APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 95/2018
GIVEN ON 17 JANUARY 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00117
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	MONDAY, 10 JUNE 2019
DELIVERED	**:**	TUESDAY, 25 FEBRUARY 2020
FILE NO.	**:**	FBA 4 OF 2019
BETWEEN	**:**	KAY HEALD Appellant AND METLABS (AUSTRALIA) PTY LTD Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER D MATTHEWS**
Citation	**:**	**2019 WAIRC 00013**
File No	**:**	**B 95 of 2019**

CatchWords	**:**	Industrial law (WA) – Appeal against decision of the Commission – Application barred by deed – Unlawful duress – Unconscionable conduct – Actual or threatened breaches of contract of employment – Discretionary decision – Alleged threat under Criminal Code to issue 'Show Cause' letter – Alleged failure to consider or properly consider implied contractual duty to act with good faith – Whether in the public interest to dismiss matter – Issues not raised at first instance cannot be raised on appeal – No relief on general grounds of unfairness – Alleged tort of deceit not raised at first instance – Appeal dismissed

Legislation	**:**	*Industrial Relations Act 1979 (WA) s 26(1), s 27(1), s 29(1)(b)(i); Criminal Code (WA) s 338, s 338A(a), (b) and (d)*
Result	**:**	Appeal Dismissed

Representation:

Appellant	**:**	Mr G McCorry (agent)
Respondent	**:**	Ms R Harding (of counsel) and with her, Ms B Swanson (of counsel)

Case(s) referred to in reasons:

Australia and New Zealand Banking Corporation Ltd v Karam [2005] NSWCA 344

Bradbury v Great Western Real Estate [1995] WAIRC 12927; (1995) 75 WAIG 2927

Civil Service Association v Department of Justice [2019] WAIRC 00713; (2019) 99 WAIG 1531

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

Commercial Bank of Australia Limited v Amadio [1983] HCA 14

Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169

Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1

Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors [2013] WASCA 36

House v The King (1936) 55 CLR 499

Jacqueline Healey v Amadeus Australia [2006] WAIRC 04575; (2006) 86 WAIG 1521

Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268

Metwally v University of Wollongong [1985] 60 ALR 68

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

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

Outlook Management v Foxtel Management Pty Ltd [2002] NSWSC 17

Re Queensland Electricity Commission and Ors; ex parte Electrical Trades Union of Australia [1987] HCA 27

Regulski v State of Victoria [2015] FCA 206

Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Thorne v Kennedy [2017] HCA 49

Tracey v R [1999] WASCA 77

University of Wollongong v Metwally (2) [1985] HCA 28

Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 419

Whooley v Shire of Denmark [2019] WASCA 28; (2019) WAIG 87

Cases also cited:

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

Crescendo Management v Westpac

Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653

Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513

House v The King [1936] HCA 40; (1936) 55 CLR 499

Jago v District Court *(NSW)* [1989] HCA 46; (1989) 168 CLR 23

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

Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366

Texts cited:

Dicey AV, *An Introduction to the Study of the Law of the Constitution*, (10th ed, 1959)

Heydon JD, *Heydon on Contract*, Lawbook Co. 2019

Reasons for Decision

SCOTT CC:

1 This is an appeal against the Commission's decision to grant an application, made by the respondent at first instance, to dismiss a claim for denied contractual benefits on the basis that the application is barred by a Deed of Settlement and Release (the Deed) between the parties. I would dismiss the appeal for the reasons set out below.

Background

2 Ms Kay Heald was employed by Metlabs (Australia) Pty Ltd (Metlabs) as an administration manager, commencing in July 2012.

3 In 2018, Metlabs engaged Ms Jodee Martine Beeson, a human resources consultant, to undertake what Ms Beeson described as 'a full workplace review' (Exhibit 2 at [9]) and she met with staff individually on 2 July 2018. Ms Beeson had discussions with Metlabs' managing director, Mr Kristopher Townend, and a number of issues were raised regarding Ms Heald's performance and conduct in her employment. Ms Beeson was to deal with that matter on behalf of Mr Townend.

4 Ms Beeson then met with Ms Heald on 20 July 2018. The Commissioner at first instance found that at that meeting, Ms Beeson dealt with Ms Heald in a way that was unfair, and with the intent of having her sign the Deed. The Deed provided that in exchange for a settlement sum, Ms Heald would resign. The parties agreed to release and discharge each other from all existing or future actions, claims or proceedings whatsoever, and that the Deed may be pleaded as a bar against any action or suit arising out of or in connection with her employment.

5 Ms Beeson indicated to Ms Heald that unless she signed the Deed, she, Ms Beeson, would immediately prepare a "Show Cause" letter requiring Ms Heald to address matters relating to Ms Heald's conduct and performance and that Ms Heald's employment may be brought to an end as a consequence of that process. Ms Heald was sent home immediately following the meeting and was expected to sign the Deed and return it to Metlabs within a very short timeframe or the disciplinary process, to be commenced by the issuing of the Show Cause letter, would commence.

6 Ms Heald obtained advice from an industrial agent. She then wrote to Ms Beeson saying that she would sign the Deed but would do so under duress. Ms Beeson responded, advising her in clear terms not to sign the Deed if she felt she was under duress. On 21 July 2018, Ms Heald signed the Deed, returned it to the employer, and, it appears, was paid the sum agreed between the parties.

7 On 7 August 2018, Ms Heald referred to the Commission a claim that she had not received a benefit under her contract of employment with Metlabs, under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act). Metlabs sought that the Commission dismiss the claim under s 27(1)(a)(ii) and (iv) of the Act because the Deed barred Ms Heald from bringing the claim.

Metlabs' case at first instance

8 Metlabs produced evidence from Ms Beeson and Mr Townend. Metlabs says it complied with its obligations to pay Ms Heald according to the Deed. It also provided her with a copy of the Deed. Ms Heald had and took the opportunity to obtain advice before signing the Deed. She had other options available than to sign the Deed, and Ms Beeson told her not to sign the Deed

under duress or if she felt railroaded into signing it. Ms Heald went ahead and signed the Deed and therefore it should not be set aside. The application ought to be dismissed pursuant to s 27(1) of the Act.

Ms Heald's case at first instance

9 Ms Heald gave evidence. She also produced evidence from David Taylor, principal solicitor of a law firm for which Ms Heald had carried out bookkeeping work. Ms Heald relied on arguments that the Deed was procured by duress and unconscionable conduct of Metlabs.

10 In respect of duress, she pointed out the elements of compulsion of will and illegitimate pressure. The illegitimate pressure was said to be limited to threatened or actual unlawful conduct of Metlabs.

11 She defined a threat as 'a declaration or determination of intent to do something that inflicts punishment or pain or loss or damage on someone in retaliation for or conditional upon some action or course taken by another' (Applicant's Submissions filed 27 November 2018).

12 Ms Heald noted that the definition of 'threat' contained in s 338 of the *Criminal Code*, 'a statement or behaviour that expressly constitutes or may reasonably be regarded as constituting a threat' is circular and not helpful. However, she cited s 338A(a), (b) and (d) of the *Criminal Code* dealing with the particular threats that are unlawful. She noted that the unlawfulness of a threat has been held to arise if the threat is made 'without reasonable cause' (***Tracey v R*** [1999] WASCA 77 per Wallwork J at [92]).

13 In respect of unconscionable conduct, Ms Heald noted that its essence lies in the party's abuse of a superior bargaining position, taking unconscientious advantage of the claimant's 'disabling condition or circumstances' (***Commercial Bank of Australia Limited v Amadio*** [1983] HCA 14 per Mason J at [6]) or the 'unfair or unconscientious disadvantage resulted in knowing exploitation by one party, of another's position of disadvantage, in such a manner that the former could not in good conscience retain the benefit of the bargain' per Dawson J at [22]. (See also ***Thorne v Kennedy*** [2017] HCA 49).

14 Ms Heald examined the evidence and submitted that she had been subjected to unlawful duress and unconscionable conduct. In those circumstances, she said, the Deed ought to be set aside. She said that, in essence, Metlabs threatened her with a process by which she would be required to show cause why she should not be dismissed, or sign the Deed and resign.

15 Ms Heald says there was nothing in her conduct which would have justified her dismissal either summarily or on notice. There was no reasonable cause for the threat to issue a Show Cause letter and therefore, Metlabs would procure a benefit or she would incur a detriment through the execution of the Deed, constituting a threat under the *Criminal Code*.

16 Ms Heald said that this constituted a threat to breach the contract and was unlawful conduct for the purposes of the economic duress doctrine.

17 Despite advice from her industrial agent, Ms Heald signed the Deed. She said that, due to her circumstances, there was no reasonable alternative. She said Metlabs knew of this and thereby exerted illegitimate pressure, inducing her to sign the Deed. She says that in doing so, Metlabs applied duress.

18 In respect of unconscionable conduct, Ms Heald said that Metlabs knew of her financial position. This amounted to a special disabling condition or circumstance, and Metlabs knowingly took unconscientious advantage of it. She also said that Metlabs knew that she did

not have the opportunity to obtain legal or other professional advice, nor was she given reasonable time to consider the matter before she signed the Deed.

Decision at first instance

19 The learned Commissioner set out in detail the evidence before him and examined the law regarding unconscionable dealing, that 'an actual or threatened breach of contract is unlawful conduct' and cited ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors*** [2013] WASCA 36 at [26]. He examined the concept of economic duress and undue pressure and noted that the New South Wales Court of Appeal in ***Australia and New Zealand Banking Corporation Ltd v Karam*** [2005] NSWCA 344 at [62] – [65] 'did not seem keen on the idea that, in relation to the equitable doctrine, an actual or threatened breach of contract was 'unlawful''. The learned Commissioner noted that at [66] of its judgment, the Court had found that 'where the power to grant relief is engaged because of a contravention of a statutory provision … the Court may be entitled to take into account a broader range of circumstances than those considered relevant under the general law'.

20 The Commissioner then noted that s 26(1)(a) of the Act required him to act according to equity and good conscience. He further noted that a court of equity will not exercise its jurisdiction 'to set aside a deed on the basis that there was simply some inequality of bargaining power between the parties to the deed (citation omitted) … More is needed'.

21 The learned Commissioner went on to find that in deciding whether or not to enforce the Deed, equitable principles apply, and that they guided him in what it means to act 'according to good conscience and equity'.

22 The learned Commissioner said that he 'found it unnecessary to decide whether it is enough to establish unlawfulness for the purpose of the equitable doctrine, to establish an actual or threatened breach of contract'.

23 The learned Commissioner then made findings about the particular circumstances. Firstly, he found that while he accepted that Ms Heald was stressed from the time of the meeting with Ms Beeson to the time when she signed the Deed, she was not under any special disadvantage. He described her emotional reaction as normal given what was happening. There was nothing to cause Ms Beeson to consider that Ms Heald was experiencing an actual psychological or emotional state beyond what would be normal. Importantly, the learned Commissioner described Ms Heald as remaining strong and articulate throughout the meeting. She 'was able to obtain professional advice and to communicate clearly, and strongly, with Ms Beeson by email'. Ms Heald had not displayed characteristics normally associated with a special disadvantage. Again, the learned Commissioner described Ms Heald as remaining 'lucid, intelligent and strong'.

24 The learned Commissioner then examined whether there was undue pressure on Ms Heald, from the commencement of the meeting until she signed the Deed. He noted a number of aspects of Ms Beeson's treatment of Ms Heald during the meeting, which he described as unfair. They were:

> [106] …
>
> (1) Ms Beeson told Ms Heald at the start of the meeting on 20 July 2018 that she had committed serious breaches of discipline, rather than that there was an allegation or allegations that she had done so;

(2) Ms Beeson rebuffed Ms Heald's attempts to tell her side of the story by referring to "evidence" of the breaches, without producing that evidence, and repeated that the "breaches", and not the "allegations", were serious (of course, such a discussion and the production of such evidence would have been, all things being equal, quite premature; but all things were not equal, Ms Beeson was telling Ms Heald she had committed "breaches", supported by evidence, and that she had to make a decision about what happened next against that background);

(3) Ms Beeson signalled to Ms Heald, by the above, that Ms Beeson, on behalf of Metlabs Australia Pty Ltd, had no real interest in Ms Heald's side of the story;

(4) Ms Beeson referred at any early stage in the meeting to a "deal", that is to Ms Heald resigning and receiving payment upon doing so, and characterised the "deal" as a way to avoid the consequences of Ms Heald's serious breaches;

(5) Ms Beeson returned throughout the meeting to the "deal", even going so far as to provide Ms Heald with a pro forma copy of a deed, thus giving the "deal" clear primacy in a meeting that Ms Beeson would have us believe was about discussion of "next steps" and "options";

(6) Ms Beeson mentioned only that immediate termination without payment was a possible outcome if Ms Heald did not take the "deal" when, of course, there were many other possible outcomes, including full exoneration and the happy continuation of the employment relationship;

(7) Ms Beeson made it clear that the employment relationship was "over" and that "you just have to move on", which again emphasised the worst for Ms Heald and accentuated the virtues of the "deal" as an alternative;

(8) Ms Beeson made it clear that a decision whether or not to take the "deal" had to made quickly by Ms Heald, with the unpalatable alternative likely to occur soon, and quickly, if the "deal" was not taken;

(9) Ms Beeson's commented that she had family commitments over the weekend, a comment which was really quite unkind and unreasonable given that Ms Beeson's and Ms Heald's situations were completely different with Ms Heald being required to make a big decision about her future while Ms Beeson was choosing to work to a timetable of her making in the context of a paid engagement; and

(10) Ms Heald was told by Ms Beeson to leave work despite it being mid-morning, something that was apparently inconsistent with any thought or belief that Ms Heald might somehow survive the planned process if she chose to participate in it rather than resign.

[107] The meeting was ostensibly about Ms Heald being informed that her employer had some suspicions about her conduct and that a process would be commencing in relation to them. This was, however, by no means its content or tenor.

[108] This was a meeting at which Ms Beeson was trying to get Ms [Heald] to take a deal to resign her employment, and receive money for doing so, against a clear background that if she did not resign she might end up with no job and no money.

[109] That is exquisite pressure for most people and was for Ms Heald.

[110] Ms Beeson kept up the pressure after the meeting.

25 The learned Commissioner noted that while it was no small matter for Ms Heald, compared with other cases of setting aside agreements involving 'large sums of money and ruinous life consequences', its 'seriousness … from Ms Heald's point of view should not be underestimated'. She left work 'that day facing a choice between agreeing to end her employment for five [weeks'] pay, or remaining in that employment with the prospect, looming large, of that employment being ended for her with no payment'.

26 Ms Beeson continued the pressure by reference to a quick disciplinary process. This included that if Ms Heald did not sign the Deed by the next morning, Ms Beeson would immediately get to work on a Show Cause letter, that taking the deal would avoid 'unpalatable and imminent consequences'.

27 The learned Commissioner found that there was no satisfactory explanation as to why it had to be finalised so quickly, except to keep up the pressure.

28 When Ms Heald emailed Ms Beeson saying that she would sign the Deed 'under duress', Ms Beeson responded that Ms Heald should not sign if she was under duress. However, the email returned to point out the result of not signing being the quick prosecution of the disciplinary process. The learned Commissioner referred to the 'naked exertion of further pressure'. Ms Heald then signed the Deed.

29 The learned Commissioner found that 'the pressure was not 'undue' in the relevant sense' because 'it did not involve any actual or threatened unlawful conduct by the respondent. There was no actual or threatened criminal act. It involved no actual or threatened breach of contract by reference to the common law doctrine or the equitable doctrine'. He noted that Ms Heald did not clearly identify any term or terms of the contract allegedly breached or threatened to be breached by Metlabs. The learned Commissioner said that this was 'because Ms Heald's arguments went off on a hopeless tangent about Ms Beeson having breached the criminal law'.

30 The learned Commissioner found that there was no contractual right to only face disciplinary proceedings where there is a basis for them. He commented that while such an action might be brought to the Commission (in what I take to be reference to a claim of unfair dismissal) he found that this was entirely different from a contractual term to that effect.

31 The learned Commissioner noted that there is no contractual duty on an employer to act with good faith towards employees.

32 As to the issue of disciplinary action, the learned Commissioner found that Ms Beeson did have a basis for this action. Although the allegations against Ms Heald were not tested at hearing, the Commissioner noted that there was no argument that they were completely illusory and he formed the view that they were not invented. They were matters that could properly give rise to a suspicion that Ms Heald had breached discipline. He found that 'there could very well have been a relevant suspicion'.

33 The learned Commissioner found that Ms Beeson did not say that if Ms Heald did not resign, she would be summarily dismissed, nor did she suggest that it would occur. 'She singled it out as a possibility but did not go so far as to intimate that it would occur'. It was a possibility but not necessarily the result or the only option if Ms Heald did not resign. If such a statement had been made and it did induce entry into the Deed, the Commissioner found, it might 'have been within the territory of an unlawful threat but no such statement was made and no such thing occurred'. He concluded that there was no threatened breach of contract.

34 The learned Commissioner noted that there was unfairness towards Ms Heald but it was not sufficient to cause him to set aside the Deed. The learned Commissioner recognised the difference in bargaining strength between the parties; that Ms Heald was stressed; that Metlabs through Ms Beeson had little regard for Ms Heald's stress or situation and 'prosecuted its purpose unremittingly and forcefully'. However, Ms Heald was under no special disadvantage, and Metlabs did not breach or threaten to breach the contract.

35 The Commissioner found that according to equitable principles and the public interest, the Commission should enforce the deal struck between the parties in this case. He granted the application pursuant to s 27(1) of the Act and the substantive claim was dismissed.

The grounds of appeal

36 The ground of appeal is that the learned Commissioner, taking account of nine particular facts found, erred in law in failing to consider or to properly consider whether:

(i) actual and threatened breaches of the Appellant's contract of employment had occurred and thus constituted unlawful conduct for the purposes of the common law economic duress doctrine;

(ii) the threats of Ms Beeson in relation to what would happen if the Appellant did not execute the Deed constituted unlawful conduct by reason of being threats that contravened statutory provisions;

(iii) a threat could be conveyed other than by an express statement of intending to cause a detriment if a certain thing did not occur and this encompassed the doing of otherwise lawful acts if done for an improper purpose;

(iv) the actions of Ms Beeson on behalf of the Respondent constituted unlawful conduct by reason of it amounting to the tort of deceit;

(v) there was a contractual duty upon the Respondent to act with good faith towards the Appellant;

(vi) there was any legitimate reason for the Respondent to have any suspicion of wrong doing by the Appellant as a basis for commencing disciplinary proceedings, and if not, whether a pretence that there was, amounted to acting in bad faith such as to constitute a breach of contract; and

(vii) in all the circumstances, it was properly in the public interest for the WAIRC to enforce unfair deals such as those struck here solely because they were not obtained by taking unfair advantage of a special disadvantage or achieved through actual or threatened unlawful conduct.

37 Ms Heald seeks the following orders:

1. The appeal be upheld.
2. The decision of the Commission at first instance be set aside.
3. The Respondent's section 27(1)(a) application be dismissed.
4. A declaration that the Deed executed by the Appellant was procured by duress.
5. The Deed be declared void or it otherwise be ordered that the Deed may not be relied upon by the Respondent in the substantive proceedings.
6. The Appellant's substantive claim be restored and heard and determined on its merits.

The approach to an appeal to the Full Bench

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

> The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499 at 504-505 as follows:
>
> > The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred [140].
>
> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in ***Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission*** [2000] HCA 47; (2000) 203 CLR 194 at [19]- [21]. At [19] their Honours explained by reference to the reasons of Gaudron J in ***Jago v District Court*** *(NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 76, that a discretionary decision results from a "decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'". Instead "the decision-maker is allowed some latitude as to the choice of the decision to be made". At [21] their Honours said that because "a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process". Their Honours then quoted part of the passage of ***House v King*** which I have quoted above [141].
>
> Similarly, Kirby J in ***Coal and Allied*** at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with "caution and restraint". His Honour said this is "because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view". (See also ***Norbis v Norbis*** [1986] HCA 17; (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535) [142].
>
> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in ***Gronow v Gronow*** [1979] HCA 63; (1979) 144 CLR 513 at 519. There, his Honour explained that although "error in the proper weight to be given to particular matters may justify reversal on appeal, ... disagreement only on matters of

> weight by no means necessarily justifies a reversal of the trial judge". This is because, in considering an appeal against a discretionary decision it is "well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion", and that when "no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight". (See also Aickin J at 534 and 537 and ***Monteleone v The Owners of the Old Soap Factory*** [2007] WASCA 79 at [36]) [143].

The appellant's characterisation of the findings

39 The learned Commissioner is said to have erred in law, in having made certain findings but then having failed to consider or properly consider certain matters in light of those findings. The ground of appeal sets out the learned Commissioner's findings and identifies them as (a) to (i). The errors are identified as (i) to (vii). I think it is important to note at the outset that the manner in which some of Ms Heald's characterisations of the Commissioner's findings constructs conclusions which are not actually made by the Commissioner or not made explicitly; which conflate issues and findings or ignore other findings.

The issues – consideration and conclusions

Threat, improper purpose and cause

40 I intend to deal with those items (i) – (vii) in groups as there is some inter-relationship and commonality. The first group of issues which the learned Commissioner is said to have erred in law in failing to consider or properly consider relate to the issue of actual or threatened breaches of Ms Heald's contract of employment, and whether this constituted unlawful conduct for the purposes of the common law economic duress doctrine, as well as threats that contravened statutory provisions.

41 Ms Heald says that there was a threat to issue a Show Cause letter, which meant that Metlabs would take action against her if she did not resign. This is said to constitute an unlawful threat, a breach of the *Criminal Code*.

42 With respect, the evidence demonstrates that Ms Beeson went to the meeting with the intent of giving Ms Heald two options – to sign the Deed and resign and therefore be paid in lieu of notice, or face a disciplinary process which would commence by a letter, the Show Cause letter, setting out allegations to which she was to respond. The Commissioner found that the subsequent emails' explicit reference to 'this deal' would allow Ms Heald to avoid what he described as 'the unpalatable, and imminent, consequences'.

43 Although he described it as an 'unfair characterisation of what a fair process would involve or, perhaps more accurately, a fair characterisation of an unfair process', the learned Commissioner gave the idea of an actual or threatened criminal act short shrift. He rejected the submission that there was a 'threat' as the term is used in the *Criminal Code*. He noted that the argument about a breach or threatened breach of contract 'went off on a hopeless tangent about Ms Beeson having breached the criminal law'. The learned Commissioner found that Ms Beeson did have a basis for telling Ms Heald that disciplinary action might be taken against her. He said there was no argument that the allegations against her were illusory. He found they 'were not invented and that the matters could properly have given rise to a relevant suspicion on the part of Ms Heald's employer that she had breached discipline'.

44 While the learned Commissioner was rightly critical of both Ms Beeson's credibility and of the fairness of the process, he was quite clear that there were valid issues raised as allegations against Ms Heald. He found that 'there could very well have been a relevant suspicion'.

45 In my respectful view, Metlabs was entitled to put to its employee, Ms Heald, that she could avoid the process of those allegations being dealt with and reach an agreement with her employer to bring her employment to an end in circumstances that may be favourable to her. In my view, this does not constitute a threat. It is certainly not a threat which meets the definitions contained within the *Criminal Code*. It is a not unusual practice in employment relationships for employers to give employees an option rather than to either proceed to a disciplinary process or to be dismissed. In this case, Ms Heald had an option and that was to face the disciplinary process.

46 Two things are significant. The first is that Ms Heald sought advice from an industrial agent, and received advice but made up her own mind. Secondly, Ms Beeson's email in response to Ms Heald saying she would sign the Deed and resign under duress is significant. She said:

> Please do not under any circumstances sign the Deed of Settlement and Release under duress or if you feel that you have been railroaded.
>
> I do not want you to feel that you had no option other than to resign. It was one option but the other option is to commence the process which we discussed today.
>
> I think it is best that I prepare the Show Cause Letter and we commence the disciplinary management process. You will be required to meet with me on Monday to respond to the Show Cause Letter and we will then consider your response.
>
> You must not under any circumstances resign and / or sign a Deed of Settlement and Release under duress. It was simply an option available to you and you must not feel that you had no option or choice to sign the form. (Appeal Book page 80).

47 Ms Beeson then went on to say that she would forward the Show Cause letter shortly and arrange a meeting for the Monday. She encouraged Ms Heald to carefully respond to the Show Cause letter. This clearly indicates that at the time Ms Heald signed the Deed, it had been made clear to her that she must not sign it under duress and in fact, she was encouraged not to, and Ms Beeson's intention was to then draw up the letter and arrange a meeting time for the Monday.

48 Although the learned Commissioner found that Ms Beeson's purpose in conducting the meeting was to procure Ms Heald's signature to the Deed, the next day, Ms Beeson backed away from that purpose in her email, advising Ms Heald to not sign under duress and saying that she would go ahead with the disciplinary process.

49 Even if there had been a threat in the meeting, which is not clear to me on the evidence, the email from Ms Beeson the next day removed that threat.

50 The learned Commissioner also considered whether the so-called threat breached the contract of employment in that this was said to be a threat to dismiss, and he found that there was no such threat. He found that Ms Beeson singled out the possibility of dismissal 'but did not go quite so far as to intimate that it would occur', but there was no threat that this would necessarily result if Ms Heald did not resign. I respectfully agree with those findings, and they were findings open on the evidence.

51 The transcript of proceedings makes quite clear that Ms Heald knew and understood that she was not being threatened with dismissal, but that the risk she faced was of an investigation. At page 68 of the transcript, the learned Commissioner asked Ms Heald about her understanding:

> **MATTHEWS C:** What did you understand by reference to show cause? Show cause about what?---From her explanations, just that I had to explain myself as to why I did what I did, um, and then that was it - - -
>
> Okay - - -?--- - - - just - - -
>
> - - - thank you?---Yeah.
>
> **HARDING, MS:** So that email is proof that you had another option other than resigning, didn't you?---Yes.
>
> Yes. And that was to go through this process of responding to their concerns, correct?---Of which I thought I'd be terminated anyway, so - - -
>
> You thought that, but she never said you'd be terminated, did she?---She said it was a option, yes.
>
> Yes, she said it was an option, but she never said - - -?---Yeah.
>
> - - - you were being terminated or that you would be terminated, did she?---No.
>
> And she said she would consider your response before they made a decision as to what the next steps would be, didn't she?---Oh, she said they would consider my response, my - and if my excuses weren't good enough, I'd be terminated anyway.
>
> So said, "You will be terminated anyway" - - -?---Anyway - - -
>
> - - - did she?---Yeah.
>
> Or did she said - or did say, "You may be terminated"?---No, she said, "You'll be terminated - you could be terminated anyway".
>
> "You could be terminated"?---The exact words were, yes.
>
> "You could be terminated" - - -?---Yes.
>
> - - - "anyway". So not, "You would be terminated anyway"?---Ah, "You could be".
>
> In her email, she doesn't say that you have to resign, does she?---Ah, no, I don't believe so [ts 68].

52 At page 83 of the transcript, in an exchange between the learned Commissioner and Mr McCorry for Ms Heald, the Commissioner put to Mr McCorry that Ms Heald did not understand Ms Beeson to be saying to her that the Show Cause letter was for Ms Heald to show why she should not be dismissed or sacked, rather to show why Metlabs should not undertake a disciplinary process.

53 It was not clear at that point what Metlabs would require Ms Heald to respond to and what it was considering. What is clear is that the process would involve a number of allegations being put to her for her answer. Metlabs would consider her answers. What was to happen as a consequence was not at that point determined, presumably on the basis that it would be determined taking account of her answers.

54 It seems to me that the thing that Ms Heald says was a threat was that if she did not sign the Deed, resign or receive a sum of money, that Metlabs would provide her with procedural fairness. It would put allegations to her about her conduct and performance and she would have an opportunity to answer them. If Metlabs found that her conduct warranted summary dismissal, then she would have her employment terminated without notice or pay in lieu of notice. Alternatively, the investigation may exonerate her and find that she had not misconducted herself. Therefore, if a threat were the options which I have discussed above, of

providing an employee with an opportunity to resign or face a disciplinary process where procedural fairness would come into play, constituting an unlawful threat for the purposes of the criminal law, then frequently-used human resources processes would constitute criminal acts. Ms Heald had a real option to face procedural fairness. She chose the other option. She did so in the face of advice and of urging by Ms Beeson not to sign if she felt under duress.

55 The grounds for the investigation are in the email from Mr Townend. There may have been innocent explanations, as the Commissioner found, but the issues were worthy of investigation. The learned Commissioner found that there was reasonable cause for allegations to be put to Ms Heald. He found that the allegations were not illusory and were not invented. They were matters that could properly give rise to a suspicion.

56 Therefore, in my view, the learned Commissioner considered the issues of threat for the purposes of the question of an unlawful threat and breach of contract. He dismissed without much consideration the issue of threat for the purposes of breach of contract in the context of the facts, not the context erroneously portrayed in the ground of appeal. There was no justification for a conclusion that there was a threat in the context used by Ms Heald. Certainly, there was not a threat 'without reasonable cause'.

57 Ms Heald did not demonstrate that there was a threat for the purposes of the first three aspects of the ground of appeal, and the learned Commissioner did not err as submitted. Without a threat, the first three aspects fall away.

Tort of deceit

58 The fourth point is that Ms Beeson's actions on behalf of Metlabs constituted unlawful conduct by reason of it amounting to the tort of deceit. I note that this matter was not raised at first instance and is not appropriate to be raised on appeal.

59 Section 49 of the Act provides that an appeal shall be conducted on the basis of the matters raised by the parties at first instance. See also ***University of Wollongong v Metwally (2)*** [1985] HCA 28; (1985) 60 ALR 68 and ***Whooley v Shire of Denmark*** [2019] WASCA 28; (2019) 99 WAIG 87. The importance of finality of litigation is an important principle of public policy (***Coulton v Holcombe*** [1986] HCA 33; (1986) 162 CLR 1).

60 A new argument may be considered in exceptional circumstances (***Water Board v Moustakas*** [1988] HCA 12; (1988) 180 CLR 419).

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

62 As this was not raised at first instance and there is no argument or justification for it being raised on appeal, this aspect ought to be dismissed.

A contractual duty to act with good faith

63 In the fifth point in the ground of appeal, Ms Heald says the learned Commissioner erred in failing to consider or properly consider that there was a contractual duty on Metlabs to act with good faith.

64 However, the argument as it developed at the hearing of the appeal was based on a requirement to act honestly, said to arise in ***Commonwealth Bank v Barker*** [2014] HCA 32; (2014) 253 CLR 169 at [41] per French CJ, Bell and Keane JJ. The issue in that matter was about the requirement for trust and confidence in the employment relationship. ***Outlook Management v Foxtel Management Pty Ltd*** [2002] NSWSC 17 and ***Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*** [2010] NSWCA 268, referred to by the appellant, were cases involving commercial contracts between parties where the contracts expressly contained obligations to act in good faith.

65 The learned Commissioner was, with respect, correct that there is no implied term of good faith and fidelity in employment relationships. In ***Regulski v State of Victoria*** [2015] FCA 209 at [219], Jessup J noted that there is no authority for the proposition that there is an implied term that parties would act in good faith towards each other in contracts of employment as compared with commercial contracts.

Legitimate reasons for suspicion

66 The sixth point submits that the learned Commissioner failed to consider or properly consider whether there was a legitimate reason for Metlabs to have any suspicion of wrong-doing by Ms Heald as the basis for commencing disciplinary proceedings.

67 The learned Commissioner considered this matter and found that there was no real challenge to there being no basis for suspicion. Given the nature of the hearing at first instance, it was not appropriate for the Commission to consider whether the allegations were true. Rather, it involved consideration of whether there was a basis for suspicion as part of the consideration of the issue of threat. He found that there were issues raised which were appropriate to be investigated. They were the issues raised by Mr Townend about Ms Heald's conduct and performance. He concluded that there was no pretence that there were grounds for a suspicion of wrong-doing by Ms Heald. It has not been demonstrated that the learned Commissioner erred in this conclusion. I would dismiss this point.

The Public Interest

68 The seventh point is that the Commissioner failed to consider or properly consider whether in all the circumstances, it was properly in the public interest for the Commission to enforce unfair deals such as those struck in this case solely because they were not obtained by taking unfair advantage of a special disadvantage or achieved through actual or threatened unlawful conduct.

69 Ms Heald's case at first instance was not about general unfairness. It was about being released from the Deed because of, in particular, duress and unconscionable conduct. This aspect of the ground of appeal seeks to add a general element of unfairness. As with the issue of the tort of deceit raised in the fourth point, it is not open to the appellant to raise a new argument on appeal.

70 In any event, unfairness in agreement making will not generally justify overturning an agreement. Something more, such as duress or unconscionable conduct, is necessary.

71 Further, the learned Commissioner did properly consider the public interest. In the early part of his Reasons for Decision, he dealt with the issue of the public interest in the need to enforce agreements reached between parties. He noted the authorities regarding providing relief against unconscionable dealing to set aside a deed of settlement and release by reference to ***Commercial Bank of Australia Ltd v Amadio*** and in respect of a contract, regarding a party entering into the contract where the pressure involves an actual or threatened unlawful act (***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd & Ors***). He couched the question as being 'what approach do I use in deciding whether or not to enforce the Deed to bar the substantive denied contractual benefits claim' [88].

72 The Commission is a creature of statute and therefore has powers according to, and is constrained by, the statute. The Commission's powers include s 27(1)(a) which provides:

> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) …
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) …
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

73 The Commission is also bound to exercise its jurisdiction 'according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms' (s 26(1)(a) of the Act).

74 Consideration of whether it is in the public interest to dismiss a matter 'will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree' (***Re Queensland Electricity Commission and Ors; ex parte Electrical Trades Union of Australia*** [1987] HCA 27 at [7], per Mason CJ and Wilson and Dawson JJ). In the same matter, Deane J dealt with the issue of a court or tribunal refraining from hearing in the public interest. At [3], his Honour noted:

> The right to invoke the jurisdiction of courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person or organisation, regardless of rank, condition or official standing, is 'amenable to the jurisdiction' of the courts and other public tribunals (cf Dicey *An Introduction to the Study of the Law of the Constitution,* 10th ed (1959), (193)). In the rare instances where a particular court or tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise.

75 The decision required of the Commissioner at first instance was a discretionary one, of whether it was in the public interest to allow the pursuit of a case in circumstances where Ms Heald had entered into a deed with Metlabs in which she expressly 'and mutually with the respondent' agreed not to do so. The Commissioner was required to decide whether to set aside the Deed

in the context of whether it is in the public interest for parties to be bound by their agreements or to be able to be relieved of them in particular circumstances.

76 The Commission has long taken the view that where parties expressly settle all matters between them and agree not to take further action against each other, either generally or by entering into a Deed of Settlement and Release, it constitutes a bar to the pursuit of a claim of, for example, unfair dismissal or for a denied contractual benefit. In ***Bradbury v Great Western Real Estate*** [1995] WAIRC 12927; (1995) 75 WAIG 2927, Sharkey P, with whom Gifford C agreed, said:

> As a matter of equity, good conscience and the substantial merits of the case, it would have been quite unfair to allow a person (the appellant), having entered into an agreement and not performed it, to proceed with his application in breach of it. Indeed, it would have been open to the respondent to take action to prevent this at law. *It is certainly not in the public interest, too, that the Commission should have proceeded to hear something which had been settled by agreement, even if, as a matter of law, the Commission could have heard the matter, which it could not have* (2928). (Emphasis added).

77 There have been many decisions following this line since that time, including those dealing with claims to set aside formal deeds (see ***Jacqueline Healey v Amadeus Australia*** [2006] WAIRC 04575; (2006) 86 WAIG 1521).

78 In this case, the arguments raised by Ms Heald at first instance did not include a ground of general unfairness. In any event, as the learned Commissioner noted, more is needed such as duress or unconscionable conduct. Ms Heald was unsuccessful on those two issues, and can obtain no comfort or relief on general grounds of unfairness, even if that had been squarely raised at first instance.

Conclusion

79 No error has been identified in this appeal. I would dismiss it.

KENNER SC:

80 The background to this appeal, the contentions of the parties, and the findings at first instance have been helpfully set out in the reasons of the Chief Commissioner, which I have had the benefit of reading and need not repeat. I am also in general agreement with the Chief Commissioner's conclusions that the appeal should be dismissed and for the reasons she gives. I add the following observations of my own.

Deceit

81 As to the tort of deceit point, this matter was not raised or argued in the proceedings at first instance. Recently, in ***Civil Service Association v Department of Justice*** [2019] WAIRC 00713; (2019) 99 WAIG 1531, I said at par 33:

> As to the written and oral submissions of the appellant in relation to the history of cl 37, it was conceded when the matter was raised by the Full Bench, that such issues had not been raised or argued before the learned Industrial Magistrate at first instance. Whilst the issue does not relate to a matter that may have been met by the other side with additional evidence, nonetheless, the well settled principle is that except in very exceptional circumstances, a party may not raise a point or issue on appeal, that was not taken in the proceedings at first instance: ***Whooley v Shire of Denmark*** [2019] WASCA 28; (2019) 99 WAIG 87 citing ***Suttor v Gundowda*** *Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418; ***University of Wollongong v Metwally*** (No 2) [1985]

> HCA 28; (1985) 59 ALJR 481; ***Water Board (NSW) v Moustakas*** [1988] HCA 12; (1988) 180 CLR 491. No exceptional circumstances were raised by the appellant and in my view, none are apparent, in terms of the interests of justice, that would warrant departing from this principle.

82 There is no basis to conclude and no exceptional circumstances were demonstrated in this matter, as to why the appellant should be able, in the interests of justice, to now raise an allegation amounting to the tort of deceit. This is especially so in circumstances where such an allegation may have been met with further evidence from the respondent. Therefore, the appellant should not be permitted to now raise this matter for the first time.

Duress

83 The essence of duress in relation to contracts is discussed in J D Heydon, *Heydon on Contract*, Lawbook Co. 2019 as follows at par [16.10]:

> [16.10] Definition of "duress"
>
> The doctrine of duress operates both in contract and in other fields. Of late its significance in relation to the law of contract has grown. So far as it operates in contract, duress is a form of pressure: which is regarded by the law as illegitimate; which is usually created by a threat coupled with a demand; which has the purpose of inducing the plaintiff to enter into a contract or a variation to a contract; which leaves the plaintiff no reasonable alternative but to do so; and which operates as a cause of the plaintiff's entry into the contract or the variation.[1] There can be overlap between the ingredients of pressure, illegitimacy and causative effect.[2] There are enactments which are derived from duress but which are not discussed in this chapter.[3]
>
> Duress is conventionally grouped into three categories: duress to the person, duress of goods and economic duress. The first two are of some antiquity. Their operation is relatively clear. The third, at least under the name "economic duress", is novel. The courts have endeavoured to develop it in order to meet what they perceive as evils. But in many respects the applicable principles are quite unclear, both in formulation and application. For this reason it has attracted much attention from writers.

84 For the purposes of economic duress, the relevant threat involves harm to the economic interests of the affected parties. There could be little doubt that the loss of employment, as a means of obtaining an income in order to meet the necessities of life, could amount to economic harm.

85 In ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors*** [2013] WASCA 36 Murphy JA considered the principles of economic duress as follows at par 174:

> Both parties in their submissions relied upon the judgment of McHugh JA in ***Crescendo Management v Westpac*** (at 45 - 46):
>
> > The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate: ***Universe Tankships Inc of Monrovia v International Transport Workers Federation*** [1983] 1 AC 366 at 384 per Lord Diplock. As his Lordship pointed out, the consequence is that the 'consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind' (at 384). In the same case Lord Scarman declared (at 400) that the authorities show that there are two elements in the realm of duress: (a) pressure amounting to compulsion of the will of the victim and (b) the illegitimacy of the pressure exerted. 'There must be pressure', said Lord Scarman 'the practical effect of which is compulsion or the absence of choice'.

> The reference in ***Universe Tankships Inc of Monrovia v International Transport Workers Federation*** and other cases to compulsion 'of the will' of the victim is unfortunate. They appear to have overlooked that in ***Director of Public Prosecutions for Northern Ireland v Lynch*** [1975] AC 653, a case concerned with duress as a defence to a criminal proceeding, the House of Lords rejected the notion that duress is concerned with overbearing the will of the accused. The Law Lords were unanimous in coming to the conclusion, perhaps best expressed (at 695) in the speech of Lord Simon of Glaisdale 'that duress is not inconsistent with act and will, the will being deflected, not destroyed'. Indeed, if the true basis of duress is that the will is overborne, a contract entered into under duress should be void. Yet the accepted doctrine is that the contract is merely voidable. In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.

86 In this case, on this issue, the appellant falls at the first hurdle. The onus was on the appellant to establish that the conduct of the respondent, through its agent Ms Beeson, in relation to the appellant's entry into the Deed, resulted from an illegitimate threat or illegitimate pressure. On the basis of Murphy JA's analysis in ***Woodside Energy*** the illegitimate pressure is confined to unlawful conduct by reference to some external standard.

87 As to the alleged breach of contract or threatened breach, resulting from the proposed show cause letter, the learned Commissioner found, and the appellant did not challenge, that the appellant understood in the meeting with Ms Beeson that a show cause letter, in the context of this case, did not mean that the appellant was to be dismissed. The appellant understood that what was to occur would be a process whereby the respondent's allegations would be put to the appellant and she would be given an opportunity to answer them. There was no doubt that the appellant was told that a possible outcome of such a process could be summary dismissal.

88 There is no breach or threatened breach of a contract of employment for an employer to put to an employee in a meeting, that the employer considers that the employee engaged in misconduct and a process would follow by which those matters would be put to the employee to answer, even if this may lead to a dismissal. In this case, the learned Commissioner concluded there was a basis for the respondent's suspicion of misconduct and that the appellant would be given an opportunity to answer them in due course. Despite finding also that Ms Beeson acted forcefully and clearly wanted to achieve an outcome favourable to the respondent, on the evidence there was no threat by the respondent to break the contract of employment constituting an unlawful act: ***Walmsley v Christchurch City Council*** [1990] 1 NZLR 199 at 208. As the learned Commissioner recognised, the situation may have been different if there was no evidence at all of any basis upon which the respondent may have had legitimate suspicions about the appellant's conduct, but nonetheless, threatened summary dismissal anyway, unless the appellant signed the Deed.

89 In this matter however, it appears from the transcript at first instance at p 83, that reliance was placed by the appellant on Ms Beeson's comment that the appellant could have had her

employment terminated, as the relevant threatened breach of contract. That is not so. By merely saying that dismissal may follow a show cause letter and a disciplinary process does not constitute a threat of a breach of the contract of employment. Indeed, a dismissal, even summary, may be entirely consistent with the terms of a contract of employment, on the facts. There is no contractual obligation on an employer to never dismiss an employee. A dismissal, albeit lawful, may be harsh, oppressive or unfair, but that is an entirely different question.

Criminal Code

90 As to the alleged contravention of s 338A of the *Criminal Code* (WA), the appellant maintained that the learned Commissioner did not consider or properly consider this point. This is also not so. Whilst the learned Commissioner dealt with this matter very shortly, he did not consider that the respondent's conduct could be so described. Having regard to the definition of "Threat" in s 338 of the *Criminal Code*, and the terms of s 338A, there can be no foundation to the appellant's argument in this respect.

91 For the purposes of Chapter XXXIIIA of the *Code*, a "threat" is "a statement or behaviour that expressly constitutes or may reasonably be regarded as constituting, a threat to (a) kill, injure etc … (b) destroy, damage, endanger or harm any property … (c) take or exercise control of a building, structure … (d) cause a detriment of any kind to any person, whether a particular person or not…" In terms of the case of the appellant, the provisions relied on at first instance under s 338A, for the purposes of criminal responsibility, were that a person commits a crime if they "make a threat with intent to (a) gain a benefit, pecuniary or otherwise, for any person; or (b) cause a detriment, pecuniary or otherwise, to any person…" (AB 35). Having regard to the approach to these provisions by Kennedy, Wallwork and White JJ in ***Tracey v R*** [1999] WASCA 77, it is with respect, difficult to see how the relevant conduct could be so characterised, even if it was appropriate for the Commission to have regard to such matters, being one ultimately for the criminal courts to resolve.

WALKINGTON C:

92 I agree with the Reasons for Decision of the Chief Commissioner and have nothing to add. The appeal should be dismissed.