APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 10/2017
GIVEN ON 13 NOVEMBER 2018
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2019 WAIRC 00754
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	**:**	MONDAY, 11 MARCH 2019
DELIVERED	**:**	THURSDAY, 17 OCTOBER 2019
FILE NO.	**:**	FBA 15 OF 2018
BETWEEN	**:**	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Appellant AND THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED) Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**SENIOR COMMISSIONER KENNER**
Citation	**:**	**2018 WAIRC 00844; 98 WAIG 1339**
File No	**:**	**CR 10 OF 2017**

CatchWords	**:**	Industrial law (WA) – Appeal against a decision of the Commission – refusal to re-employ or reinstate – Appeal against part of a decision relating to an interim order – Whether the Commission's jurisdiction is excluded by the Public Sector Standard – Whether a vacancy is required for there to be a refusal to employ – Flawed investigation – Without prejudice privilege – Application of s 41(3) of the *Working with Children (Criminal Record Checking) Act 2004* – Commission not bound to the remedy sought by a party – Whether there is power to order compensation where there is no relationship of employer and

		employee for the period covered by order for compensation – Retrospectivity – Consideration of special circumstances – FBA 15 of 2018 appeal dismissed
Legislation	**:**	*Industrial Relations Act 1979,* s 39, s 44, s 49*;* *Industrial Legislation Amendment Act 1995,* Part 6; *Public Sector Management Act 1994;* *Working with Children (Criminal Record Checking) Act 2004*, s 41(3)*;* *Teacher Registration Act 2012* s 27(3)(b); *School Education Act 1999* s 240; *Labour Relations Reform Act 2002 (No 20 of 2002), s 38*
Result	**:**	Appeal dismissed

Representation:

Counsel:

Appellant	**:**	Mr R Andretich (of counsel) and Mr J Carroll (of counsel)
Respondent	**:**	Mr C Fordham (of counsel) and Mr D Stojanoski (of counsel)

Case(s) referred to in reasons:

Australasian Meat Industry Employees' Union v Belandra Pty Ltd [2003] FCA 910, (2003) 126 IR 165

Balfour v Attorney-General [1991] 1 NZLR 519

BHP Iron Ore Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australia Branch (2001) 81 WAIG 1363; 2001 WAIRC 02849

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers and Another [2006] WASCA 49

Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers' Association WA (1975) 55 WAIG 543

Charles Brett v Sharyn O'Neill, Director General, Department of Education [2015] WASCA 66; (2015) 95 WAIG 429

Coles Myer Ltd trading as Coles Supermarkets v Coppin and Others *(1993) 73 WAIG 1754*

Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd [2000] FCA 1008

The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd [2005] 85 WAIG 1924; (2005) WAIRC 01797

Director General Department of Justice v Civil Service Association of Western Australia (Inc) (2005) 149 IR 160

Director General, Department of Justice v Civil Service Association of Western Australia Incorporated [2005] WASCA 244; (2005) 86 WAIG 231

Director General, Department of Justice v The Civil Service Association of Western Australia (Incorporated) [2003] WAIRC 07994, (2003) 83 WAIG 908

Falkirk Nominees Pty Ltd t/as Ross Hughes and Company and Australian Property Consultants v Bernard Roy Worthing [2002] WAIRC 06373; (2002) 82 WAIG 2388

Fraser v Fletcher Construction Australia Ltd (1996) 70 IR 117

Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch [1992] 45 IR 392

Kounis Metal Industries Pty Ltd v TWU WA Branch *(1993) 73 WAIG 14*

Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch) (1954) 34 WAIG 51

Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch) *(1954) 34 WAIG 60*

Maritime Union of Australia v Burnie Port Corporation Pty Ltd [2000] FCA 1189, (2000) 101 IR 435

Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter [2014] FWCFB 7198

Norwest Holst Group Administration Ltd v Harrison [1985] ICR 668

Princess Margaret Hospital v Hospital Salaried Officers Association (1975) 55 WAIG 543

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (2016) WAIRC; (2016) 96 WAIG 408*;*

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1988) 69 WAIG 990

Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees Union of Western Australia (1988) 68 WAIG 11

Rodgers v Rodgers (1964) 114 CLR 608

Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Buktenica (2006) 86 WAIG 1254

SGIC v Terence Hurley Johnson (1997) 77 WAIG 2169

SGS Australia Pty Ltd v Taylor (1993) 73 WAIG 1760

Slonim v Fellows *(1984) 154 CLR 505*

State Government Insurance Commission v Terence Hurley Johnson *(1997) 77 WAIG 2169*

State School Teachers' Union of WA (Incorporated) v Director General, Department of Education *[2015] WAIRC 00875; (2015) WAIG 1661*

Stephens v Australian Postal Corporation [2014] FCA 732

Tip Top Bakeries v Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch (1994) 74 WAIG 1729

Welsh v Anderson (1902) 5 WALR 1

Case(s) also cited:

Automatic Fire Sprinklers Pty Ltd and Another v Watson [1946] 72 CLR 435

Blackadder v Ramsey Butchering Services Pty Ltd [2005] HCA 22; (2005) 79 ALJR 975

Cliffs West Australian Mining Co Pty Ltd v The Association of Architects Engineers Surveyors and Draftsmen *58 WAIG 1067*

Csomore and Another v Public Service Board of NSW *(1986) 10 NSWLR 587*

Independent Education Union of Australia v Canonical Administrators, Barkly Street, Bendigo and Others (1998) 157 ALR 531

Inland Revenue Commissioners v. Duke of Westminster[1936] AC 1; [1935] All ER 259; 19 Tax Cas *490; 104 LJKB 383*

Jones v Dunkel *(1959) 101 CLR 298*

Kidd v Savage River Mines [1984] 6 FCR 398

Metropolitan (Perth) Passenger Transport Trust v Gersdorf *(1981) 61 WAIG 611*

Parsons v Martin *(1984) 58 ALR 395*

Potter v Minahan *(1908) 7 CLR 277*

Sargood Bros v Commonwealth *(1910) 11 CLR 25*

Totalisator Agency Board v Federated Clerks' Union of Australian Industrial Union of Workers *(WA) 60 WAIG 624*

Reasons for Decision

SCOTT CC

Introduction

1 The Director General, Department of Education appeals against the decision of the Commission issued on 13 November 2018 ([2018] WAIRC 00844). In that decision, the Commission found that the Director General's refusal to employ a member of the State School Teachers' Union of WA (Incorporated) (SSTU), Mr Justin Buttery, was unfair. The Commission ordered that upon Mr Buttery presenting himself at the Director General's head office at a specified time the Director General is to offer him a contract of employment as a primary school teacher at a level and salary commensurate with his qualifications and experience. Finally, it ordered that the Director General pay to Mr Buttery an amount reflecting the salary and benefits he would have otherwise earned had he remained employed by the Director General from 2 October 2017 to the date of the acceptance of any offer of employment by Mr Buttery, less any income received from other employment over the same period. The sum was to be paid to Mr Buttery within seven days of any acceptance by him of an offer of employment.

Background

2 Given the scope and nature of the grounds of appeal, it is necessary to set out, in some detail, the history of this matter.

3 Mr Buttery commenced employment with the Department of Education (the Department) as a teacher in January 2008. On or about July 2011, he started work as a teacher at Greenfields Primary School (the school).

4 In 2016, Mr Buttery taught a split class of Year 2 and 3 students, who were aged between seven and nine. There was a 'buddy-class' in the classroom next door.

5 A particular student, referred to in the reasons for decision at first instance as S, was in Year 4 in 2016. He suffered from attention-deficit hyperactivity disorder (ADHD) but, at that time, was not taking medication.

6 On 31 August 2016, an incident arose between Mr Buttery and S. In the briefest terms, S had been in his usual class and was disruptive. He was sent to Mr Buttery's classroom, which was his buddy class, where he was again disruptive. S then left Mr Buttery's classroom in an angry state. Ms Patching, the Deputy Principal, came to take S to the principal's office. But first, S went back into Mr Buttery's classroom to collect his book. He entered swiftly. Mr Buttery was teaching students who were sitting on the floor. S entered without knocking, proceeded across the room and was stopped when Mr Buttery shouted at him and grabbed him at the front of the shirt. There was dispute as to whether S was pushed against a bookcase or dropped to the ground. Two people, Ms Patching and Ms Draper, a Special Needs Assistant, each witnessed part of the incident.

7 Arising from that incident, in early September 2016, Mr Buttery was charged with one count of common assault in circumstances of aggravation pursuant to the *Criminal Code* (WA) (the criminal charge).

8 By letter dated 3 November 2016, the Director General directed Mr Buttery, pursuant to s 240 of the *School Education Act 1999* (WA), to not attend the school or any other state government

school until further notice. The letter also advised Mr Buttery that the Director General would conduct an investigation into the incident.

9 On 8 November 2016, Mr Buttery was issued with an Interim Negative Notice (INN) pursuant to the *Working with Children (Criminal Record Checking) Act 2004* (WA) (WWC Act). An INN prohibits the recipient of the notice from being engaged in child-related work.

10 On 10 November 2016, Mr Buttery's registration as a teacher, pursuant to the *Teacher Registration Act 2012*, was cancelled by the Teacher Registration Board of Western Australia (TRB), because he had been issued with an INN.

11 By letter dated 11 November 2016, Mr Cliff Gillam, Executive Director, Workforce, for the Department of Education (the Department) notified Mr Buttery that it had been advised that he had been issued with an INN; that he had repudiated his employment contract by reason of the INN; his employment record had been marked as not suitable for re-hire in child-related work, and, accordingly, his employment was terminated with immediate effect. The marking of the file is referred to in the proceedings at first instance as being 'red-flagged'.

12 By letter dated 25 November 2016, the Department notified Mr Buttery that in the circumstances, there was no reason to continue to investigate the incident.

13 The INN did not become final and Mr Buttery was issued with an Assessment Notice on 21 December 2016. The effect on an Assessment Notice was said by the SSTU to remove any restriction on Mr Buttery's working with children.

14 In a letter to Mr Buttery dated 4 January 2017, the TRB informed him that the Department for Child Protection and Family Support, Working with Children Screening Unit had informed the TRB that, he had been issued with an Assessment Notice and was permitted to carry out child-related work. His registration as a teacher had been reinstated effective 4 January 2017 as s 27(3)(b) of the *Teacher Registration Act 2012* required it to be reinstated in those circumstances.

15 On 24 January 2017, the SSTU wrote to Mr Gillam seeking that Mr Buttery be reinstated to his position. By letter dated 3 February 2017, Mr Gillam advised the SSTU that the Department was unwilling to reinstate him, noting that Mr Buttery still faced the criminal charge.

The application

16 On 21 February 2017, the SSTU brought an application under s 44 of the *Industrial Relations Act 1979* (IR Act), application number C10 of 2017, seeking, in effect, that the Director General reinstate or re-employ Mr Buttery effective from 5 January 2017.

17 The Commission convened conferences in relation to the application. The SSTU sought interim orders that Mr Buttery be reinstated or re-employed.

First Interim Orders decision

18 Commissioner Matthews delivered reasons for decision on 2 May 2017 ([2017] WAIRC 00241; (2017) 97 WAIG 564), which dealt with a jurisdictional issue, but did not finally determine the matter. However, the learned Commissioner said that if he had power to make the orders sought, he would not do so because, at that time, Mr Buttery was facing the criminal charge.

Further request to re-employ

19 On 19 June 2017, the criminal charge against Mr Buttery was discontinued. The next day, the SSTU wrote to the Director General. The letter is referred to as the 'without prejudice letter'. It was headed "RE: Mr Justin Buttery – C 10 of 2017", and commenced by briefly setting out the background and noting that:

> In summary then the current circumstances are such that Mr Buttery holds the necessary qualifications and clearances enabling him to be employed as a teacher for the Department in child-related employment.
>
> In formalising the present request on behalf of Mr Buttery, the union hereby requests the reinstatement or reemployment of Mr Buttery by the Department at your earliest convenience, as it is just and fair to do so.

20 Under the heading 'C 10 of 2017 – WITHOUT PREJUDICE – OFFER TO SETTLE', the letter then proceeded to set out a detailed proposal for reinstatement or re-employment; to 'make good' his lost pay; that certain leave be re-credited to him; that his service be recorded as continuous, and that his employment record be amended to reflect his eligibility to be employed in child-related work. The letter then dealt with the issue of the alleged 'repudiation' referred to in Mr Gillam's letter of 11 November 2016, and the effect of the situation on Mr Buttery.

21 By letter dated 5 July 2017, Mr Mike Cullen, Director, Standards and Integrity of the Department responded to the SSTU and advised that the Standards and Integrity Directorate would now commence a disciplinary investigation into Mr Buttery's conduct on 31 August 2016. He noted the endorsement on Mr Buttery's employment record that he was not suitable for future employment with the Department, and that his 'employment status with the Department will not change during this disciplinary matter'.

22 On 14 July 2017, the Commission convened a conference at which the SSTU applied to the Commission for interim orders for Mr Buttery's reinstatement pending the outcome of the disciplinary investigation.

23 Paul Douglas Milward, Principal Investigator of the Standards and Integrity unit of the Department assisted in preparing a briefing note (Exhibit A7) in relation to the SSTU's request (Exhibit A6 - Affidavit of Paul Douglas Milward). In his affidavit, he said that in the briefing note, he recommended that the request be declined; that 'although a full investigation was still underway, based on information currently held by the Department I did not consider that Mr Buttery was suitable for employment in his former role'. Mr Milward continued that, '(t)he reason he was not suitable is because of the evidence of unnecessary and inappropriate physical contact with a year four student'.

24 Mr Milward's recommendation was adopted when, by letter dated 20 July 2017, the Director General wrote to Mr Buttery, care of the SSTU, saying that she had carefully considered the application, however, she rejected the proposal to reinstate Mr Buttery's employment or salary.

25 The Director General continued with and concluded the disciplinary investigation. By letter dated 2 October 2017, the Director General advised Mr Buttery that she was satisfied that he had acted in a manner 'inconsistent with the Code of Conduct'; that he had engaged in excessive physical contact with a student; that his employment record would remain marked 'not suitable

for future employment by the Department of Education'; imposed a reprimand, and advised him that if he felt aggrieved by the decision, he could appeal to the Commission.

Second Interim Orders decision

26 In July 2017, the SSTU applied for orders that Mr Buttery be reinstated or re-employed on an interim basis pending the final hearing and determination of the substantive claim. That claim was that Mr Buttery was harshly and unfairly denied re-employment following the termination of his employment as a consequence of an INN being issued under the WWC Act.

27 Senior Commissioner Kenner heard and determined that matter on 18 August 2017 (2017 WAIRC 00737; (2017) 97 WAIG 1497). The first issue was the Commission's jurisdiction and whether s 23(2a) and s 80E(7) of the IR Act excluded the Commission from dealing with the matter, on the basis that there is a public sector standard issued by the Public Sector Commissioner under the *Public Sector Management Act 1994* (the PSM Act) which deals with the matter, the subject of the dispute.

28 The learned Senior Commissioner noted that he considered the terms of the Employment Standard (the Standard) in the ***Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services*** [2014] WAIRC 00313; (2014) 94 WAIG 581. In that matter, he observed that the Standard, in its terms, 'applies when filling a vacancy …' (paras 1 and 2 of the Standard) [39]. The Standard contains principles dealing with merit, equity and interest. He said that the references under the Merit Principle of the Standard to 'a competitive field', 'outcomes sought' and the 'work-related requirements' could 'only sensibly be understood as referring to the requirements of a vacant position sought to be filled by the employer'.

29 The learned Senior Commissioner had examined the Equity and Interest Principles of the Standard as they appear to relate to transfer and said, '(t)he overall sense of this provision seems to be directed towards some matching of the transferee's interests with the requirements of the position into which they may be transferred' [40].

30 The learned Senior Commissioner had then proceeded to examine the other parts of the Standard and said that, '(t)he conclusion is compelling, that on its ordinary and natural meaning, the standard is a legislative instrument, directing public sector bodies that where they need to fill a vacancy in their organisation, they are obliged to do so in the manner set out in the Employment Standard …' [43].

31 The learned Senior Commissioner then proceeded to note that the claim before him was characterised as a refusal to reinstate or re-employ Mr Buttery. He found that Mr Buttery's removal as a teacher was as a consequence of the effect of s 22 of the WWC Act and that the respondent's actual reason for dismissal was the issuance of the INN [33]. What the applicant sought was that Mr Buttery be re-employed, related to his former teaching position; that there is no evidence of, or suggestion that, Mr Buttery was required to participate in a merit selection process in relation to the 'filling of a vacancy'. He found that the terms of the Standard were to be read with and understood as part of procedures for filling vacancies in the public sector [34].

32 The Senior Commissioner then distinguished this matter from other cases involving teachers. He noted that the dispute in the present case is plainly between the SSTU and the Director General about Mr Buttery's re-employment as a consequence of the termination of his employment resulting from s 22 of the WWC Act, and the Director General's refusal to employ. The Senior Commissioner said, '(t)he respondent has plainly made a decision that it does not wish to employ Mr Buttery any further' [38].

33 The learned Senior Commissioner concluded that '(t)he matter before the Commission concerns an industrial dispute between the applicant and the respondent, in relation to an industrial matter concerning the fairness of Mr Buttery's removal as a teacher from his school and the refusal of the respondent to re-employ him. On any view of this case, the circumstances of his removal and the claim for re-employment, are inextricably linked.' He said that this matter was distinguishable from ***Director General, Department of Justice v Civil Service Association of Western Australia Incorporated*** [2005] WASCA 244; (2005) 86 WAIG 231 (***Jones***), and ***State School Teachers' Union of WA (Incorporated) v Director General, Department of Education*** [2015] WAIRC 00875; (2015) 95 WAIG 1661 ***(Appleton)***. He said, 'The Commission's jurisdiction is not excluded, given the terms of s 23(2a) of the Act as explained and applied by the Industrial Appeal Court in (***Jones***)' [40].

34 The Senior Commissioner went on to deal with the powers of the Commission to make interim orders under s 44(6)(bb) and then the merits of the matter. He concluded that s 44 did not provide the Commission with the power to make the orders sought and issued a decision '(t)hat the application for interim orders be, and is, hereby dismissed', ([2017] WAIRC 00738; (2017) 97 WAIG 1507).

The outcome of the investigation

35 A report of the investigation was concluded by Senior Investigator, Mr Tony Belshaw, on 3 August 2017. By letter dated 18 August 2017, the Director General informed Mr Buttery that she had formed a preliminary view that he had committed a breach of discipline and was inclined to issue him with a reprimand. She noted that his employment record would be endorsed 'Not suitable for future employment by the Department of Education'.

The matter referred for hearing and determination

36 On 12 March 2018, the Commission referred the matter for hearing and determination pursuant to s 44(9) of the IR Act. The schedule to that referral is very lengthy. I do not intend to recite all of those terms. However, they set out some of the background referred to above. The SSTU's contentions were set out in relation to two separate periods, the first being the period of Mr Buttery's 'non-employment' from January 2017, when the INN was removed, the Assessment Notice issued and the teacher registration reinstated, to 2 October 2017, when the outcome of the investigation was known. In regard to this period, it contended that the termination of Mr Buttery's employment on 11 November 2016 was unnecessary and unfair; that the respondent ought to have looked for other alternatives; that Mr Buttery ought to have been re-employed when the circumstances which brought about his dismissal changed in January 2017, and that he ought to have been on paid suspension pending the outcome of the criminal and/or internal disciplinary matters. It said Mr Buttery was denied natural justice in the refusal to reinstate him on 2 October 2017, and therefore he ought to receive back-pay and/or compensation for the period of non-employment ended 2 October 2017.

37 In relation to the second period dealing with the respondent's letter of 2 October 2017, the SSTU contended that the letter of that date constituted a further and final refusal to employ Mr Buttery; and that the investigation was flawed and did not warrant a finding of misconduct. It sought that the Commission make findings about the conduct and whether that would otherwise justify termination of employment.

38 The SSTU sought orders for reinstatement or re-employment and payment for income lost by Mr Buttery from 21 February 2017 until the date of reinstatement. In the event that the Commission found that Mr Buttery had engaged in misconduct sufficient to justify termination of employment, the SSTU sought an order that the Director General pay Mr Buttery for loss of income and superannuation from 21 February 2017 until 2 October 2017.

39 The SSTU also sought that the Commission consider a range of questions about the circumstances in the classroom on 31 August 2016 and whether Mr Buttery was denied procedural fairness.

40 The Director General's response included that the provisions of the WWC Act excluded any remedy being available. The issues the Director General said ought to be determined related to the questions of a refusal to employ and fairness. The Director General also denied that having refused to employ Mr Buttery on any occasion from 16 January 2017 to 3 February 2017. The Director General contended that the Commission had no power to award compensation absent on legal entitlement; that there was nothing unfair in the refusal to employ Mr Buttery in circumstances where he was facing criminal charges; and that there was no prima facie right to an order for employment where the Commission finds that a refusal to employ is unfair.

The hearing

The SSTU's case

41 The SSTU said that there were at least four requests to reinstate or re-employ Mr Buttery. Two of those were acknowledged by the Director General. The third was made in the SSTU's letter of 20 June 2017. The first part of the letter contained a bare request for re-employment and the SSTU says that the second part, under the heading 'Without prejudice', contained an offer to settle.

42 A response to a fourth request was made in an email exchange of 7 August 2017 between then-counsel for the Director General and the Senior Commissioner's Associate and copied to the SSTU's Mr Amati (Exhibit A1).

43 The SSTU called evidence, including about the incident, from Mr Buttery; Robert Gordon Ransley, the Manager, Corporate Services at the school; Dorothy Catherine Draper, the Special Needs Assistant who witnessed most of the interaction between Mr Buttery and S, and Lance Bradley Gunn, a teacher at the school who had experience in dealing with S.

44 The Director General said that it was not appropriate for the Commission to make determinations about the incident, that they had been the subject of the investigation and in the circumstances of the jurisdictional impediments, and the Commission could not overturn them.

45 However, the learned Senior Commissioner noted it is the Commission that refers the matter for determination and its terms are determined by the Commission, in accordance with s 44(9) of the Act and he would need to consider those matters.

Application to dismiss under s 27(1)(a)(ii) or (iv)

46 At the conclusion of the SSTU's case, the Director General made an application under s 27(1)(a) that the proceedings be dismissed as being not necessary or desirable in the public interest or for any other reason. The basis of the submission was there was no remedy available to the SSTU

in light of the evidence that had been led by it; that it was now not open for the Commission to find that it was practicable for Mr Buttery to be employed, and as a matter of law absent an employment relationship, compensation is not available. The Director General referred to the decision of the Industrial Appeal Court in ***Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees*** (1988) 68 WAIG 11 (**Pepler**) and ***Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch*** [1992] 45 IR 392 (**Kounis**) at (402) – (403), per Owen J. The Director General said that the Commission's jurisdiction rested on the present or future existence of an employment relationship. Unless the relationship actually existed or was expected to come into existence in the future, the element of an industrial matter was missing. Therefore, it was not possible to order freestanding compensation. The Director General said that there was no doubt the Commission had jurisdiction to deal with a refusal to employ but there is no power to award compensation absent an order for employment. The Director General argued that reinstatement or re-employment was impracticable.

47 The Director General's second point of principle was that it was impracticable to order re-employment if there has been the destruction of the necessary mutual trust and confidence. She referred to the decision in ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** *(2016) WAIRC; (2016) 96 WAIG 408* ***(Vimpany)*** at [106] and ***Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter*** [2014] FWCFB 7198.

48 It was submitted that Mr Buttery's uncontested evidence demonstrated his loss of confidence in the administration team at Greenfields Primary School, yet he wanted only the position at that school.

49 The Director General said that this meant that it was not practicable for Mr Buttery to be returned to his position. In those circumstances, the Director General said that there was no relief available other than a declaration.

50 The Director General confirmed that she is the employing authority, and the employer of teachers, under the PSM Act, not the individual school (AB 631).

51 The SSTU said that what it sought was the renewal of the legal relationship between the employing entity and Mr Buttery, whether it be at Greenfields Primary School or to some other position within the Department. The Department is a very large organisation. The fact that relationships at the Greenfields Primary School are at a low ebb did not meet the test for impracticability.

52 The SSTU noted that the Director General's argument that, absent an employment relationship, there could be no compensation or other remedy had been overtaken by amendment to the IR Act by the *Industrial Legislation Amendment Act 1995*, Part 6, with the insertion of s 7(1a).

53 The Senior Commissioner said that he was not persuaded to dismiss the matter pursuant to s 27(1)(a) at that point, as he was not satisfied as to the impracticability argument, given the stage the proceedings had reached.

The Director General's case

54 In the Director General's opening submissions filed on 12 June 2018, the matter of the exclusion from the Commission's jurisdiction by s 23(2a), which was rejected in the Second Interim Orders

decision, was re-agitated. At 16.3 of that submission, by the identification of one of the issues for determination being 'is the present matter excluded from the Commission's jurisdiction by virtue of s 23(2a) of the IR Act?', the submission asserted that the learned Senior Commissioner would affirm his view in relation to s 23(2a) but said that one consideration was not brought to his attention in the interim orders hearing. The submission went on to examine the statutory scheme of the IR Act; the provisions of s 97(1)(a) of the *Public Sector Management Act 1994* (PSM Act); the Standard and the case law. It noted that 'a vacancy' for the purposes of the Standard includes the creation of a new office, and concluded that the Arbitrator's jurisdiction was excluded in respect of that matter, being the matter of 'the breach of a very broad standard relating to the appointment of employees', per Wheeler and Le Miere JJ at [53] – [54] in ***Jones***.

55 The submission examined the Senior Commissioner's comments in the Second Interim Orders decision at [34] and [40], where the Senior Commissioner referred to the Employment Standard dealing, in this particular case, with 'the filling of a vacancy'. It argued that the learned Senior Commissioner, in these observations, failed to take into account the definition of 'vacancy' within the Standard. It says that "(a) 'vacancy' can be created by the 'creation of a new office' or the temporary or permanent movement of another employee from an office" [59].

56 It proceeded to argue that '(t)he *only* way the respondent could have acceded to (a request for Mr Buttery to be employed in his former teaching position) would have been to move the another (sic) employee from Mr Buttery's former position in order to create a vacancy. Upon the vacancy being created, the respondent would have been obliged to comply with the Employment Standard if it wished to employ Mr Buttery in the role' [60]. It said that '(a)ccordingly, the present matter *is* covered by the Employment Standard because of what the applicant wanted the respondent to do – that is, employ Mr Buttery (necessarily into a vacant position, even if that required creating a vacancy).' To employ Mr Buttery without complying with the Standard, and the related 'Commissioner's Instruction No 2: Filling a Public Sector Vacancy', the Director General would act unlawfully. An order of the Commission requiring the Director General to employ Mr Buttery could only be achieved by appointing him to a vacant position (or creating a vacant position in which to appoint him). This would require compliance with the Standard.

57 Therefore, the Director General again put to the Senior Commissioner in the substantive proceedings at first instance, that the Commission's jurisdiction was excluded by s 23(2a) of the IR Act 1979.

58 The Director General presented evidence through Anthony Eric Belshaw, a senior investigator in the Standards and Integrity directorate of the Department, and Lucinda Maxine Barnard, Director, Staff Recruitment and Employment Services in the Department.

Mr Belshaw's evidence

59 Mr Belshaw undertook the investigation. At the time he undertook the investigation, Mr Belshaw had been a Senior Investigator in the Department since September 2016 and had previously been employed as a police officer in England and then briefly in Western Australia. He gave some evidence about his qualifications and his knowledge of interviewing children.

60 In cross-examination, he said that he was new to this type of investigation, having been in the role for approximately two months. He had not previously investigated any matters involving physical contact between a teacher and a student.

61 He agreed 'from a forensic point of view, that repeated interviewing is well known to have the effect of distorting people's memory' (AB 524) and the lapse of time from the incident to the

interview meant that the account 'is going to be tainted' (AB 524). The number of times that S had been interviewed; the length of time between the incident and the interview, and the influence of others on S during that time, affected the quality of what he said to the investigator.

62 Mr Belshaw could not recall if he had discussed the issue of the reliability of S's evidence with Mr Milward (AB 525).

63 Mr Belshaw also agreed that it was important not to ask leading questions, that because children can be easily led, they will often agree with someone they see as powerful, such as a police officer or an investigator. However, S was asked leading questions. He acknowledged that some of S's answers suggested the possibility of adult influence, such as S's use of the word 'insult'.

64 Mr Belshaw accepted the account of the incident provided by Ms Patching because her interviews with him and with the police were consistent. Ms Patching's account was more detrimental to Mr Buttery than Ms Draper's account. Ms Draper's account conflicted with her police witness statement so he rejected her account. Mr Belshaw thought that there was a collegial relationship between Ms Draper and Mr Buttery and she was protecting him in some way, even though there was no particular evidence to support this. He said he could not see any way of explaining the differences between her statement to the police and to the investigators. On that basis, Mr Belshaw completely discounted Ms Draper's evidence, finding that it was unreliable.

65 He accepted that the description of Ms Patching's evidence as containing very emotive language and colourful expressions including the use of the word 'hysterically' in describing Mr Buttery shouting at S when she had sent S into Mr Buttery's classroom to retrieve his book; and that Mr Buttery was 'red in the face, shaking with saliva on his face and 'out of control''. Mr Belshaw rejected the proposition that Ms Patching's comments ought to be seen as her acknowledging that she had made a mistake in not accompanying S into Mr Buttery's classroom when S's behaviour had been very challenging that morning, and that she needed to go in and correct it.

66 Mr Belshaw disagreed that the use of the term 'in a very aggressive manner' to describe the way Mr Buttery was holding S's shirt and twisting it up under his chin was an exaggeration.

67 Ms Patching had described how S had almost stood on his tiptoes and was near to an L-shaped bookcase in the front corner of the room near her location to the door. Mr Belshaw agreed that the use of the term 'almost stood on his tiptoes' implied that S was being held up to the point where he could not touch the floor with his toes. Mr Belshaw also accepted Ms Patching's evidence that when she came into the room, she believed that S had been pushed back by Mr Buttery but that the pushing back allegation could not be substantiated.

68 Mr Belshaw also accepted that 'the incident left Ms Patching feeling really shocked, describing that she would be greatly concerned if Mr Buttery was ever employed working with children again', and he agreed.

69 Mr Belshaw said in his report that '(t)he evidence provided by S, Ms Patching and Ms Draper corroborates that S's behaviour was not significantly aggressive at the time he entered Mr Buttery's class.' Yet he acknowledged that in his interview, S had said he was a bit angry when he came into the classroom, but that Mr Belshaw said that his review of the evidence indicated that S was not displaying any significant aggression. He said that, notwithstanding that S had initially said that he 'barged into room', Mr Belshaw then said in his report that '(i)t is probable that S opened the door with some degree of excessive force. However, it is likely this

was carried out due to S's excitement to retrieve his book and make his way to the school office with Ms Patching.'

70 It was put to Mr Belshaw in cross-examination that the use of the term 'excitement' was a complete misreading of the situation given that the reason that S was going to attend the school office with Ms Patching was because his behaviour had been problematic even before he had gone into Mr Buttery's classroom to retrieve his book. Mr Buttery's statement had included that he had heard a commotion from the classroom next door in which he identified that it was being caused by S. Mr Belshaw said he accepted Ms Draper's word 'excitement'.

71 In respect of the allegation of Mr Buttery having pushed S and hurt his back, Mr Belshaw noted in his report that S's mother had taken him to the doctor but there was no medical evidence of any injury to his back. Mr Belshaw acknowledged that it was probable that if S had been held underneath his chin in a very aggressive manner, holding him up so that S was almost standing on tip-toes, that it might be expected that S might be hurt around the neck or head area. However, the complaint of back pain, resulting from S saying that he had been pushed into a bookstand, was not consistent with the prospect that there might be bruising around his chin and that this was never explored. Mr Belshaw agreed that it would have been worthwhile to enquire as to whether or not there was any injury on the S's neck. He had not dealt with that because the account from the S's mother was in relation to the S's back.

72 As noted earlier, Mr Belshaw rejected Ms Draper's evidence. She said that S had suddenly dropped to the floor. Ms Draper also said that she believed that S did not appear to be happy with having to go to the office with Ms Patching and ran from his class through the internal door straight back into Mr Buttery's classroom. Mr Buttery was in the middle of teaching his students, some of whom were sitting on the carpet in front of the smart board in the path of where S was running. Ms Draper had said that upon being grabbed by Mr Buttery, S cried out in shock before he dropped to the ground in front of the smart board.

73 Mr Belshaw concluded that as Ms Draper had had time to reflect between the two statements, she chose to change her evidence to protect Mr Buttery. However, he did not put that to her, nor did he put to Ms Draper that she had deliberately misled the investigation in order to protect a colleague. Mr Belshaw asked Ms Draper why her police statement was different to the account that she had given to the investigators. He and Mr Milward decided not put to her that she had deliberately misled the investigation. Mr Belshaw said he consulted his manager, Mr Davis, 'regarding lies' but made no note of it and nothing was done about it.

74 Mr Belshaw also acknowledged that the briefing note to the Director General regarding the investigation made no reference to Mr Buttery's account of the circumstances and mitigation. He said that the investigation report had already included this information, and he had not drawn any attention to it in the briefing note. Mr Buttery's employment record of over eight years with the Department and a lack of any disciplinary enquiries or concerns was not referred to in the briefing note and was not put to the Director General for her consideration in making her decision. He acknowledged that in retrospect Mr Buttery's employment record might have been a factor that ought to have been brought to her attention.

75 Mr Belshaw also acknowledged that all accounts of the incident suggested that it took place over a few seconds; that S was extremely difficult to manage; that he was disruptive on the day, and that Mr Buttery in particular knew that S was capable of pushing furniture around, being violent and generally disruptive in his classroom.

76 Mr Belshaw also acknowledged that the red-flagging of Mr Buttery's employment record was not an outcome of a disciplinary enquiry available according to Commissioners Instruction No. 4.

77 Mr Belshaw did not recall Mr Buttery ever saying that he was sorry for what happened or showing any indication that he believed that he may have been at fault in any way whatsoever, however he could not recall if he asked Mr Buttery that or not.

78 It became clear during the hearing that there had been no written statement by S. There was a recording of the interview with him but there was no transcript. A copy of the recording was provided to the Commissioner, however, some parts of the recording were said to be hard to make out. A transcript of S's interview with the police on 29 September 2016 was attached to Mr Belshaw's statement.

Ms Barnard's evidence

79 Ms Barnard gave detailed evidence about the processes adopted by the Department, through school principals, to fill vacancies in teaching positions. She said that the Director General had delegated her authority to engage, transfer and otherwise manage the members of the teaching staff' to all school principals, Regional Executive Directors and the Executive Director Workforce.

80 Ms Barnard described that when a principal decides that teaching staff need to be recruited to fill a vacancy or recruit new teaching staff for a school, the Department's '5 Step Staff Process' [LMB1] is used. The '5 Step Staffing Process' refers to 'if there is a position to fill'. The principal is required to consider 'internal employees and/or external redeployees' for teacher positions. If a suitable match is found between an internal employee requiring placement and a fixed-term or permanent vacancy, the employee is appointed. If there is no suitable match, the principal proceeds through a variety of processes, depending on whether the principal considers the situation to be one of an increase in hours and not a new position. There are considerations such as whether there is a school-based pool of teachers arising from a previous call for expressions of interest already qualified to be appointed. There may be a graduate pool or a fixed-term pool if no school-based pool exists. The principal may fill a fixed-term vacancy for up to six months without advertising. An assessment of the merit of the individual appointee is required to ensure the person has the required knowledge and skills.

81 Ms Barnard said that on 8 May 2018, she accessed the Recruitment Advertising Management System (RAMS), a whole of government online jobs board, which the Department uses to manage vacancies. She examined Greenfields Primary School's recruitments, and determined that:

a) it does not have a school-based pool;

b) when recruiting teachers in the last three years, it had largely used either the Department's fixed-term or graduate pool;

c) in 2015, it advertised to fill a permanent teaching position on two occasions; and

d) in February 2017, it advertised a permanent teaching position and received 59 applications for the position.

82 While she had no involvement in the decisions that were made about Mr Buttery in 2016/17, Ms Barnard's evidence about the respondent's practices and arrangements was that the respondent is able to re-employ Mr Buttery without breaching Public Sector Standards.

83 Ms Barnard gave evidence that there are approximately 700 schools operated by the Department, approximately 400 of which are primary schools. There are approximately 30,000 teachers including permanent, temporary and fixed-term contract teachers. That includes both primary and secondary school teachers.

84 Two new schools were being built in the Mandurah area where Greenfields Primary School is located. Ms Barnard thought that they were due for commencement in 2019 and that the staffing complement of each school was up to the respective principals of the schools. The principals have a significant degree of discretion in terms of the allocation of their budgets and who is employed.

85 Ms Barnard described the difference between being employed and holding a permanent position. She said that it is possible to be employed and to be on leave or not hold a permanent position during that time. An example would include maternity leave where the teacher still holds the permanent position but is on leave. She confirmed that it was common for permanent positions to be held by someone who is on maternity leave or long service leave.

86 She said that where a position was made redundant and the person holding that position is surplus to requirements, the person continues to be employed by the Director General. There were between 300 and 400 redeployees on average at any given time. They are placed in various situations across the system. They are placed by the section in which Ms Barnard is employed, the Workforce Directorate, on the basis of need and qualifications.

87 Ms Barnard also gave evidence that she was familiar with the situation of a teacher formerly employed by the Department, Ms Hislop, who was the subject of an order of reinstatement pursuant to a decision of the Commission. Her section would have been responsible for finding the placement for Ms Hislop.

88 When, for any number of reasons, a person requires placement, the person's details are recorded within RAMS. As schools have vacancies that they need to fill, those vacancies are recorded into RAMS as well. There are case managers who match the employees to the vacancies. Anybody who matches the vacancy in regard to qualifications and location, for example, is referred to those schools. If that school does not select them, then the teacher is referred to another vacancy. In respect of Ms Hislop's reinstatement, Ms Barnard recalled that she was placed in a school and was paid so that she was not left sitting at home.

89 If a teacher is not able to be placed through RAMS, they can be placed somewhere else while awaiting a suitable position, according to their qualifications and experience. Ms Barnard gave evidence that the Mandurah area is part of the South Metropolitan Education Region. At the time she prepared her statement, there were 15 surplus primary school teachers requiring placement in that region. That would change from time to time and could be anything between 10 and 30 surplus teachers. Those people find jobs through this system. They are all currently employees of the Department – it is a matter of placing them. They are on the payroll and they are the only people referred through the process that Ms Barnard described.

90 In some circumstances, the ED Workforce or the Regional Executive Director may also transfer staff within their area of control. Ms Barnard gave an example of a staff member who may need to be transferred for various reasons and that either the Regional Executive Director or the ED Workforce could 'make that happen' (Appeal Book, 645).

91 Ms Barnard also gave evidence about the Department's practice of red-flagging a former employee's employment record. She said it is a complete prohibition on future employment. The flags are not regularly reviewed by the Department but reviewed on application by an individual, the subject of a flag. The Employment Suitability Assessment Committee reviews cases on request. The review will take account of the reason why the flag was put on in the first place; how long ago this occurred and what may have changed since the placement of the flag. The Committee reviews between two and 10 requests per month and upwards of 50 per cent are cleared. The Committee makes a recommendation to the Executive Director of Workforce and if the flag is removed, the individual is then advised of the Committee's decision. If the flag is lifted, the individual is entitled to apply and be considered for employment.

92 Ms Barnard gave evidence that where a former employee of the Department makes an application to a non-government school or an educational institution outside of the Department of Education, those prospective employers do not make enquiries of the Department concerning whether or not there is a red flag and the Department treats that information as confidential. The Department provides statements of service for former employees who are looking for work outside of the State education system, including those who have a red flag on their record, but the flag is not disclosed.

93 Ms Barnard also explained the breach of Standard claim process. Such a claim is available where a vacancy is advertised. However, if an appointment is made from an existing pool of teachers, a claim of breach of standard is not available to the individual at that point. If there is a permanent position which is vacant in a school, it can be filled by 'whatever process is being used' and others who feel they ought to be considered can make an application. If the position is filled through advertising, they can make an allegation of breach of standard. If it is filled from a pool, the breach of standard process applied at the earlier stage.

94 It would appear that the breach of standard provisions applies when a teacher seeks to be included in a pool for potential employment or to take up a permanent position which is vacant. It does not apply where a teacher who was already part of the pool is deployed and appointed to a particular position.

95 In reverting to the issue of a person's file being red-flagged, Ms Barnard said she was not sure of where the power came from for the Department to place a flag on someone's record. However, she said that the suitability and eligibility assessment of an employee for a particular job is undertaken through the PSM Act provisions and the Commissioner's Instructions.

96 That concluded the evidence called by the parties and they proceeded to make submissions.

Closing submissions

The Director General

97 The Director General referred to the decision of the Industrial Appeal Court in ***Charles Brett v Sharyn O'Neill, Director General, Department of Education*** [2015] WASCA 66; (2015) 95 WAIG 429 (***Brett)*** that an employer would not be in breach of the *WWC Act* if it continued to employ an employee who had received an INN provided the employee was not working with children. However, if the employer dismissed the employee for the reason that the employee was the subject of an INN, the employee could not obtain a remedy for the dismissal, that is, the employer is not obliged to consider alternatives to dismissing the employee. That alone provides the employer with protection from the employee obtaining a remedy. The Director General

pointed out that the Senior Commissioner had found in the Second Interim Orders decision that Mr Buttery was dismissed because he had been issued with an INN.

98 The Director General also said there is no jurisdiction in relation to the refusal to employ because of s 23(2)(a) of the *Industrial Relations Act.* The Director General said notwithstanding that that had been dealt with in the Second Interim Orders decision, it may still be argued on the basis that jurisdiction is always at large and a party cannot be estopped from raising jurisdiction. Secondly, the Second Interim Orders decision was made before the Memorandum was settled and the Memorandum sets the boundaries of the dispute. So the issue may be raised at that stage, as the boundaries of the dispute for determination had been set.

99 The third reason was that there is no absolute right of appeal from an interim decision and it needed to be a public interest for it to be appealed at that point. The Director General says it was not estopped from pursuing the argument on appeal.

100 The Director General also said that Mr Buttery did not make an application for employment. If the Director General were to accede to the requests by the SSTU on Mr Buttery's behalf to employ him, the Director General would have had to create a vacancy in order to put him into any role or would have to find a vacancy that already existed. On either approach, the Employment Standard applies, particularly noting that the definition of 'vacancy' in the Standard includes within it a creation of the new position.

101 The Director General also said there is no power for the Commission to reinstate outside of an unfair dismissal claim and is not a remedy available in the case of an unfair refusal to employ.

102 To the extent that there were refusals to employ, the Director General said that there were only two and they occurred in January and February 2017, prior to the s 44 application being made. At the time Mr Buttery was subject to the criminal charges. The Director General said that these refusals were not unfair because at the time Mr Buttery was still facing the criminal charges arising out of the incident. Even taking into account the presumption of innocence, it was reasonable and not unfair to refuse to employ Mr Buttery, as acknowledged by Commissioner Matthews in the First Interim Orders decision (2017 WAIRC 241 [27] – [29]).

103 The Director General submitted that in order to refuse to employ within the meaning of the Act, it is necessary that there be a request or some type of application for the employee to be so employed. There does not need to be a formal application to an advertisement but there needs to be some form of request to be employed. No authority has dealt with a situation where a refusal to employ has been considered without there having been some sort of demand, application or request for employment or some previous promise that was broken, such as in the ***Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers' Association WA*** (1975) 55 WAIG 543. There was no other evidence of a request for employment save for the disputed 'without prejudice' letter which the Director General dealt with later.

104 The refusals up to that point were not unfair because neither Mr Buttery nor the SSTU on his behalf applied for an advertised position. According to the Director General, Ms Barnard's evidence was that external applicants are required to go through an application process unless the position is filled through a pool. Otherwise, there is a requirement for advertising and a merit selection process. The Director General said it would be unfair to all other applicants for teaching positions with the Department if Mr Buttery could side-step the usual process for filling positions and come through the back door, so to speak.

105 The third reason why the Director General said it was not unfair to refuse the requests was that if the Director General had agreed to Mr Buttery's request for a job without undertaking advertising in a competitive recruitment process, the Director General would have acted contrary to s 9(a)(ii) of the PSM Act by acting contrary to Commissioner's Instruction No. 2.

106 The Director General said that there were no further refusals. The only evidence that could establish a request for a job is a letter dated 20 June 2017 which the Director General said was a 'without prejudice' communication. It came after the First Interim Orders application was determined but before the second. It was during the process of the negotiations relating to the s 44 application. The terms of the letter, read in context, constituted a 'without prejudice' offer by the SSTU, with a number of terms or conditions, for Mr Buttery's reinstatement or re-employment. There was no bare request for employment separate to those terms. Those terms included, amongst other things, that Mr Buttery receive backpay for the period including when he was subject to the INN and not entitled as a matter of law to work with children and therefore to teach.

107 According to the Director General, the Commission cannot act upon the evidence contained in the without prejudice letter because its proper context is that it was a request made with a view to resolving proceedings on foot and the proper characterisation of any refusal was a refusal to accept an offer of settlement, and not a refusal to employ within the meaning of the Act. The Director General referred to ***Norwest Holst Group Administration Ltd v Harrison*** [1985] ICR 668, a decision of the English and Wales Court of Appeal where the Court considered whether an employee's purported acceptance of a repudiation by the employer by way of a letter headed 'without prejudice' amounted to an acceptance of the repudiation. Lord Justice Cumming-Bruce at 679 observed:

> The effect of heading the letter (Without Prejudice) was to communicate to the recipient that the letter was to be regarded as a commencement of a process of negotiation or compromise which is a communication of a very different kind from what is commonly called an open letter stating in black and white the final stance taken upon an issue which has arisen between the parties… That is quite a different stance from taking up an unequivocal position upon which the writer seeks to establish his legal rights.

108 The Director General said there was no black and white, unequivocal, request for employment. Rather, the SSTU chose to use the cover of a without prejudice letter to open the lines of negotiation and put an offer which included for Mr Buttery to be employed and for backpay and other terms and conditions. Any response by the Director General to that without prejudice offer can only be regarded as a continuation of that negotiation process and cannot be regarded as the Director General taking an unequivocal position upon which to establish legal rights. For that reason, the Director General said the letter and any response to it cannot be regarded as a refusal to employ.

109 The Director General said that while the letter appears to be in two parts, those parts preceding and those following the 'without prejudice' heading, should be read together – that the first part is introductory and the second, setting out 'the terms of reinstatement and re-employment sought', following the 'without prejudice' heading, is a clear reference back to the request for reinstatement and re-employment contained above that heading. The terms are those which the SSTU was putting as part of that proposal to settle. Whilst the Director General acknowledged that the manner in which the letter was drafted was unusual, it would not have mattered if the letter did not use the words 'without prejudice' because 'without prejudice' is determined as a matter of substance. The Director General says that the purpose of the communication is self-evidently an attempt to resolve the proceedings.

110 The Senior Commissioner put to the Director General that from the commencement of proceedings, in February 2017, until the point of the hearing 'the (Director General) has resisted the re-employment of Mr Buttery at every turn'. The Director General disagreed that this means that the Director General has refused to employ within the meaning of the IR Act during the relevant period. The Director General says that there has been no demand or request for employment in that time.

111 The Director General said that the Commission cannot and should not rely on the 'without prejudice' communications and act on the letter as evidence because it would be unfair to the Director General for the Commission to allow the SSTU to engage the jurisdiction of the Commission and use these proceedings on foot to engage in 'without prejudice' discussions and then deploy those 'without prejudice' communications against the other side. This is against equity and good conscience.

112 Even if there was an ongoing refusal, or a refusal after the date of the 'without prejudice' letter, the Director General says that any such refusal still was not unfair. It is not the correct approach to start from Mr Buttery's conduct with S and determine whether dismissal was unfair. That is because at least for the purposes of the question of the refusal to employ, it does not necessarily require consideration of whether his conduct could have sustained a dismissal. The Director General says she simply invoked the protection of s 41 of the WWC Act as far as a remedy is concerned. She does not concede that the dismissal was unfair and did not intend to address why it was not unfair.

113 The Director General also said that there is no unfairness for any further refusal for five reasons. The first is that the offer to settle by the SSTU was a 'without prejudice' offer and had a package of conditions attached to it. The Director General had and still has no legal obligation to provide those benefits to Mr Buttery. Even if it could be said that the respondent rejected the offer, the only inference that can be drawn is that the Director General rejected the entire package of conditions. Those conditions included paying Mr Buttery for a period of time when he was subject to the INN and could not have lawfully worked with children, so he could not do the job that he was employed for. He therefore would not have any entitlement to be paid even if he did remain employed.

114 The Senior Commissioner asked the Director General's counsel whether the employer would be acting unfairly by dismissing an employee subject to an INN when there may be other possibilities to continue to employ the teacher. Counsel said that as a matter of industrial fairness, the employer probably should consider whether any other jobs are available. However, as long as the dismissal was for the reasons set out in s 41 of the WWC Act, no remedy can flow from a claim of unfair dismissal, in the case of the failure to do so. The unfairness might arise because of the terms of the legislation, the objective of which is the protection of children. This could operate in a harsh way. People's careers could be destroyed, wrongly as it turns out, but the unfairness arises because of the legislation. It does not mean that the Director General's actions were harsh or unfair – they simply occurred in the context of the operation of an act of Parliament.

115 The Director General's counsel noted Exhibit A12, a letter from the Director General, sets out changes to her approach to teachers whose employment is terminated on account of an INN. However, counsel for the Director General said that what is contemplated in that letter is quite possibly contrary to the PSM Act in terms of the need to comply with the Standard and the Commissioner's Instruction.

116 As to the second reason why any refusal is not unfair, the offer put forward on Mr Buttery's behalf sought his employment in the position that he previously held at Greenfields Primary School. Mr Buttery accepted in cross-examination that the requests were all for that particular position at Greenfields Primary School and it is apparent that that position was filled on a permanent basis on 30 January 2017. It would be unfair to the employee in that position if the Director General were to move that person out of their position and parachute Mr Buttery back into his previous role.

117 The third reason is that the Director General would have had to either put Mr Buttery into an existing vacancy or create a vacancy. This could not be done consistently with the PSM Act without advertising and conducting a competitive process.

118 The fourth reason was set out in Ms Barnard's evidence, that if the employer was to have acceded to Mr Buttery's request, it would have stepped outside of the established processes for recruitment and that would have been unfair to a large number of prospective employees seeking a job.

119 The fifth such reason was that it is reasonable for the Director General to have formed the view that Mr Buttery engaged in conduct that amounted to a breach of discipline by using unreasonable force on a student while he was employed by her. This made it necessary for the Director General to traverse some of the evidential material on this point. The Director General examined Mr Buttery's conduct on the day. Mr Buttery's evidence was that he yelled at S regarding entering a room without permission and asked where his manners were. He did not yell at S about any potential danger he was causing to himself or other students. This demonstrated that Mr Buttery's purpose in grabbing S was that he was not happy that S had entered the room without asking permission. If Mr Buttery was concerned about his own or his students' physical safety and that was the reason why he grabbed S, he would have been put in his contemporaneous email to Mr Wright.

120 In respect of the investigation report, there was evidence that S was troublesome for a number of reasons. The evidence of Ms Draper was that she did not see the initial part of the interaction between Mr Buttery and S until the point where Mr Buttery was holding S. It is unclear whether or not Ms Draper's original statement is now to be read as suggesting that she had seen the earlier parts of the incident.

121 In respect of the remedy, the Director General said that if it were a claim of unfair dismissal, because of s 41 of the WWC Act, no remedy is available.

122 If there is an order for employment, there needs to be special circumstances for there to be any backdating, and the earliest it can be is the date of the s 44 application. Any retrospective order for employment should take into account any moneys earned by Mr Buttery in the meantime and any failure to reasonably mitigate losses. Save for one application to a school, not for a teaching position, Mr Buttery has not applied for a job as a teacher, that is, in his trade. Therefore, there has been a failure to mitigate or reasonably mitigate. The Director General also says that an order for employment or reinstatement is impracticable.

Other issues

123 The Director General pointed out that as the decision-maker and the ultimate employing authority, she took account of matters of mitigation which were put in Mr Buttery's submission to the investigation, as part of a 50-page response. The Director General's final letter referred

to having taken into account matters of mitigation, notwithstanding that reference to the mitigation was not contained in the investigation report.

124 Finally, the Director General says that the fact of S's ADHD and challenging behaviours were referred to in the summary of evidence in the investigation report. Therefore, they were matters before her and had been taken into account.

SSTU's closing submissions

125 The SSTU said that the task of the Commission was not to consider not only what was before the decision-maker as to what occurred at the time of the incident but also the entire facts which were then before the Commission including the material that was before the investigator or the Director General. Even if the task of the Commission is confined as the Director General suggests, to consider what was before the decision-maker at the time, the SSTU said that when considered in the entire context of the case, the events of 31 August 2016 did not justify the action subsequently taken by the Director General.

126 The SSTU said that a ***Jones v Dunkel*** (1959) 101 CLR 298 inference ought to be drawn from the Director General's failure to call Ms Patching and Mr Wright, the school principal, to give evidence.

127 The SSTU said that Mr Wright made two reports of the incident and that they are inconsistent and in error. It is suggested that it was not surprising then that the police took the position they did, to charge Mr Buttery based on what the SSTU says was misinformation.

128 The SSTU was also critical of Mr Milward not being called to give evidence. The police running sheet recorded that on 17 October 2016, amongst other things, Detective Senior Constable Earnest spoke to Mr Milward, and queried 'what the Dept of Ed planned to do in relation to the POI (Mr Buttery)'. It recorded Mr Milward as saying that '(t)hey will put their investigation on hold pending Police investigation'. He is recorded as then stating 'that should the Police not pursue the matter the outcome of Dept of Ed is likely that the POI would be dismissed' (AB 213). According to the SSTU, this level of prejudgment of the outcome of the enquiry, which had yet to be commenced, was alarming.

129 On 31 October 2016, Mr Buttery was informed that he would be charged with one count of aggravated common assault. It is noted that there has been a tendency during proceedings to refer to the 'criminal charges' in the plural, when in fact there was only one charge.

130 The SSTU also noted that there appeared to have been no point at which the investigators considered that the outcome would not involve dismissal. This was notwithstanding that the letter from the Department regarding the requirement for Mr Buttery to leave the school and remain away, pursuant to s 240 of the *School Education Act*, indicating that this was in no way to be interpreted as a prejudgment. This is to be distinguished from Mr Milward's comments to the police only two weeks prior to the date of the letter.

131 The SSTU said that the letter to Mr Buttery terminating his employment on the basis that an INN had been issued to him said that he had repudiated his contract of employment. No one from the Department was called to give evidence about why the Department suggested that Mr Buttery had repudiated his contract by being in receipt of an INN produced by a third party. In an exchange with the Senior Commissioner, the SSTU's counsel noted that the Department may rely upon the incident itself to justify its actions, but the concept of repudiation does not meet with the circumstances. The concept of repudiation is that the party has done something to

indicate that they consider themselves no longer to be bound by the contract and that this is an unnecessary and confusing approach in response to an action by a third party.

132 The SSTU then noted that Mr Buttery's employment record was then annotated to record that he was not suitable for re-hire in child-related work. The SSTU said that the basis for Mr Buttery's dismissal had been entirely swept away by the removal of the INN and the TRB reinstating Mr Buttery's registration. On 16 June 2017, the police discontinued the charge against Mr Buttery and paid his costs. The SSTU drew attention to the reason for the WA Police taking that action was that it considered that there was no evidence to support the charge and that 'paying his costs in the sum of $800 speaks volumes about why it was that the Police decided to discontinue the charge' (AB 697).

133 The SSTU made submissions about Mr Buttery's work and the loss he suffered since the dismissal, and the effect of the red-flagging.

134 The investigation of the incident was placed on hold while the criminal charge was dealt with. According to the SSTU, the reason for carrying out the investigation was telling. Mr Belshaw said that it was '(t)o confirm a breach of discipline to support the continued marking of Mr Buttery's employment file' (AB 698), it was not to enquire as to whether or not there had been a breach. This was said to be supported by Mr Milward's telephone call to police on 17 October 2019, which demonstrate a pre-determination of the matter.

135 The SSTU said that there were also numerous other flaws in the investigation, demonstrated by Mr Belshaw's evidence, including the repeated interviewing of S, that repeated interviewing of children could have the effect of rehearsing the evidence, corrupting the account, changing their recollections and it was not accepted practice, and the delay after the incident in interviewing him.

136 S's mother was present throughout the interview and she interceded on two occasions. The SSTU said that S's recollection was affected by this, placing him in a situation where he would have not wanted his mother to hear of his behaviour and he significantly downplayed his behaviour by a description of it being 'a bit silly'. It was also pointed out that S said that Mr Buttery had 'insulted' him when he meant 'assaulted'. This is said to demonstrate an adult influence over S. Further, the SSTU said that he did not understand the meaning of a word he used in his statement to Mr Belshaw and Mr Milward, that Mr Buttery had 'overwhelmed' him. This was a notion imported into his memory. This was all said by the SSTU to demonstrate that the interview with S was deeply flawed. The audio of the interview demonstrated that S was calm, focussed, compliant and cooperative during a fairly lengthy period, something like 47 minutes. This is completely contrary to the evidence of his behaviour described as being 'out of control' in 2016, when he was not taking his medication for ADHD.

137 (I note for completeness that in his interview with the police on 29 September 2016 (Exhibit R2), S said that Mr Buttery had 'overcome' him.)

138 Mr Belshaw reached his conclusion that Mr Buttery showed no remorse because Mr Buttery did not say he was sorry during his interview. However, the SSTU noted that Mr Buttery's response to the investigation report contained an expression that it was regrettable that he had had physical contact with S, and that this was overlooked by Mr Belshaw (see Attachment AB 8 of Belshaw's witness statement at 116).

139 In terms of his acceptance of Ms Patching's evidence, Mr Belshaw did not consider that she had a tendency to overstate matters even though she used colourful and exaggerated language. He did not see or investigate any suggestion that she may have had a motive to exaggerate her

evidence given at the time that she was responsible for S and had sent him back into Mr Buttery's classroom unaccompanied. Her words to herself when she heard him shouting was that she needed to get in there. Mr Belshaw did not consider the possibility that if Ms Patching's account was correct, S would have been likely to have complained about soreness to the neck and chin area when he complained only of soreness to his back.

140 The SSTU pointed out that Mr Belshaw gave evidence that he preferred Ms Patching's account to the more measured account by Ms Draper because he believed Ms Draper was deliberately misleading him due to her friendship with Mr Buttery. However, at no point was this belief documented. He did not put it to Ms Draper for her response. Mr Belshaw claimed to have discussed this misleading with Mr Milward but there is no record of such a discussion. It was not put to Ms Draper in her evidence in the witness box that she had mislead anyone about anything. Mr Belshaw said he believed Ms Draper was lying to him notwithstanding that Ms Draper's account was not particularly partial or favourable to Mr Buttery. The fact that Ms Draper's statement to police and her statement to the investigation contained some inconsistency, the SSTU said, was a demonstration of the fallibility of human memory and that recollections change over time. It would be of concern if they were identical particularly given the lengthy period of time between those events.

141 Mr Belshaw is said to have accepted Ms Draper's opinion that S was excited rather than angry when he entered the classroom the second time, in spite of the fact that S himself said in his interview that he was angry when he re-entered the classroom, and despite the fact that Mr Belshaw believed in respect of other matters that Ms Draper was lying to him. He could not accept the obvious proposition that a child being sent to the principal's office as punishment is unlikely to be excited.

142 The SSTU said that Mr Belshaw accepted that he was required to consider mitigating circumstances but did not do so in respect of Mr Buttery's otherwise clear record.

143 The SSTU also noted that negotiations between the SSTU and the Director General had resulted in a change in the policy of the Department in respect of teachers who have been the subject of INNs and those notices having been withdrawn, demonstrated by Exhibit A 12. This is notwithstanding that counsel for the Director General said that the arrangement may contravene the PSM Act and the Standards.

Refusal to employ

144 The SSTU said the Director General refused to employ Mr Buttery on six occasions, including when his employment record was marked 'do not employ' and by the defence of the application during the hearing, over a period of four days.

145 The SSTU said that this repeated refusal must be considered to be an actual refusal to employ. Any denial of this is said to be form over substance. If the Director General had come to the SSTU at any stage during the proceedings and offered him a job, there would be no matter to proceed.

146 The SSTU said a sensible reading of the 'without prejudice' letter leads to the conclusion that the first part of the letter was open and the second part, underneath the heading, in bold on page two, was without prejudice. If the letter had simply ended after the first part it would have clearly indicated that the SSTU was seeking, on an open basis, reinstatement or re-employment. That part of the letter under the heading of 'without prejudice' was there for a reason. It referred to the proceedings then before the Commissioner in conciliation and was an offer to settle the

proceedings. The SSTU said that it was clear that by that time, 20 June 2017, the SSTU had referred the dispute to the Commission and was seeking Mr Buttery's re-employment or reinstatement and the heading included the number of the application before the Commission. The SSTU said that it was not open on a plain, ordinary reading of the document itself to conclude that the entire letter was 'without prejudice'.

147 The SSTU dealt with the issue of Mr Buttery's failure to find alternative employment and said that he had been doing what he could to find employment in the context of the red flag against his personal file.

148 As to the question of the application of the Standard, the SSTU said Ms Barnard's evidence was that teachers can be transferred, employed, moved around, supernumerary or surplus to requirements, or placed in schools without a vacancy being advertised, on the basis of the circumstances that face individual teachers at various times during their careers. There were teachers who were surplus to requirements in the South Metropolitan area, according to Ms Barnard. The SSTU said there was a distinction between the employment contract between the Director General and the individual teachers and the vacancies which are created within schools by principals in order to carry out their duties to educate students. The SSTU said that it is obvious from Ms Barnard's evidence that the Director General reserves to herself the right to move teachers around, to employ them and transfer them without the need for a particular vacancy to arise. Large numbers of the individuals had moved around by the Department, due to their special or unusual circumstances. Mr Buttery's circumstances were said to be very special and unusual.

149 The SSTU said that it was conceded in the event that the Commission were to order that Mr Buttery be offered a contract of employment, that he would be offered that contract and he would be found work to do. That might be in Mandurah, where he lives, in one of the two new schools opening up in the area as no decisions had yet been made to fill those positions, or somewhere else in the region generally.

150 The SSTU noted that in the decision of the Industrial Appeal Court in ***Brett*** at [40], Le Miere J commented on the distinction between the performance of work and the terms of the ongoing contract of employment. His Honour made the point that s 23 of the WWC Act does not mandate termination of the contract of employment. The SSTU noted the words that if an employer suspends an employee from carrying out child-related work, or all work or orders the employee to stay away from the premises which the child-related work is carried out then the employer would not be contravening the WWC Act notwithstanding that the contract of employment subsists. There was no evidence that the Director General actively considered alternatives to dismissal.

Director General in reply

151 The Director General in reply referred the Senior Commissioner to [33] of the Second Interim Orders decision where he noted that it was accepted between the parties that the reason for dismissal was as a consequence of s 22 of the WWC Act.

152 The Director General also said that it is not open on the evidence to infer that Mr Milward said what was suggested in the police running sheet regarding a note of a phone call with Mr Milward. It is said that this is because it is effectively double hearsay. It is not open, the Director General said, to find that Mr Milward, in fact, used those words.

Substantive decision at first instance

153 The substantive decision in this matter (2018 WAIRC 00820) issued on 6 November 2018. The learned Senior Commissioner set out what he described, and what can readily be accepted, as a 'lengthy, and somewhat torturous history'.

Section 44

154 The learned Senior Commissioner noted the broad jurisdiction and powers of the Commission pursuant to s 44 of the Act, and that they should not be read down (***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1988) 69 WAIG 990 (***Robe River***) per Nicholson J at 999). He set out the process for a matter under s 44, being the subject of a compulsory conference and the drafting of the Memorandum of matters to be heard and determined where matters remain in dispute. He noted that the source of power for the Commission to grant relief or redress at s 26 of the IR Act includes that the Commission is not bound to the specific claim in deciding the matter.

155 The learned Senior Commissioner observed that the s 44(9) referral set out a lengthy and complicated recitation of the SSTU's contentions of fact and the orders sought. They included that termination of Mr Buttery's employment was unnecessary and unfair; that the Director General ought to have had regard to practical alternatives to dismissal; that when the circumstances which caused Mr Buttery's dismissal had ceased to exist in January 2017, the Director General ought to have re-employed Mr Buttery and suspended him on pay pending the resolution of the criminal and/or internal disciplinary matters; that Mr Buttery was denied natural justice in the refusal to reinstate his employment pending the final decision; that he ought to receive backpay and/or compensation for the period of non-employment ended 2 October 2017.

156 The SSTU's second contentions were that the Director General's finding and comments articulated in the letter of 2 October 2017 constituted a further and final refusal to employ Mr Buttery and that this was based on findings of misconduct. Mr Buttery denied the allegation of misconduct. The investigation was flawed, and no finding of misconduct could reasonably have been established. If the Commission found that Mr Buttery had not committed an act of misconduct that would otherwise justify termination of employment, then he should have been provided with relief by way reinstatement and compensation for lost wages and superannuation.

157 The orders sought were:

1. Mr Buttery's reinstatement or re-employment on terms and conditions no less favourable than his previous employment with the respondent;
2. That the Director General pay Mr Buttery an amount reflecting the income, including superannuation, that he would have earned for the period 21 February 2017 until the date of the determination;
3. Alternatively, if he was found to have engaged in misconduct sufficient to justify termination of employment, that the Director General pay Mr Buttery an amount that reflected income and superannuation he would have earned from 21 February 2017 until 2 October 2017, being the date that the Director General finalised its investigation and determination of the matter.

158 The Commissioner set out the parties' contentions and arguments. He noted that there had been two applications for interim relief, which had been rejected. He noted that the issue of refusal to employ is within the scope of the Commission's jurisdiction, being within the definition of

industrial matter. He set out Burt J's comments in ***Princess Margaret Hospital*** in which his Honour had agreed with the reasons in ***Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch)*** (1954) 34 WAIG 51. In that case, Jackson J commented on the scope of the definition of industrial matter as including issues of dismissal and reinstatement. The learned Commissioner examined the cases regarding reinstatement and refusal to employ.

159 He went on to note:

> What these earlier cases demonstrate is the breadth of the definition of "industrial matter" as it has been successively cast in the Act and its predecessors for many years and, in particular, the breadth of the terms "matters affecting or relating or pertaining to work … of employers and employees" and of "any matter affecting or relating or pertaining to …" (e) "the dismissal of or refusal to employ any person or class of persons".
>
> The present matter, properly characterised, is an industrial dispute between the applicant and the respondent, in relation to the applicant's member Mr Buttery, and the ongoing refusal of the respondent to employ him, despite repeated requests by the applicant, on behalf of Mr Buttery, as an organisation for the purposes of s 7 of the Act, with standing to make an application under s 44(7)(a)(i) of the Act. The question, dispute or disagreement between the applicant and the respondent as to the respondent's ongoing and persistent refusal to employ Mr Buttery was not resolved by conciliation and by s 44(9), was referred for hearing and determination. By s 23(1) of the Act, read with s 44(9), the Commission has ample jurisdiction and power to enquire into and deal with the industrial matter so referred for determination [31] – [32].

WWC Act

160 The Senior Commissioner then went on to examine s 41 of the WWC Act and in particular the decision in ***Brett*** at [20]. He noted the parties' arguments on that issue.

161 In respect of the SSTU's argument, that because he had already dealt with the issue of s 41(3) of the WWC in the Second Interim Orders proceedings, this constituted and acted as an estoppel against the Director General and that the Commission was unable to depart from that decision. The learned Senior Commissioner said at [42]:

> This submission must fail. Firstly, the Interim Order proceedings were just that, they were proceedings commenced in relation to a claim for interim relief and the observation made by me in those proceedings was clearly obiter. Secondly, and more fundamentally, there could not be an estoppel in circumstances where the effect of the WWC Act was not raised or argued before the Commission in the Interim Order proceedings. That issue was not essential for a disposition of these proceedings and 'only a decision about a matter which it was necessary to decide – a decision which is fundamental or cardinal to the judgment – can create an issue estoppel. (See *Cross on Evidence* Loose Leaf Australian Edition Vol 1, 1996 at par [5080].

162 The learned Senior Commissioner went on to examine ss 22, 23 and 41 of the WWC Act. He commented that these provisions were considered in ***Brett***. He said, '(i)n that case the issue for determination was the meaning of s 41(3)(b) as to how the words 'the reason' an employer dismisses a person are to be construed. In considering this provision, the Court noted that Parliament had, by s 41(2), subject to the savings provisions in s 41(3), abrogated an employee's rights in cases where they are dismissed by their employer to comply with the WWC Act; ***Brett*** at par [20]'. At [50], he noted that:

> Section 41(2) affords an employer protection from any liability where the employer dismisses an employee to comply with s 22 of the WWC Act. This is so, irrespective of whether other alternatives were open to an employer in order to comply with the WWC Act, if, on the evidence,

> it is established as a fact that the operative reason, subjectively determined, is that the person making the decision to dismiss did so to comply with the WWC Act: ***Brett*** at pars [15], [16] and [21]. Whilst it was not necessary to decide the matter before it, the Court considered the arguments of the parties and held that the WWC Act does not require the termination of a contract of employment for there to be compliance with s 23 of the legislation, if compliance may be achieved in other ways: at pars [39] – [40].

163 The learned Senior Commissioner considered that 'Section 41(3) of the WWC Act extends to include claims under the Act brought by the SSTU on behalf of an employee as well as claims made by employees themselves, assuming sub-pars in (a), (b) and (c) are met' [53].

164 The learned Senior Commissioner went on to consider the terms of s 41(3)(a) and found that the claim of the SSTU is one relating to unfair refusal of the Director General to employ Mr Buttery after the WWC Act prohibition on him had been revoked, his Working with Children authority and teacher registration had been returned. He said given the remedy claimed, he did not consider that s 40(1) and (3)(a) of the WWC Act was satisfied in this case, that is that the remedy sought of re-employment is not one that is prevented by s 41 of the WWC Act. He confirmed that the reason Mr Buttery was dismissed was the issuance to him of the INN and that therefore subjectively viewed, the operative reason for Mr Buttery's dismissal was for the employer to comply with s 22 of the WWC Act and in the circumstances, s 41(3)(b) would appear to be satisfied. He went on to conclude that s 41(3) did not preclude the SSTU's claim, or Mr Buttery obtaining relief in this matter, as it relates to re-employment. The learned Senior Commissioner also noted that the actual relief, if any, would be a matter for the Commission exercising discretion under s 26(1) and (2) of the Act.

The s 23(2a) point

165 Under this heading, the Senior Commissioner noted that in the Second Interim Orders decision he had rejected the Director General's argument that the Commission's jurisdiction is ousted by s 23(2a) of the IR Act. He referred to his reasons at [20] – [41] of that decision and said that he did not propose to repeat them but adopted and relied on them. He said he remained of the same view. However, he went on to deal 'furthermore and alternatively' with the fact that the Director General had previously informed the Commission that the reason for refusal to employ on 16 January 2017 and 3 February 2017 were different to the reason Mr Buttery was refused employment on 20 July 2017. He noted:

> On the two earlier dates, the respondent maintained, in a communication from Mr van Hattem of the State Solicitor's Office to my Chambers, that the refusals involved the respondent declining to appoint Mr Buttery to a vacant position. Accordingly, those two requests, which were the subject of the initial application by the applicant on 21 February 2017, were claimed as excluded from the Commission's jurisdiction because of s 23(2a) of the Act. The refusal to employ of 20 July 2017 was not claimed to be based on any need to fill a vacancy: Exhibit A1 [61].

166 The learned Senior Commissioner then went on to note the Director General's reliance on the evidence of Ms Barnard and to discuss that evidence. He said:

> … However, in cross-examination of Ms Barnard, it appears that in many cases, the respondent takes a flexible approach to employment arrangements for teachers. The evidence of Ms Barnard was to the effect that teachers regularly move within the school system, by way of transfer, and promotion, without the need to proceed through the formal process of filling a vacancy in

> accordance with the Employment Standard. It seems that the respondent has a very broad discretion as to how it deploys teaching personnel throughout the State, without the formalities of filling a vacancy, in response to a specified need for a position at a school. The number of teachers moved around the education system in this manner seemed to be considerable, on Ms Barnard's evidence.
>
> Also, and importantly, the change in policy of the respondent set out in its letter to the applicant of 9 April 2018, which I deal with below, and which emerged late in these proceedings, is directly contrary to the contention advanced in opposition to Mr Buttery's claim that any re-employment or employment of him would trigger a jurisdictional barrier, by way of the need to "fill a vacancy". This is because the Director General of the respondent herself, as the employing authority of teachers under the PSM Act, has determined that the respondent will re-employ teachers who have had notices issued to them under the WWC Act, subject to the conditions set out in the letter, none of which involve a process even remotely resembling that set out in the Employment Standard and other such processes, as described by Ms Barnard in her witness statement.
>
> Thus, apart from my conclusions above adopted from the interim order proceedings, I am not persuaded by the respondent's contentions in this regard, based on the totality of the evidence of Ms Barnard and the respondent's own policy position. It is manifestly clear that Mr Buttery can be offered a contract of employment with the respondent, who is ultimately responsible for running and staffing hundreds of primary schools in the State, and he can be placed at a school as a teacher, without the need to "fill a vacancy" [63] – [65].

167 The learned Senior Commissioner then went on to deal with the application by the Director General to dismiss pursuant to s 27(1)(ii) or (iv) of the Act. He concluded that 'absent an order for employment, there would not be power to order the respondent to pay compensation as a stand-alone order' [71]. However, he went on to find that there is no basis to dismiss the matter at that stage and observed that in any event, dismissing the application at a relatively late stage of proceedings would not, in the context of the history of the matter, be in the public interest.

The incident

168 The Senior Commissioner noted that the evidence of Mr Buttery in relation to the incident was relevant, as the Director General's ongoing refusal to employ him was based on his alleged misconduct in using unreasonable force in restraining S. He looked at the evidence of Mr Buttery; of Mr Gunn in relation to S's conduct; or Ms Draper's and Ms Patching's observations of the incident and the investigation.

169 He then noted the criminal charge that had been raised, including the Police Incident Report of 9 September 2016 (Attachment E to Mr Buttery's witness statement). The Senior Commissioner noted that '(i)t is immediately apparent from the material raised in these proceedings that the narrative is inaccurate in a very material respect. It referred to Mr Buttery pushing S 'into the wall' and 'against the book rack on the wall' of the classroom.' He said that this is simply wrong and did not occur. He noted that none of the other evidence identified this as occurring. The learned Senior Commissioner also noted the statement of Mr Wright, the principal, to the police and that Mr Wright reported what he had heard from Ms Patching. He also noted the Police Statement of Material Facts contained certain false allegations which were then included in the investigation report and annexed to the witness statement of the investigator, Mr Belshaw. He concluded that the reports used as the basis for the Police Statement of Material Facts were both incomplete and inaccurate [98]. He also noted that whilst comments reported to have been made by Mr Milward to the police 'cannot be taken to be evidence of a pre-determined outcome, given

all relevant events, it certainly is indicative of a state of mind predisposed towards removing Mr Buttery from the respondent's workforce' [99].

170 The learned Senior Commissioner went on to note that Ms Draper was not interviewed by police until 13 January 2019, some time after the charges were brought against Mr Buttery.

171 Under the heading 'The investigation starts and Mr Buttery is banned from the School', the learned Senior Commissioner set out some further background information. He concluded by noting that there was no explanation for the delay between the incident taking place on 31 August 2016 and any further action two months later. He said in the meantime Mr Buttery continued to teach as normal and:

> There was no suggestion in the respondent's letter of 3 November 2016, or in the evidence before the Commission, aside from awareness of the laying of criminal charges, how it was that Mr Buttery was said to pose a risk to students at the School … If the respondent regarded the matter as seriously as was suggested when the Initial Reporting Form was lodged, then one would have expected the respondent to react almost immediately. It is quite extraordinary that this did not happen. This does not make any sense [103].

172 The learned Senior Commissioner then went on to note the INN and teacher registration matters, Mr Buttery's dismissal and his file being red-flagged. In respect of the red-flagging, the Senior Commissioner noted that the basis for such red flagging was not clear and that it was not at all clear how such a practice is consistent with the respondent's obligations under the PSM Act.

173 The Senior Commissioner then went on to note the terms of the letter (Exhibit A1) which the Director General wrote to the SSTU on 9 April 2018, the effect of which was to change the respondent's approach to teachers who have received INNs or NNs under the WWC Act.

174 He said that:

> The letter appears to go much further than the mere removal of 'red flags' inappropriate cases. It commits the respondent to re-employing teachers where the conditions set out in the letter have been met. The letter also does not refer to any process of 'filling a vacancy' allegedly under the Employment Standard, which the respondent has emphasised in the proceedings in this application [110].

175 The Senior Commissioner then noted the initial disciplinary investigation ceased, the WWC Act assessment notice was issued and the teacher registration restored. He said that from this point, on 21 December 2016, there was no legal impediment to Mr Buttery resuming child-related work.

Refusals to employ on 16 January and 3 February 2017

176 The Senior Commissioner noted that these refusals to employ were during the period when the criminal charge was still pending and that was the reason for those two refusals. He noted that the Director General did not indicate what her position might be following the resolution of the charge.

177 The Senior Commissioner then considered the further requests for re-employment on 20 June 2017 and 14 July 2017 and the new disciplinary action. In examining the 'without prejudice' letter, the Senior Commissioner concluded that '(t)he first part of the letter of 20 June 2017 may properly be regarded as a further request by the applicant for the respondent to re-employ or reinstate Mr Buttery' [125] and that the Director General not only refused the further request but

also informed the applicant in the letter of 5 July 2017, that a disciplinary investigation would be conducted.

Further refusals on 20 June 2017 and 14 July 2017

178 The learned Senior Commissioner then noted the conciliation process that commenced. He said:

> It has long been the view that matters discussed in and arising from a s 44 conference may not be later relied upon by parties once the conference has concluded. To do so would discourage the exchange of views to which I have referred and would be contrary to the objects of the Act in s 6, to promote and encourage the settlement of disputes through conciliation. Accordingly, I do not propose to have regard to what was put by the applicant in the conciliation conference of 14 July 2017. Despite this however, there can be no doubt that as a practical matter, the parties were and remained in dispute as to the circumstances of the termination of Mr Buttery's employment and the applicant's claim that he be once again employed by the respondent. That is what these proceedings have been about from their inception [128].

The disciplinary investigation

179 The Senior Commissioner then examined the disciplinary investigation and its outcome and Mr Belshaw's evidence. He noted that the Director General failed to answer the issue of Mr Buttery's primary reason for acting as he did was that S barged into him with students sitting on the floor at his feet. He agreed that the investigation was flawed and that no finding of misconduct could reasonably be justified [143].

180 He noted the difficulties caused by repeated interviews of child witnesses, especially in the presence of authority figures. He said:

> No allowance appears to have been made for this in the analysis stage of the investigation or importantly, for the type of behaviour S engaged in on the day of the Incident, rather than his demeanour in the interview with the investigators on 19 July 2017. The latter stood in stark contrast to how S was behaving on the day in question on 31 August 2016 [144].

181 The learned Senior Commissioner noted that there was almost complete reliance in the investigation on Ms Patching's version of the events and that this was problematic. He said that her initial description of S being forced into the wall was wrong; that Mr Belshaw accepted that Ms Patching's statements were highly emotive; that if S was almost up on his "tiptoes" when being held by the shirt by Mr Buttery this would mean that he was almost elevated off the ground and would seem difficult to achieve without the shirt slipping over the child's head. He also said that such an aggressive hold under the chin in the circumstances where it was supporting the child's body weight was more likely to have resulted in S complaining of soreness and bruising, if not injury, in that area and yet no complaint or injury was reported.

182 He also noted other inconsistencies regarding Ms Patching's statements including about how S would have fallen to the floor while being held as she described. He said, '(o)n the other hand, it is far more logical and more in accordance with the basic laws of physics, that S may have fallen to the floor when moving forward and being restrained in the manner described by Mr Buttery. S moving forward in the classroom was entirely consistent with Ms Draper's version of events' [147].

183 The Senior Commissioner noted that Mr Belshaw discounted Ms Draper's version of the events on the basis that there were some inconsistencies between her statement to the police in January 2017, compared to her interview with Mr Belshaw in July 2017. The Senior Commissioner did

not consider the differences to be so great as to warrant not accepting any of her account, particularly compared with Ms Patching's account and the emotive descriptions given by her. He considered this discounting was unreasonable.

184 Mr Belshaw also rejected Ms Draper's account because he considered that she had deliberately mislead the investigation because of her friendship with Mr Buttery. The Senior Commissioner found that this was problematic. Firstly, it was not mentioned in the investigation report. If it were so it would have stood out as a strong basis for questioning Ms Draper's credibility. He said that:

> … to deliberately mislead an investigator in such matters is a very serious issue. It is surprising that no disciplinary action was taken against Ms Draper by the respondent. Mr Belshaw did say that he discussed the possibility of this with Mr Milward, but there was no other evidence to confirm that this occurred. Also, as the applicant pointed out, this allegation was never put to Ms Draper at any stage of either the disciplinary investigation, or in these proceedings [149].

185 The learned Senior Commissioner concluded that by the time he had grabbed S, Mr Buttery was angry and shouting but he did not accept Ms Patching's description of Mr Buttery being 'hysterical'. He accepted that physical contact ought to be a last resort and that Mr Buttery's reaction was instinctive and was directed to stopping S from potentially colliding with students seated on the floor.

186 He also noted that Ms Patching was not called to give evidence, but for reasons he had already identified, he regarded her statement of events with considerable caution.

187 The learned Senior Commissioner commented that Mr Wright's statement to police contained serious factual errors. None of Mr Wright's assumptions about Mr Buttery's state of mind were put to Mr Buttery and were self-evidently prejudicial towards him. He said that in his view 'both Mr Wright and Ms Patching's accounts of the Incident were highly prejudicial to Mr Buttery' [159]. He described some of Mr Wright's references as problematic and untrue. The Senior Commissioner went on to comment:

> Having regard to the evidence and the other material before the Commission, including the content of the Investigation Report, the question to be determined is whether the ongoing refusal of the respondent to employ Mr Buttery was industrially unfair. I am not persuaded that Mr Buttery committed an act of misconduct that would warrant the summary termination of his employment, the placing and retention of a red flag on his employment record and the ongoing refusal of the respondent to employ him. Even if one accepts that Mr Buttery may have over reacted, as a one-off in the circumstances in which the Incident occurred, in the context of an otherwise exemplary employment record, summary dismissal would not be a proportionate response in my view.
>
> I do not propose to revisit my conclusions in relation to the Investigation Report, set out in some detail above. In my view, there were substantial flaws in the findings and conclusions that made reliance by the respondent on it unreasonable. As I have noted, the crucial issue of why Mr Buttery reacted the way that he did and the conduct of S immediately prior to Mr Buttery grasping S's shirt, were not the subject of any findings nor was there consideration of any exculpatory or mitigating factors.
>
> It was also part of the applicant's case in this matter, that prior to the dismissal of Mr Buttery, because of the issuance of the INN, no consideration was given to alternatives to dismissal. It is the case, as noted by Le Miere J at para 40 in ***Brett*** that the effect of s 23 of the WWC Act does not require the termination of a contract of employment. Section 23 prevents a person from continuing in child-related work. The INN was not, of itself, a direction to the respondent to dismiss Mr Buttery. Compliance with the WWC Act at the time, that being between 8 November

> and 21 December 2016, a relatively short period of time as it turned out, could have been achieved by other means. This could have included by giving Mr Buttery other work if available to do; by maintaining the order for Mr Buttery to stay away from the School under s 240 of the SE Act; or by suspending him from employment under s 82 of the PSM Act. Unlike on the facts in ***Brett***, there was no evidence in this case of any consideration of alternatives to the dismissal of Mr Buttery. However, the difficulty with the applicant's contention in this respect is that the Court in ***Brett,*** as noted earlier in these reasons, concluded that a dismissal may be found to be for reasons of compliance with the WWC Act, despite alternatives being open. I have already found in this case, that the initial action of the respondent in dismissing Mr Buttery was, as the subjective and operative reason, to comply with the WWC Act [161] – [163].

188 As to the SSTU's submissions that the Director General's failure to call Mr Wright and Ms Patching, and possibly also Mr Milward, ought to lead to ***Jones v Dunkel*** inferences against the Director General, the Senior Commissioner said:

> I incline to the view that the absence of these witnesses is more related to the approach of the respondent to its case. That is, its contentions, as set out earlier in these reasons, that the evidence of Mr Buttery in relation to the incident was not relevant to the disposition of these proceedings, rather than any conscious decision to avoid scrutiny [165].

189 The learned Senior Commissioner had found that there was a refusal to employ and that it was not industrially unfair for the respondent to refuse to employ Mr Buttery on 16 January 2017 and 3 February 2017 when Mr Buttery was facing a charge of aggravated assault. He said that this was despite, as he had mentioned earlier, Mr Buttery being left in charge of his class for over two months after the incident.

190 As to the refusal to employ after June 2017, while the Director General undertook the investigation, the learned Senior Commissioner did not consider that also to be industrially unfair. He went on, though, to say that by the time of the conclusion of the disciplinary investigation and the preparation of the investigation report, and the decision to red flag Mr Buttery's employment record, the ongoing refusal to employ was unfair. From that point, he said, given the erroneous and unreasonable conclusions reached in relation to the incident, it was industrially unfair. He noted that taken in its full context and having regard to the action of S and Mr Buttery's concern for his own students, it was excessive and did not warrant ending his career as a primary school teacher in government schools, given his very good teaching record.

191 Finally, the Senior Commissioner noted that in respect of remedy, this was not an unfair dismissal claim but a refusal to employ. The appropriate remedy would be for the Commission to order that on Mr Buttery presenting himself at the Director General's workplace, the Director General offer him a contract of employment as a teacher. He also found that an order ought to be made that Mr Buttery be paid an amount representing his salary that he would have earned from 2 October 2017 (being the date of the disciplinary investigation outcome) to the date of reinstatement.

192 The Senior Commissioner then considered an alternative, if he had been incorrect and the Commission had no jurisdiction or power to deal with the applicant's claim to award a remedy because of s 23(2a) of the Act and/or s 41(3) of the WWC Act. He considered that Mr Buttery should be re-employed in accordance with the new policy of the Director General. He said '(t)his man has been dealt with very harshly and he has had his career as a public school primary teacher ended in circumstances that did not warrant it. It would be unjust for the respondent not to act.' [170]

The appeal

193 The grounds of appeal as filed were amended by consent.

Ground 1 of the appeal.

194 This ground of appeal contends that the Senior Commissioner made an error of law in finding that the proceeding was within the Commission's jurisdiction, given the exclusion set out in s 23(2a) of the IR Act. A preliminary issue arises in this ground of appeal. The SSTU says that this ground of appeal arises from the Second Interim Orders decision, [2017] WAIRC 00737; (2017) 97 WAIG 1497 ([20] – [40]), where the Senior Commissioner dealt in detail with the jurisdictional impediment of s 23(2a) and it is not now appropriate for it to be raised in this appeal.

195 In the Second Interim Orders decision, the learned Senior Commissioner summarised the issue by saying:

> Therefore, on the face of it, if a matter before the Commission concerns (in the words of the Standard) 'the filling of a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting) in the WA Public Sector' then by s 23(2a) of the Act, the Commission is deprived of jurisdiction to enquire into and deal with such a matter [26].

He then posed the question whether this case was properly characterised as such a matter. He examined the facts of the matter, beginning with the application under s 44 being in relation to a 'refusal of the respondent to reinstate or re-employ' Mr Buttery. He noted that '(t)here is no doubt that the reason the respondent dismissed Mr Buttery was because of an effect of' (s 22 of the WWC Act). He continued that, '(i)t is clear that the applicant has brought the s 44 application it has, alleging 'unfair refusal to re-employ' because, by reason of the exception in s 41(3) of the WWC Act, an unfair dismissal claim cannot be made to the Commission, if the elements of pars (a), (b) and (c) of s 41(3) are met, which they no doubt are in this case' [33].

196 He continued that:

> Despite repeated requests, the respondent has declined to employ Mr Buttery. There is no suggestion in this case of a competitive field for appointment in which Mr Buttery was required to, or would be required to participate in, which would normally be expected. There is no necessity, as established by the decision of the Court in *Jones* for there to be a particular allegation of a breach of the Standard. However, properly characterised, and taken in context, the present matter before the Commission is not one dealing with the filling of a public sector vacancy… Ultimately, the matter before the Commission concerns an industrial dispute between the applicant and the respondent, in relation to an industrial matter concerning the fairness of Mr Buttery's removal as a teacher from his school and the refusal of the respondent to re-employ him. On any view of this case, the circumstances of his removal and the claim for re-employment, are inextricably linked [40].

197 He went on to distinguish ***Jones*** and ***Appleton***, and to conclude that the Commission's jurisdiction was not excluded 'given the terms of s 23(2a) of the Act, as explained and applied by the Industrial Appeal Court in ***Jones'*** [40].

198 In the final, substantive, reasons, under the heading of 'The s 23(2a) point', the Senior Commissioner noted that he had previously rejected the Director General's argument and did not propose to repeat the reasons for his conclusion; he said that he adopted and relied on those reasons for present purposes and remained of that view. He then went on to set out, briefly, a view expressed as '(f)urthermore, and alternatively', that the refusals to employ on 16 January and 3 February 2017 were explained as involving the Director General declining to appoint Mr Buttery to a vacant position. Those two refusals were claimed as being excluded from the

Commission's jurisdiction because of s 23(2a) of the IR Act. The refusal to employ on 20 July 2017 was not claimed to be based on any need to fill a vacancy [61] and reference was made to Exhibit A1. This was an email chain, the last of which was from the Director General's then-counsel, to the Senior Commissioner's Associate, dated 7 August 2017. This email noted that:

> The Respondent also notes that the 'reasons for its refusal to re-employ Mr Buttery as at 20 July 2017 are distinct from the reasons for its decision on 16 January 2017 and 9 February 2017… the Respondent declined to appoint Mr Buttery to a vacant position, and these decisions are excluded from the Commission's jurisdiction as per the respondent's submissions of 2 August 2017'.

199 As noted earlier, attached to the email was Mr Milward's affidavit dated 7 August 2018, the same date as the email. In it, Mr Milward explained that following the receipt of the without prejudice letter of 20 June 2017, he assisted in preparing a briefing note which was ultimately submitted to the Director General. Mr Milward's recommendation in that briefing note was to decline to re-employ Mr Buttery. He said:

> 6. The reason for the recommendation was, although a full investigation was still underway, based on information currently held by the Department I did not consider that Mr Buttery was suitable for employment in his former role.
>
> 7. The reason he was not suitable is because of the evidence of his unnecessary and inappropriate physical contact with a year four student.

200 Mr Milward went on to record that:

> 10. On 20 July 2017, the Director General wrote to the SSTU WA in terms adopting my recommendation.

201 Therefore, while the refusals of 16 January and 3 February 2017 were said to be refusals to appoint to a vacant position, the final reason for the refusal was because the employer had concluded, some weeks before the final interviews in the investigation, that Mr Buttery was unsuitable for re-employment because of 'unnecessary and inappropriate physical contact with a year four student'. Therefore, while the Director General complains that s 23(2a) which provides a jurisdictional impediment where there is a procedure for review in respect of a breach of Standard, the final reason why the Director General refused to re-employ Mr Buttery did not relate to any issue associated with filling a vacancy as would arise under the Standard, it related to the view of Mr Buttery's conduct.

202 The SSTU objects to the Director General being able to appeal one of the conclusions in the reason for the Second Interim Orders decision, the finding which went against it when the decision itself was in its favour. The SSTU says that it is relevant that no appeal was lodged in respect of the Second Interim Orders decision and that the Director General is seeking to argue the same issues by way of a very belated appeal. It says that an appeal against a decision must be brought within 21 days and must be based on the evidence raised in the proceedings. It is not now open to the Director General to seek to overturn the finding. Further, it says that having decided that matter, the learned Senior Commissioner is estopped from re-deciding the matter.

Consideration and conclusion regarding preliminary point to Ground 1

203 Is the Director General now prevented from appealing against a part of a decision relating to an interim order? I am of the opinion that she is not.

204 Firstly, I note that the issue of the s 23(2a) is squarely a challenge to the Commission's jurisdiction and jurisdiction is always at large (***Welsh v Anderson*** (1902) 5WALR 1 at (5) – (6) cited in ***SGS Australia Pty Ltd v Taylor*** (1993) 73 WAIG 1760).

205 Secondly, the Second Interim Orders reasons for decision is under the number C 10 of 2017 and was dated 18 August 2017. The "C" prefix in the application number indicates that at this time, the matter was still in the conciliation stage of the process under s 44 of the IR Act and prior to the final referral for hearing and determination under s 44(9) of the IR Act. This occurred on 12 March 2018, some seven months before the referral. The question arose in the context of the application for interim orders, not for the determination of the matters ultimately reflected in the referral for hearing and determination.

206 Whilst the matter of s 23(2a) was dealt with at the Second Interim Order stage and formed part of the reasons for decision in that matter, it was a finding and therefore, not subject to an appeal at that stage. An appeal might have been pursued if it were demonstrated to be in the public interest. In ***Falkirk Nominees Pty Ltd t/as Ross Hughes and Company and Australian Property Consultants v Bernard Roy Worthing*** [2002] WAIRC 06373; (2002) 82 WAIG 2388, his Honour, Sharkey P explained the reason for the requirement for leave for an appeal against a finding. This is 'to prevent proceedings for the resolution by arbitration of industrial matters and disputes being interrupted by appeals against decisions which do not finally dispose of the matter, unless the matter of appeal is of such importance that it is warranted' [76]. Given that the ultimate conclusion of the Second Interim Orders matter was in the Director General's favour, that is, not to grant the interim order, it is hardly surprising that the Director General would not want to disturb that order at that time and would await the final outcome. In that context, it is a primary example of the circumstances identified by Sharkey P.

207 One can also understand the practicalities, and as a matter of policy, that leave is required for there to be an appeal against a finding. This, no doubt, is at least partly on the basis that whilst the finding might go against a party, the ultimate result may not. Therefore, there may be no practical purpose to be served in appealing at that point and time and expense may be wasted for an appeal to be pursued.

208 In any event, the issue did not die with the Second Interim Orders decision, because the Director General pursued it in the substantive hearing. In his final decision, the Senior Commissioner referred to his Reasons in the Interim Orders decision under the heading 'The s 23(2a) point'. He said he did not propose to repeat them, but that he adopted them and relied on them 'for present purposes', and that he remained of that view [60].

209 Also, the evidence of the respondent's witness, Ms Barnard, again ventilated the issue in the substantive hearing. Ms Barnard's evidence included how formal vacancies are dealt with. While I note that Ms Barnard's evidence was not about the question of law, but about the practical application of the Director General's procedures for deploying teachers, it appears to have been called to bolster the Director General's argument about the filling of vacancies. However, as I will explain later, it did not entirely have that effect.

210 In all of those circumstances, I am of the view that, even though this ground of appeal relates mainly to a matter dealt with in the Second Interim Orders decision, although not exclusively so, there is no impediment to the issue being pursued on appeal at this stage.

Consideration and conclusions regarding Ground 1

211 Returning to the substance of this ground of appeal, I am of the view that, for the following reasons, the circumstances of the case do not meet the circumstances which are dealt with in the Standard and therefore, the Commission's jurisdiction is not excluded.

212 At [63] of the substantive Reasons, the Senior Commissioner noted that '(t)he respondent has a very broad discretion as to how it deploys teaching personnel throughout the State, without the formalities of filling a vacancy, in response to a specified need for a position at a school. The number of teachers moved around the education system in this manner seemed to be considerable, on Ms Barnard's evidence.

213 The learned Senior Commissioner then went on to note the change in the Director General's policy, notified to the SSTU in a letter of 9 April 2018, which is directly contrary to the contention advanced by the Director General that any re-employment or employment of Mr Buttery would trigger the jurisdictional barrier of the need to fill a vacancy. This is because the Director General, as the employing authority of teachers under the PSM Act, had determined that she will re-employ teachers who have had notices issued to them under the WWC Act, subject to conditions set out in that letter, none of which involves a process resembling that set out in the Standard and other processes as described by Ms Barnard in her evidence.

214 The Senior Commissioner went on to note that, apart from his conclusions adopted from the interim orders proceedings, he was not persuaded by the Director General's contentions. He said:

> It is manifestly clear that Mr Buttery can be offered a contract of employment with the respondent … without the need to 'fill a vacancy' [65].

215 There is no doubt that, but for the question regarding the application of s 23(2a), the Commission has jurisdiction to deal with a refusal to employ. Section 23 - jurisdiction of Commission, of the IR Act provides, in subsection 1(1), that:

> Subject to this Act, the Commission has cognisance of and authority to enquire into and deal with any industrial matter.

216 'Industrial matter' is defined in s 7(1)(c) as including the 'refusal to employ any person'.

217 However, s 23(2a) provides that 'the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in s 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, may be prescribed under that Act'. Section 97(1)(a) of the PSM Act sets out that one of the functions of the Public Sector Commissioner is:

> (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards

218 The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (PSM (BPPS) Regulations) are regulations prescribing procedures referred to in s 97(1)(a) of the PSM Act.

219 In ***Jones***, Wheeler and Le Miere JJ concluded that there was a public sector standard dealing with recruitment, selection and appointment, and that was a matter in respect of which a procedure was prescribed pursuant to s 97(1)(a) of the PSM Act. Therefore, the Commission's jurisdiction to deal with the matter of the fairness or otherwise of Mr Jones not being appointed to a position was excluded (see [502] – [506]).

220 The Standard, published in the Government Gazette of 11 February 2011, says that it 'applies when filling a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting)) in the Western Australian Public Sector'. Its purpose is clear. It defines "vacancy" as being:

> 'a vacant post, office or position within the public sector. A vacancy can result from the creation of a new office, post or position or by the temporary or permanent movement of another employee'.

221 'Recruitment' is defined as 'the process used by an agency to attract, assess and select applicants to fill a vacancy.

222 It is to ensure that decisions to fill a vacant post, office or position are made on the basis of merit and equity, and are transparent. Employing authorities are expected, except in limited circumstances, to appoint from a competitive field of candidates.

223 There is also an instruction issued by the Public Sector Commissioner pursuant to the PSM Act, which sits alongside the Standard. It is Commissioner's Instruction No. 2 – Filling a Public Sector Vacancy (CI 2). This sets out a range of directions to Chief Executive Officers and employing authorities in deciding to fill a vacancy and how they are to go about it. It sets out a number of requirements which supplement the Standard. They include options for filling a vacancy, by way of permanent or fixed-term contract of service; redeployment; transferring an employee at level; secondment, or an acting opportunity. It sets out certain considerations in respect of the use of fixed-term appointments and contracts of service. It deals with advertising requirements, whether they be general advertising, targeted advertising, quarantining or expressions of interest. Interestingly, it provides for circumstances where a Chief Executive Officer/employing authority may not be required to advertise to establish a competitive field or conduct a competitive assessment of merit to fill a vacancy. Those circumstances include:

1. acting, secondment or fixed-term contract opportunities less than six months, where there is no likelihood that these opportunities will be extended;

2. where the Chief Executive Officer/employing authority is satisfied that advertising will not attract a competitive field due to the specialist nature of the position;

3. and other conditions.

224 Most significantly, CI 2 provides:

> 4.1(g) Where a previous permanent employee of an agency (not in the Senior Executive Service) is to be appointed to a vacancy that is the same or similar (same level and same or similar job requirements) to a previous role held by the employee, and the following criteria are met:

i. the employee must have worked for the agency for a period of no less than 12 months;

ii. the employee must have a documented record of satisfactory performance in their previous role; and

iii. if applicable the employee is to have met any severance or redundancy conditions,

4.2 The decision not to advertise and conduct a competitive assessment of merit should be documented and endorsed by the Chief Executive Officer/employing authority.

225 CI 2 also deals with appointment pools. The Chief Executive Officer/employing authority may form an individual agency pool of potential appointees who have already applied for a position and been assessed as meeting the criteria for a particular position, or they may combine with other Chief Executive Officers/employing authorities to form a shared appointment pool. There is also the capacity for suitability lists to be established as part of an open pool. There are other arrangements for appointing to a vacancy which means that an employer does not have to go through a formal advertising and competitive selection process.

226 The Director General says two things about the Standard. Firstly, she says that she would breach the Standard and, consequently, the Commissioner's Instruction No. 2 if she re-employed Mr Buttery. Secondly, she says the Standard excludes the Commission's jurisdiction to deal with the claim to require her to re-employ Mr Buttery.

227 The question that arises is whether the current circumstances require or relate to the filling of a vacancy as covered by the Standard. Those circumstances are that Mr Buttery had been an employee of the Director General. He was removed from that employment. When the reasons for his removal ceased, he sought to be re-employed. But for the exclusion of his capacity to achieve a remedy, because of the WWC Act, he could have challenged that removal as constituting an unfair dismissal. Such a dismissal could result in an order of reinstatement or re-employment pursuant to s 23A of the IR Act. Such a reinstatement or re-employment would not require the employer to fill a vacancy. Even if the employer had filled the position from which the employee had been dismissed, it would not be open for the employer to say it could not reinstate or re-employ because of a requirement to comply with the Standard to fill a vacancy. This much was confirmed by Ms Barnard's evidence about what occurred when Ms Hislop was required to be reinstated. It would be a matter for the employer to manage, as is always the case with reinstatement. In the circumstances of this matter, it is not reasonable to object to an order of reinstatement as being impracticable on the ground that the job has since been filled.

228 Further, Ms Barnard's evidence demonstrates the practical application of the Standard. As correctly characterised by the Senior Commissioner, it demonstrates the flexibility with which the Director General may approach the employment and deployment of teachers.

229 Ms Barnard says that the Director General acts in a very flexible way in finding positions for teachers for whom transfers need to be made. Her evidence relates to a number of different circumstances. They include appointments and transfers including from pools of pre-assessed candidates.

230 I understand her evidence to be that there is no capacity to allege a breach of Standard where a teacher is already in a pool and is appointed to a vacancy or is otherwise allocated work. But to get into the pool, the teacher must go through a competitive process and have their skills, knowledge and abilities, and other considerations, assessed. This assessment and appointment to a pool appears to be in line with the Standard and with CI 2. A teacher may then be appointed to a particular position from the pool. It is entry into the pool which may be subject to complaint of breaches of Standard and to review, not the appointment from the pool to the position. In this way, there is a competitive field established and an assessment of merit and equity.

231 In my view, if the Director General had properly assessed Mr Buttery for appointment in accordance CI 2 4.1(g), she could reasonably have concluded that he could be appointed. He had performed the same or a similar role previously and had worked for the Director General for no less than 12 months. As I will conclude later, had the investigation not been so flawed, there would be no question that Mr Buttery had misconducted himself in such a serious manner as to constitute misconduct. He had a documented record of satisfactory performance in his previous role. All the requirements of 4.1(g) would be met. The Director General could have acceded to a request to employ Mr Buttery without being in breach of the Standard.

232 However, the question remains as to whether the Commission's jurisdiction is excluded by the existence of the Standard and the provision for review under the PSM (BPPS) Regulation.

233 What is sought in the matter referred for hearing and determination is that the Director General re-employ Mr Buttery. The Standard and CI 2 are specified as dealing with the filling of a vacancy. They appear to cover all possible options relating to filling a vacancy. However, they do not say that a person cannot be employed without there being a vacant position.

234 Ms Barnard's evidence demonstrates that when positions are abolished, some teachers remain employed, that is, in a contract of service with the Director General, until they can be formally allocated to a position, whether that position be vacant due to the incumbent, for example, acting up, taking leave or being on secondment. Alternatively, there may be a vacant position into which they can be transferred at level.

235 In this case, the Commission was asked to order the Director General to re-employ Mr Buttery in his former position. However, the Commission is not bound to the limits of the remedy sought (s 26(2) of the IR Act). In this case, the SSTU made clear that while it sought re-employment in Mr Buttery's former position at Greenfields Primary School, another position in the area would be acceptable.

236 In the circumstances, then, what was sought was the re-establishment of the employment relationship. It might mean that Mr Buttery would be supernumerary until he could be placed in a particular position. The re-employment, that is, the re-establishment of the employment relationship, would be a step prior to the filling of a vacancy, or the other steps dealt with in the Standard. The Standard would come into play after the re-establishment of the employment relationship, if Mr Buttery is to be placed in a vacant position.

237 In this way, the learned Senior Commissioner did not err. The matter excluded by s 23(2a) relates to procedures prescribed for the filling of a vacancy. It is to be distinguished from the creation or re-establishment of the employment relationship. The filling of the vacancy is the next step. It is the next step which is the matter excluded due to the prescribed procedure.

238 Therefore, where the ground of appeal alleges error in two ways, firstly regarding the Commission's jurisdiction being excluded by s 23(2a) and secondly, that the Director General could not accede to a request to re-employ because of the Standard, I would dismiss this ground.

Further Ground 1 issues

1. 'Conflating' issues

239 The Director General argued that in the way the learned Senior Commissioner described the matter in dispute, in [40], he erred by conflating the issues. (For convenience, I have set that paragraph out at [195] above.) This was the characterisation of the industrial matter as 'concerning the fairness of Mr Buttery's removal as a teacher from his school and the refusal of the respondent to re-employ him'. He went on to describe the circumstances of Mr Buttery's removal and the claim for re-employment as being 'inextricably linked'.

240 I respectfully agree with the Senior Commissioner that the circumstances of the removal and the claim for re-employment are inextricably linked, both arising from the incident on 31 August 2016. Without the first, the second does not require consideration and, in any event, would be irrelevant.

241 However, merely because the Senior Commissioner described the claim before him at that point as concerning the fairness of the removal and the refusal to re-employ does not conflate them. They are two separate issues and while inextricably linked, can be and were dealt with separately. The first issue, of the fairness of Mr Buttery's removal, is not a matter for which there can be a remedy due to the provisions of s 41(3) of the WWC Act and the learned Senior Commissioner concluded accordingly.

242 However, the Director General went on to do something else – she refused to re-employ Mr Buttery and did so a number of times and for different reasons. The issue of those reasons and whether there can or should be a remedy relating to those different reasons is a separate matter from the dismissal itself.

243 As the Senior Commissioner found, and in my respectful view, correctly, the reason for the dismissal was to comply with the WWC Act. The reason why the Director General undertook an investigation after all of the impediments to Mr Buttery's reinstatement were otherwise removed was, in spite of what Mr Belshaw said, to decide whether it wanted to re-employ him. I think it is fair to draw the inference, and I do, that the investigation would not have been undertaken but for the fact that the SSTU was persisting in seeking Mr Buttery's re-employment. The timing of the recommencement of the investigation confirms this. The reason for the refusal, as set out by Mr Milward in his affidavit (Exhibit A6), was because the Director General concluded that Mr Buttery was not suitable to be employed as a teacher.

2. Necessity for a vacancy

244 Another point raised in this ground is that the Director General says that there cannot be a refusal to employ without there being a vacant position and referred to the decision of the Federal Court in *Stephens v Australian Postal Corporation* ([2014] FCA 732) as authority for that proposition. This case involved the application of s 342(1) of the *Fair Work Act 2009* (Cth) which defines 'adverse action'. In item 2 of that definition, 'adverse action' is that action taken by a prospective employer against a prospective employee if the prospective employer refuses to employ the

prospective employee. Flick J cited observations made by Moore J in ***Fraser v Fletcher Construction Australia Ltd*** (1996) 70 IR 117 at [119]:

> It is necessary to consider the phrase 'refuse to employ' in context. Its immediate context is 'one in which two aspects of an employer's conduct are identified in the prefatory words in s 334(2). The expression 'refuse to employ' identifies the first. The remainder of the prefatory words identify the second. They concern conduct where an offer is made to employ a person on discriminatory terms… It concerns actual and not theoretical employment. That is, employment by an employer to perform work for the employer albeit on discriminatory terms or conditions. Thus the companion words to the expression 'refuse to employ' concerns actual employment and they constitute a fairly compelling pointer of the subject matter Parliament intended to address in s 334(2). They indicate that the expression 'refuse to employ' deals with the same subject matter, that is, actual employment where there is a refusal to employ a person in circumstances where, apart from the refusal, employment might or would arise. I refer to situations where employment might arise to allow for circumstances where a vacant position exists and a refusal to employ arises before the employer has ascertained whether the person applying for the job or position, who is victimised for a proscribed reason, is qualified or equipped to do the job.

245 Flick J went on to quote from Wilcox J in ***Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd*** [2000] FCA 1008 where his Honour observed:

> A refusal to employ somebody involves discrimination or victimisation only if there was, at the relevant time, a vacancy or prospective vacancy [50].

246 Other examples of refusal to employ were cited by Flick J such as '(w)here there is in fact a vacant position and where another person is appointed in preference to the claimant: e.g., ***Maritime Union of Australia v Burnie Port Corporation Pty Ltd*** [2000] FCA 1189, (2000) 101 IR 435'.

247 His Honour also examined cases where '(s)uch statements have not gone unchallenged' and he referred to ***Australasian Meat Industry Employees' Union v Belandra Pty Ltd*** [2003] FCA 910, (2003) 126 IR 165, where North J held that there were two available constructions, one of which was if there was no vacancy. He said:

> (I)t can be said that there is no refusal to do something if that result cannot be achieved. A person cannot refuse to do that which cannot be done. If there is no vacancy, then there can be no refusal to employ… Alternatively, it can be said that even if the outcome is not available, the decision not to provide it is nonetheless a refusal to provide an outcome. That is, whether the outcome can be achieved should be considered separately from whether there was a decision not to achieve the outcome. Thus, there can still be a refusal to employ even if there is found to be no available vacancy (the latter construction) [49].

248 North J preferred the latter construction. However, his Honour went on to note:

> … In this case there was a refusal to employ the Belandra employees when Belandra said, in September 2001, that it would not offer re-employment to the Belandra employees. The question whether there were any vacancies to be filled by the Belandra employees, then, is a matter which the respondent can raise in relation to the existence of a proscribed reason for the refusal, with a view to rebutting the presumption that the refusal was for a proscribed reason. However, if it is shown that Belandra contrived to have no vacancies through its decision not to employ, this argument might not succeed….[67].

249 Flick J observed that what North J's comments 'make self-evident is that much depends upon the facts and circumstances to which the statutory language is sought to be applied'. His Honour went on to note a number of circumstances where there might be a contrivance resulting in there being no available vacant position to which one or other of the employees could have been appointed.

250 His Honour noted, in the paragraph [30] referred to by the Director General in these proceedings, that:

> First, if the reasoning of Moore J in ***Fraser***, supra, and that of Wilcox J in ***BHP Steel***, supra, be accepted without reservation, the fact is that as at 22 December 2011 there was no vacant position which Mr Stephens could have filled. On their Honours' approach, there has been no 'refusal to employ' for the purposes of Item 2 of s 324(1) of the *Fair Work Act.*

251 What the decision of Flick J in ***Stephens*** and North J in ***Australasian Meat Industry Employees Union*** make clear is that the facts of the case are most important. I also note that those decisions deal with the phrase 'refuse to employ' in a particular statutory context of the *Fair Work Act*, for a demonstration of adverse action being taken against an employee. That is not the context in the case before the Full Bench.

252 What can be taken from ***Stephens***, however, is that a contrivance on the part of the employer for there to be no vacancy is not sufficient to justify a conclusion that there was no refusal to employ because there was no vacancy.

253 Further, while the Director General argues that there was a requirement for a vacancy, Ms Barnard's evidence clearly suggests that the requirement for there to be a vacancy may be the sort of contrivance referred to by North J in ***Australasian Meat Industry Union***.

254 The Director General is an employer of a very large number of teachers in a very significant number of schools. The Department facilitates the movement of teachers from one position to another, from one school to another and from one district to another where circumstances require it. Any argument that the position that Mr Buttery had held had been filled was overcome by the fact that there were about to be positions available in the area. New schools were about to open. The fact that Mr Buttery, through the SSTU, sought re-employment in the position he had held before does not mean that the Commission is limited to or bound by that preference.

255 Therefore, in my view, the first ground of appeal fails.

Grounds 2 and 5

256 In ground 2 the appellant says that the Senior Commissioner made an error of law in failing to find that the letter dated 20 June 2017 was wholly covered by without prejudice privilege and could not be relied upon by the respondent as evidencing a request for employment.

257 In ground 5, the appellant puts an alternative to Ground 2. It says that if the letter was not wholly covered by without prejudice privilege, the Senior Commissioner erred by failing to consider a relevant consideration, namely that the letter was not a bare request for employment; it contained a number of conditions; and the Senior Commissioner failed to consider whether it was unfair for the appellant to have refused to accede to those conditions.

258 The Senior Commissioner concluded that 'the first part of the letter may properly be regarded as a further request by the applicant for the respondent to re-employ or reinstate Mr Buttery' and that the Director General not only refused the further request but also informed the SSTU that a disciplinary investigation would be conducted.

259 He noted that the conciliation process had commenced and said:

> It has long been the view that matters discussed in and arising from a s 44 conference may not be later relied upon by parties once the conference has concluded. To do so would discourage the exchange of views to which I have referred and would be contrary to the objects of the Act in s 6, to promote and encourage the settlement of disputes through conciliation. Accordingly, I do not propose to have regard to what was put by the applicant in the conciliation conference of 14 July 2017. Despite this however, there can be no doubt that as practical matter, the parties were and remained in dispute as to the circumstances of the termination of Mr Buttery's employment and the applicant's claim that he be once again employed by the respondent. That is what these proceedings have been about from their inception [128].

Consideration and conclusion regarding Ground 2

260 The without prejudice letter was dated 20 June 2017 and was headed 'Re: Mr Justin Buttery – C 10 of 2017'. The number C10 of 2017 is the number of the application made by the SSTU pursuant to s 44 of the IR Act. By 10 June 2017, the Commission had convened conferences to deal with the application by conciliation. By that time, the First Interim Orders application had been made and dealt with. The parties continued to communicate, both in conference before the Commission and in writing.

261 The first sentence of the letter says 'I refer to all previous correspondence with you in regards to Mr Buttery and the abovementioned application currently before the WA Industrial Relations Commission'. It proceeded to set out some of the background in relation to a letter to Mr Buttery dated 3 November 2016 in which he was directed to leave the school premises, pursuant to s 240 of the *School Education Act 1999*; it referred to the criminal charge and that it had been withdrawn. It said that in those circumstances, Mr Buttery was able to be employed as a teacher and '(i)n formalising the present request on behalf of Mr Buttery, the union hereby requests the reinstatement or re-employment of Mr Buttery by the Department at your earliest convenience, as it is just and fair to do so'.

262 What followed is a heading of 'C 10 of 2017 – WITHOUT PREJUDICE – OFFER TO SETTLE'.

263 Two things lead me to the conclusion that the whole of the document is to be read as a without prejudice communication and therefore, was inadmissible. The first is that the whole of the letter dealt with the negotiations between the parties to resolve the dispute that was referred to the Commission as application C 10 of 2017. All communications between the parties aimed at settlement of such a dispute may attract without prejudice privilege even if they are not expressed in that way by a letter containing a heading to claim the privilege (*Rodgers v Rodgers* (1964) 114 CLR 608 at (614)).

264 Secondly, the first part of the letter, above the 'without prejudice' heading, relates directly and explicitly to the dispute the subject of the s 44 application and the last paragraph of the first part may be seen as an introduction to the without prejudice offer that follows.

265 Therefore, ground 2 is made out. However, it does not warrant the overturning of the decision. This is because the Director General responded to the letter rejecting the proposal for re-employment it contained. That a without prejudice offer to settle was made, and the terms of that offer, do not alter the fact that throughout the time from Mr Buttery's dismissal until the determination of the substantive matter, the Director General refused to re-employ Mr Buttery. The refusals were for a variety of reasons.

266 It is also clear that, whatever else was contained in the letter, and whatever was said in the conciliation conferences, the parties were in dispute because the SSTU wanted the Director General to re-employ Mr Buttery and the Director General was refusing to do so. There appears to be no argument that the conditions put in the without prejudice part of the letter were unacceptable to the Director General. The email of 7 August 2017 and Mr Milward's affidavit of the same date make clear that the Director General was refusing to re-employ Mr Buttery. This was not because of the conditions attached to the request in the without prejudice communication. It was because Mr Buttery was considered not suitable to return to teaching because of the Director General's conclusion about what happened in the incident. Mr Milward's recommendation was reflected in the Director General's response to that letter.

267 Mr Milward's affidavit demonstrates that at this point, before the investigation had been completed, he had formed the view that Mr Buttery should not be re-employed and was not suitable for employment in his former role. This was 'because of the evidence of his unnecessary and inappropriate physical contact with a Year four student'. This was in August 2017 before Mr Buttery had been provided with an opportunity to comment.

268 I also note that, according to Mr Milward's affidavit, Mr Buttery's former position had been filled by way of a 12-month fixed term contract as at 2 February 2017. This would mean that by 2 February 2018, Mr Buttery's former position would be vacant.

269 All of this makes very clear that the Director General had no intention of re-employing or reinstating Mr Buttery. The Director General had formed a view that he had misconducted himself and that view was formed even before the conclusion of the investigation and before Mr Buttery had an opportunity to respond. The decision not to re-employ did not relate to the terms of the without prejudice letter.

270 Therefore, while I would uphold this ground, it does not affect the outcome.

Consideration and conclusions regarding Ground 5

271 This ground is overtaken by the fact that Mr Milward's affidavit makes very clear that the Director General was not going to re-employ Mr Buttery on the basis that he was not suitable for employment as a teacher. This was regardless of whether there were or were not conditions placed on any proposal for settlement. Mr Milward prepared a briefing note to the Director General, which contained a recommendation. That recommendation was that Mr Buttery not be re-employed. The Director General adopted the recommendation and, in response to the letter of 20 June 2017, said she would not be reinstating his employment or salary.

272 There was no evidence before the Senior Commissioner that the conditions attached to the without prejudice letter were given any consideration by the Director General or were the reason for the refusal to employ. Therefore, there was no requirement for the issue to be considered.

273 I would dismiss this ground.

274 **Ground 3**.

275 In ground 3, the appellant contends that the Senior Commissioner made an error of law in finding that s 41(3) of the WWC Act did not preclude Mr Buttery obtaining relief in the proceedings.

276 The Director General says that the learned Senior Commissioner erred in finding that s 41(3) of the WWC Act did not preclude Mr Buttery from obtaining relief in the proceedings. The point the Director General relies upon is that the employer cannot incur any liability because in complying with the provisions of the WWC Act, the employer does not start or continue to employ the person. It is said that this protects the Director General against a remedy by the person.

Consideration and conclusion regarding Ground 3

277 Section 41 of the WWC Act provides:

> Employer to comply with Act despite other laws etc.
>
> (1) If it would be a contravention of a provision of this Act for a person (the ***employer***) to employ another person in child-related employment, the employer is to comply with the provision despite another Act or law or any industrial award, order or agreement.
>
> (2) The employer does not commit an offence or incur any liability because, in complying with the provision, the employer does not start or continue to employ the person in child-related employment.
>
> (3) Nothing in this section operates to affect a person's right to seek or obtain a remedy under the *Industrial Relations Act 1979* unless –
>
> (a) the remedy is for the dismissal of the person by the employer; and
>
> (b) the reason the employer dismissed the person was to comply with this Act; and
>
> (c) the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

278 This provides that no remedy is available if all three conditions are met. Those conditions relate to a remedy for the dismissal.

279 The Memorandum of matters referred for hearing and determination sets out the SSTU's contentions. The first was that the termination of Mr Buttery's employment on 11 November 2016 was unnecessary and unfair. The SSTU relied on the decision of the Industrial Appeal Court in ***Charles Brett v Sharyn O'Neill, Director General, Department of Education*** [2015] WASCA 66; (2015) 95 WAIG 429 at [40]. In that matter, the Court noted that a person with an INN must not be 'employed' in child-related employment. The purpose of s 23 is said to be to prevent a person holding a current INN from carrying out child-related work by prohibiting people who have been charged with or convicted of relevant offences from carrying out child-related work whilst in an employment-like relationship. The Court noted that the WWC Act is not concerned with regulating a contract of employment:

> … or requiring contracts of employment to be terminated. If an employer suspends an employee from carrying out child-related work, or all work, or orders the employee to stay away from the premises on which child-related work is carried out then the employer would not be contravening WWC Act s 22(3) notwithstanding that the contract of employment continued to subsist. The terms 'employ' in s 22(3) and 'employed' in s 23(a) relate to the work performed or to be performed by the person in question, as distinct from the contractual or other relationship between the person and the employer. [40]

280 In this way, the SSTU said that dismissal was not required.

281 The learned Senior Commissioner found that the reason Mr Buttery was dismissed was the issuance to him of the INN and that therefore, subjectively viewed, the operative reason for Mr Buttery's dismissal was for the employer to comply with s 22 of the WWC Act. In those circumstances, s 41(3)(b) would appear to be satisfied. The learned Senior Commissioner found at [50] that s '41(2) affords an employer protection from any liability where the employer dismisses an employee to comply with s 22 of the WWC Act'.

282 The Senior Commissioner said at [56]:

> The applicant in this case argued that it does not seek to alter or modify the respondent's decision to dismiss Mr Buttery. Rather, the claim of the applicant is one relating to the unfair refusal of the respondent to employ Mr Buttery after the WWC Act prohibition on him had been revoked and his working with children authority and teacher registration returned. I agree with this. Given the remedy claimed, I do not consider s 41(3)(a) is satisfied in this case.

283 He went on to note in [58] that:

> (T)he respondent's refusal to employ Mr Buttery was not to comply with the WWC Act. It refused to employ him because, even some time after any prohibition on his employment in child-related work no longer applied, it considered his prior conduct made him unsuitable to be employed as a primary school teacher…'.

284 An employee may seek re-employment at any stage. The question is the fairness or otherwise of the refusal to re-employ. That requires separate consideration from the dismissal, unless, of course, the reason for the refusal to employ is the same as the reason for dismissal. Therefore, in my view, any consideration of re-employment on the basis of the fairness or otherwise of the refusal of the request to employ can be distinguished from the issue of whether the dismissal itself was unnecessary or unfair given that the reason for dismissal was to comply with the WWC Act.

285 The learned Senior Commissioner appears to have considered whether the dismissal itself was unfair. In [161], he said that 'I am not persuaded that Mr Buttery committed an act of misconduct that would warrant the summary termination of his employment, the placing and retention of a red flag on his employment record and the ongoing refusal of the respondent to employ him'. Read apart from the overall context of the claim, the first part, the conclusion regarding the justification for the dismissal, may appear to be in error. However, that phrase, read in the context of the sequence of events that he was describing, and of the issue which was being considered, of a refusal to employ, must be seen as also answering the question of whether the conduct was justification for the ongoing refusal to employ.

286 In my respectful view, it was quite valid for the Senior Commissioner to examine the circumstances and determine whether those circumstances acted as a proper basis for the Director General to refuse to re-employ.

287 Mr Milward's affidavit and the evidence before the Senior Commissioner make it clear that the Director General treated Mr Buttery unfairly in that the decision to refuse to re-employ was made on the basis of what was alleged in the incident with S and that this meant that he was not suitable for re-employment. What the Senior Commissioner found was that the investigation which resulted in the findings about his conduct was deeply flawed. The incident, and later the findings, were used to support the decision not to re-employ.

288 Section 44(3)(a) of the WWC Act prevents a remedy when the remedy sought is for the dismissal. The remedy sought was, in part, for the dismissal and in that case, s 44(3)(a) prevents that remedy. However, the claim also included a claim for re-employment on the basis of an unfair refusal to re-employ. While the matter referred for hearing and determination contended, amongst other things, that 'the termination … was unnecessary and unfair', the matter proceeded on the basis of the refusals to employ and their fairness. That last issue was the issue the Commission determined.

289 I would dismiss this ground.

290 **Ground 4**.

291 In this ground, the appellant says that in finding that the appellant unfairly refused to employ Mr Buttery, the Senior Commissioner erred by failing to consider relevant considerations. These are:

(a) Mr Buttery only sought to be employed in the position he previously held at Greenfields Primary School, and did not seek employment with the appellant in any other position;

(b) the position in which Mr Buttery was previously employed at Greenfields Primary School was filled on a permanent basis on 30 January 2017;

(c) none of Mr Buttery's "requests" for employment were made through the usual process of applying for an advertised position; and

(d) whether it would be unfair to other applicants for teaching positions with the appellant if the appellant was to appoint Mr Buttery to a teaching position without him applying through the usual process which all other applicants for teaching positions with the appellant are required to do.

Consideration and conclusions regarding Ground 4

292 As I have already noted, the Commission is not bound to the remedy sought by a party (s 26(2) of the IR Act). Secondly, it became very clear that the SSTU did not limit the remedy to the position previously held by Mr Buttery.

293 As to the first matter that the learned Senior Commissioner is said to have failed to consider, it was quite clear with respect to the Director General, that whether Mr Buttery was willing to be

re-employed and posted to another school, she had no intention of re-employing him. At no time did the Director General indicate that she was prepared to enter into discussions with the SSTU with a view to an alternative position being found for him. Further, if the position that he had previously held had been filled on a 12-month basis then by 3 February 2018, the position would have come vacant.

294 The third basis upon which the Director General says the Senior Commissioner failed to consider relevant considerations is that none of Mr Buttery's 'requests' for employment were made by his applying for an advertised position. The second part of this is that it would be unfair to other applicants for teaching positions with the appellant if the Director General were to appoint Mr Buttery to a teaching position without him applying through the usual process. These two aspects, in my view, once again rely on form over substance. As I noted in respect of the Standard, the evidence of Ms Barnard makes quite clear that the Director General could have found an opportunity for Mr Buttery to be employed and undertake meaningful work until he could apply for a position. Had Mr Buttery formally applied for a particular position, he could not have succeeded due to his red-flagging.

295 Further, the Director General could have appointed Mr Buttery to a vacancy in compliance with s 4.1(g) of CI 2.

296 I would dismiss this ground.

297 **Ground 6**.

298 The appellant says that the Senior Commissioner erred by having regard to irrelevant considerations, namely:

(a) that the appellant's refusal to employ Mr Buttery "end[ed] his career as a primary teacher in government schools": [168], and

(b) that the conduct of Mr Buttery did not warrant summary termination of his employment: [161].

299 The Director General notes that Mr Buttery had no prima facie right to be re-employed and that the Director General's views concerning Mr Buttery's suitability for employment were valid. It is said that the Full Bench accepted this in ***The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd*** [2005] 85 WAIG 1924; (2005) WAIRC 01797 at [251] – [252]. In that matter, Sharkey P noted:

> The Commissioner at first instance found that it was not logical to approach the matter on the basis that, because he was an experienced and competent driver and therefore an experienced driver he ought to be employed…
>
> I agree that there is some flaw in that reasoning. There are, of course, many reasons why a 'contractor' may fairly not be offered employed which may not have anything to do with his competence or incompetence.

300 The Director General goes on to say that during the time after the lifting of the INN, the Director General remained concerned about restoration of Mr Buttery's registration and discontinuance of the assault charges, as to his suitability to be employed as a teacher.

301 The Director General also refers to the decision of the New Zealand Court of Appeal in ***Balfour v Attorney-General*** [1991] 1 NZLR 519 where Hardie Boys J observed:

> The second point is one that must not be lost sight of, and it is the great care that educational authorities must exercise when made aware of an allegation, even a rumour, of this kind. Their prime duty must be the protection of the children, if possible to prevent problems rather than await their occurrence. They also have a duty to their employees, to act justly and with discretion. The duties may conflict, and to maintain a balance between them can be a delicate matter. There can be no criticism of action taken in the interests of the children, even if there is no more than suspicion, provided the action is appropriately restrained and rational, and the ultimate need for a balanced judgment on the validity of the suspicion is not lost sight of. It is clear that in the present case it was lost sight of.

302 At (528), his Honour went on to observe that an employer is free to form its own judgments about employees or prospective employees and record them for possible future reference. He said that the law must recognise 'the balance to be preserved between a teacher's rights and the Department's wider responsibilities. Particularly in the case of moral suitability clear proof may be difficult to obtain. Yet to ignore possible warning signs may be irresponsible.' The Director General says that the Senior Commissioner gave no consideration to the Director General's duties in deciding it was unfair to refuse Mr Buttery employment.

303 The Director General says that the hearing at first instance in large part took the form of a hearing de novo concerning the allegation, the subject of the disciplinary proceedings. The Director General says in her submissions that '(i)t cannot be reasonably contended that material upon which a prospective employer relies to decide whether to employ or not should be subjected to that degree of scrutiny. The appellant was entitled to rely upon the evidence then available to decide whether to employ Mr Buttery or not.'

304 The Director General says that the evidentiary test is not that which is applied in a de novo hearing to determine whether the misconduct relied upon did occur in relation to dismissal but whether at the time the employment was refused the Director General could still reasonably suspect Mr Buttery was unsuitable for employment as a teacher. This is to be considered in the circumstances that prevailed at the time the refusal decision was made having regard to the duties of the Director General and the nature of Mr Buttery's employment.

Consideration and conclusions regarding Ground 6

305 As to the first issue, I am of the view that the characterisation of the Senior Commissioner's considerations, said to be irrelevant, in the way they are by the Director General, takes them out of the context of the dispute.

306 Firstly, Mr Buttery was not a person, unknown to the Director General, with no prior relationship with the Director General, who was simply demanding to be employed. He was a former employee whose employment had come to an end in circumstances where he had been issued with an INN because of his alleged conduct towards a student. Secondly, the issue of refusal to employ was squarely in dispute. Thirdly, the final reason for the refusal to employ was his unsuitability to be employed as a teacher given his alleged conduct, the conduct said to have justified the INN. Given these circumstances, it was necessary for the Commission to examine the conduct to determine if it justified the Director General's reason for the refusal. It required a hearing de novo. The Director General chose to conduct her case at first instance without

dealing with the conduct itself. As the Senior Commissioner noted, it was a deliberate decision, and it was a strategic one. However, the conduct and the investigation were issues clearly within the matter referred for hearing and determination.

307 The learned Senior Commissioner approached the matter as a hearing de novo by undertaking a review of the employer's actions and decision-making process. He did so for the purpose of determining whether the decision was an unfair exercise of the employer's contractual, and in this case statutory, right to refuse to employ to determine if it was necessary to intervene in that decision. This approach is in conformity with the approach set out in ***Tip Top Bakeries v Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch*** (1994) 74 WAIG 1729 per Sharkey P. To do so, it was necessary to examine all of the material before the decision-maker. The Memorandum of matters referred for hearing and determination set out the very broad scope of the issues in contention. They included an examination of what occurred in the classroom during the incident.

308 As to the question of whether Mr Buttery's career as a primary school teacher was ended by the refusal to employ, the Director General is the largest employer of teachers in Western Australia. She is the employer in all government schools. If the Director General refuses to employ a teacher, one with a number of years of service in government schools, then unless something significant changes, a teacher's career as a primary teacher in government schools is at an end. This was a consideration relevant to the fairness in the refusal to employ.

309 The refusal to employ, which the Senior Commissioner found to be unfair, was unfair because of the flawed investigation which resulted in erroneous conclusions about Mr Buttery's conduct. Even before the investigation was concluded, the Department had made a decision about that conduct.

310 In respect of the comments made in ***Balfour***, I note that this case arose almost 30 years ago and related to rumours about the teacher's morality. Where the judgment deals with the balance between the teacher's rights and the Department's wider responsibilities, it is clear that the present case is distinguishable. Firstly, this matter involves a conclusion by the employer about a particular incident which it investigated. But for the erroneous conclusion, Mr Buttery ought to have been considered to be a teacher in good standing. It was not a matter of rumour or suspicion about a general unsuitability. In this case, the conclusions about Mr Buttery's conduct which lead to the decision to refuse to employ were demonstrably in error.

311 The Director General must have a reasonable and rational basis for her actions and cannot deflect responsibility for managerial decisions based on the content of an investigation report that the Director General has produced, particularly when the reliability and findings of that report were squarely placed in issue in the Memorandum of matters referred for hearing. Given the scope of that dispute, it was entirely appropriate for the Commission to carry out an objective assessment regarding Mr Buttery's conduct in circumstances where the SSTU was seeking orders that he be returned to child-related work.

312 I would dismiss this ground.

313 **Ground 7**.

314 In finding that the appellant unfairly refused to employ Mr Buttery, the Senior Commissioner is said to have failed to properly exercise his discretion by making a decision which was manifestly unreasonable. This is said to be in a range of circumstances relating to Mr Buttery having no legal right to be employed; that the position for which Mr Buttery requested employment was not vacant, and the appellant would have had to transfer the person employed in that position to another position; that Mr Buttery did not apply for, or request to be placed in, any other position with the appellant; that Mr Buttery did not apply for a position through the usual process and there was no legal obligation for the appellant to comply with the conditions contained in the without prejudice letter.

Conclusions and consideration regarding Ground 7

315 With respect to the Director General, the bases for this ground of appeal are generally reformulations of other grounds of appeal. The following comments are made in the context of my earlier comments where those issues have arisen in other grounds of appeal.

316 In my view, this matter was never about the Director General's formal processes and Mr Buttery's compliance with them in terms of re-employment. It is about whether the Director General's decision in refusing to re-employ Mr Buttery was unfair.

317 It is true that Mr Buttery had no legal right to be employed. However, the issue before the Commission at first instance was not about a legal right, it was a question of fairness in the refusal to employ. Merely because he had no legal right does not mean that as a matter of fairness, the Director General ought to have refused to re-employ him given all of the circumstances. The Commission's role was not to determine existing legal rights but to deal with fairness (s 26(1) IR Act).

318 In respect of the position for which Mr Buttery requested re-employment not being vacant, the Director General again asserts that this would have required the transfer of a person who was in the position he had vacated. I have dealt with these matters earlier regarding other appeal grounds. In any event, Mr Buttery did not need to apply for or request to be placed in any other position with the Director General. He made very clear his request for re-employment. There is no evidence that it was suggested that the Director General might re-employ him in any position.

319 The question of fairness in this process has always been a primary consideration. The Director General's reliance on this issue demonstrates a reliance on form rather than substance.

320 The same applies in respect of the particular that Mr Buttery did not apply for a position through the usual process. Ms Barnard's evidence makes clear that that was not necessary. Even if he did apply through the usual process, his employment record was red-flagged.

321 The letter contained a package of conditions including backpay which the Director General said she had no legal obligation to meet. However, as noted earlier, the evidence is clear that the Director General's reason for refusal was not about the conditions attached to the proposal. It was about the Director General's view of Mr Buttery's conduct, set out in Mr Milward's affidavit.

322 This ground ought to be dismissed.

Ground 8.

323 The appellant contends that the learned Senior Commissioner erred in law in ordering that the appellant pay Mr Buttery an amount reflecting salary and benefits that he would have earned from 2 October 2017 until the date of any acceptance of an offer of employment, when there is no power for the Commission to make such an order.

Particulars

(a) *Mr Buttery had no legal right to be employed on 2 October 2017, nor did the appellant have a legal obligation to employ him.*

(b) *The order requiring the appellant to pay Mr Buttery an amount reflecting salary and benefits that he would have earned from 2 October 2017 until the date of acceptance of any employment contract was an order for compensation.*

(c) *The remedial powers of the Commission are limited to making orders to "deal with" an industrial dispute which is before it, which requires that orders made by the Commission be "sufficiently related" to the jurisdictional fact giving rise to the Commission's jurisdiction.*

(d) *The Commission can also make orders for "incidental matters" as the Commission considers "just and equitable", however, such incidental orders must still be made to "deal with" the industrial dispute, and be "sufficiently related" to the jurisdictional fact giving rise to the industrial dispute.*

(e) *The jurisdictional fact giving rise to the industrial dispute was a refusal to employ Mr Buttery.*

(f) *The only order that could be made to "deal with" that industrial dispute was to "reverse" any refusal and order the appellant employ Mr Buttery.*

(g) *An order for substantial compensation not connected to any legal right cannot be characterised as an order to "deal with" a refusal to employ, nor can it be characterised as an incidental order.*

324 One element of this ground, while not explicit in the Particulars, is that if the Commission were to order compensation in the nature of a retrospective order, then the Senior Commissioner was required to consider whether there were special circumstances which make it fair and right to do so.

325 As noted earlier, the Memorandum of matters referred for hearing and determination (the Memorandum), drawn up at the conclusion of the conciliation, subject to s 44(9) of the IR Act, in this matter is lengthy. It set out the applicant's contentions including the history of the matter. It speaks of Mr Buttery's dismissal on 11 November 2016, the SSTU's requests for the Director General to reinstate or re-employ him and says that the dismissal was unfair. The orders sought were:

1. that the respondent reinstate or re-employ Mr Buttery on terms and conditions that are no less favourable than his previous position; and

2. that the respondent pay Mr Buttery the amount that reflects the income (including superannuation) he would have earned for the period from 21 February 2017 to date.

3. If Mr Buttery was found to have engaged in misconduct sufficient to justify termination of his employment, the respondent pay Mr Buttery an amount that reflects the income and superannuation he would have earned from 21 February 2017 to 2 October 2017.

326 In its response, set out in the Memorandum, the respondent said that '(t)he matter before the Commission properly relates to a refusal to employ', and that the issues for determination were:

(a) was there a refusal to employ;
(b) if so, was such a refusal unfair; and
(c) if yes, what relief should be granted.

327 The respondent went on in the Memorandum to contend that 'the Commission has no power to award compensation absent a legal entitlement, in conformity with the decision of the Industrial Appeal Court in ***Pepler***.

328 The appellant's submissions filed on 12 February 2019, covering the 8 grounds of appeal, are relatively brief. The submission dealing with ground 8 contains no reference to the ground of appeal as filed, that is, about the power to make the order. Its focus is the issue of retrospectivity.

329 The respondent's written submissions treat the question raised in this appeal as being answered by the scope of the Memorandum, that is, that it provides the necessary jurisdiction and power.

330 In oral submissions, Mr Andretich for the appellant said "(w)e say that there's no power to make a bare order for compensation and in dealing with the matter that he did, the Senior Commissioner didn't purport to make a retrospective order of the type that could be made under s 44' (ts 20). The submissions then proceeded to deal with the issue of the appropriate test for retrospectivity. However, in submissions in reply, Mr Andretich said:

> Now, I don't know why compensation wasn't an issue. There's been much reference back to the Memorandum of matters, and page 14 of the appeal book, the respondents say is in paragraph 3:
>
> The Commissioner has no power to award compensation, absent a legal entitlement.
>
> So it was something that was raised, and it was something that was argued. You will see it in the reasons for decision, reference to those old cases like ***Pepler***, where it was thought, at one stage, there was no power to award compensation, were raised. So it definitely was – at large, it was not a non-issue, and it shouldn't come as any surprise' (ts 37).

331 In the appellant's (respondent's) Opening Submissions at first instance, filed on 12 June 2018, under the heading Compensation, in [88] – [90], the appellant raised the issue, and did so by reference, once again, to ***Pepler's*** case (at footnote 41).

332 At the hearing at first instance, Mr Carroll for the appellant (respondent) noted that sections of the IR Act have been amended to overcome the issue identified in ***Pepler***, ss 7(1a) and 23A for unfair dismissal claims, but that they do not 'apply to these proceedings' (ts 166).

333 The learned Senior Commissioner considered the Commission's jurisdiction and powers, taking account of the definition of industrial matter, as well as case law. He concluded that 'By s 23(1) of the Act, read with s 44(9), the Commission has ample jurisdiction and power to enquire into and deal with the industrial matters so referred for determination' [32].

Consideration of Ground 8

334 The scope of the matters for hearing and determination, and for which an order may be made is to be that which is set out in the Memorandum. It is to be that which was explicitly part of

that matter or was an issue raised by the parties or the Commission. It must be an industrial matter, it must be within the scope of the Memorandum and the orders made must be within the powers of the Commission to make (see ***BHP Billiton Iron Ore Pty Ltd v Transport Workers Union, Industrial Union of Workers, Western Australian Branch*** 2006 WAIRC 04239; (2006) 86 WAIG 1211 at [75] per Ritter A/P with whom Beech CC and Gregor SC generally agreed).

335 In considering this ground, I note the sparse nature of the appellant's submissions, and the lack of any attempt to address the matter in much detail apart from merely identifying a significant jurisdictional issue. However, I think the issue raised is quite clear. It is that there is no power to order compensation in the circumstances of there being no relationship of employer and employee for the period covered by the compensation order. Therefore, it is said, there was no industrial matter to ground in order for compensation. This is said to be analogous to the situation applying in claims of unfair dismissal prior to 1987, and identified in ***Pepler***.

The history of the Commission's jurisdiction and powers relating to unfair dismissal claims

336 In 1987, the IR Act did not contain the current s 7(1a) which explicitly provides that an unfair dismissal or a denied contractual benefits claim are industrial matters even though the employment relationship has ended. Nor did it contain the detailed considerations required by the Commission in providing a remedy for an unfair dismissal, currently contained in s 23A of the IR Act.

337 I set out below, a good deal of significant case law that relates to the Commission's jurisdiction and powers on a claim of unfair dismissal. There is very little case law on point dealing with the remedy of compensation for a refusal to employ. However, the cases from ***Pepler*** onwards and the changes to the IR Act in response, demonstrate the distinction between the Commission's powers in dealing with an unfair dismissal as compared with a refusal to employ.

338 In 1987, the Industrial Appeal Court issued its decision in ***Pepler***. It was a case about the Commission's jurisdiction and powers in dealing with unfair dismissal claims. Kennedy J noted, '(i)t is necessary always to bear in mind that the purpose of the *Industrial Relations Act* is to give the Commission wide powers to affect the common law rights of employers in cases where an industrial matter exists – see per Gibbs CJ in ***Slonim v Fellows*** (1984) 154 CLR 505 at p. 510' (12-13).

339 His Honour set out in considerable detail, the history of unfair dismissal claims and the Commission's (and previously, the Court of Arbitration's) jurisdiction and powers to deal with them. He then noted at page 17 that:

> The Commission exercising jurisdiction conferred by the Industrial Relations Act has the powers expressly or by implication conferred by the legislation. In addition, it has the powers which are incidental and necessary to the exercise of the jurisdiction or the powers so conferred – see ***Parsons v Martin*** (1984) 58 ALR 395 at p. 401.
>
> If it be accepted, as I consider it should, that the Commission has jurisdiction to order an employer to re-employ a recently dismissed employee, does it follow, as the respondent contends, that, if it declines to exercise that jurisdiction, it has the jurisdiction to make an order that the employer compensate the employee, and, in particular, that the employer compensate the employee beyond any amount which the employee could reasonably have recovered at common law. This is not a conclusion which sits easily with section 29(b) of the Act, for it would mean

> that, under paragraph (i) the Commission's jurisdiction to order compensation is at large, whereas, under paragraph (ii) it is strictly limited to allowing an entitlement arising out of the employee's contract of service. The preferable view appears to me to be that the jurisdiction under paragraph (i) is limited to ordering re-employment whilst the remedy under paragraph (ii) is restricted to the employee's contractual rights.
>
> The words of Gibbs CJ in ***Slonim v Fellows*** at p. 510 are apposite here: 'The dispute in the present case concerns whether the (employee) was fairly dismissed, and if not, whether (he) should be reinstated'. In other words, the jurisdiction of the Commission to deal with the recent unfair dismissal of an employee extends to ordering the employer to re-employ him; but it does not extend to making an order for compensation at large, quite unrestricted to the legal entitlement of the employee at the time of his dismissal. If that power exists, it is difficult to set any limits to it. … In my opinion, if the Parliament desires the Commission to have such a power, it should legislate to that effect, as indeed it has already done in the limited context of section 96I.

340 I interpose here, to note that in 1987, s 96I of the IR Act to which Kennedy J referred contained a provision empowering the Industrial Magistrate to transmit a case to the Commission where a person had been convicted of an offence under s 96B or s 96F. The powers of the Commission under s 96I(a) were to order the employer to reinstate the complainant or 'to pay the complainant such sum as the Commission considers adequate as compensation for loss of employment or loss of earnings', or both of those things. That provision has since been deleted.

341 Kennedy J went on at page 17 to observe:

> This conclusion is not one which I have reached without difficulty, and it has been reached in an appreciation of the apparent width of the jurisdiction conferred on the Commission by section 23(1) of the Act to inquire into and 'deal with' any industrial matter [except any matter provided for in paragraph (a)]. It should, however, be observed that the jurisdiction is conferred 'subject to this Act'. Furthermore, to deny the power to order compensation in this case is not to deny the Commission power to deal with the industrial matter. It is simply to deny that its power to do so is unconstrained in any manner. It may deal with a complain (sic) of unfair dismissal in the most appropriate manner, by ordering re-employment in a proper case. If the respondent's argument were correct, it is not difficult to envisage a vast range of powers which would be available to the Commission which it can never have been thought to have been conferred upon it.

342 Olney J in ***Pepler*** also set out the history of unfair dismissal cases and dealt with the Commission's jurisdiction and powers in a claim of refusal to employ. In referring to Burt J's comments in ***Princess Margaret Hospital v Hospital Salaried Officers Association*** (1975) 55 WAIG 543, he noted that:

> … the main argument centred around the question of whether the failure of the employer to employ a person whom it had previously engaged was within the meaning of the Act as it then stood an industrial matter. That issue was decided adversely to the employer and consistent with the decision in ***Kwinana Construction Group***. The appellant also raised a second ground, namely that the Commission was wrong in law and had acted in excess of its jurisdiction in making an order reinstating the contract of employment of the named worker and entitling him to payment from the date upon which the matter was brought to the Commission. In dealing with this aspect of the matter Burt J (as he then was) said that the order should be an order directed to the employer requiring it upon the worker presenting himself for work at a particular place and time to engage and so to employ the worker on the agreed terms and in the agreed location. His

Honour approved the form of order made in ***Kwinana Construction Group*** as amended by the Court of Arbitration. He then went on to say at p. 545:

> I assume that the second limb of the order is designed to create in the worker a right to wages as from 6 September. If this is so, then again I would have thought it better to make an order for a money sum as was done in the Kwinana case. The amount ordered to be paid may well be less than the total amount which the worker would have earned had he been employed pursuant to the agreement. It may be that in the meantime he has found employment elsewhere – cf. the measure of damages had the worker sued for breach of the contract.

It would seem with respect that the comments last quoted may well have been misconstrued in subsequent cases by the Commission. It is true that in ***Kwinana Construction Group*** the order was for the payment of a money sum but it was 'a sum of money equal to the amount of wages (the reinstated employee) would normally have received had his employment continued for (the period of non employment)'. And one can understand why the order was framed in that way. It would have been inappropriate to order that the reinstated employee be paid his 'wages' or his 'ordinary wages' during the relevant period as there is no question that during that time he was not employed and therefore was not entitled to wages. In ***Kwinana Construction Group*** Jackson J expressed the opinion that 'the Court has power to make an order for reinstatement and such other incidental matters, including payment of wages from the time of dismissal, as the Court considers just and equitable' but when it came to frame the order more precise draftsmanship was called for and hence the form of words that was adopted. In ***Princess Margaret Hospital*** all that Burt J was saying in the passage last quoted was that if in the period of non employment the employee had found employment elsewhere any earnings so derived ought to be brought into account. In so doing he referred to the practice adopted in actions for wrongful dismissal in which the measure of damages takes into account any post dismissal earnings of the employee. His Honour's comments cannot be interpreted as authority for the proposition advanced by Commissioner Collier in ***Cliffs West Australian Mining Co Pty Ltd v The Association of Architects Engineers Surveyors and Draftsmen*** 58 WAIG 1067 at p. 1070:

> This Commission is charged with the responsibility of acting according to equity, good conscience and the substantial merits of the case when exercising its jurisdiction under the Act. In my view it would be an inequitable decision and one devoid of good conscience if the Commission found that the termination of a worker's service was harsh and unjust yet took no action to reinstate the worker or provide some alternative remedy. Where the employer has been found to have acted harshly or unjustly in a termination he should not be able to maintain his decision simply on the assertion of irretrievable breakdown of relationship unless he is prepared to fairly compensate the worker for the loss of his job. What the compensation should be would depend on the circumstances of the individual case but the nature and salary of the position together with the likelihood of gaining similar employment elsewhere, housing and related matters, disruption to family life are factors which come readily to mind.

And nowhere in the Act can there be found any authority for such a proposition. It is trite but perhaps ought to be repeated that the statutory requirements of section 26(1) directing the Commission in the exercise of its jurisdiction under the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms is a direction as to the manner in which it must exercise its jurisdiction. That section does not confer a general jurisdiction to do whatever is thought to be in accordance with equity, good conscience and the substantial merits of a particular case. There must first be a foundation in the Act itself for the exercise of the jurisdiction before section 26 operates.

> There is another aspect of the reasoning and of the order made in **Kwinana Construction Group** which deserves scrutiny. It is clear that Jackson J took the view that the power of the Court to order payment of wages from the time of dismissal was a power incidental to the power to make an order for reinstatement. The order originally made by the Conciliation Commissioner that was subject to appeal provided for the reinstatement of the named employees in their previous employment and for the payment to them of the money equivalent of the wages they would normally have received had the employment not been terminated. [See (1954) 34 WAIG 60.] Upon appeal the Court of Arbitration amended the Conciliation Commissioner's order so as to make it apply only to such of the named persons who presented themselves for duty and the order for payment of the equivalent of wages was in favour of 'each of such persons so reinstated'. It is patent that the Court of Arbitration deliberately restricted *the entitlement to the payment of money to persons who were in fact reinstated as a result of the order. To restrict the entitlement in this way was consistent with the President's view that the power to order payment was incidental to the power to order reinstatement and was not a separate head of power.*
>
> …
>
> *In my opinion there is nothing in the Act to justify the exercise of a jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement or re-employment* (19 - 20). (Emphasis added)

343 After commenting that he saw no reason to revisit the issue of the Commission's power to order reinstatement of a dismissed worker as being within an industrial matter, at page 22-23, Rowland J observed:

> … On the other hand, I can see no charter to extend the power of the Commission to make an order directing a former employer to make payments to an ex-employee where no order for re-employment is made simply because it may be thought to follow from the reasoning in such earlier decisions that it arises from an industrial dispute between other parties.
>
> If it be accepted, and as stated for the purpose of this exercise I do accept it, that the Commission has power to direct the former employer to re-employ the ex-employee, then there is clear jurisdiction for the Commissioner to embark upon the enquiry he first embarked upon in this case. *There is, however, no express power in the Act to award 'compensation' in this type of circumstance. And once the finding is made that the employee shall not be reinstated, then it seems to me that, even if the matter started off being an industrial dispute in the sense that it was a matter affecting or relating to the rights of employer and employee, the matter is no longer an 'industrial matter' as defined because the termination of that employment has been confirmed by the Commissioner's finding that he be not re-employed. That settled that particular industrial dispute.* The Union sought reinstatement. It was not granted. It is recognised that by section 26(2), in granting relief or redress under the Act, the Commissioner is not restricted to the specific claim or to the subject matter of the claim; but that section does not authorise the exercise of a power that is not otherwise within power. *One can well understand an argument that the power to order re-employment connotes an ancillary power to award lost wages because the relationship of employer and employee is to be reactivated by the order that resolves that industrial dispute; but, whatever the merits of that argument, it seems to me that there is no argument to support a claim for compensation unrelated to the contract of employment just ended, at least in this case where the sole and only industrial dispute related to the way in which the former employer treated the particular ex-employee.*
>
> In my view, there is simply no nexus between an employer and a Union, concerned for an employee wrongly dismissed who is not reinstated, whatever the reason for failure to direct re-employment, so as to say that an industrial matter still exists to found an order for the payment

of anything, call it what one likes, to such an ex-employee where there is nothing else involved in the dispute. There is simply no live 'industrial matter' to condition the making of such an order. There is no express power in the Act to justify such an order. Nor can I find any power by necessary implication.

…

… I accept, of course, that section 26(1)(a) sets out the basis on which the Commissioner can act. That section is, however, not a source of jurisdiction to give power which otherwise would not exist. Nor can I understand how the Commissioner can rely upon that provision to justify an award to an employee that completely ignores both his and his employer's rights under his contract of employment which is terminated and remains terminated. To set the common law and the law of contract aside is no mere disregard of a technicality or a legal form and it seems to me that to call in aid the rather elusory idea of equity and good conscience to justify such action simply does not assist. It is well settled as a matter of construction that 'it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness', per O'Connor J in ***Potter v Minahan*** (1908) 7 CLR 277 at p. 304, where he was quoting Maxwell on Statutes with approval. See also ***Sargood Bros v Commonwealth*** (1910) 11 CLR 25 at p. 279.

The power of the Commission in the exercise of its jurisdiction is not at large. It has to be exercised within the framework of the Act.

…

The resolution of an industrial dispute by an order reinstating or ordering the re-employment by a former employer of a recently dismissed ex-employee will, of course, cut across the accepted common law remedies. A Court of Equity would not normally grant such relief. The only basis, therefore, to justify such an order is that it does resolve that industrial dispute or, alternatively, the power to so order exists as a matter of construction of the Act or because it is necessarily implied in the Act. By parity of reasoning, it could be argued that the grant of alternative relief is open because that also apparently would resolve the industrial dispute. In logic, that may be accepted. It seems to me, however, that the difference between the two orders for relief is that in the first case the order *for reinstatement or re-employment retains or reactivates the industrial basis for the dispute, ie the relationship of employer and employee. There is no such nexus involved with relief that does not retain that relationship.* Where the dispute, like the present, is resolved solely on the issues in the dispute between the particular former employer with the particular ex-employee, there is no charter to make orders that are not part of a reactivated industrial relationship. Put another way, an order cannot be made which affects rights and obligations arising out of an industrial matter when the finding of the Commissioner has confirmed that the 'industrial' element involved has ended. For these reasons, I would allow the appeal and discharge the order directing the appellant to pay compensation to Mr Pepler. (Emphasis added)

344 In 1992, the Industrial Appeal Court issued its decision in ***Kounis Metal Industries Pty Ltd v TWU WA Branch*** (1993) 73 WAIG 14. Owen J, with whom Nicholson and Wallwork JJ agreed, considered whether *Pepler* was confined to compensation for unfair dismissal. At p 19, His Honour said:

… In my view the ratio decidendi of ***Pepler*** extends beyond unfair dismissal and covers redundancy.

In my view, the judgments in ***Pepler*** suggest that the decision rests upon a point of principle, namely, that jurisdiction depends on the present or future existence of the employer/employee relationship. Unless, at the time when the application is made, the relationship actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an 'industrial matter' is missing. The very language of the judgments carries this implication. Particular regard should be had to those parts from the judgements which are underlined in the passages which I have set out earlier in these reasons. While it may be possible to say that the context of those statements in the reasons of Kennedy J might suggest that his Honour was referring specifically and solely to unfair dismissal, the same cannot be said of the reasons of Olney J and of Rowland J.

There are a number of propositions which can be extracted from the judgments and which, in my view, point to the ratio of Pepler.

1. The jurisdiction and powers of the Commission are limited to the terms of the Act.

2. The powers of the Commission extend to those which are incidental and necessary to the exercise of the jurisdiction so conferred.

3. The Commission is confined to dealing with an 'industrial matter' as defined.

4. A claim that a dismissed employee should be reinstated or re-employed is an industrial matter.

5. *The power to award compensation to an employee whose contract of employment has been brought to an end is not a power at large. It can be exercised only as an incident to the restoration or re-activation of the contract of employment.*

In my opinion, there is nothing in earlier authority of a binding nature which is inconsistent with this conclusion***.*** ***Slonim v Fellows*** *(supra)* dealt with the jurisdiction to order reinstatement, not compensation, and it arose from a dispute in a jurisdiction which has a definition of 'industrial matter' which is wider than that in the Act. Similarly, decisions under the South Australian legislation (which, of course, would not be binding) have no direct application because of the legislative context. ***Kwinana Construction Group Pty Ltd v ETU*** *(supra)* can be explained on the basis that the power to order payment of wages from the time of dismissal was a power incidental to the power to make an order for reinstatement. In ***Princess Margaret Hospital v HSOA*** *(supra)*, the order for payment was made upon the worker presenting himself for work. In other words, once again the order for payment was an adjunct to the order reinstating the contract of employment. The point at issue in ***Totalisator Agency Board v FCU*** *(supra)* was whether certain conditions should be inserted in an award, which conditions were to apply to retrenchment notices which might be served in the future. It seems to me that this is a very different situation to that with which we are confronted in this appeal. The provisions under consideration in that case applied to employees who were subject to the award, and who had, or might in the future have, a contract of employment. It was a provision of general application made prior to the termination of the contracts of employment to which it sought to attach. Accordingly, there is, in my view, nothing in earlier authority which would justify reading down the Pepler doctrine.

> I should also say that I have some difficulty with the distinction drawn by the Full Bench between a 'dismissal' and a 'redundancy'. The foundation for the Pepler principle is that the relationship of employer and employee no longer exists. It seems to me not to matter whether the termination of that relationship occurs because the job no longer exists or whether the employer no longer wishes the particular employee to carry out the job. (Emphasis added)

345 Then, in 1993, in ***Coles Myer Ltd trading as Coles Supermarkets v Coppin and Others***, (1993) 73 WAIG 1754, the Industrial Appeal Court considered claims for increased redundancy payments made by three former employees of the appellant, arising out of their retrenchments. The Commission, having found that there was an implied term in each contract of service concerning redundancy, made orders that each of the applicants be paid the redundancy payments claimed.

346 The Court set out some of the history of decisions and legislation regarding re-employment or reinstatement of an ex-employee as being an industrial matter. At 1756, it said:

> … It has also been held that coincidental with an order directing re-employment in the resolution of an industrial matter the Commission may direct that any wages lost or contractual benefits lost may be ordered to be paid by the employer. The justification for this has usually been that the industrial matter arises out of a dispute which has been referred under s 44 of the Industrial Relations Act. Cases under the earlier legislation are ***Kwinana Construction Group Pty Ltd v The Electrical Trades Union*** (1954) 34 WAIG 51 and ***Princess Margaret Hospital for Children v The Hospital Salaried Officers Association of WA*** (1975) 55 WAIG 543.
>
> In ***Robe River Iron Associates v The Association of Drafting Supervisory and Technical Employees of Western Australia (Pepler's Case)*** (1987) 68 WAIG 11, Kennedy J traced the history both of the legislation and the case law. That case concerned a dispute that was referred under s 44 concerning a claim of unfair dismissal where no order for reinstatement was made but the Commissioner granted compensation which was unrelated to any contractual rights. That order was set aside as being incompetent.

347 The Court then noted what I have quoted above from ***Kounis***, and said:

> In Kounis at p 19, the Industrial Appeal Court decided that '*unless, at the time when the application is made, the relationship [of employer/employee] actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an industrial matter is missing'.*
>
> *What this line of authority indicates is that there must be a continuation of an industrial relationship between the parties to constitute an industrial matter. The interpretation provisions of the Act speak in terms of an existing employer employee relationship. Paragraph (b) of the interpretation section defines 'industrial matter' to include any matter relating to the 'conditions of employment which are to take effect after the termination of employment'. The exercise of power under that provision is limited to the making of the conditions whilst the contract of employment is in existence.*
>
> The provision in paragraph (c) of the interpretation section 'industrial matter' which gives power to deal with any matter relating to 'the dismissal … of any person …' should also be read in the context of the opening words of the definition, and thereby limited in the same way to an existing or prospective continuing relationship of employer and employee. The only extension of this has been where an industrial dispute has been resolved by orders directing re-employment and in some cases where re-employment is sought on the basis of unfair dismissal.

…

Absent any industrial dispute and a claim to reinstate a dismissed employer (sic) the Commission does not have jurisdiction to deal with the common law contract between an ex-employer and his ex-employee. (Emphasis added)

The law amended

348 The IR Act was subsequently amended to overcome the limitation on the Commission's power to award compensation in the absence of an ongoing employment relationship in the circumstances of a claim of unfair dismissal or denied contractual benefits. The *Industrial Legislation Amendment Act 1995* did three things of note. Firstly, it inserted a new subsection 7(1a) which provided that:

> (1a) A matter relating to –
>
> (a) The dismissal of an employee by an employer; or
>
> (b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,
>
> is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended.

349 Secondly, it amended s 23(3) by inserting as new paragraph (h) which prohibited the Commission from making "any order except an order that is authorized by s 23A" when dealing with a claim of unfair dismissal.

350 Thirdly, it amended s 23A to provide that, in effect, a claim of unfair dismissal could be dealt with by the Commission ordering the employer to pay compensation for loss or injury caused by the dismissal, if it found that reinstatement or re-employment was impracticable. According to Hansard, this was in response to ***Pepler*** and to ***Coles Myer*** (Hansard – Tuesday, 20 December 1994 p. 10047, at 10049, Mr Kierath, Minister for Labour Relations).

351 The current form of *s 23A – Unfair dismissal claims, Commission's powers* – of the IR Act is a result of *Labour Relations Reform Act 2002* (No 20 of 2002), s 138. It provides a step by step method of determining a remedy for an unfair dismissal and the considerations to be had in the determination of compensation.

Refusal to employ – order with retrospective effect

352 This matter is to be distinguished from an order creating an employee-employer relationship with retrospective effect, as occurred in ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers and Anor*** [2006] WASCA 49. In that case, the Industrial Appeal Court dealt with an industrial matter of a refusal to employ. A dispute was referred to the Commission for hearing and determination under s 44(9). The Union had claimed that BHP Billiton had unreasonably refused to employ Mr Brandis, a former employee, and sought a decision that Mr Brandis 'has been and is employed by BHP Billiton' and 'an order that BHP Billiton employ Mr Brandis on the award'.

353 The Commission at first instance dealt with the matter and his decision was subsequently appealed to the Full Bench. The Full Bench issued a declaration that BHP Billiton had unfairly refused to employ Mr Brandis, whom it had previously employed, and that refusal was as and from 7 May 2004. It issued an order requiring BHP Billiton to employ Mr Brandis as and from that date. Its effect was retrospective.

354 Le Miere J, with whom Wheeler and Pullin JJ agreed, noted in respect of the power to deal with a refusal to employ 'may be an industrial matter even though that person is not employed by the employer and had never been employed by that employer in the past' [78]. He said:

> Section 232A(3) of the Act empowers the Commission to order an employer to reinstate an unfairly dismissed employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.
>
> The Act does not expressly confer upon the Commission the power to order an employer to 'reinstate' a person it has unfairly refused to employ. Indeed, it could not. The power 'to reinstate' in the context of an employee unfairly dismissed means that the employment situation, as it existed immediately before the termination, must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms: ***Blackadder v Ramsey Butchering Services Pty Ltd*** [2005] HCA 22; (2005) 79 ALJR 975 per McHugh J at [14]. There was no contract of employment between BHPB and Mr Brandis prior to the decision of the Commission at first instance. That is, there was no employment situation to be reinstated.
>
> An order to employ should generally take the form of the order referred to by Burt J in the ***Princess Margaret Hospital*** case, that is, an order directed to the employer requiring it upon the worker presenting himself for work at a particular place and time to engage and so to employ the worker on the agreed or specified terms and in the specified position. The question is whether the Commission has power to order an employer to employ a person as and from a date preceding the order.
>
> An order that an employer employ a person as and from a date preceding the order is truly retrospective. Such an order changes the rights and obligations of the employer and the person to be employed with effect prior to the making of the order. The courts have frequently declared that, in the absence of some clear statement to the contrary, an Act will be assumed not to have retrospective operation. Similarly, in the absence of some clear statement to the contrary, an Act will be assumed not to confer upon a court or tribunal the power to make orders that have retrospective operation. However, there is nothing preventing the Western Australian Parliament from making laws having retrospective operation or conferring upon the Commission the power to make orders with retrospective operation.
>
> …
>
> The effect of subsection 44(13) together with subsection 39(3) of the Act is to expressly confer upon the Commission the power to give retrospective effect to an order made under s 44. An order that an employer employ a person it has refused to employ is an order that may be made under s 44. There is nothing in s 44 of the Act or other relevant provisions of the Act that requires subsection 44(13) to be construed so as not to confer upon the Commission the power to order that an employer employ a person as and from a date preceding the date of the order. To the contrary, upon its proper construction subsection 44(13) together with subsection 39(3) confers that power upon the Commission.

That is not the end of this ground of appeal. The Union concedes that the order of the Full Bench was beyond power for a different reason. Subsection 39(3) of the Act provides that the Commission may give retrospective effect to an award if in the opinion of the Commission there are special circumstances which make it fair and right to do so but not beyond the date upon which the application leading to the making of the award was lodged in the Commission. The application to the Commission was made on 10 June 2004. Hence, subsection 39(3) did not, in any event, empower the Commission to give effect to its order as from 7 May 2004.

The Commission erred in law in the construction or interpretation of subsection 44(13) and subsection 39(3) of the Act in the course of making the decision appealed against. It is a necessary implication from the fact that the Commission gave retrospective effect to its order beyond the date upon which the application was lodged that it construed or interpreted the statutory provisions as conferring upon the Commission the power to give retrospective effect to its order beyond the date upon which the application leading to the making of the order was lodged in the Commission. This ground of appeal is competent by reason of par 90(1)(b) of the Act.

Furthermore, the Commission is only empowered to give retrospective effect to an award if in its opinion there are special circumstances which make it fair and right so to do. The Full Bench did not find that there were special circumstances which made it fair and right to give retrospective effect to its order.

Further, no party before the Commission or the Full Bench submitted that the Commission or the Full Bench should give retrospective effect to its order. The issue was never raised before the Commission or the Full Bench. By making the retrospective order in circumstances where the matter was not raised at first instance or on appeal, the Full Bench denied BHPB the right to be heard in relation to that matter. BHPB did not allege that it had been denied the right to be heard in relation to that matter in its grounds of appeal. However, the Union concedes that the retrospective order was beyond power and must be quashed. The fact that no party sought the retrospective order and that it was not raised at first instance or on appeal is relevant to the order that this Court should now make [80] – [90].

355 Therefore, the order in that matter retrospectively established the employment relationship. That was within power. However, to do so, the Commission was required to consider whether there were special circumstances which made it fair and right to do so. Without such a determination, the order to retrospectively create the employment relationship was beyond power and was quashed.

356 A number of points arise from ***Pepler***, ***Kounis***, ***Coles Myer***; the amendments of the IR Act and ***BHP Billiton v CFMEU*** that are of particular significance in this case:

1. The Commission is a creature of statute; its powers are expressly or impliedly conferred by that legislation. It also has powers which are incidental and necessary to the exercise of the jurisdiction or the powers so conferred. Its powers, in the exercise of jurisdiction, are not at large, but are to be exercised within the framework of the IR Act.

2. Prior to the amendments to the IR Act to remedy the limitations in the Commission's powers identified in ***Pepler*** and ***Coles Myer***:

(a) the Commission had jurisdiction to deal with an industrial matter which included the dismissal of an employee, the denial of a contractual benefit or the refusal to employ;

(b) in respect of an unfair dismissal, the Commission had power to remedy the unfair dismissal by reinstating the employment relationship. Absent the reinstatement of the employment relationship, there was no power to order compensation for loss occurring as a result of the dismissal because there was no employment relationship, or industrial matter, to which the jurisdiction could attach;

(c) 'to deal with an unfair dismissal' extended to ordering the employer to re-employ, but did 'not extend to making an order for compensation at large, quite unrestricted to the legal entitlement of the employee at the time of his dismissal. If that power exists, it is difficult to set any limits to it', per Kennedy J in ***Pepler***;

3. The amendments to the IR Act affected only claims of unfair dismissal and denied contractual benefits. There was no amendment to set out the Commission's powers in dealing with a refusal to employ.

4. Burt J's order for overcoming a refusal to employ, set out in ***Princess Margaret Hospital***, of the employee presenting himself to the employer and the employer being required to employ him, is the appropriate formulation. However, as Olney J concluded in ***Pepler***, Burt J's comments in respect of what Burt J referred to as the second limb of the order after the order to employ, an order for a money sum, 'may well have been misconstrued in subsequent cases by the Commission' (p 20) and that there was nothing then in the IR Act to justify an exercise of jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement.

5. The amendments to the IR Act expressly provide the Commission with jurisdiction to deal with a claim of unfair dismissal or denied contractual benefits, as they remain industrial matters even though the employment relationship has ended (s 7(1a)).

6. The IR Act expressly provides the Commission with powers to deal with an unfair dismissal by ordering reinstatement (s 26A(3)).

(a) If reinstatement is impracticable, then employment in another available position, and either or both of orders maintaining the continuity of employment and for the employer to pay the employee the remuneration lost because of the dismissal (s 26A(4) and (5));

(b) if, and only if, reinstatement or re-employment would be impracticable, subject to the consideration in s 23A(7) to (12), order the employer to pay the employee an amount of compensation for loss or injury carried by the dismissal. In deciding on the amount to be ordered, the Commission:

(i) is required to consider issues of mitigation of loss and any other redress the employee has obtained and any other relevant matter (s 26A(7));

(ii) is required to cap the amount of compensation at six months' remuneration (s 26A(8));

(iii) may calculate the amount by reference to an average rate received by the employee (s 26A(9));

(iv) may order the payment to be made in instalments (s 26A(10));

(v) may require the order to be complied with within a specified time (s 26A(11));

(vi) 'may make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this section' (s 26A(12)).

7. An order to remedy an unfair refusal to employ may have retrospective effect provided it meets the test of special circumstances set out in s 39(3).

No general compensation power

357 Other than s 23A(6), no other power is express in the IR Act for the Commission to award compensation. The power to award compensation set out in s 23A in the case of an unfair dismissal is expressly limited. The words used in s 23(3)(h) are that the Commission "shall not" make any order except that which is authorised by s 23A or s 44. S 23A(6) provides, in the use of the emphatic language, 'if, and only if, the Commissioner considers reinstatement or re-employment impracticable, the Commission may', subject to specified conditions, order the remuneration lost or likely to have been lost by the employee because of the dismissal. This is a very specific power. Section 23A goes on to set out the consideration to be had in deciding on the amount of compensation including efforts to mitigate the loss, and a limit of six months' remuneration. The manner of calculation is set out. There is specific provision for the payment of the compensation in instalments, and for payment to be made within a specified time.

358 Subsection (12) then provides that the Commission may make any ancillary or incidental orders necessary to give effect to an order under that section.

359 Given the scheme of the IR Act, and that the only power to award compensation sets out a very detailed process, I am of the view that the provisions for compensation for unfair dismissal do not then set out a scheme that may be implied as a general power for the Commission to award compensation as an incident to an order to remedy the unfair refusal to employ. In an unfair dismissal, compensation is for the loss or injury caused by the dismissal (and I emphasise here that it is not compensation for the dismissal itself but for the loss or injury caused by it). Given, too, what was said by the Industrial Appeal Court in ***Pepler***, it is contrary to the other powers set out in the IR Act that there should be an implied power which contains none of the constraints of s 23A.

360 In ***SGIC v Terence Hurley Johnson*** (1997) 77 WAIG 2169, the Industrial Appeal Court dealt with the jurisdiction and powers of the Public Service Appeals Board (PSAB). That jurisdiction and the powers are set out separately in the IR Act from any relating to the Commission's jurisdiction and powers in dealing with industrial matters. However, Anderson J's observed that in regard to a claim before the Board, which had power to "adjust" the employer's decision:

> The most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question … He made only a claim for monetary compensation on the grounds that the decision of dismissal itself was unfair. Hence the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss' (2170 - 2171).

361 I do not make reference to this decision to draw any particular parallels between the Commission's jurisdiction in dealing with the industrial matter of a refusal to employ and the PSAB's jurisdiction to adjust the employer's decision. To be clear, I do so only for the purpose of drawing the analogy between the use of the remedy within power of the PSAB of 'adjusting' the employer's decision to dismiss and the Commission's power to deal with the appellant's refusal to employ.

362 To provide compensation for loss or injury caused by that refusal is to 'super-add a consequence to the decision to refuse to employ', that is, it is not clearly an ancillary or incidental power. While Olney J in ***Pepler*** and the Court in ***Kounis*** suggested that an order for compensation in an unfair dismissal may be an incident to the order for reinstatement, or "the restoration or re-activation of the contract of employment," these comments were made before the amendments to the IR Act.

363 Further, given that the order in ***Sealanes (1985) Pty Ltd v John Francis Foley and Another*** [2006] WAIRC 04431; (2006) 86 WAIG 1254 for repayment of monies paid to the employee on dismissal is not an ancillary or incidental order to an order reinstating the employee, I find that an order for compensation, being a matter of some substance, is not an ancillary or incidental order.

364 This is consistent with Kennedy J's conclusion in ***Pepler*** that 'to deny the power to order compensation in this case is not to deny the Commission power to deal with the industrial matter. It is simply to deny that its power to do is unconstrained in any manner. It may deal with a complaint of unfair dismissal in the most appropriate manner, by ordering re-employment in a proper case' (p 18). In Rowland J's words, the order for compensation is one where there is no "nexus involved" in the relief of an order for employment.

365 Therefore, for the reasons I have set out, I am of the view that there is no power for the Commission to award compensation to Mr Buttery as the claim could not be related to an unfair dismissal due to the WWC Act, which brings in the statutory remedy including compensation for loss or injury. The refusal to employ which the Commission found to be unfair was many months after the dismissal. There had been no employment relationship during that time. No employment relationship would exist until the prospective order 2 came into effect. Nor was Mr Buttery in an employer-employer relationship with the appellant during the period for which compensation was awarded, and in accordance with ***Pepler***, there is no capacity for such

a remedy. The inadequacy in the Commission's power was rectified by legislation, in respect of two types of industrial matters only, and neither of them is a refusal to employ.

366 Given the very prescribed process and considerations set out for the determination of compensation in unfair dismissal cases, and there being no express power in other cases, in my view, no such power can be implied. Given the way in which the Parliament chose to provide power to award compensation in the case of unfair dismissal, I am of the view that the award of compensation is a substantive one.

In the alternative

367 If I am wrong and there is power to make an award of compensation, I find it has not been exercised according to the IR Act. Le Miere J, in ***BHP Billiton*** found that s 44(13) together with s 39(3) expressly confers on the Commission the power to give retrospective effect, but it requires the Commission to form an opinion that there are special circumstances which make it fair and right to do so. The learned Senior Commissioner did not deal with the issue of whether special circumstances arose. To the extent that there has been a failure to consider that matter, and if I am wrong that there is no power to make such an order, it is appropriate to uphold this ground of appeal.

368 Section 49(5)(b) and (6a) of the IR Act set out the Full Bench's powers in disposing of an appeal. They include that if an appeal is upheld, the Full Bench may suspend the operation of the decision and remit the case to the Commission for further hearing and determination. Alternatively, it may vary the decision.

369 In my view, the material is before the Full Bench to enable the Full Bench to come to a conclusion, and to do so on terms which could have been awarded by the Commission.

370 Although he did not address the matter directly, it is clear to me that the Senior Commissioner found that there were special circumstances to warrant paying Mr Buttery that sum which he had lost due to the appellant's unfair refusal to employ him from 2 October 2017, if such constitutes a retrospective order. I am of the view that special circumstances warrant such an order. They are manifest in these reasons for decision regarding the unfairness suffered by Mr Buttery and the loss he has endured. In my respectful view, there are indeed special circumstances.

371 I would uphold this ground of appeal and quash Order 3.

Ground 9.

372 The appellant says that the Senior Commissioner erred in fact and law in finding that there was a "refusal to employ" within the meaning of s 7 of the Act other than on two discrete occasions, being 16 January 2017 and 3 February 2017. She says that the Commission's reliance on the parties having been in dispute since January 2016 is not 'evidence'. She also argues that it is not open to infer from the appellant's conduct in defending the proceedings that the appellant engaged in an 'ongoing refusal to employ'. Rather, the only inference that can be drawn from such conduct is that the appellant maintained her position that she did not unfairly refuse to employ Mr Buttery on 16 January 2017 and 3 February 2017. The appellant says that there was otherwise no evidence to support a finding that there was an 'ongoing application for employment' coupled with an 'ongoing refusal'.

Consideration and conclusions regarding Ground 9

373 The Director General did not address this ground of appeal in her written submissions or at the hearing on 11 March 2019 except to say that up until 2 October 2017 there was no unreasonable refusal to employ, as found by the Senior Commissioner. After that point, the Senior Commissioner found that there was a basis upon which there should be employment.

374 Whether the characterisation of ongoing and persistent refusal to employ is correct, in my respectful view, there were repeated requests and repeated refusals. The final refusal was because of an erroneous conclusion regarding Mr Buttery's conduct.

375 I think it is fair to say that the evidence demonstrates that from the outset, the Director General refused on a number of occasions to employ or re-employ Mr Buttery. As the Senior Commissioner found, at least one of those refusals was not unreasonable.

376 I would dismiss this ground of appeal.

Ground 10.

377 The Director General says that where the Commissioner said at [170] of the reasons for decision, that the Director General's change of policy in the 9 April 2018 letter constituted an alternative basis for finding that there was an unfair refusal to employ, then the Director General says she was denied a fair hearing and she was not put on fair notice of a claim based on that document.

378 At (218 – 220) of the transcript at first instance, Mr Carroll for the Director General addressed the letter of 9 April 2018. The Senior Commissioner and Mr Carroll had an exchange in which Mr Carroll said that he had not intended to address the letter but said he would make one brief submission. It was that the terms of the letter were 'quite possibly contrary to the *Public Sector Management Act* in a need to comply with the Standard and the Commissioner's Instruction'.

379 What the Senior Commissioner said was that, as an alternative and if he was incorrect and the Commission had no jurisdiction or power to deal with the SSTU's claim or to award a remedy because of s 23(2a) of the Act and/or s 41(3) of the WWC Act, or otherwise because there was no relevant refusal to employ then, 'given the respondent's change of policy as set out in its letter of 9 April 2018, referred to above, without hesitation, I consider Mr Buttery should be re-employed in accordance with the new policy'.

380 Such a comment has no binding effect. It was merely an indication that if the Commission had no jurisdiction to deal with the matter, the Director General ought to do what was fair.

381 As to the question of the Director General not having a fair hearing on that issue, it became clear during the course of the hearing that the Director General had changed her policy in regard to the potential re-employment of employees dismissed for compliance with s 41(3) of the WWC Act. The Director General was represented by experienced and diligent counsel. There was no request for time to consider the matter, nor a reasonable suggestion that counsel was taken by surprise. A submission was made about one issue only.

382 I would dismiss this ground of appeal.

Conclusion

383 I have found the appeal to be unsuccessful except in grounds 2 and 8. Ground 2 does not result in the overturning of the decision. In respect of ground 8, Order 3 ought to be quashed.

384 I feel compelled to note that I agree entirely with the learned Senior Commissioner's final comments in his reasons for decision. He said '(t)his man has been dealt with very harshly and he has had his career as a public school primary teacher ended in circumstances that did not warrant it. It would be unjust for the respondent not to act.' Whilst I agree with the Director General that the provisions of the WWC Act prevent a remedy for an unfair dismissal, that does not prevent the Director General re-employing Mr Buttery on the basis that he had been unfairly dealt with and unfairly denied re-employment. The WWC Act may prevent him obtaining a remedy for the dismissal itself but it does not prevent Mr Buttery obtaining a remedy for the refusal to employ.

EMMANUEL AND WALKINGTON CC

385 We have had the benefit of reading a draft of the Chief Commissioner's reasons for decision. We respectfully agree with her reasons other than in relation to grounds 2 (specifically at [263] – [264]), 8 and 9.

Ground 2

386 We disagree with the Director General's argument that the only interpretation of the letter dated 20 June 2017 is that the whole letter was an attempt to settle. It was open to the Senior Commissioner to find that the letter was in two separate parts. The first part of the letter was an open communication and on the record. It included a request for 'reinstatement or re-employment'. The second part of the letter was an offer made without prejudice.

Ground 8

387 The Director General says Mr Buttery had no legal right to be employed on 2 October 2017 and she did not have a legal obligation to employ him. She argues there is no power to make an order that provides compensation in connection with the refusal to employ. The only order that can 'deal with' the industrial dispute is to reverse any refusal and order that the Director General employ Mr Buttery. An order for compensation not connected to any legal right cannot be an order to 'deal with' a refusal to employ and it cannot be an incidental order. Further, the effect of her submission is that order 3 is an order for retrospective employment. To make such an order, the Senior Commissioner would have to have found that there are special circumstances which make it right and fair to do so, but he did not.

388 Those submissions by the Director General raise a number of issues, central to which is that the Senior Commissioner had no power to make order 3 because effectively it required the Director General to pay Mr Buttery as though he was employed from 2 October 2017. As outlined below, we consider that argument misunderstands the nature of order 3 and the Senior Commissioner's reasons. In our view, the Senior Commissioner had jurisdiction to deal with the industrial matter arising from the treatment of Mr Buttery and he appropriately exercised his powers by making order 3 subject to the employment relationship being restored under order 2.

389 The Commission's jurisdiction under s 23(1) and s 44(9) is broad. Under s 23(1) of the IR Act, the Commission can 'enquire into and deal with' any industrial matter before it. It is common ground that refusal to employ is an industrial matter: s 7 of the IR Act.

390 In accordance with the reasoning of Le Miere J in ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor*** [2006] WASCA 49; (2006) 86 WAIG 1193 (**Brandis**), the Commission's jurisdiction was enlivened by the refusal to employ. The Commission has power to make an order to 'deal with' that industrial matter. Any order must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction: ***Brandis*** at [78]. We consider the Senior Commissioner's orders are sufficiently related to and deal with the dispute that remained when the matter was referred for hearing and determination.

391 We respectfully adopt the reasoning of Matthews C in ***Public Transport Authority of WA v The Australian Rail, Tram and Bus Industry Union of Employees, WA Branch*** [2017] WAIRC 00452; (2017) 97 WAIG 1329, (**PTA v ARTBIU**) from [177] – [188]:

> In my view, so long as those questions, disputes or disagreements are in relation to an industrial matter the Western Australian Industrial Relations Commission, pursuant to section 44(9) *Industrial Relations Act 1979*, "may hear and determine" them and "may make an order binding…the parties…" in relation to them.
>
> So that the Western Australian Industrial Relations Commission and parties know the exact nature of the questions, disputes and disagreements regulation 31 *Industrial Relations Commission Regulations 2005* provides as follows:
>
> > Where at the conclusion of a conference under section 44 of the Act a matter is to be heard and determined by the Commission, the Commission is to draw up or cause to be drawn up and sign, a memorandum of the matter requiring hearing and determination and for that purpose may direct parties to file statements of claim, answers, counter-proposals and replies in such manner and within such time as the Commission sees fit.
>
> It is obvious that the parties entering arbitration must know the boundaries of that arbitration. If regulation 31 *Industrial Relations Commission Regulations 2005* did not exist there would be a good argument that the boundaries of arbitration must be found in the Notice of Application and that section 44(9) *Industrial Relations Act 1979* cannot have been intended to extend those boundaries beyond it.
>
> The conference process under section 44 *Industrial Relations Act 1979* is too dynamic and fluid for parties to, in each case, come away from it, where settlement is not achieved, knowing the exact questions, disputes and disagreements which remain, especially given that the issues discussed may be wider than those raised by a strict reading of the initiating document.
>
> However, that potential problem is avoided by regulation 31 *Industrial Relations Commission Regulations 2005*.
>
> Section 44(9) *Industrial Relations Act 1979* gives the Western Australian Industrial Relations Commission the power to hear and determine, and make binding orders, on **any** question, dispute or disagreement in relation to an industrial matter that is not settled by agreement and regulation 31 *Industrial Relations Commission Regulations 2005* ensures that the parties know the particulars of the question, dispute or disagreement to be ventilated at the hearing and resolved by orders made following it.
>
> A Commissioner, of course, would have to ensure, in drawing up the memorandum under regulation 31 *Industrial Relations Commission Regulations 2005*, or agreeing to hear matters included in the memorandum he or she has caused to be drawn up, and in authorising the hearing of those matters by his or her signature, that the questions, disputes or disagreements contained

therein were questions, disputes or disagreements in relation to an industrial matter and which were not settled, after attempts to do so, by agreement between all of the parties at the section 44 conference.

Subject to those things however, section 44(9) *Industrial Relations Act 1979*, in my view, clearly gives the Western Australian Industrial Relations Commission the power to make orders on what is included in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*.

In ***BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch*** (2006) 86 WAIG 642 at 652 the Full Bench said, without needing to decide, that:

> *It may be that an order of the type which was made could be within jurisdiction if the making of such an order was explicitly part of the dispute remaining for determination under s44(9) of the Act, following the conclusion of a conference.* Alternatively, if during the hearing of a dispute under s44(9), the issue of the making of such an order was raised by the parties or the Commission, the order could perhaps be made, by the Commission, in reliance upon s26(2). (my emphasis)

In my view the Western Australian Industrial Relations Commission may, within jurisdiction, make an order that was "explicitly part of the dispute remaining under section 44(9) of the Act." That is, I consider that the comment of the Full Bench in bold above was clearly correct.

The only question then in this matter is whether the issue in relation to which the Acting Senior Commissioner made orders was "explicitly part of the dispute remaining under section 44(9)."

Whether or not the issue was "explicitly" part of the dispute is a matter, in my view, of determining whether it was "clearly expressed" (Macquarie Dictionary 3rd edition) in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*.

392 Smith AP, with whom Scott CC agreed, applied similar reasoning in the same case at [148]:

> Having made a finding that dismissal was not a proportionate penalty (leaving aside the disposition of this appeal raised in ground 4 of the appeal), and then determining a demotion was a proportionate and appropriate penalty, these findings were findings that were squarely part of or put another way explicitly part of the industrial matter referred for hearing and determination pursuant to s 44(9) of the Act. Consequently, by the power conferred in s 44(9) to hear and determine a dispute, it was open to the learned Acting Senior Commissioner to make the order reinstating Mr Merlo to a position of transit officer, level 3, and to make the order for loss of remuneration assessed at the rate of pay, entitlements and benefits applicable to the position of transit officer, level 3.

393 Clearly the Commission has power to make an order that is 'explicitly part of the dispute remaining under s 44(9) of the IR Act': ***BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch*** [2006] WAIRC 03908; (2006) 86 WAIG 642 at 652.

394 Paragraph [5] on page seven of the Memorandum explicitly states that part of the dispute remaining under s 44(9) included:

(a) whether there was an unfair refusal to employ and, if so,

(b) what relief should be granted.

The dispute was not limited to whether there was a refusal to employ. The parties were in dispute about how to resolve the matter if the refusal was found to be unfair.

395 Accordingly, an order determining what relief should be granted upon a finding that there was an unfair refusal to employ was explicitly part of the dispute remaining under s 44(9) of the IR Act.

396 We are not persuaded by the Director General's submission that the Commission has no power under s 44 to make an order for compensation. The Commission may only exercise powers conferred under relevant legislation, in this case the IR Act. A power to make an order for compensation may be expressly or implicitly authorised: ***State Government Insurance Commission v Terence Hurley Johnson*** (1997) 77 WAIG 2169. Section 44 of the IR Act does not confer a power that expressly authorises the making of an order for compensation. However, when read with s 23(1), in our view s 44(9) of the IR Act implicitly authorises the making of an order for compensation.

397 We agree Mr Buttery had no legal entitlement to be paid salary in circumstances where he did not provide service to his employer. Accordingly, Mr Buttery could not claim unpaid salary under his contract of employment. But that does not mean that there was no power for the Senior Commissioner to create an obligation on the Director General by making order 3. The Commission has that power as long as doing so deals with what is explicitly part of the dispute remaining for determination.

398 The Senior Commissioner did not find that Mr Buttery *had* a legal entitlement to be paid salary from 2 October 2017 until he accepted an offer of employment. Rather the Senior Commissioner *created* an obligation on the part of the Director General by ordering payment of an amount representing the salary and benefits that Mr Buttery would have otherwise earned had he remained employed by the Director General, from 2 October 2017 until the date of any acceptance of an offer of employment by Mr Buttery under order 2.

399 Contrary to the Director General's submission, in our view simply ordering that she employ Mr Buttery would only deal with part of the industrial dispute. It would resolve the refusal to employ, but not the unfairness of the refusal. It is clear from the Senior Commissioner's reasons, in particular at [169], that he considered an order for employment alone would not adequately deal with the industrial dispute. An order for compensation was necessary to deal with the industrial dispute. Orders 2 and 3 are both sufficiently related to the industrial matter to be within power.

Is there no power to order compensation because there was no employment relationship on 2 October 2017?

400 We agree with the Chief Commissioner that the submissions on appeal in relation to ground 8 were sparse and opaque, and that the Director General's submissions focussed on retrospectivity and the need for special circumstances.

401 In our respectful view, the issue identified by the Chief Commissioner at [335] as there being no power to order compensation in circumstances where there is no relationship of employer and employee for the period covered by the compensation order, because there is no industrial matter to ground the order for compensation, was not an issue in the appeal. We understand the Director General's reference to ***Pepler*** was a reference to the argument she made at first instance, that there is no power to order compensation absent an order to employ.

402 In a matter of this type, the Commission's powers come from s 23(1) and 44(9) of the IR Act. Section 23(3) of the IR Act limits the exercise of those powers: ***Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers Division, WA Branch v Augusta-***

Margaret River Tourist Bureau (1995) 75 WAIG 372. In our view, nothing in s 23(3) prevents the Commission from making an order for compensation in the circumstances.

403 Further, the industrial matter in this case was an unfair refusal to employ, not an unfair dismissal, therefore the Commission was not restricted to the powers set out in s 23A of the IR Act. That s 23A of the IR Act prescribes the limits of the Commission's power to order compensation on a finding of unfair dismissal does not restrict the Commission's broad powers under s 23(1) and s 44(9) of the IR Act where the matter is not about unfair dismissal. Section 23A of the IR Act was not relevant to the matter before the Senior Commissioner and in our view does not bear on the Commission's powers to deal with the industrial dispute in question.

404 As argued in this matter and set out in the Chief Commissioner's reasons, s 23A of the IR Act was introduced by Parliament to extend the Commission's jurisdiction in unfair dismissal cases to award compensation in circumstances where the key element of the industrial relationship between the parties has come to an end and is not restored by an order of the Commission. The circumstances of this case are different in two fundamental ways:

(a) this case relates to refusal to employ and not unfair dismissal; and

(b) there was an expectation by the union of the employment relationship being restored in the future, as set out in the application and Memorandum, and the consequence of order 2 is that the employment relationship between the Director General and Mr Buttery continues to constitute an industrial matter.

405 Respectfully, we would not apply ***Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia*** (1987) 68 WAIG 11 (**Pepler**), ***Kounis Metal Industries Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch*** (1993) 73 WAIG 14 (**Kounis**) and ***Coles Myer Ltd v Coppin*** (1993) 73 WAIG 1754 (**Coles Myer**) as the Chief Commissioner has done. As was said in ***Kounis***, 'the foundation of the ***Pepler*** principle is that the relationship of employer and employee no longer exists' (at 19) and is not expected to come into existence or be restored (at 21).

406 It has long been accepted that the Commission had power under s 23 of the IR Act to order compensation in circumstances where reinstatement, re-employment or employment was ordered, notwithstanding that no provision of the IR Act expressly authorised the making of such an order. Burt J in ***Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia*** (1975) 55 WAIG 543 (**PMH**) observed as much at 545, and his reasons related to a situation of refusal to employ and an order that the employer employ the worker upon him presenting himself to the workplace. ***Pepler*** did not overturn that authority.

407 We consider that, consistent with ***Pepler***, ***Kounis*** and ***Coles Myer***, as long as 'when the application is made, the relationship actually exists, or is expected to come into existence in the future, or did exist and is to be restored' (per ***Kounis*** at 19), the Commission has power to order compensation where, as here, the making of such an order is explicitly part of the dispute remaining for determination. Such an order for compensation is implicitly authorised by s 23(1) and s 44(9) of the IR Act.

408 The 'reactivated industrial relationship', as it was put by Rowland J in ***Pepler***, ensures the key industrial element is present. In this matter, unlike in ***Pepler***, there was no finding that it was impracticable to restore the employment relationship. Indeed, the Senior Commissioner considered the relationship ought to be restored and accordingly made order 2. In this matter,

unlike in ***Coles Myer***, the application did not 'recognise that the relationship was irretrievably at an end'. To the contrary, the application and the Memorandum make it clear that the union sought to restore the employment relationship.

409 Our reasoning is consistent with that in ***Kounis***, where Owen J, with whom Nicholson and Wallwork JJ agreed, considered the principle to be:

> …the jurisdiction depends on the present or future existence of the employer/employee relationship. Unless, at the time when the application is made, the relationship actually exists, or is expected to come into existence in future, or did exist and is to be restored, the key element of an 'industrial matter' is missing. (19)

410 We note that in ***Kounis***, Owen J characterised the order in ***PMH*** that restored the employment relationship as 'an order reinstating the contract of employment', although it was, like order 2 in this matter, an order that the worker be employed upon presenting himself for work.

411 Here, the key element of an industrial matter was present. The employment relationship existed in the past and the union expected it to come into existence in future. The union sought orders to restore the employment relationship. There is 'a continuation of an industrial relationship between the parties to constitute an industrial matter', because of order 2 which ensures the 'prospective continuing relationship of employer and employee.' (***Coles Myer*** at 1757)

412 There is no need for an employment relationship from 2 October 2017 to ground order 3. The Commission's power to order compensation was not dependent on there being an employment relationship from 2 October 2017. Rather, the Commission could make the order for compensation as long as:

(a) the industrial basis for the dispute, being the employment relationship, was restored; and

(b) the order for compensation 'deals with the industrial matter' and was explicitly part of the dispute remaining under s 44(9) of the IR Act.

413 The union sought an order that Mr Buttery be employed, there was no finding that employment was impracticable and that order 2 was made. The industrial element involved did not end and the ***Pepler*** principle therefore does not preclude an order for compensation. Order 2 kept the industrial matter 'live', grounding order 3.

414 The Director General said the Commission could not order compensation without ordering employment and an order for employment would be impracticable. She argued that even if an order for employment were practicable, it would require a retrospective order which the Commission can only make in special circumstances.

415 We do not agree that an order for employment required a retrospective order.

Did the Senior Commissioner order retrospective employment?

416 Plainly order 2 orders prospective employment. It does not order that Mr Buttery be employed from a past date. On its face, order 3 orders compensation and not retrospective employment.

Does order 3 otherwise have retrospective effect?

417 Order 3 depends on order 2 being fulfilled at a future date. Further, while order 3 arises to address past conduct, it is not retrospective as explained by Le Miere J in ***Brandis***. It does not '[change] the rights and obligations of the employer and the person to be employed with effect prior to the making of the order': [83].

418 Order 3 does not require the Director General to pay Mr Buttery for work done in the past. It is not an order for salary earned in the past. Rather, after the parties comply with order 2, thus re-establishing the employment relationship, then in order to deal with the industrial matter the Director General is obliged to pay Mr Buttery an amount which is to be established by reference to a sum he would have earned across a particular period. That the sum is to be established by reference to a period that includes a past period does not give the order retrospective effect. Rather, the Senior Commissioner's orders relate to future employment and the payment of a sum to resolve the broader industrial dispute about the treatment of Mr Buttery, calculable by reference to a past period.

419 Order 3 is not for retrospective employment. It is a payment to resolve the part of the industrial matter that remains in dispute after the parties comply with order 2, being the Director General's treatment of Mr Buttery in unfairly refusing to employ him.

420 If we are wrong and order 3 is a retrospective order, we still consider there was no error.

421 The Commission has power to give retrospective effect to an order made under s 44: Le Miere J in ***Brandis***, Wheeler J agreeing. The Commission is only empowered to give retrospective effect to *an award* if in the Commission's opinion there are special circumstances which make it fair and right to do so: [89] (and s 39 of the IR Act). In our view, 'award' in that context means an award that is an industrial instrument.

422 Le Miere J's reasoning at [89] was in the context of that particular matter, where the impugned order had the effect of ordering that the employee in question be employed on the industrial instrument from a past date. The circumstances of this matter are different. The Senior Commissioner did not order that Mr Buttery be employed from a past date or give retrospective effect to an industrial instrument.

423 It is clear that an order made under s 44 of the IR Act that gives retrospective effect to *an award* can only be made if in the Commission's opinion there are special circumstances which make it fair and right to do so. But that does not necessarily mean that the same applies in relation to *any order* made under s 44 with retrospective effect.

424 If we are wrong about that, and the Commission only has power to give retrospective effect to any order made under s 44 if it finds there are special circumstances which make it fair and right to do so, did the Senior Commissioner err in making order 3?

425 There was no express finding about special circumstances, but it is clear that the Senior Commissioner considered the order was fair and right, being in accordance with s 26(1)(a) of the IR Act, because of the unique circumstances of this matter. He considered:

(a) Mr Buttery was a teacher with an exemplary teaching record of 9 years;

(b) the Director General ended his employment to comply with the WWC Act;

(c) because of the statutory scheme, there was no avenue for Mr Buttery to appeal the termination of his employment; and

(d) he was dealt with very harshly by the Director General, and his career as a primary school teacher in government schools was ended, as a result of reliance on a substantially flawed investigation report that included erroneous and unreasonable conclusions.

426 If special circumstances are necessary to warrant retrospectivity, a fair reading of the Reasons for Decision establishes that at least those are the special circumstances that the Senior

Commissioner considered make it fair and right to order that Mr Buttery be paid an amount reflecting the salary and benefits Mr Buttery would have earned had he remained employed from 2 October 2017, less any income earned.

427 We agree order 3 was not an incidental or ancillary order. We consider that order 3 was within power. It was an order to deal with the industrial matter before the Commission, properly made under s 44(9) and s 23(1), and in accordance with s 26(1)(a) of the IR Act. We would dismiss ground 8.

Ground 9

428 The Director General says the only material relied on by the Senior Commissioner to find that there was an ongoing refusal to employ was his conclusion that the parties have been and remain in dispute about the termination of employment and the claim that Mr Buttery be employed or re-employed. We disagree.

429 We consider the Senior Commissioner found that the statement in the letter dated 2 October 2017, referring to what is colloquially known as 'flag' or a 'red flag', that Mr Buttery's employment record would remain endorsed 'Not suitable for future employment with the Department', amounted to a refusal to employ. That finding was correct, based on the letter and Ms Barnard's evidence that the effect of a flag is a 'complete prohibition on future employment'. Moreover, in our view the statement in the letter about the flag amounted to an ongoing refusal to employ.

430 For these reasons, we would dismiss the appeal.

431 Beyond the reasons above for dismissing the appeal, we understand why both the Senior Commissioner and Chief Commissioner chose to conclude their reasons with further comment about the treatment of Mr Buttery. In the circumstances, Mr Buttery has been treated harshly and unjustly indeed.

CONCLUSION

432 Given the majority decision which rejected all of the grounds of the appeal, the appeal is to be dismissed.