APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 97/2018 GIVEN ON 21 JUNE 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00358
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
HEARD	**:**	MONDAY, 21 OCTOBER 2019
LAST SUBMISSIONS	**:**	FRIDAY, 22 NOVEMBER 2019
DELIVERED	**:**	THURSDAY, 25 JUNE 2020
FILE NO.	**:**	FBA 7 OF 2019
BETWEEN	**:**	THE MINISTER FOR CORRECTIVE SERVICES Appellant AND MR GARY HAWTHORN Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**The Commission**
Coram	**:**	**Senior Commissioner S J Kenner**
Citation	**:**	**2019 WAIRC 00307**
File No	**:**	**U 97/2018**

CatchWords	**:**	Industrial law (WA) – Appeal against decision of the Commission in relation to unfair dismissal – Termination of employment of Senior Prison Officer – Commission found dismissal harsh, oppressive and unfair – Use of force by deployment of Oleo-resin Capsicum Aerosol spray in two incidents – Alleged contravention of *Prisons Act 1981* (WA) and breach of discipline under *Public Sector Management Act 1994* (WA) not upheld at first instance – Standards of appellate review considered on appeal – Correctness standard found not to

		apply – Reasonableness of use of force – Consideration of s 14(1)(d) *Prisons Act 1981* (WA) – Use of force proportionate to risk posed – Full Bench found use of force reasonable and proportionate – Loss of trust and confidence as basis for dismissal – Fairness of dismissal – Full Bench found Commission entitled to base finding of unfairness on incidents not loss of trust and confidence – Application to add new ground of appeal – Not Full Bench role to identify issues and suggest new grounds for parties – Unfair dismissal matters generally dealt in once sitting – Staged approach not sustainable and not allowed – Leave to add new ground of appeal refused
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23A, s 27(1)(l), s 27(1)(m); *Prisons Act 1981* (WA) s 13(2), s 14, s 14(1), s 14(1)(d)*;* *Public Sector Management Act 1994* (WA) s 80(b), s 80(c), s 81(1)(a), s 76(4)
Result	**:**	Appeal dismissed

Representation:

Appellant	**:**	Mr J Carroll (of counsel) and with him, Mr D Akerman (of counsel)
Respondent	**:**	Mr D J Stojanoski (of counsel) and with him, Mr C Fordham (of counsel)

Case(s) referred to in reasons:

Ammon v Colonial Leisure Group Pty Ltd [2019] WASCA 158

Australian Rail, Tram and Bus Industry Union v Public Transport Authority [2017] WASCA 86

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36

George v Rockett [1990] HCA 26; (1990) 170 CLR 104

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

Ian Anderson v Rogers Seller and Myhill Pty Ltd [2007] WAIRC 00218; (2007) 87 WAIG 289

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 92 ALJR 713

Norbis v Norbis [1986] HCA 17; (1986) 161 CLR 513

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch [2016] WAIRC 00236; (2016) 96 WAIG 408

SGS Australia Pty Ltd v Taylor [1993] WAIRC 11760; (1993) 73 WAIG 1760

State School Teachers' Union of WA (Incorporated) v Director-General, Department of Education [2019] WAIRC 00175; (2019) 99 WAIG 336

Waddell v Commissioner of Police [2012] WAIRC 00112; (2012) 92 WAIG 254

Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531

Case(s) also cited:

Bradley v Commonwealth [1973] HCA 34; (1973) 128 CLR 557

Liversidge v Anderson [1942] AC 206

Nakkuda Ali v MF De s Jayaratne [1951] AC 66

Mattar v The Minister for Corrective Services [2017] WAIRC 00794; (2017) 97 WAIG 1627

R v IRC; Ex parte Rossminister Ltd [1980] AC 952

WA Pines Pty Ltd v Bannerman (1980) 41 FLR 169

Reasons for Decision

SCOTT, CC

Introduction

1 The Minister for Corrective Services (the Minister) appeals against the decision of the Commission that the dismissal of Mr Hawthorn, a Senior Prison Officer, was unfair.

Background

2 Mr Hawthorn had been a Prison Officer and Senior Prison Officer for a total of 22 years when he was dismissed. This service was made up of approximately 11 years in the Scottish Prison Service and approximately 11 years with the Department of Justice, Corrective Services in Western Australia, where Mr Hawthorn worked in a range of prisons. There is no record of any issue with his conduct or performance until two incidents arose which led to allegations that he had used excessive or unreasonable force against prisoners on 4 May and 20 May 2017. Both incidents relate to his use of Oleo-resin Capsicum Aerosol (OC spray).

3 The allegations against Mr Hawthorn were investigated and found to be substantiated. By letter dated 11 July 2018, the Director General of the Department of Justice informed Mr Hawthorn that:

> In light of the gravity of your conduct, your lack of insight into the excessive nature of your uses of force, and the high standards of professional conduct expected of Prison Officers both by myself, and the Western Australia community at large, I have lost trust and confidence in your ability to conduct yourself in a manner that accords with such standards.

4 The Director General dismissed Mr Hawthorn effective from that date, and he was to be paid in lieu of notice.

5 Mr Hawthorn claimed that he had been unfairly dismissed.

6 The incident, the subject of the first set of allegations, arose on 20 May 2017. Mr Hawthorn was alleged to have:

1. Breached discipline by deploying OC spray at Prisoner Bellin. This was said to have been an excessive use of force constituting an act of misconduct.
2. Breached discipline when he did not administer after-care and/decontamination after deploying the OC spray at Prisoner Bellin.

7 The second set of allegations arose from an incident on 4 May 2017, when Mr Hawthorn was alleged to have breached discipline when he used force, which was unreasonable in all of the circumstances, in spraying OC spray on Prisoner Wharerau prior to using de-escalation techniques. It was also alleged that he used OC spray when he was not permitted to because he had not undergone the necessary refresher training.

8 The allegations were couched in terms of being breaches of discipline and were dealt with under s 81(1)(a) of the *Public Sector Management Act 1994* (WA) (the PSM Act) and the *Public Sector Commissioner's Instruction 'Discipline – General'*.

9 An investigator was appointed and carried out an investigation. Mr Hawthorn denied the allegations.

10 By letter dated 25 May 2018, the Director General informed Mr Hawthorn that as the matters were only six days apart, they were to be viewed together as they related to conduct of a similar nature in respect of his method and judgement in dealing with prisoners and deployment of OC spray. It was found, on the balance of probabilities, that he had committed the misconduct. In respect of both Mr Bellin and Mr Wharerau, it was found that Mr Hawthorn had breached s 14 of the *Prisons Act 1981* (WA) in relation to the lawful use of force, and Policy Directive 5, '*Use of Force'* (PD5). These breaches were said to therefore be breaches of discipline under s 80(b) of the PSM Act and constituted acts of misconduct under s 80(c).

11 The second aspect of the first allegation regarding Mr Bellin, of failing to administer after-care, was withdrawn.

12 In relation to the second aspect of the allegation regarding Mr Wharerau, of using OC spray when he was not permitted to do so due to not having undertaken refresher training, it was found that his inaction constituted an act of misconduct under s 80(c) of the PSM Act.

Reasons for decision at first instance

13 The Commission issued Reasons for Decision ([2019] WAIRC 00302). I note that the headings and structure of the Reasons suggest that the decision itself is contained after the heading '*Consideration*'. However, a number of significant findings and conclusions are set out earlier and are not limited to that section.

14 The learned Senior Commissioner examined the two incidents. He also considered evidence relating to practice in prisons, and the Department's policies and training materials. The learned Senior Commissioner also considered an email sent by Principal Officer Cooper dated 11 February 2015 (the Cooper email), in which Principal Officer Cooper advised prison officers at Hakea Prison that in light of a high number of assaults by prisoners on prison officers, that 'if in doubt get the spray out' [12].

15 Under the heading '*Use of Force Principles*', the learned Senior Commissioner noted:

> [29] Use of force by a prison officer in the course of his or her duties must be strictly controlled and is, at all times, subject to legal restraint. The appointment, powers and duties of a prison officer in this State are governed by the *Prisons Act*. Section 13 empowers the respondent to appoint prison officers. Under s 13(2), on engagement, a prison officer takes an oath to well and truly serve the State as a prison officer and to maintain the safety and security of a prison, the prisoners and officers employed at a prison. The oath also obliges a prison officer to uphold the Prisons Act and all orders, rules and regulations made under it, to deal fairly with prisoners and to obey lawful orders of superiors.
>
> [30] Section 14(1) is most relevant for present purposes. It deals with the powers and duties of prison officers.

16 He then set out the terms of s 14(1)(d) of the *Prisons Act* that:

> Every prison officer –
>
> …

> (d) may issue to a prisoner such orders as are necessary for the purposes of this Act, including the security, good order, or management of a prison, and may use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with.

and noted:

> [31] For the purposes of these proceedings, s 14(1)(d) is most relevant. That empowers a prison officer to use such force as he considers necessary, based on reasonable grounds, to ensure that either his or other lawful orders are complied with. In terms of the meaning of 'reasonable grounds' for these purposes, as was stated by the High Court in *George v Rockett* (1990) 93 ALR 483 at 488:
>
> > When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Arkin's famous, and now orthodox, dissent in *Liversidge v Anderson* [1942] AC 206 : see *Nakkuda Ali v MF De s Jayaratne* [1951] AC 66 at 76-7; *R v IRC; Ex parte Rossminister Ltd* [1980] AC 952 at 1000, 1011, 1017-18; *Bradley v Commonwealth* (1973) 128 CLR 557 at 574-5; 1 ALR 241; *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 180-1; 30 ALR 559 at 566-7. That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see, for example, *Attorney-General v Reynolds* [1980] AC 637. Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist.

17 The learned Senior Commissioner also noted that the Department has policies and procedures dealing with the use of force by prison officers and referred to PD5. He noted that the Corrective Services Academy where prison officers undergo their training provides training on the use of OC spray. He set out the effect of the chemicals and the instructions of a minimum recommended engagement distance of one metre. Mr Kentish, team leader at the Academy, gave evidence in which he accepted 'that OC spray may be used at a closer distance and each case will be dynamic and depend on its circumstances' [35].

18 The Senior Commissioner also examined a document used as part of the training of prison officers by the Academy called 'Defensive Equipment and Techniques Use of Force (Adult Custodial)' (exhibit R8) which deals with issues relating to the use of force including the reasonableness of the force used and how that is to be interpreted. The Senior Commissioner also noted Mr Kentish's evidence in respect of the 'The Use of Force Model', contained in that document, which the Senior Commissioner described as 'a theoretical model used as a tool to assist prison officers in the assessment of a situation with a prisoner that may involve the use of force' [35].

19 The learned Senior Commissioner then examined the two incidents, the subject of the allegations, in detail.

The Whararau incident

20 The Senior Commissioner set out the evidence of the witnesses, both those officers present and other senior officers, about proper practices and protocols and of what is seen in the CCTV footage, about the deployment of the OC spray towards Mr Whararau. I note, in passing, that while the CCTV footage contains a visual recording, there is no audio recording.

21 He noted the conflicting opinions as to whether the use of force in the circumstances was necessary. He noted the evidence of Principal Officer Parker, who was present at the incident and having viewed the CCTV footage, that he had no concern with Mr Hawthorn's use of OC spray. He noted Officer Idowu's evidence about the situation being unpredictable, that handcuffs could not be used, and that Mr Hawthorn gave Mr Wharerau two warnings that if he did not let go, the OC spray would be used. The Senior Commissioner noted that this was at odds with the inference drawn by the investigators that Mr Hawthorn did not likely have the time to warn. He noted Officer Idowu's agreement that it was important to act quickly in the circumstances, including that there was a significant chance of an assault on officers [47] – [48].

22 The evidence of Assistant Superintendent Reynolds, on viewing the CCTV footage, was that there were a lot of other prisoners outside their cells and milling about the area and that 'it looked like a situation that could escalate and get out of control'. She said she would have acted in the same way as Mr Hawthorn [50].

23 Senior Officer English's evidence was much the same as that of Assistant Superintendent Reynolds [53].

24 Acting Deputy Commissioner Blenkinsopp expressed the view that, as there were a number of officers present at the time, they could have assisted in getting Mr Wharerau to release his hands, without the need to use the OC spray [54].

25 The Senior Commissioner noted that Superintendent Hedges, Prison Superintendent at Eastern Goldfields Regional Prison, who gave evidence, undertook a review of Mr Hawthorn's use of force in both incidents and prepared reports. Superintendent Hedges concluded that the use of force in the circumstances was 'adequate to control the situation and to prevent it from escalating'. The Senior Commissioner said that he agreed with Superintendent Hedges' view that the 'circumstances which arose on that day constituted a volatile situation' and that there were a considerable number of prisoners milling about and taking an interest in Mr Wharerau's interaction with officers [56].

26 The learned Senior Commissioner said:

> [56] There was plainly, as Superintendent Hedges and Officer Idowu identified, a risk of involvement of other prisoners. From a review of the CCTV footage, which I have studied carefully, especially from the full room angle, there were a considerable number of prisoners milling about and taking an interest in Mr Wharerau's interaction with the officers. They were edging closer. It was also clear from the CCTV footage, although the lack of audio is a limitation, that Mr Wharerau was becoming argumentative and non-compliant. Situation awareness, as all of the respondent's training material emphasises, is important. This was a factor which Superintendent Hedges considered. I agree with this also.

27 The Senior Commissioner noted that Superintendent Hedges' assessment of the incident was consistent with the evidence of Principal Officer Parker and Officer Idowu and Mr Hawthorn. He went on to note, 'I would add that the officers called on the applicant's behalf also supported this assessment, although it was, as with Acting Deputy Commissioner Blenkinsopp's evidence, based on an after the event assessment with all of the limitations that involves.' The learned Senior Commissioner said that he found the evidence of these witnesses to be credible. He also noted that 'Superintendent Hedges' view was also consistent … with the respondent's training materials in relation to use of force guides. As the most

senior officer and the Superintendent, who is under the *Prisons Act* responsible for the good order and security of the prison, I found Superintendent Hedges' evidence very persuasive'. The Senior Commissioner found that Mr Hawthorn's actions were consistent with the respondent's training materials and 'the respondent's criticisms of his actions were unwarranted' [57].

28 The Senior Commissioner then considered issues of Mr Hawthorn's conduct in attempting to de-escalate the situation and how the matter progressed.

29 While there had been criticism of Mr Hawthorn's use of the spray at such a close distance, the Senior Commissioner noted that the training materials and Mr Kentish's evidence indicated that each case must be assessed in accordance with the circumstances. He concluded that on all of the evidence, the deployment of OC spray by Mr Hawthorn was justified and '[i]t did not, having regard to all of the circumstances, constitute the use of unreasonable force' [59].

30 The second allegation arising from the Wharerau incident, that Mr Hawthorn used OC spray when his refresher training was not up to date, was not formally abandoned, but there was no reference to it in the dismissal letter and nor did it form part of the Director General's reasons for decision in the letter of 25 May 2018. The learned Senior Commissioner noted that whilst this allegation was not expressly abandoned and no evidence was called from a responsible person as to the Director General's decision in that regard, he noted that as a matter of law, the primary obligation relating to training rests with the employer under the employer's general duty of care [61].

The Bellin incident

31 The learned Senior Commissioner examined the incident of 20 May 2017 where Prisoner Bellin was becoming increasingly argumentative and did not comply with instructions. He examined the circumstances of Mr Hawthorn issuing a warning and of twice spraying OC spray at Mr Bellin after he was in his cell. He considered the evidence of other officers who were present at the time and the CCTV footage.

32 Officer Bryunzeel testified that, as a new officer, he had never been in such a situation or faced with such a highly agitated prisoner and he found it 'fairly scary' and overall, 'confronting' [66]. Officer Mulvaney's evidence confirmed Mr Bellin's state of agitation. The Senior Commissioner commented on the involvement of Officers Mulvaney and Bryunzeel but said, 'I cannot accept the criticisms by the respondent of Mr Hawthorn, when he said his colleagues on the day provided him little assistance, and the respondent's assertion that he was attempting to shift blame for the incident to the other officers. Any reasonable assessment of the CCTV footage shows that the applicant did almost all of the work in containing Mr Bellin' [67].

33 The Senior Commissioner then examined what occurred by reference to the CCTV footage. He also examined Mr Hawthorn's testimony as to the first spray he deployed at the prisoner and he considered the other evidence. The Senior Commissioner found:

1. Mr Bellin was a young and fit prisoner in an aggressive state.
2. The training materials recognised that the perception of a prisoner officer is relevant in such matters. Mr Hawthorn's history of having been assaulted by prisoners may have shaped his perception of the events up to that point.

3. At the point of reaching the cell door, Mr Bellin actively resisted entry into the cell:

> His momentary action at moving back towards the applicant, in the context of Mr Bellin's actions and demeanour leading up to that point, would be on any reasonable view, sufficient to create an apprehension in the mind of a reasonable person, that Mr Bellin may have been intending to physically engage with the applicant or the other officers [75].

4. That conclusion was plainly open from the CCTV footage, as well as from the situational factors, matters of perception and the fact that:

> Mr Bellin was resisting at the cell door and his momentary moving backwards towards the officers, would be sufficient to create reasonable grounds for a state of mind of a prison officer in the applicant's position, that Mr Bellin may engage physically with the applicant or the other officers [76].

5. Also, there had been a previous direction for Mr Bellin to return to the cell.

> This direction did not mean that Mr Bellin was to remain standing outside of it. It was obvious that the lawful direction from the applicant was for Mr Bellin to return into his cell and to stay there [76].

6. 'not without some oscillation', that the first OC spray deployment did not constitute an excessive use of force. He noted that with the benefit of hindsight and not being present in the heat of the moment made it difficult to assess whether the matters could have been handled differently up to that point. He noted that this concession seemed to have been recognised in the investigators letter of 7 December, that the first spray may have been justified. In his view, the first spray was justified.

34 However, the learned Senior Commissioner drew a different conclusion in respect of the second OC spray towards Mr Bellin. He noted that a review of the CCTV footage showed that when Mr Bellin had moved inside the cell and prior to the second OC spray, he was moving towards and was then on the cell bed, attempting to cover himself with blankets. He did so to avoid the effect of a further OC spray and in this case, was acting defensively. By this time, the Senior Commissioner considered, Mr Bellin did not constitute a threat to either Mr Hawthorn or the other officers who were present at the cell door. He said that once the first spray had been deployed, Mr Hawthorn should have stood clear and the cell door should have been shut by Officer Mulvaney [78].

35 The Senior Commissioner did not consider that, once Mr Bellin was on the cell bed attempting to cover himself with bedding, this would have created the apprehension in the mind of a reasonable person that Mr Bellin may have created a threat to the safety to Mr Hawthorn or the other officers. Even if a second spray might have been in accordance with the respondent's policies, as Mr Bellin had not been exposed to the full effects of the first spray, once Mr Bellin was in the cell and on or close to the cell bed, there was no need for the second spray. He said:

> Most aptly, I do not consider that the second spray was justified to ensure that Mr Bellin was complying with the lawful order to return to and remain in his cell. By that time the order had been complied with. Even if, as the applicant maintained, that a further direction as given by the applicant for Mr Bellin to move to the rear wall of the cell, the further use of OC spray was not necessary to ensure that such an order was complied with [79].

36 Under the heading of '*Consideration*', the learned Senior Commissioner examined the Cooper email and found that not much weight could be placed on it. Firstly, it was issued by a Principal Officer at Hakea Prison and not the Eastern Goldfields Prison. It was directed to Senior Officers at Hakea to address specific circumstances. It was also clear that the suggestion in the email must be qualified by the terms of the PD5, governing the use of chemical agents in a prison. He also said, 'It also, of course, must be read in the context of the law, in particular s 14 of the *Prisons Act*. Accordingly, I do not consider that it can be relied on by the applicant to provide any justification for in particular, the second OC spray deployment in the Bellin incident' [83].

37 The Senior Commissioner then examined the joint basis for the decision to dismiss, being the two incidents taken together. He noted that the issue of what might be the outcome if the Commission were to find that one of the incidents of deployment of OC spray was not unreasonable or an excessive use of force. Mr Hawthorn contended that the effect of this 'fractured' the decision to dismiss and that it should fall away, that if the Commission found that 'the Wharerau incident did not constitute an unreasonable use of force, then apart from fracturing the decision to dismiss in the way contended, the incident in relation to Mr Bellin could not, taken alone, justify the dismissal of a prison officer of 22 years' experience, 11 of which with the respondent and an unblemished record of employment' [85].

38 The Senior Commissioner also noted that '[t]he respondent accepted that if, as I have in fact found, the Wharerau incident fell away and reliance is solely placed on the Bellin incident, then the 'correctness' of the decision was open to question. Submissions were made by the respondent that this could, but would not necessarily, make Mr Hawthorn's dismissal unfair.'

39 The Senior Commissioner then noted that the two issues had formed the basis for the dismissal, and that the Director General had also considered that Mr Hawthorn had 'obviated his actions' in various reports. The Senior Commissioner commented that this had not formed any part of the allegations against Mr Hawthorn during the process. However, he noted that in the final letter of 11 July 2018, the Director General referred to Mr Hawthorn not being able to reflect on his actions. He noted that nowhere in either of the letters of 25 May 2018 or 11 July 2018 did the Director General say that Mr Hawthorn's conduct in respect of only one incident could justify a decision to dismiss. However, whilst the Director General's letter of 11 July indicated that he had considered other options to dismissal including reduction in rank, reprimand and re-training, the Senior Commissioner noted that 'it seems that the respondent's view that the applicant was not able to accept responsibility for his actions assumed some significance in the Director-General's decision and appears to have 'tipped the scales' in terms of the respondent's ultimate decision [88]'. He said that this further illustrated that if one of the incidents forming a foundation for the decision to dismiss is removed, then the rationale for the dismissal itself was undermined.

40 In those circumstances, the learned Senior Commissioner concluded that 'it is difficult to see how the decision to dismiss could be other than unfair' [89]. He said that even if he were incorrect in that conclusion, the issue could be tested as to whether reliance on one incident alone, in relation to the second OC spray of Mr Bellin, in all the circumstances, would warrant the ultimate sanction of dismissal. He considered that it would not. He said that 'must be seen in the context of the applicant's unblemished record of service over 11 years and his prior commendations. It must also be seen in the context of the whole incident with Mr Bellin, from

the very beginning in the common room, and ending up with Mr Bellin being extracted from his cell because of his high level of agitation and aggression' [89].

41 The learned Senior Commissioner then examined the letters of 25 May and 11 July 2018 and found that no detail of the contentions of Mr Hawthorn obfuscating his actions set out there was put to Mr Hawthorn at any time either in the course of the disciplinary investigations or subsequently. There were allegations within the Notice of Answer filed by the Minister that Mr Hawthorn had made inaccurate or false reports in relation to the two incidents. These allegations were the subject of an investigation by the Corruption and Crime Commission (CCC) which concluded that Mr Hawthorn had engaged in serious misconduct in relation to his reporting obligations. However, the Minister had accepted that none of the allegations, the subject of the CCC report, were put to Mr Hawthorn as disciplinary allegations in relation to either the Wharerau or the Bellin incidents. He said that, '[t]hey appear to have emerged and been progressed subsequently.' Accordingly, the Minister had not complied with the requirements of the PSM Act and the Commissioner's Instruction No. 3 – Discipline – General. He noted that 'no finding can be made against an employee in relation to an alleged breach of discipline, unless the detail of the alleged breach is put to the employee in writing; the possible consequences for the employee if the breach of discipline is established; and a reasonable opportunity to respond is afforded' [94]. The learned Senior Commissioner noted that '([f]urthermore, before any proposed action is taken by the employer, in relation to the allegation, the employee is to be given an opportunity to respond to the proposed action'. None of this occurred in this case in relation to the assertions that Mr Hawthorn had 'obviated his actions' in relation to his reporting obligations.

42 The learned Senior Commissioner noted that the Director General could have taken disciplinary action against Mr Hawthorn as a former employee, in accordance with s 76(4) of the PSM Act. The letter of dismissal of 11 July 2018, by reference to 'further allegations' appeared to stay those allegations in light of the decision to dismiss. The Senior Commissioner said that in the absence of any confirmation by the Minister that the reporting issues, that is, those dealt with by the CCC, 'somewhat fleetingly adverted to in the correspondence', were what the Director General was referring to in the letter of dismissal, the comments were merely speculative.

43 The Senior Commissioner further noted that it was not appropriate to foreshadow 'other allegations' of breaches of discipline when communicating a decision to dismiss an employee. He said that it 'raises the prospect that those other matters may have had some influence on the decision maker' [96]. After further consideration of the matter, the Senior Commissioner concluded that without having complied with its obligations under the PSM Act in relation to further allegations, of the applicant obviating his obligations, then the Minister could not rely on the CCC report. It would, in his view, 'render the dismissal at least partially unlawful' were the Minister to have relied upon that report in those circumstances, and it could not support a dismissal on fairness grounds. The learned Senior Commissioner noted that counsel for the Minister conceded this, but said that for the Minister to now seek to rely on Mr Hawthorn's alleged obfuscation of his reporting obligations, without those issues being fairly and squarely put to him by way of disciplinary allegations, would constitute denial of procedural fairness. It would be unfair on Mr Hawthorn for the Minister to rely on the CCC Report as an alternative basis to support the decision to dismiss [102].

Remedy

44 The learned Senior Commissioner then considered the remedy. He looked at the issue of impracticability of reinstatement by reference to 'a bespoke factual evaluation' required by the decision in *Australian Rail, Tram and Bus Industry Union v Public Transport Authority* [2017] WASCA 86 ('*Vimpany*'). He noted that prison officers, like police officers, are in a position of trust and are able to exercise substantial powers under the *Prisons Act*, including the use of force in relation to prisoners under their supervision. He noted that the respondent must be able to rely on the integrity and honesty of officers in the discharge of their duties. They must be able to have a high level of trust and confidence in an officer. He noted that the Minister sought to invite the Commission to infer from the absence of some information recorded by Mr Hawthorn in his various reports that there was a deliberate attempt to deceive his employer and minimise any wrongdoing. This included there being no reference to a second spraying of Mr Bellin and no reference to Mr Bellin being in the cell on the bed covering himself with blankets.

45 The Senior Commissioner also examined Mr Hawthorn's level of insight into his actions. He noted that Mr Hawthorn had not wavered in his view that he had acted correctly and would do the same again if faced with the same circumstances as those applying in Bellin and Wharerau. He said that it was important to appreciate that the decision to dismiss Mr Hawthorn was based on an assessment and findings that both incidents were a breach of discipline. He said that, to the extent that Mr Hawthorn's failure to have insight into his actions was a substantial consideration of the employer, the decision to dismiss must 'be significantly diminished' given his own 'findings in relation to the Wharerau incident and the first OC spray deployment in relation to Bellin' [108]. The second OC spray at Bellin was 'plainly an error of judgement'. However, there had been no consequences arising from that spray in that it did not seem that Mr Bellin had suffered any significant adverse effects, although he did not place much weight on that consideration.

46 Taken overall, the Senior Commissioner did not consider this incident, 'in and of itself, constitutes a sufficient basis' for Mr Hawthorn's dismissal given his 11 years of unblemished employment and 22-year career to lose trust and confidence in him as a prison officer. He considered that a reprimand and re-training would have been an appropriate outcome, although he noted that the Commission could make no such order.

47 The Minister had argued that Mr Hawthorn ought not be reinstated because Mr Hawthorn had obfuscated his response in various reports of his actions. The learned Senior Commissioner said he was unable to reach a conclusion on the evidence as to the issue of Mr Hawthorn's alleged dishonesty in his reporting. He said there was some substance in the argument that the Incident Description Report (IDR) in relation to the Bellin incident was deficient in material respects. He did not draw an inference that this was a result of deliberate dishonesty by Mr Hawthorn. He said there was simply insufficient evidence before the Commission in relation to those matters. He noted that the IDRs for Officers Mulvaney and Bryunzeel were also deficient in that they lacked detail of the nature complained of by the Minister. Yet despite this, the Minister had put that they were both witnesses of truth and should be believed.

48 The learned Senior Commissioner was not persuaded that Mr Hawthorn was dishonest in his various responses, in particular to the Bellin incident. He said it must be borne in mind that these various processes took place over two years previously and he would have been more concerned if Mr Hawthorn's responses to innumerable questions put to him over that period were 'in perfect alignment', which would have suggested 'a rehearsal of his responses and testimony' [111].

49 There was one final issue and that was in relation to trust and confidence, that after Mr Hawthorn had completed his secondment to Eastern Goldfields Regional Prison and subsequent to the commencement of the disciplinary processes, Mr Hawthorn acted in higher positions and performed higher duties. The learned Senior Commissioner found that '(i)f there had been genuine concern for the safety of prisoners under the applicant's care and supervision because of, in particular the Bellin incident, then placing him in any acting capacity in higher duties was quite inconsistent with it' [112].

50 The learned Senior Commissioner ordered that Mr Hawthorn be reinstated in his position as a Senior Officer without loss of earnings.

The approach to an appeal to the Full Bench

51 The appropriate basis upon which the Full Bench deals with appeals against discretionary decisions of the Commission is in accordance with the decision of the High Court in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at pp 404 – 405:

> 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 at first instance.

52 However, the Minister also notes that in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713, at [35] – [50], Gagelar J dealt with a different approach established in *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531, 551-553, that particular types of appellate reviews require what is now known as the correctness standard. This applies where a primary judge must apply legal criterion and that evaluation does not allow for judicial minds to reasonably differ. The correctness standard applies and does not allow for a range of outcomes where a unique outcome is to be reached (see also *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158).

Grounds of appeal

Ground 1

53 The first ground of appeal is that the Senior Commissioner erred in the way he applied the test for determining whether Mr Hawthorn's use of force fell outside of the provisions of s 14(1)(d) of the *Prisons Act*. This ground contains a number of particulars and aspects.

54 The decision as to whether the use of force was reasonable, while being in the context of s 14(1)(d), required a broad evaluative judgment and such a judgement involves the application of the principles in *House v The King*. The statutory elements set out in s 14(1)(d) must be addressed but they require consideration of the weight to be given to the factors making up the circumstances of the case. A case-by-case approach is necessary (*Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513 [218].) The question in this case is whether the

Senior Commissioner's conclusions about the circumstances 'exceeded the generous ambit within which reasonable disagreement is possible, and is, in fact, so plainly wrong that an appellate body is entitled to interfere' (per Brennan J; *Norbis v Norbis* [8]).

55 As I understand the Minister's submission, one aspect is that the use of force can only be considered by reference to s 14(1)(d) and that this brings the reasonableness test and thus, the correctness standard comes into play.

56 The provisions of s 14(1)(d) contain a reasonableness test. The evidence was clear that what is reasonable in any particular case of the use of force will vary according to the circumstances. It must be assessed in the context of those circumstances and this requires a judgment to be made by the prison officer, including the officer's perception of the circumstances. As Mr Kentish said in his evidence (ts 14), the use of force requires the prison officer to assess the situation and this will bring into play the officer's perceptions. The use of force will require the officer to consider options, to plan and then to act. The evidence makes clear that an officer's own history and experience will affect those perceptions. As I will note later, some officers who witnessed the incidents or viewed the CCTV footage assessed the need for the use of force in one way, while others viewed it differently. This illustrates that in each situation of the use of force, while it must be within the limits of s 14(1)(d), there will not necessarily be a sole acceptable outcome. In that context, the Full Bench, in considering the appeal, must also admit the range of possible outcomes in the decision of the Commission at first instance as to the reasonableness of the use of force.

57 Again, while s 14(1)(d) forms the only lawful authority for a prison officer to use force, there are policies and procedures, guides and training which the Department has established to support prison officers in making decisions as to when and under what circumstances force ought to be used and that it must be proportionate to the end to be achieved. However, these policies, procedures, guides and training are within the context of the force being used in accordance with s 14(1)(d).

58 In this context, for the reasons I set out below, I see no error in the Senior Commissioner's approach to the issues in ground 1. In my view, the Senior Commissioner took account of and assessed the particular use of force by reference to the statutory criteria. In doing so, he was entitled to come to the conclusions that fell within the generous ambit available to him. He applied the elements of the test in s 14(1)(d) but also by reference to the circumstances, policies and training. He went on, then, to assess the other matters which go to determining the fairness of the process and of the decision to dismiss.

59 In this context, the Minister's argument regarding the correctness standard is not sustained.

The first aspect – the Bellin incident

60 The first aspect of ground 1 relates to the Bellin incident. It is said that the Senior Commissioner made an error of law in that he considered the justification for the use of force was reasonable, taken at a point that was not the point at which the force was used, that is when Mr Bellin was at the cell door, not when he was moving inside the cell, some 3 – 4 metres away from Mr Hawthorn. At this latter point, it is said, Mr Hawthorn could not reasonably have apprehended that Mr Bellin intended to physically engage with him or others.

61 It is also said that the Senior Commissioner erred in that he misconstrued the test. The Minister says the test is made up of the elements of s 14(1)(d) of the *Prisons Act* and is:

(a) Whether any lawful order was given to Mr Bellin;

(b) If so, what was that order, and did Mr Bellin fail to comply with such an order; and

(c) If so, whether there was in existence facts which were sufficient to induce a reasonable person to believe that the use of OC spray was necessary to ensure that Mr Bellin complied with the order.

Consideration of the first aspect

62 I intend to deal with both of the issues relating to Mr Bellin together. At [62] of the Reasons, the Senior Commissioner set out that Mr Bellin became increasingly argumentative, picked up a plastic chair, took up a fighting stance; Mr Hawthorn requested the OC spray; Mr Bellin made threats to fight Mr Hawthorn and the officers present; Mr Hawthorn pushed Mr Bellin back towards his cell, and Mr Bellin remained non-compliant.

63 At [64], the Senior Commissioner notes that 'a warning was given by the applicant to Mr Bellin that unless he obeyed the directions for him to return to his cell, then OC spray would be used'. In this way, the Senior Commissioner identified the order for Mr Bellin to return to his cell.

64 There is no suggestion that such an order was not lawful. The order was to return to his cell. Given Mr Bellin's conduct and increasing agitation, it can readily be concluded that it was not an order for him to comply when he felt like it. It was important to have him contained in his cell immediately.

65 Mr Bellin did not comply. He had to be pushed along. As the Senior Commissioner noted at [62], he resisted by holding onto the cell door and can be seen to momentarily push back towards Mr Hawthorn and away from the cell. It was only for a brief moment, but nonetheless, it was a push backwards and he was, according to the evidence, still abusive and threatening to the officers.

66 The third aspect of the test was dealt with by the Senior Commissioner in [76]. He found, expressly, in considering 'situational factors' and matters of perception, along with Mr Bellin's resistance at the door and his momentary move backwards, this would have been sufficient to 'create reasonable grounds for a state of mind of a prison officer in the applicant's position, that Mr Bellin may engage physically with the applicant or the other prison officers'. While this does not reflect the exact characterisation used by the Minister, in my view, the learned Senior Commissioner did address the test of whether the use of force was necessary and reasonable in the circumstances.

67 As to the issue of the timing of the OC spray's uses, I have noted, in particular, [62] – [69] of the Reasons for decision. Then at [75], the learned Senior Commissioner said he drew a number of conclusions from the sequence of events, which I have set out earlier in [33].

68 In my view, the first spray at Mr Bellin must be seen in the context of the whole of the incident, not just, as the Minister suggests, from when Mr Bellin was already in the cell door and near the back wall. The CCTV footage of the whole incident shows that, indeed, Mr Bellin did appear to be a young and fit prisoner. He became increasingly agitated in the common room area. He took off his T-shirt, picked up a chair and then took up a fighting stance. He threw his T-shirt on the floor. When Mr Hawthorn had the OC spray in his hands with his arms extended, Mr Bellin turned side on to him and picked up his T-shirt and wrapped it

around his face. Covering his face is clearly to protect him from the effects of the OC spray, should it be used. In my view, this indicates an attitude that he was not intending to readily comply with the order. Mr Bellin was then pushed out of the room and as he does so, he removed his T-shirt from his face but put it back again.

69 In the next segment of the CCTV footage, three officers are behind Mr Bellin as he is pushed towards his cell, with his T-shirt in hand. When they arrived at the cell door, Mr Bellin hung on to the door momentarily, quickly leaned back towards Mr Hawthorn, and then Mr Hawthorn pushed him into the cell. Mr Hawthorn then moved back out of the doorway of the cell and the two officers and Mr Hawthorn then pushed the door closed and locked it.

70 The view from inside the cell shows Mr Bellin moving rapidly towards the back of the cell. It is to be borne in mind that the CCTV footage shows that over a period of less than five seconds, Mr Bellin ran or is pushed through the cell door, he paused momentarily close to the back of the cell and looked over his shoulder towards the door. At almost the exact moment that Mr Bellin grabbed bedding and covered his face (at 0.16-0.17 in the video), the first OC spray can be seen shooting across from the door. By the time it reached Mr Bellin, he had the bedding at his face and the spray most likely did not affect him. Mr Bellin climbed onto the bed, pulling the bedding over himself and the second spray occurred at a point of 20 seconds of this video.

71 In this context, the first OC spray was deployed less than two seconds after Mr Bellin had resisted at the cell door, moved back, ran into the cell and paused. He was not compliant. He was not resigned. He was still volatile and there was still a prospect of his turning back. That could not be discounted given all that had happened up until that point. As the Senior Commissioner pointed out, in [68] – [74], there was a need for co-ordination between the three officers to enable the cell door to be shut once Mr Bellin was inside, to avoid his engaging further. That coordination was less than satisfactory.

72 The whole process from Mr Bellin coming in the door until just before the second spray happened almost in the twinkling of an eye, in a few seconds. To split hairs and find that the first spray was not reasonable ignores the speed and dynamics of the event and Mr Bellin's unpredictability and his clear intention to resist complying with the order, matters the Senior Commissioner was entitled to take into account.

73 I am far from satisfied that the learned Senior Commissioner erred in his finding about the first spray. Further, he noted that the investigator's letter of 7 December seemed to concede that the first spray may have been justified. In fact, in his letter to Mr Hawthorn of 25 May 2018, the Director General said:

> In relation to Mr Bellin, while there is some argument that deploying the spray in the first instance was necessary when taken as a whole, you could not have had a belief based on reasonable grounds that you needed to deploy the chemical agent twice in order to protect yourself, your colleagues and any other prisoner.

74 This seems to confirm that there was no cut-and-dried, unique and obvious conclusion available that the first spray at Mr Bellin was unreasonable. Therefore, it was open to the Senior Commissioner to find, as he did, that the first spray did not constitute an excessive use of force. He did so, taking account of the Prisons Act and PD5, relating to the lawful order not complied with, the benefit of hindsight, the heat of the moment, the circumstances including the prisoner's conduct and the officer's state of mind.

The second aspect – the Wharerau incident

75 In the second particular of ground 1, the Senior Commissioner is said to have failed to consider whether the use of force upon Mr Wharerau was proportionate to the risk posed.

76 The Senior Commissioner is said to have failed to consider, and assess, whether the use of force was necessary and this requires consideration of the proportionality of the use of force, whether the use of force was proportionate to the end sought to be achieved and amounts to an error of law. According to the Minister, the Full Bench may itself reconsider this issue.

77 The Senior Commissioner's error is also said to be in finding that Mr Hawthorn's actions in the Wharerau incident did not amount to a breach of discipline because, amongst other things, there was a risk of involvement of other prisoners in the incident and Mr Wharerau was 'becoming argumentative and non-compliant', and that it was difficult to see how else Mr Hawthorn could have rendered him compliant in the circumstances.

78 The Minister says that a review of the CCTV footage shows Mr Hawthorn directing Mr Wharerau to release the handle, and it is clear from the body language of most senior officers in attendance, that they held no concern that the other prisoners in the room would cause any issues. It is said that this is clear from the fact that both Principal Officer Parker and Assistant Superintendent Marshall are merely standing, watching Mr Hawthorn and Mr Wharerau with their hands on their hips. Mr Marshall only took interest in directing prisoners after the spray was deployed. A reasonable prison officer would not have considered the presence of the other prisoners to have presented as any specific risk or threat.

79 According to the Minister, the best evidence of what options could have been taken was given by Mr Kentish. He said that 'from a training point of view, we – we would pull the trainee aside and talk about what other options they could have done … and we would've probably … marked them down as not satisfactory just because they couldn't – they didn't use – didn't seem to use a lot of de-escalation techniques and talking to the prisoner, discussing and – and trying to get him to release his grip'.

80 Mr Kentish went on to say that he would question why Mr Hawthorn went to the OC spray so quickly, whereas other steps could have been used such as talking to the prisoner and using de-escalation techniques. He said that the first option would be more communication. Therefore, the Minister said that de-escalation is a preferred strategy before using the force and this is supported by PD5. The Minister says there was no immediate threat posed by the prisoners in the day room, nor was there any physical threat posed by Mr Wharerau who was simply refusing to let go of the handle. The Minister says that it cannot be said that there were reasonable grounds for believing that it was necessary to use force upon Mr Wharerau that carried with it the risk of significant damage to his eyeball by spraying OC spray at such close proximity *before* communication and de-escalation techniques were used. Rather, Mr Hawthorn escalated the situation and moved immediately to using a form of force that carried a significant risk of severe eye injury to the prisoner. In doing so, it is said that he used excessive force.

Consideration of the second aspect

81 It is true that the Senior Commissioner did not analyse the Wharerau incident in the particular formula espoused by the Minister. However, he analysed what occurred by reference to the evidence and other conclusions he had made. The Senior Commissioner recited the evidence

of a range of witnesses. At [40] of the Reasons, he noted Mr Hawthorn's evidence that Mr Wharerau was becoming very agitated, that Mr Wharerau had some history and was known to get into fights with other prisoners, that he used an abusive term to Principal Officer Parker, and the large number of prisoners milling about. He became concerned that there might be some disturbance created and since there were some 15 prisoners behind him, he was conscious of possible escalation.

82 In [41], the Senior Commissioner noted that Mr Hawthorn said he called a 'code green' and given the situation developing, he tried to move Mr Wharerau into a corner of the room. Mr Wharerau grabbed the door handle and refused to let go. Mr Hawthorn warned him to remove his hands or he would be sprayed. At [42], the Senior Commissioner noted that Mr Wharerau was remaining non-compliant and was not going to move, and given his concerns as to the number of prisoners milling about and taking an interest, Mr Hawthorn deployed the OC spray.

83 In my respectful opinion, in these paragraphs, the Senior Commissioner set out the facts which grounded the prison officers' subjective belief. In short, he had a prisoner who was belligerent and agitated, refusing to comply with a direction to let go of the door handle so he could be restrained in a room, with a number of prisoners taking an interest and an awareness that the situation could escalate. In [57], the Senior Commissioner observed that '[h]aving regard to how the incident unfolded, it is difficult to see how else the applicant could have rendered Mr Wharerau compliant in the circumstances'.

84 Principal Officer Parker gave evidence of Mr Hawthorn's efforts to de-escalate the situation and calm Mr Wharerau down. There were conflicting opinions amongst the witnesses about that.

85 Superintendent Hedges and Officer Idowu said there was a volatile situation, with the risk of involvement of other prisoners, who were edging closer [56]. Officer Idowu said the situation was unpredictable, and that it was important to act quickly. Assistant Superintendent Reynolds' opinion was that there were a lot of prisoners milling about and the situation looked as if it could escalate and get out of control. She said she would probably have acted in the same way as Mr Hawthorn did given the circumstances. Senior Officer English's evidence was that it is paramount to get a non-compliant prisoner out of the area and constrained as quickly as possible, and that it does not take much for other prisoners to get involved.

86 In the context of the issue of the distance of the spray from Mr Wharerau, Senior Officer English said he would have acted in the same way. Superintendent Hedges said that the use of force was adequate to control the volatile situation and prevent it from escalating. Acting Deputy Commissioner Blenkinsopp disagreed, saying that with the number of officers present, they could have assisted in getting Mr Wharerau to release his hands without the need for the OC spray.

87 The Senior Commissioner addressed the issue of proportionality. He addressed the risk of the use of force by reference to the risk of the spray being applied at the distance. As I noted at [17], the learned Senior Commissioner referred at [35] of his Reasons to Mr Kentish's evidence that 'OC spray may be used at closer distance and each case will be dynamic and depend on its circumstances'. He concluded at [58] – [59] that 'from the training materials that the one metre distance is a recommended distance and that Mr Kentish's evidence was that each case must be assessed in accordance with its circumstances', the deployment of the OC spray was justified. Therefore, the Senior Commissioner did consider and assess the issue of the proportionality in the use of force by reference to the risks and the end to be achieved. I

think it can readily be concluded that the risk of the involvement of other prisoners formed part of the Senior Commissioner's assessment, along with the issue of proximity.

88 I note, though, that while the Minister referred to Mr Kentish's evidence that he would have expected greater use of de-escalation techniques and talking to the prisoner, Mr Kentish had seen only the CCTV footage which did not contain an audio element, and he said that he had not read the reports (ts 18). In this context, reliance by the Minister on Mr Kentish's evidence must be reliance on the whole of his evidence.

89 I would dismiss ground 1.

Ground 2

90 The Minister does not pursue ground 2 as it said that the issues are dealt with in other grounds.

Ground 3

91 This ground asserts that the Senior Commissioner erred in fact by finding, at [112] of his Reasons, that the Director General placed Mr Hawthorn in a position of higher authority and trust after the incidents and that this was incongruous with the Director General's view that there had been such a break down in the relationship as to affect the practicability of reinstatement.

92 It is clear that the employer did not take any particular action to place Mr Hawthorn in the position of Officer in Charge but rather, that this occurred by virtue of there being no officer more senior to Mr Hawthorn on the roster and present at the time. This happened in accordance with the terms of the *Department of Corrective Services Prison Officers' Industrial Agreement* 2016 (the Agreement). Therefore, being Officer in Charge occurred by operation of law, not by any positive act of the employer.

93 It is said that the Senior Commissioner therefore mistook the facts. This mistake is said to have polluted the Senior Commissioner's Reasons regarding the genuineness and credibility of the Minister's case that the Director General had lost the necessary trust and confidence in Mr Hawthorn. Where ground 3 is established, the Minister says that the Full Bench is able to reconsider the question of practicability.

94 The Minister also says that the only way for Mr Hawthorn not to have been in this role of Officer in Charge would have been for Mr Hawthorn to have been suspended in accordance with the PSM Act and the fact that Mr Hawthorn was not suspended should not undermine this case.

95 Mr Hawthorn does not challenge this ground of appeal and it seems to be agreed that to suspend him in such circumstances would have been counterproductive.

Consideration - ground 3

96 I respectfully agree that the learned Senior Commissioner erred in forming the view that he did, that the employer took some particular action to place Mr Hawthorn in a more responsible role. His placement in that role was by operation of law.

97 The question then arises as to how this error affects the Senior Commissioner's conclusion regarding the Director General's trust and confidence in Mr Hawthorn. The issue is dealt with in [112]. The Senior Commissioner describes it as 'a matter of note'. It comes after he dealt

with the 'mainstay' of the Minister's opposition to reinstatement, being Mr Hawthorn's obfuscation and lack of insight; the CCC Report; the omissions and inadequacies in Mr Hawthorn's and other officers' reporting and whether Mr Hawthorn was deliberately dishonest in his reporting. An examination of the way this issue is addressed in the Reasons leads me to believe that it was not a significant issue in the Senior Commissioner's reasoning. It appears to be supplementary or even incidental in the issue of trust and confidence. While the error may have the effect of undermining the ultimate conclusion about trust and confidence, it does so, in my mind, only slightly.

98 While this ground of appeal is upheld, it does not affect the outcome.

Ground 4

99 The fourth ground of appeal is that the Senior Commissioner erred in fact and law in exercising discretion without proper regard to the rationale for the dismissal.

100 The Minister also says that the Senior Commissioner's conclusion that Mr Hawthorn's lack of insight could be remedied by further training was in error.

The reason for the dismissal

101 The Minister says that the reason for dismissal was the lack of trust and confidence which arose from the fact of Mr Hawthorn's breaches of discipline, his lack of insight into the excessive nature of his uses of force, and the high standards of professional conduct expected of prison officers. Where the Senior Commissioner considered that the Bellin incident alone was not sufficient to warrant dismissal, and that the dismissal was not a disproportionate response to the conduct, he erred. The Minister says Mr Hawthorn was not dismissed as a penalty for established breaches of discipline but because of the lost trust and confidence. The Senior Commissioner is said to have failed to address the question of whether the dismissal on that basis was harsh or unfair. In failing to address this, the Senior Commissioner constructively failed to exercise his jurisdiction and therefore, fell into appealable error. Where the Senior Commissioner addressed the Minister's asserted lack of trust and confidence through the lens of impracticability of reinstatement, his approach to the question of trust and confidence was said to be erroneous.

102 It is said that the Senior Commissioner's approach contained the following errors:

1. He assessed whether the conduct was sufficient to have led to a loss of confidence. However, that was never put as the basis for the loss of trust and confidence. Rather, it was stated as arising from a combination of the three factors referred to above. By failing to consider whether the reasons for losing trust and confidence were genuine, credible and rational (*Australian Rail, Tram and Bus Industry Union v Public Transport Authority* (*Vimpany*) [2017] WASCA 86 at 428), the Senior Commissioner is said to have constructively failed to exercise jurisdiction;
2. In finding that a reprimand and re-training would be appropriate, the Senior Commissioner implicitly found that trust could not be rationally lost because, with further training, Mr Hawthorn would be able to conduct himself appropriately. However, his lack of insight was established in the proceedings on sworn evidence that he would conduct himself in the same manner in the

future. There was no evidential foundation for the finding that further training would have any beneficial effect. This is particularly so where a prison officer of a number of years, having undergone periodic training on the use of force, and despite this training, did not understand the proper limits of the lawful use of force. Therefore, it is said that there was no rational basis for a conclusion that further training would remedy his lack of insight;

2. Taking account of Mr Hawthorn's continued employment after the commencement of the disciplinary process was irrelevant. The loss of trust and confidence arose from Mr Hawthorn's lack of insight. Accordingly, that Mr Hawthorn continued in employment is irrelevant and it was only the period after the lack of insight into proper boundaries of use of force crystalised which is relevant.

103 In these circumstances, it is said to fall to the Full Bench to reconsider the question of fairness of the dismissal in accordance with the principles set out in *Vimpany*.

Consideration – ground 4

104 In cases involving an employer's loss of trust and confidence, it is necessary that the employer's view must be objectively grounded (*Vimpany*). Firstly, the Minister says dismissal was due to a lack of trust and confidence, not the number of incidents. Rather, Mr Hawthorn's lack of insight into his conduct and consequently his unwillingness to acknowledge that he ought to have done things differently which caused the loss of trust and confidence.

105 The difficulty for this submission is that the loss of trust and confidence was said to be based on a supposed lack of insight when in a number of respects, the employer's conclusions about the conduct about which Mr Hawthorn is said to have lacked insight were incorrect or harsh in the circumstances. While it is said that the Senior Commissioner did not explicitly consider whether the reasons for losing trust and confidence against the standard set in *Vimpany* of genuine, credible and rational, in my respectful view this is a misapprehension of the Reasons.

106 What he found, in effect, was that the facts and conclusions did not take the matter as far as a proper loss of trust and confidence. Mr Hawthorn was entitled to maintain his view of the correctness of his conduct in two of the three occasions. The learned Senior Commissioner found no misconduct regarding the Wharerau incident and no misconduct in the first aspect of the Bellin incident, but misconduct in the second Bellin spray.

107 The Minister also attacks the decision at first instance by saying that it dealt with the conduct in the two incidents taken together as being the justification for dismissal when the Minister says it was for a lack of trust and confidence. However, I find firstly that the Director General's correspondence undermines this view. The letter of 25 May 2018 set out allegations and drew conclusions that in each *incident* Mr Hawthorn misconducted himself. It described his *actions* as excessive and disproportionate (emphasis added). In terms of the 'proposed Discipline Action', the letter refers to dismissal as 'the most appropriate action'. Following Mr Hawthorn's response on 19 May 2018, the Director General wrote to Mr Hawthorn on 11 July 2018. The letter commenced with 'I refer to my correspondence to you dated 25 May 2018 in which I found that you had committed a breach of discipline in relation to the allegations particularised in the correspondence and proposed a Discipline Action of dismissal'. The 'allegations particularised' were the *conduct* or *actions*. It referred later to his remaining 'of the view that your actions were inconsistent with the Department's

Policy Directive 5 (PD5)'. It further said that Mr Hawthorn's 'actions and subsequent responses demonstrate that you are unable to reflect on your conduct or accept responsibility for your actions which were disproportionate and excessive in both circumstances'. It referred to his having disregarded the safety of colleagues and prisoners in his care, despite his rank and experience. In addition, he was said to have obfuscated his actions in his various reports and shown no contrition.

108 The letter goes on to say that:

> In light of the gravity of your conduct, your lack of insight into the nature of your uses of force, and the high standards of professional conduct expected of Prison Officers both by myself, and the Western Australian community at large, I have lost trust and confidence in your ability to conduct yourself in a manner that accords with such standards. … Having considered all the circumstances in relation to both these matters, I find that you did commit a breach of discipline as set out in the Act and accordingly dismiss you from your employment with effect from the date of this letter.

109 It is clear then, that the genesis for the dismissal was that Mr Hawthorn had misconducted himself in the two *incidents* taken together. The issue of obfuscation of his actions and that he had shown no contrition were 'additional' issues. These were also issues that arose subsequently and which, by the way, had not been put to Mr Hawthorn for his response.

110 Therefore, where the Minister says that the dismissal was not about the incidents but was about the loss of trust and confidence, with respect, that is not the way in which the letter of 11 July 2018 was composed. Further, if the incidents were not misconduct then a failure to reflect on them and be contrite is not a valid reason for dismissal. In any event, what started out as conduct arising in two *incidents* subsequently included something more or additional. The misconduct grounded the lack of insight and obfuscation, which in turn, grounded the loss of trust and confidence.

111 The learned Senior Commissioner correctly, in my respectful view, found the Minister was not entitled to rely on the issue of obfuscation and lack of insight for a number of reasons.

112 Therefore, what was left and what the Senior Commissioner was entitled to base the finding of unfairness were on the *incidents.* In my view, that was consistent with the approach taken by the Director General until the final letter, and was included in that letter, albeit the letter added an aspect, a loss of trust and confidence not previously raised.

113 The Senior Commissioner referred to the issue of the Minister's view that Mr Hawthorn was not able to accept responsibility for his actions and this appeared to 'tip the scales' in the Director General's ultimate decision [88]. This is consistent with the way the allegations and the ultimate decision were communicated.

114 In those circumstances, the learned Senior Commissioner was entitled to consider the two *incidents* as jointly the basis for dismissal as the other matters fell away, and to then analyse the strength and fairness of the decision to dismiss based on his view of the facts of the incidents and the reasonableness of Mr Hawthorn's actions. In those circumstances, in my view, this ground of appeal is misconceived.

115 If the basis for dismissal was legitimately a loss of trust and confidence, it was supported by a number of pillars. If any of those pillars fell, then the whole decision to dismiss was under threat. If the misconduct is not as alleged, and the obfuscation and lack of insight are not valid, then there may be insufficient to justify dismissal.

Reprimand and re-training

116 As to the issue of the remedy and of the Senior Commissioner's comments regarding reprimand and re-training, what the Senior Commissioner said was '(i)t may warrant a reprimand and retraining', but ultimately what was within jurisdiction and power, what he could, and did order, was reinstatement. I take the comment to be obiter, not as a conclusion in itself, but as a recognition of the options available to the employer. The Director General himself had set out those options in his letter of 25 May 2018.

117 I would dismiss this ground of appeal.

Application to add a new ground of appeal

118 On the day of the hearing of the appeal, in response to an issue raised by the Full Bench, the Minister sought leave to add a ground of appeal, namely:

> The Senior Commissioner erred in law on the basis that the appellant was not heard in relation to the question of whether the dismissal was fair in light of the findings made by the Senior Commissioner.

119 The Minister said leave ought to be granted because this proposed ground of appeal raises an important issue of principle. It is not possible to predict what the particular facts and circumstances of any alleged misconduct will be found following a hearing. Therefore, it is not possible for an employer to meaningfully lead evidence as to whether the employer would have dismissed the employee if only some of the misconduct is established, based on the facts and circumstances later found by the Commission.

120 The Minister says that the proposed new ground of appeal would provide the opportunity to address the particular combination of findings made by the learned Senior Commissioner which could not have been assumed at the time of the hearing. The submissions would be about how the findings were to affect the final outcome. Had the Minister known of the particular combination of factual findings, then evidence could have been called and submissions made as a consequence.

121 The Minister properly acknowledges that the Senior Commissioner raised with counsel what the effect would be of the findings in relation to the Wharerau incident falling away and 'then you're just left with Bellin and possibly just the second spray'. Counsel for the Minister made brief submissions as to the way such findings would affect the correctness of the decision but not necessarily the fairness of it in response to the Senior Commissioner's comment.

122 Mr Hawthorn attacks the application to add a new ground of appeal on a number of bases, however, in terms of the substance of the application, he said that the Minister was in fact not denied procedural fairness. He had an opportunity and did respond to the issue, raised by the Senior Commissioner, of the possible different combinations of findings of fact.

Consideration regarding application to add a new ground of appeal

123 The Full Bench has the power to amend grounds of appeal or to add new grounds, under s 27(1)(l) of the Act, to 'allow the amendment of any proceedings on such terms as it thinks fit'. The Full Bench in *Waddell v Commissioner of Police* [2012] WAIRC 00112; (2012) 92 WAIG 254, noted that s 27(1)(l) and s 27(1)(m) of the *Industrial Relations Act 1979* (the Act)

permits the substitution of completely new grounds of appeal at least to correct errors, without it being considered to be the institution of a new appeal out of time. In *Ian Anderson v Rogers Seller and Myhill Pty Ltd* [2007] WAIRC 00218; (2007) 87 WAIG 289, the Full Bench considered whether leave should be granted to allow the appellant to amend his grounds of appeal. Ritter AP and Scott C observed that:

> [106] In our opinion when considering an application to amend a ground of appeal, at the hearing of the appeal, there are a number of factors to consider. These include: -
>
> (a) The time when notice was first given to the Full Bench and the respondent of the intention to apply for the amendment.
>
> (b) The explanation, if any, for seeking the amendment including why it is sought at the hearing of the appeal.
>
> (c) Whether the proposed amendment constitutes a reasonably arguable ground of appeal.
>
> (d) The consequences to the appellant of the non-granting of leave to amend.
>
> (e) The extent of any prejudice to the respondent.
>
> (f) Any measures which may be taken to eliminate or reduce the prejudice to the respondent.
>
> (g) Issues of delay and costs.
>
> …
>
> [110] Overall, however, perhaps no more can be said than that the power of the Full Bench to grant leave to amend grounds of appeal is a discretionary power which will be exercised having regard to the particular facts and circumstances of each case. The factors outlined above are likely to be relevant to the exercise of the discretion but this is not intended to set out an exhaustive checklist.

124 I am of the view that these considerations are equally applicable to an application to add a new ground of appeal. An issue may arise of the new ground not being filed within the statutory time limit.

125 Might I say in passing that it is not the role of the Full Bench to identify issues not raised by the parties or to suggest new grounds of appeal. It is, of course, necessary that the Commission is satisfied that it has jurisdiction (*SGS Australia Pty Ltd v Taylor* [1993] WAIRC 11760; (1993) 73 WAIG 1760) and it is not unusual for the Commission to raise an issue of that nature. This is not such an issue. If the Commission raises an issue and it is not part of the appeal, it ought not be seen as an invitation to seek to add to or amend the grounds of appeal.

126 This is a new ground of appeal in that it raises a different and additional question to those which are raised in the other grounds of appeal. Although it was made without notice, the Full Bench allowed the Minister time to consider the formulation of the ground and to make formal submissions. Those submissions were made in writing some weeks after the hearing. Mr Hawthorn was then allowed the opportunity to make submissions on the new ground of appeal and he did so, also a couple of weeks later. In that context, whilst there may be no prejudice to Mr Hawthorn in having to answer the ground, there were issues both of delay and costs to be incurred by him in responding.

127 As to whether there is a reasonably arguable ground of appeal, two issues arise. Firstly, the provisions in relation to a claim of unfair dismissal must be considered. In s 23A – **Unfair dismissal claims, Commission's powers on**, the Act sets out what is, in effect, a cascading order of issues to be dealt with. They include the fairness of the dismissal having regard to a number of elements; the issue of reinstatement including its impracticability, re-employment in another position, considerations of continuity of employment and lost pay. Subsection (6) then moves to the question of compensation for loss or injury caused by the dismissal if the Commission considers that reinstatement or re-employment would be impracticable. Then there are issues in respect of efforts to mitigate loss, any redress the employee has obtained under another enactment and any other matters the Commission considers relevant. The Act then sets out the cap on the amount which might be ordered as compensation. It then deals with the calculation of the rate of pay for the purposes of that cap.

128 Claims of unfair dismissal before the Commission are usually, but not always, dealt with in a single hearing. That is, they cover all of the issues in the one sitting. The parties are expected to put before the Commission all of their evidence and submissions about all of the issues I have identified.

129 If the parties argue, and the Commission considers it appropriate, that the best way to deal with a particular claim is a series of hearings, then that approach might apply. However, the usual approach is that all matters are dealt with at the one time. This is generally the most expeditious way. It requires parties to anticipate alternative outcomes along the way and they would do so.

130 In this particular case, there was no suggestion at first instance that a staged approach was necessary to the determination of the claim. The Minister purported to argue the case in full. The Minister chose not to call the decision-maker who could have given evidence about issues such as the impracticability of re-instatement or the various possible combinations of the findings and how the employer might be required to deal with those. The Full Bench has previously commented in *State School Teachers' Union of WA (Incorporated) v Director-General, Department of Education* [2019] WAIRC 00175; (2019) 99 WAIG 336 at [86] on this lack of evidence being unsatisfactory.

131 Therefore, in my view, as a matter of policy, it is not desirable that the staged approach be the norm, and to suggest that the Senior Commissioner erred in not providing the Minister with the opportunity to have a staged approach is not sustainable.

132 Secondly, the learned Senior Commissioner prompted counsel for the Minister to deal with the issue by asking what his view might be in the case of some findings of fact being made but not others. It was up to the Minister to take advantage of that opportunity and to conduct the case in such a way that it covered those possible combinations of outcomes. This is particularly so when the Minister said that there were a number of reasons for the decision to dismiss. The Minister ought to have addressed those at the time and not now claim that an opportunity was denied. There was no such denial.

133 In those circumstances, I would not grant leave to add a new ground of appeal. Even if such a ground were added, in my view, it is not sustainable as the Senior Commissioner prompted counsel and counsel responded.

MATTHEWS, C:

Introduction

134 The Senior Commissioner held that the dismissal of Mr Hawthorn was unfair.

135 The Senior Commissioner found that Mr Hawthorn had misconducted himself on the second occasion where he used OC spray on a prisoner named Bellin. He upheld the finding of the appellant in this regard.

136 The Senior Commissioner found that Mr Hawthorn had not misconducted himself in relation to the first use of OC spray on Mr Bellin and had not misconducted himself in relation to his use of OC spray on a prisoner named Wharerau. The Senior Commissioner found both the first use of OC spray on Mr Bellin and the use of OC spray on Mr Wharerau were reasonable actions in all of the circumstances.

137 The Senior Commissioner quashed the findings of the appellant in relation to these two matters.

138 In relation to the first use of OC spray on Mr Bellin, the Senior Commissioner found, either, it was reasonable as an act of self-defence or it was reasonable in the context of having Mr Bellin comply with a lawful order, being an order Mr Bellin return to and remain in his cell.

139 In relation to the use of OC spray on Mr Wharerau, the Senior Commissioner found it was reasonable in the context of having Mr Wharerau comply with a lawful order, being an order Mr Wharerau let go of a door handle.

140 There were, of course, various factual findings made by the Senior Commissioner on the way to his substantive conclusions.

141 The appeal grounds are:

1. The Senior Commissioner erred in finding the first use of the OC spray on Mr Bellin was reasonable because 'there was no sound basis to find that there were reasonable grounds for Mr Hawthorn to believe that it was necessary to use OC spray on Mr Bellin' (the Bellin appeal ground; appeal ground 1(a));
2. The Senior Commissioner erred in finding that the use of the OC spray on Mr Wharerau was reasonable because the Senior Commissioner 'failed to consider whether the force used by Mr Hawthorn upon Mr Wharerau was proportionate to the risk posed' (by which it was explained it was meant not "to the risk posed" but "to have the order complied with") (the Wharerau appeal ground; appeal ground 1(b));
3. The Senior Commissioner erred in concluding the dismissal was unfair because the Senior Commissioner failed to have any, or sufficient, regard to Mr Hawthorn 'refusing to accept that he had done anything wrong and his sworn evidence that he will not do anything differently in future' (the unfair dismissal appeal ground; appeal ground 4(a));
4. The Senior Commissioner erred in not giving the parties an opportunity to address him before deciding whether the dismissal was unfair in light of his factual findings, which were different to those upon which the appellant had

proceeded (the potential procedural fairness appeal ground; potential appeal ground 5); and

5. The Senior Commissioner erred in a making a factual finding in the course of deciding that the appellant's decision to dismiss was unfair in relation to Mr Hawthorn filling on a temporary basis a position more senior to his substantive position (the placement appeal ground; appeal ground 3).

The Bellin appeal ground; appeal ground 1(a)

142 In relation to the Bellin appeal ground, the appellant explained at the hearing of the appeal that he challenged whether the Senior Commissioner laid out proper facts before coming to his finding that the use of force was reasonable.

143 The appellant contended, and the CCTV footage shown during the appeal clearly demonstrates, that Mr Bellin was inside his cell, indeed at the back wall of the cell as far as he could be within that cell from the door, when Mr Hawthorn, standing at the door, first used the OC spray on him.

144 The appellant contended, and I agree, that the material sections of the decision of the Senior Commissioner do not deal with the fact that when the OC spray was first used on Mr Bellin he was away from the cell door, and well into his cell.

145 The Senior Commissioner, at [75] of his reasons for decision, writes 'at the point of reaching the cell door, Mr Bellin was actively resisting entry into the cell. His momentary action at moving back towards [Mr Hawthorn], in the context of Mr Bellin's actions and demeanour leading up to that point, would be on any reasonable view, sufficient to create an apprehension in the mind of a reasonable person, that Mr Bellin may have been intending to physically engage with the applicant or the other officers.'

146 It is that apprehension which the Senior Commissioner found excused the first use of the OC spray.

147 While the Senior Commissioner deals with why use of OC spray upon Mr Bellin at the door would have been reasonable he does not deal with why it was reasonable for the OC spray to have been used in the circumstances in which it actually was used, when Mr Bellin was in his cell and well away from the cell door.

148 The Senior Commissioner sets out evidence on the question but does not deal with it in his decision making.

149 The crucial part of the reasons, [75] to [77], read as if the first use of the OC spray was when Mr Bellin was actually at the door, which plainly he was not.

150 I consider that a ground of appeal that complains that the reasons for decision do not disclose a sound basis for a conclusion that there were reasonable grounds for the respondent to have believed that the first use of the OC spray on Mr Bellin was necessary is made out.

151 I would uphold the Bellin appeal ground, appeal ground 1(a).

The Wharerau appeal ground; appeal ground 1(b)

152 The Senior Commissioner drew an inference from the facts he found that the use of force by Mr Hawthorn was, and here I paraphrase section 14(1)(d) *Prisons Act* 1981, 'on reasonable grounds … necessary to ensure that his lawful order was complied with by Mr Wharerau.'

153 The appellant contends that the inference was not open to the Senior Commissioner and that a different inference should be drawn.

154 As I understand it, the appellant says the Full Bench is in as good a position as the Senior Commissioner to draw inferences on this matter.

155 The first question is whether the conclusion drawn by the Senior Commissioner is one which attracts what is called the "correctness standard" or one which attracts what is called the "*House v. R* standard."

156 At [49] of *Minister for Immigration and Border Protection v. SZVFW and Ors* (2018) 357 ALR 408 Gageler J writes that the line between the two is 'drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v. R* standard applies.'

157 I note, as counsel for the appellant made us aware, the Court of Appeal in this State has recently adopted the analysis of Gageler J in *Ammon v. Colonial Leisure Group Pty Ltd* [2019] WASCA 158.

158 The initial question is whether a conclusion that a use of force is excused by section 14(1)(d) *Prisons Act* 1981 because a prison officer's belief was "reasonably grounded" is one that demands a unique outcome or one which tolerates a range of outcomes?

159 It seems to me that whether a state of mind is "reasonable" is something upon which the law has long tolerated a range of outcomes. That is, I do not consider that reasonableness in this context is something demanding only one outcome, such that it is open to the Full Bench to consider itself at large, as it were, to assess whether the Senior Commissioner's conclusion was "correct", and should be left undisturbed, or "incorrect", and therefore in need of amendment by us.

160 So much I think is clear from the decisions Gageler J cites at footnote 79 of his judgment in *Minister for Immigration and Border Protection v. SZVFW and Ors* (2018) 357 ALR 408.

161 In those decisions the question of reasonableness arose in broadly similar legal contexts to that here, being a legislative power restricted to exercise only on "reasonable grounds."

162 In each of those cases, the High Court treated the matter of reasonableness as one upon which reasonable minds may differ, and required demonstration of a *House v. R* type error to interfere with the decision under appeal.

163 I note that Gageler J himself in *Prior v. Mole* (2017) 91 ALJR 441, one of the cases his Honour footnoted, made, without demonstration of a *House v. R* type error as far as I can tell, his 'own independent assessment' of the evidence at first instance and found that the belief held by the police officer in that matter was not reasonable.

164 The majority of the court did not take such an approach.

165 In my view, it is clear that there is no "uniquely correct outcome" to the question of whether a belief is objectively reasonable or not.

166 To succeed the appellant has to demonstrate a *House v. R* type error on the part of the Senior Commissioner.

167 The appellant says the Senior Commissioner failed to assess, or properly assess, whether there were reasonable grounds for a belief the particular use of force, the use of OC spray so close to

the eyes of Mr Wharerau, was necessary to have Mr Wharerau comply with his order to let go of the door handle.

168 In terms of a *House v. R* type of error, I understand the appellant alleges that the Senior Commissioner failed to take into account, or failed to properly take into account, a relevant consideration, being the distance between the OC spray and Mr Wharerau's eyeball when it was used.

169 Proportionality is obviously relevant to an assessment of whether a belief under section 14(1)(d) *Prisons Act* 1981 is reasonable or not. Section 14(1)(d) *Prisons Act* 1981 says that a prison officer may use **such force as he believes on reasonable grounds to be necessary** to ensure compliance.

170 If the force used was, objectively speaking, beyond what was necessary to ensure compliance that will be a relevant matter in assessing the reasonableness of any asserted belief that the force was necessary.

171 Here the appellant says, and I reproduce part of [41] of his Outline of Submissions, 'the Senior Commissioner failed to refer to, or consider, [whether] the risk of harm from the level of use of force (spray from mere centimetres) was justified in light of the end that was sought to be achieved by [Mr Hawthorn].'

172 The appellant asserts there is a different and more dangerous use of force the closer the spray is to a person's eye and the "higher" level of force involved in the use of the spray was not reasonable to get Mr Wharerau to let go of the door.

173 The attack fails.

174 The Senior Commissioner was aware of what the appellant had to say about the matter and dealt with it in his reasons for decision.

175 The Senior Commissioner was simply unconvinced that it was a material matter. He found, at [58] of his reasons for decision, that the idea that OC spray should only be used at a distance greater than one metre from the target was a "recommendation" and not a rule or directive or order and agreed with evidence to the effect that 'each case must be assessed in accordance with its circumstances'.

176 The Senior Commissioner's reasons for decision make it clear that he took the distance from Mr Wharerau's face that the OC spray was discharged into account and decided, for the reasons given, that it made no difference to his ultimate finding that Mr Hawthorn's belief that the use of force was necessary for compliance was reasonably grounded.

177 The Senior Commissioner exhaustively dealt with all of the circumstances going to his conclusion.

178 In that treatment he dealt with the issue of distance and found it was neither here nor there.

179 The appeal ground, as explained by [41] of the outline of submissions, asserts a failure on the part of the Senior Commissioner to have regard, or sufficient regard, to a relevant consideration. That error is not in any way demonstrated and the challenge is dismissed.

The unfair dismissal appeal ground; ground of appeal 4(a)

180 The appellant contends that the Senior Commissioner made a *House v. R* type error in not having any, or sufficient, regard to Mr Hawthorn 'refusing to accept that he has done anything wrong and his sworn evidence that he will not act differently in future.'

181 The appellant says that the decision to dismiss the respondent was taken not only because of the wrongdoing inherent in the misconduct found but because of the respondent's failure to see that he had acted wrongly. The appellant says it should count against the respondent that he failed to display insight into his wrongdoing.

182 The appellant asserts, I think, that we should accept that if the respondent had at some point in the process accepted that he had acted badly and promised to not repeat the conduct or had said that he was open to further training to address the conduct that this would have likely led to him not being dismissed and that this would have been a fair thing all round.

183 What may be said immediately, and determinatively, is that while the argument may have force in some cases, this is plainly not such a case.

184 There may be cases where the wrongdoing on the part of an employee is so obvious, so beyond argument, that it is telling that an employee denies it.

185 There may be cases where an employee's defence to an allegation is so ridiculous that it is telling.

186 There may indeed be cases where an employee's conduct after a disciplinary matter is raised with them is such that that conduct itself becomes relevant to disposition.

187 The fact of denying an allegation, or the basis upon which it is denied, may, in a particular case, exhibit such a lack of insight that the lack of insight itself takes on significance in the disposition of a matter, in some cases even determinative significance.

188 There may be cases where the original wrongdoing would not warrant dismissal but a lack of insight into it becomes part of a sound basis to dismiss.

189 But this case is far from being such a case.

190 This is a case where the respondent was, in my view, entitled to deny wrongdoing and to say, consistent with that, he would do the same again in similar circumstances.

191 In relation to the Wharerau incident that conclusion has been amply demonstrated by the fact it has ultimately been found the respondent did not misconduct himself.

192 In relation to the Bellin incident I consider, for reasons that come, that both discharges of the OC spray were wrong, and plainly so, but that is not the same thing as saying the respondent not having admitted this should sound in the appropriate disposition of the matter.

193 I cannot ignore that witnesses of credit and experience came to the Western Australian Industrial Relations Commission and gave evidence supportive of a conclusion that the respondent's conduct in relation to Mr Bellin did not involve misconduct. Also, although I disagree with the conclusion, I cannot ignore that the Senior Commissioner found that the first use of the spray was not improper.

194 I do not consider that in this case the Senior Commissioner should have found, at the point where he was considering whether the dismissal was unfair, that weight should be given to the appellant being of the view that the respondent lacked insight into his wrongdoing.

195 It was simply not that kind of case. This case was one where it was open to the respondent to fight his corner without that being in any way used against him.

196 I consider that the Senior Commissioner in fact gave the argument made by the appellant much greater consideration and weight than it deserved. Any criticism of him for not giving its content any or insufficient regard is misplaced and fails.

The Potential Procedural Fairness appeal ground; potential ground of appeal 5

197 An application to amend the grounds of appeal was made largely as a result of an exchange between myself and counsel for the appellant.

198 The potential ground of appeal, which would allege an error on the part of the Senior Commissioner in not hearing the appellant on a certain matter, could not possibly succeed in light of a review of pages 821 and 822AB (t75 and 76) where the Senior Commissioner quite squarely gave counsel for the appellant an opportunity to be heard on the matter in question.

199 This is not an occasion to rehearse the hearing rule. It may simply be stated that an invitation to counsel in an open hearing to address the bench on a matter is an opportunity for the party to be heard as the rule requires.

200 I would not grant leave to add the ground of appeal.

The placement appeal ground; appeal ground 3

201 At [112] of his reasons for decision the Senior Commissioner noted, in the context of whether the dismissal was unfair or not, that the respondent 'performed higher duties' after the alleged misconduct came to the notice of the appellant.

202 In the context of the appellant arguing that he had lost trust and confidence in the respondent and that this was relevant to whether the decision to dismiss was fair or not the Senior Commissioner wrote 'if there had been genuine concern for the safety of prisoners under [Mr Hawthorn's] care and supervision because of, in particular the Bellin incident, then placing him in any acting capacity in higher duties was quite inconsistent with it.'

203 The appellant argued on appeal that he had not "placed" the respondent in an acting capacity in a more senior position. The appellant said the respondent may have ended up at some time for some period in a more senior position to that he substantively held, but that this occurred as a result of the lawful operation of the relevant industrial agreement and not because of a "placement" by him of the respondent in the position.

204 The respondent did not contest this characterisation.

205 The appellant says the only way it could have lawfully prevented the industrial agreement from operating in the way it did in relation to the respondent would be the suspend him pursuant to the *Public Sector Management Act* 1994. The appellant says that his decision not to suspend the respondent should not operate against him in the circumstances of this case.

206 As far as I can tell the respondent agreed with that last submission, that is a decision not to suspend should not operate against the appellant in the circumstances of this case.

207 The respondent shared a concern I expressed that to allow such would be as good as inviting the appellant to seek to suspend everyone facing an allegation of a breach of discipline so that a failure to do so would not be viewed as the appellant suffering alleged misconduct.

208 I agree with counsel for the appellant that this would not be a happy event for good industrial relations in this sector.

209 I have reviewed the relevant parts of the industrial agreement and agree with the appellant that it did not "place" the respondent in higher duties. I do not consider that the appellant not doing anything about the operation of the industrial agreement in relation to the respondent in the circumstances of this case should count against the appellant's case in any way.

210 I consider the appeal ground should succeed.

Disposition

211 A finding that a dismissal was unfair is a finding that attracts consideration of, on appeal, the *House v. R* standard and not the correctness standard.

212 I need to consider whether this matter ought be remitted back to the Senior Commissioner for him to:

1. deal with the first use of the OC spray upon Mr Bellin; and/or
2. reconsider disposition given that the appellant did not "place" the respondent in a higher position to his substantive one.

213 I have decided that there is no need to remit the matter on either basis.

The Bellin appeal ground

214 Even if the matter were remitted and the Senior Commissioner were to find that the respondent had misconducted himself in the first use of the OC spray, as I am of the view the Senior Commissioner ought do, it could make no difference to the ultimate outcome of the matter.

215 I asked counsel at the appeal whether the Senior Commissioner had enjoyed an advantage over the Full Bench in relation to the matter of the first use of OC spray upon Mr Bellin.

216 Counsel for the appellant submitted that the CCTV footage spoke for itself and that the Senior Commissioner had no advantage over the Full Bench.

217 Counsel for the respondent disagreed but did not point to any evidence in support of an argument that the Senior Commissioner had enjoyed a material advantage.

218 I have read the transcript and find that there was no advantage of great materiality enjoyed by the Senior Commissioner, especially in light of the CCTV footage.

219 I consider that I am in as good a position to make findings in relation to the first use of the OC spray as the Senior Commissioner.

220 The OC spray was clearly used after Mr Bellin had left the cell door and was in his cell and, what is more, at a place in the cell which was as far from the door as possible.

221 I can find in the evidence no credible foundation for an assertion that when Mr Hawthorn first used the OC spray on Mr Bellin he was acting in self-defence or in an attempt to have an order complied with.

222 Having watched the CCTV footage such a finding is simply not open.

223 Mr Hawthorn clearly moves his arm so that the OC spray is trained on Mr Bellin when he is in the cell and well away from the cell door. He then uses the OC spray.

224 It may be said that things happened quickly, but they did not happen that quickly. If Mr Hawthorn had time to train the OC spray on Mr Bellin after his change of location from the cell door to the back of the cell, he had time to decide to not use it. That is a decision that the respondent had been making constantly, and appropriately, throughout the series of events captured by the CCTV footage.

225 Mr Hawthorn ended up making a different decision and made that decision when Mr Bellin represented the least threat to officers that he had during the series of events and when he had, in fact, complied with Mr Hawthorn's order.

226 It is plain that the first use of the OC spray was discrete from what had happened at the cell door. It is plain also that, in the circumstances, the first use of the OC spray upon Mr Bellin had no real or good relationship with the care or management of the prisoner or of the prison.

227 However, crucially to the disposition of this appeal, I find, having viewed the CCTV footage, that the first and second uses of force against Mr Bellin were part of the one course of conduct.

228 Having watched the CCTV footage, I find there to be no material distinction between the first use of the OC spray upon Mr Bellin and the second use. Both uses were when Mr Bellin was a long way from the cell door and offering no threat. They came very close together. They were part of the same course of conduct, an attack upon a defenceless man.

229 If I were to remit this matter to the Senior Commissioner, the best the appellant could hope for would be that the Senior Commissioner would reconsider his decision in relation to whether the dismissal was unfair on the basis that both uses, and not only one use, of the OC spray on Mr Bellin were acts of misconduct.

230 However, the Senior Commissioner has already decided that the dismissal of the respondent was unfair despite his finding of misconduct in relation to Mr Bellin.

231 There is no appeal from the Senior Commissioner's decision on the ground that it was legally unreasonable for him to have made that order.

232 The additional act of misconduct I would find is no worse than the one found by the Senior Commissioner. In any event, both acts were part of a course of conduct the wrongdoing inherent in which the Senior Commissioner has already considered.

233 I do not think the Senior Commissioner would be obliged to consider that a second finding of misconduct in relation to Mr Hawthorn's actions against Mr Bellin makes the matter a materially different one from that which he considered in deciding whether the dismissal was unfair.

234 Whether it was one act or two, the gravamen of the wrongdoing, that Mr Hawthorn used OC spray on a defenceless man for whom he was supposed to be caring, must have been part of the Senior Commissioner's thinking in deciding that the dismissal was, in all of the circumstances, unfair.

235 In any event, there is no appeal ground which says that the decision to find the dismissal was unfair was legally unreasonable given the gravamen of the wrongdoing found by the Senior Commissioner.

236 Accordingly, in my view, there is no good reason to remit based on the upholding of appeal ground 1(a).

The placement appeal ground

237 In relation to the placement appeal ground I do not consider that the Senior Commissioner's wrong finding was material to his ultimate decision or that, if it were remitted for further consideration on this basis, that it would, or should, lead to a different outcome.

238 There is no good reason to remit based on the upholding of appeal ground 3.

Conclusion

239 Accordingly, although appeal grounds 1(a) and 3 have been made out, I would dismiss the appeal.

WALKINGTON, C:

240 I have read the Reasons for Decision of the Chief Commissioner and agree that the appeal should be dismissed.