused difficulty were no longer in the class. This does not demonstrate an improvement in student behaviour brought about by any improvement in Mr Dixon's classroom management or student engagement skills.

83 In his reasons for Decision the learned Commissioner cited the variety of assistance Mr Dixon was given throughout 2017 'to address those deficiencies' [111]. He did not acknowledge any improvement in Mr Dixon's performance. Rather, he found that 'the applicant failed to improve' [112]. He noted all of the efforts to assist Mr Dixon to improve his performance. Ms Sanders noted in the Investigation Report that there was no demonstration of 'sufficient

improvement' (Exhibit 22).

84 Therefore, even if there was improvement in Mr Dixon's performance, it was not sufficient to bring it to a level that was satisfactory. I would dismiss this ground.

Consideration of Ground 5

85 During the course of the hearing, Mr Dixon sought and was granted leave to amend his grounds of appeal to challenge the Commissioner's description of Mr Purcell as an expert. Mr Dixon says that Mr Purcell had neither the training nor experience to justify such a description and says that in this way the Commissioner made an error of fact.

86 Mr Purcell gave evidence that he is a teacher of approximately 40 years, having taught in both public and private schools. He is a level 3 teacher, the highest level of classroom teacher. He is a maths teacher. He was trained to assess teachers against the AITSL Standards and teachers who were going from "Graduate" level to "Proficient" level or higher, particularly people looking to become recognised as excellent teachers.

87 He said that he twice performed an assessment twice in respect of "Graduate" teachers looking to be deemed "Proficient" teachers. Although he had no training in substandard versus standard performance, what he was assessing in Mr Dixon's performance was by reference to the AITSL Standards and whether they were achieved. Mr Purcell's evidence was not undermined in any way.

88 Mr Purcell's evidence both as to his experience as a maths teacher and his training as an AITSL assessor, make it clear that he is indeed an expert in what can be expected of a "Proficient" maths teacher. Whilst he may not be trained in substandard performance, what he was assessing was performance against the AITSL Standards and whether it was met or not. I respectfully agree that Mr Purcell is an expert as described by the learned Commissioner and I would dismiss this ground of appeal.

Other issues

<u>Staff turnover and retention</u>

89 During the course of the hearing of the appeal, Mr Dixon raised a number of issues which were not directly related to the appeal grounds although he said they fitted within them. He said that staff retention was indicative of a problem. He said that there was 'a complete turnover of administration and academic staff in 12 months…this would indicate Toodyay had a problem with staff retention…a significant problem with staff retention' and he says that this was not taken into account by the Commissioner.

90 This fact of a significant staff turnover in a particular period does not assist the appeal without there being some link between the issue of staff retention and his performance. There is no indication that the turnover in administration and academic staff was in any way other than coincidental. There was no evidence of a particular problem with the School or the individuals. Therefore, the inference he seeks to draw is not available.

Conclusion

91 I find that none of the grounds of appeal is made out. I would dismiss the appeal.

KENNER SC:

92 I have had the opportunity to read a draft of the reasons for decision of the Chief Commissioner. I agree with them. 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.

WALKINGTON C:

93 I have had the opportunity to read a draft of the reasons for decision of the Chief Commissioner. I agree with them. The appeal should be dismissed.