APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 11/2019 GIVEN ON 27 JUNE 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2019 WAIRC 00781
CORAM	**:**	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	**:**	THURSDAY, 26 SEPTEMBER 2019
DELIVERED	**:**	FRIDAY, 1 NOVEMBER 2019
FILE NO.	**:**	FBA 8 OF 2019, FBA 9 OF 2019, FBA 10 OF 2019
BETWEEN	**:**	MR LESLIE MAGYAR Appellant AND DEPARTMENT OF EDUCATION Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner D J Matthews
Citation	**:**	2019 WAIRC 00321
File No	**:**	APPL 11 of 2019, APPL 13 of 2019 and APPL 14 of 2019

Catchwords	**:**	*Industrial Law (WA) - Appeal against decision of the Commission to dismiss three applications - s 27(1)(a) of the Act - Whether the Commissioner erred in law or fact in dismissing the applications without properly regarding hardship to the applicant, the public interest and the*

		interests of employees generally - Whether the Commissioner erred in law or fact by not sufficiently regarding the lack of prejudice to the respondent - Whether the Commissioner erred in law or fact in dismissing the applications because he prejudged the appellant as conceding wrongdoing, was influenced by prejudicial material or was biased towards the appellant - No appealable error established - appeals dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 6(c), 26(1)(a), 27(1)(a), 29(1)(b)(i) *Public Sector Management Act 1994* (WA) ss 78(2)(b), 82A(3)(b)
Result	**:**	Appeals dismissed

Representation:

Counsel:

Applicant	**:**	In person
Respondent	**:**	Ms R Hartley of counsel

Solicitors:

Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

The Australian Workers Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project [2000] WAIRC 13162; (2000) 80 WAIG 3162

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00451; (2014) 94 WAIG 787

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) 97 WAIG 1689

Birkett v James [1978] AC 297

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2003) 203 CLR 194

Holsworthy Urban District Council v Holsworthy Rural Council [1907] 2 Ch 62

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

Howley v Principal Healthcare Finance Pty Ltd [2014] NSWCA 447

Johnston v Mr Ron Mance, Acting Director-General Department of Education [2002] WAIRC 06155; (2002) 83 WAIG 1553

Johnston v Wesfarmers Ltd [1990] WAIRC 12434; (1990) 70 WAIG 2434

Muto v Faul [1980] VR 26

Nathan Maher v Director General of Health [2012] WAIRC 00134; (2012) 92 WAIG 386

Palermo v Rosenthal [2011] WAIRC 00069; (2011) 91 WAIG 129

Ulowski v Miller [1968] SASR 277

White v Northern Territory of Australia (No. 519 of 1981 dated 13 June 1989)

Case(s) also cited:

Alfresco Concepts Pty Ltd v Franse [2015] WAIRC 00244; (2015) 95 WAIG 437

Barry Landwher v Department of Education [2017] WAIRC 00866; (2017) 97 WAIG 1671

Browne v Dunn [1893] 6 R. 67, H.L

Deborah Harvey v Commissioner for Corrections [2017] WAIRC 00728

The Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Reasons for Decision

KENNER SC:

The appeals and brief background

1 The Full Bench has three appeals before it. The three appeals relate to the dismissal of applications 11, 13 and 14 of 2019 brought by the appellant against the respondent, arising out of disciplinary proceedings. Two of the applications, which are relevant to FBA 8 and FBA 10 of 2019, were dismissed by the Commission under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) by reason of excessive delay in bringing the proceedings. The dismissal of the application arising on FBA 9 of 2019, again under s 27(1)(a) of the Act, was on the ground that the appellant had signed a deed of settlement and release which included a bar to future proceedings being brought by the appellant against the respondent.

2 The appellant was employed as a teacher at Kent Street Senior High School from February 2001 until September 2018. In application 11 of 2019, the appellant sought to challenge a finding of a breach of discipline and the imposition of a disciplinary penalty by the respondent on 18 August 2017. The relevant breach of discipline related to the appellant, in May 2016, knowingly enrolling a student at the school in a Certificate III in Information, Digital Media and Technology. This was at a time when such enrolment was in breach of a memorandum of understanding between the School and the Registered Training Organisation responsible for the delivery of the training.

3 In relation to application 13 of 2019, this proceeding was commenced in February 2019 and related to a breach of discipline imposed on the appellant by the respondent in August 2015, arising from conduct in February 2015. The appellant impermissibly provided a computer access code to a student when the student was knowingly under a temporary suspension of his internet access. In those proceedings, in which the appellant was represented by a legal practitioner, the proceedings were settled, and a deed of settlement and release was signed in January 2016. As a result, the Commission made an order in February 2016 dismissing the application.

4 Finally, application 14 of 2019 related to a breach of discipline incident which occurred in October 2016, involving unnecessary contact by the appellant with a student, leading to a disciplinary penalty being imposed in August 2017.

5 In each case, the penalty was a reprimand and a fine.

6 The appellant now appeals against the dismissal of the applications under s 27(1)(a) of the Act on various grounds, which are set out below.

7 Some considerable time after the disciplinary proceedings, the appellant was dismissed by the respondent, which is the subject of separate proceedings before the Commission. The three disciplinary penalties imposed, the subject of these appeals, were not the only basis for the ultimate termination of the appellant's employment by the respondent. However, as will be explained further below, it was made clear by the respondent at the time of the imposition of the disciplinary penalties, that these matters could be later relied on in any further disciplinary action commenced by the respondent against the appellant.

Decision at first instance

8 In its decision on the applications brought by the respondent for the dismissal of the proceedings, in relation to application 13 of 2019, in which the appellant signed the Deed, the Commission concluded that the application should be dismissed by reason of the appellant entering into the Deed and it was not established there was any duress or other vitiating factor.

9 In relation to applications 11 and 14 of 2019, the Commission concluded that the delay in bringing the claims, that being one year and five months and one year and eight months respectively after the imposition of the disciplinary penalties by the respondent, was excessive and no adequate explanation had been offered by the appellant for the delay. Furthermore, the learned Commissioner was of the view that given the lengthy period of time from the occurrence of the relevant incidents, the imposition of the relevant disciplinary penalties, and the commencement by the appellant of his applications to belatedly challenge them, the employer was entitled to conclude that the employee had accepted the outcome and that state of affairs governed their employment relationship from that point onwards.

10 The learned Commissioner did not accept the appellant's explanation for the delay, that being that he could not afford legal representation at the time to mount a challenge, as in and of itself, a satisfactory explanation. He considered the appellant had made at the time, a tactical and personal choice not to challenge the disciplinary penalties, which he could not now resile from. Furthermore, whilst the learned Commissioner concluded that the respondent did not point to any actual or presumptive prejudice because of the delay, she was entitled to assume that the findings and conclusions, and the imposition of the disciplinary penalties, were not going to be disturbed.

Grounds of appeal

11 The three appeals have common grounds, except for an additional ground of appeal in relation to FBA 9 of 2019, relating to the Deed. The grounds of appeal are summarised in the first paragraph of each ground and are as follows:

Ground 1 - Hardship to the employee if application dismissed

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the hardship to the employee if the appeal is dismissed and the cause of action left statute barred. The reasons for the decision are silent on the matter of hardship to the employee.

Ground 2 - Public Interest

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the principles of the "public interest".

Ground 2A - Interests of Employees Not Sufficiently Considered

The Commissioner erred in law and or fact in summarily dismissing this application because paragraph 13 of the decision indicates that the Commissioner primarily focused on the interests of the employer. The principles of the "public interest" require that consideration must be given to all the parties, that is, employees and employers.

Ground 2B - Decision Gives Employers an Unfair Advantage - violates the "fair go all round" principle.

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the principles of the "fair go all round" philosophy of the Australian industrial relations model used throughout Australia.

Ground 3 - No Prejudice to the Employer

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the lack of prejudice to the employer.

Ground 4 – Prejudicial Conduct Of The Employer

Ground 4.1 – Act of Omission – The Deed of Settlement and Release

The Commissioner erred in law and or fact in summarily dismissing this application because he prejudged the employee as having admitted wrongdoing in relation to the IP Address misconduct finding.

Ground 4.2 - Act of Commission - The Brendan C Allegation

The Commissioner erred in law and or fact in summarily dismissing this application because he was influenced by prejudicial material placed before him by the employer.

Ground 4.3 - Act of Commission - Prejudicial Investigation Reports

The Commissioner erred in law and or fact in summarily dismissing this application because he was influenced by prejudicial material (two investigation reports) placed before him by the employer at an inappropriate time.

Ground 5 - Favoured Treatment of Employer

Ground 5.1 Conduct Contrary to Objective 6c - Maximum of expedition

The Commissioner erred in law and or fact in summarily dismissing this application because he acted in a biased manner that was contrary to object 6c of the Act and in doing so the Commissioner demonstrated biased conduct that favoured the employer.

Ground 5.2 - Preferential Treatment of Employer - Employee Exhibits Refused

The Commissioner erred in law and or fact in summarily dismissing this application because he demonstrated bias against the employee in refusing to accept employee exhibits, yet inappropriately called for employer submission even though employer's counsel did not request to adjourn the hearing in order to prepare additional submissions and evidence.

Ground 5.3 - Preferential Treatment of Em ployer - Easy Treatment of Employer's Position

The Commissioner erred in law and or fact in summarily dismissing the application because he demonstrated bias in favour of the employer as demonstrated by the soft interactions between the Commissioner and the employer’s counsel during the hearing.

Approach to the appeal

12 Given that the three appeals before the Full Bench arise from a discretionary decision of the Commission at first instance, the well-known principles set out in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 apply. That is, it is not sufficient for an appellant to persuade the Full Bench that it should reach a different decision to that of the learned Commissioner. It is necessary that the appellant establish an error in the exercise of the Commission's discretion, such as the learned Commissioner acting upon a wrong principle; making a material mistake in relation to the facts; failing to take into account relevant considerations or taking into account irrelevant considerations; or allowing extraneous or irrelevant matters to affect his decision making: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2003) 203 CLR 194. Kirby J in *Coal and Allied* at par 72, emphasised that an appeal court, considering an appeal from a discretionary decision, should proceed with appropriate caution and restraint.

13 The Commission has available to it a broad power under s 27(1)(a) of the Act, to dismiss or refrain from further hearing a matter if at any stage of the proceedings, it is satisfied as to certain things. Section 27(1)(a) provides as follows:

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

14 In a decision of the Full Bench in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WAIRC 00830; (2017) 97 WAIG 1689, in relation to an appeal from a decision of the Commission dismissing at first instance proceedings under s 27(1)(a) of the Act, in relation to this power, and in particular s 27(1)(a)(ii), at pars 137 to 139 I said as follows:

137 Section 27(1)(a) is a power to dismiss an application or refrain from further hearing an application. This power is broad in scope and should be exercised with caution. It is in the following terms:

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

138 In *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431, in considering an application under s 27(1)(a)(ii) to dismiss a matter before the Commission in the public interest, I said at pars 22 and 23:

> 22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:
>
> > 35 Given the construction I have placed on s 36A(1) of the Act, it is for the PTA to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:

> *"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."*

23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

139 This approach to s 27(1)(a) of the Act was affirmed on appeal to the Full Bench (*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00451; (2014) 94 WAIG 787) and on further appeal to the Industrial Appeal Court (*The Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2015] WASCA 150; (2015) 95 WAIG 1593).

15 In an earlier decision of the Full Bench in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00451; (2014) 94 WAIG 787, Smith AP, when also considering the operation of s 27(1)(a) of the Act, came to similar conclusions at pars 49 to 58 of her reasons for decision. Accordingly, I adopt and apply the above approach to the exercise of the s 27(1)(a) discretionary power for the purposes of determining the present appeals.

Consideration of the appeal grounds

Ground 1

16 By this ground of appeal the appellant submitted that the learned Commissioner did not properly consider or consider at all whether the appellant would suffer hardship if the applications were dismissed. In this respect the appellant referred to a decision of the Commission in *Nathan Maher v Director General of Health* [2012] WAIRC 00134; (2012) 92 WAIG 386, a decision of the Public Service Appeal Board in relation to an application by the respondent in that matter to have the proceedings dismissed for want of prosecution. In that case, the Appeal Board, at par 12, referred to and relied on the decision of the Full Bench in *The Australian Workers Union, West Australian Branch, Industrial Union of Workers and Barminco Pty Ltd – Plutonic Project* [2000] WAIRC 13162; (2000) 80 WAIG 3162, where, in reliance on *Ulowski v Miller* [1968] SASR 277 at 280; *Birkett v James* [1978] AC 297 and *Muto v Faul* [1980] VR 26, principles for the dismissal for want of prosecution were considered.

17 In *Barminco*, Sharkey P referred to "five paramount matters" to be taken into account in the exercise of the discretion to dismiss a matter for want of prosecution. Those considerations being the length of the delay; the explanation for the delay; the hardship to the plaintiff if the application is dismissed and the cause of action left statute barred; the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay, and the conduct of the defendant in the litigation. In a similar vein, the appellant also referred to a decision of the Supreme Court of the Northern Territory in *White v Northern Territory of Australia* (No. 519 of 1981 dated 13 June 1989) and *Howley v Principal Healthcare Finance Pty Ltd* [2014] NSWCA 447 per McColl, Meahger and Barrett JJA, although the latter case concerned whether leave to commence workers' compensation proceedings outside of a statutory time period, should be granted.

18 Most cases relied on by the appellant both at first instance and on this appeal, in this respect, deal with dismissal for want of prosecution of proceedings initially commenced within time, but not then proceeded with expeditiously. That is not the case here. The applications the subject of the order of dismissal under s 27(1)(a) of the Act were commenced under s 78(2)(b) of the *Public Sector Management Act 1994* (WA) from decisions to take disciplinary action under s 82A(3)(b) of the PSM Act. Such a matter is able to be referred to the Commission "as if that decision or finding were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly".

19 It would appear that the reference to "section 29(b) of that Act", in s 78(2)(b) of the PSM Act, is a drafting error as there is no such provision and nor was there at the time of the enactment of s 78(2)(b) of the PSM Act and it seems it was intended to refer to "section 29(1)(b)" instead. This matter was considered in *Johnston v Mr Ron Mance, Acting Director-General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553. As it is only applications under s 29(1)(b)(i) of the Act that are subject to a statutory time limit of 28 days, with an opportunity for a late claim to be considered by the Commission, there is no time limit on claims made under s 78(2) of the PSM Act. No time limit is referred to in reg 63A of the *Industrial Relations Commission Regulations 2005* either.

20 Therefore, strictly speaking, it appears the case that the present appeals are to be determined based upon general considerations in relation to the exercise of the s 27(1)(a) power to dismiss, rather than the application of the cases dealing with dismissal for want of prosecution or the grant of extensions of time to extend statutory time periods to commence proceedings in the Commission. However, it seems to me, that subject to what follows, some guidance can be taken from these cases as to how the general discretion under s 27(1)(a) of the Act should be exercised in the circumstances of the present case.

21 The fact that in this jurisdiction there exist time limits for employees to commence proceedings against their present or former employers, whether it be alleging they were unfairly dismissed or, in the case of employment in the public sector, to challenge disciplinary action before the Appeal Board for example, is indicative of the need for timeliness generally. The Commission has the power to extend statutory time limits, but there must be good reason established, with the onus being on the party seeking an extension to persuade the Commission that the discretion to do so should be exercised in their favour.

22 In terms of the factor of delay, the general need for timeliness in the commencement of claims in this jurisdiction is a principle of long standing and is illustrated in the decision of Fielding C in *Johnston v Wesfarmers Ltd* [1990] WAIRC 12434; (1990) 70 WAIG 2434. In this matter, the applicant purported to "convert" an unfair dismissal claim into a claim for denied contractual benefits in relation to events that had occurred some three and a half years earlier. The respondent brought an application to dismiss the proceedings under s 27(1)(a) of the Act, by reason of the excessive delay in the institution of the proceedings.

23 Whilst at the time of those proceedings before the Commission in that case, no time limits were then imposed within which such claims were to be commenced, as opposed to the present position in relation to unfair dismissal claims for example, the Commission made some general observations in relation to delay generally in commencing proceedings before the Commission. In this respect, Fielding C said at 2435:

> Although the Act does not impose time limits, within which a dismissed employee might bring a claim with respect to unfair dismissal, as is the case in comparative legislation in some other States, for example, in Victoria and in South Australia it is obviously essential that such a claim be instituted at or about the time of the dismissal. It is patently obvious that the interests of industrial harmony dictate that the Commission have the benefit of dealing with disputes of this kind whilst the incidents are fresh in the minds of those likely to be called before the Commission. After more than three and a half years it would be surprising if the recollections of those directly involved with the matter were not somewhat blurred.
>
> Moreover, the only practical remedy available for such a claim is reinstatement and that cannot reasonably be effected where a long period of time has elapsed following the dismissal. The Commission has to consider not only the position of the dismissed employee, but that of the employer. It would obviously be unreasonable to expect that an employer make the necessary adjustments to reinstate an unfairly dismissed employee years or even months after the dismissal has taken place. In this respect I adhere to the view I expressed in Fosbury *v.* Mt Newman Mining Co Pty Ltd (1988) 68 WAIG 1882 at 1884, that is, that claims for unfair dismissal should be brought with expedition. Where there has been delay the Commission is entitled to exercise its discretion against the Applicant and either refuse reinstatement or, in more extreme cases, to refuse to proceed with the matter at all.
>
> The Respondent rightly accepts that ignorance of the law is not really an excuse. In his case he made a deliberate decision, albeit based on legal advice which he regards as erroneous, that he should not institute proceedings in the Commission against the Applicant arising out of his dismissal. Having made that deliberate decision he ought not now complain if the Commission exercises the discretion given it by section 27 (1)(a) not to hear an application instituted more than three years later. If the dismissal was indeed unfair it is simply asking too much to expect that at this late stage he be reinstated and, indeed, the Applicant now accepts that. There seems to me to be little point in proceeding with what at best would be an academic exercise. The Commission's charter is to deal with practical solutions and is not such as to invite academic solutions. Furthermore, it is hardly consistent with the public interest that it should be engaged in such an exercise when there are numerous applications by others waiting to be dealt with relating to allegations of unfair dismissal and which have been made expeditiously and in a proper manner.
>
> I do not consider the position to be improved by the Applicant's proposal to abandon his claim for unfair dismissal and convert it to one for denied contractual benefits. Whilst the need to institute proceedings expeditiously is perhaps not as compelling for a claim of denied contractual benefits as it is for a claim for reinstatement, nonetheless the nature of the Commission's jurisdiction is such that disputes of that kind should be dealt with without delay. In this instance the claim cannot be said to have been made without delay. Indeed, by comparison with similar claims dealt with in the Commission, it could be described as an ancient claim.

24 In my view, in the context of s 27(1)(a) of the Act, the considerations guiding Fielding C's decision in *Johnston* are relevant to the determination of the present appeals and with respect, I adopt and apply them in the present circumstances. I also note that in *Barminco*, Sharkey P, at 3162, noted that in a jurisdiction such as the Commission, emphasis is placed on swift remedies and a lengthy period of delay, as in that case, was "almost inordinate and irrecoverable". Of course, it goes without saying, that by s 26(1)(a) of the Act, the exercise of the discretion by the Commission must be in accordance with equity and good conscience and

the substantial merits of the case. By s 26(1)(c), the Commission must also have regard to not just the interests of an employee, but also of the employer too.

25 The appellant argued that the learned Commissioner did not have regard to his interests in his decision. The appellant submitted, as a main plank of his argument, that he did not challenge the penalties imposed in applications 11 and 14 of 2019 because of the cost of taking legal action against his then employer. The appellant said that the learned Commissioner failed to properly consider the prejudice to him by the dismissal of the application. He contended that the learned Commissioner did not properly consider the cost of litigation as a barrier to the appellant bringing the claim to challenge the disciplinary decision. The appellant also contended that there was no reference to hardship to the appellant if his claims were dismissed.

26 A further strand of the appellant's argument in relation to this ground, was that the employer, sometime after, relied on the disciplinary outcomes in its decision to terminate his employment. The appellant contended that due to the dismissal of applications 11 and 14 of 2019, he will no longer be able to challenge those findings in the proceedings he has commenced to contest his dismissal. The appellant submitted that the respondent now will rely upon these historical matters to support its decision to dismiss. The appellant also referred to the *White* case in the Northern Territory at pp 29 to 30, to the effect that each case is to be evaluated in accordance with its own circumstances. The appellant also referred to s 26 of the Act and the need for fairness and justice to apply.

27 There is no doubt from a fair reading of the transcript that the learned Commissioner was well aware of the need to consider the fairness of any decision to dismiss the applications under s 27(1)(a) of the Act (see pp 4 to 5 of the transcript at first instance). In particular, when discussing the circumstances of each case, the learned Commissioner expressly recognised the need to take into account the prejudice to either party as a consequence of the dismissal of the applications: p 5 transcript at first instance. The learned Commissioner referred to taking into consideration factors set out in the "want of prosecution" cases referred to by the appellant. The learned Commissioner expressly referred to taking these matters into account and engaging in a "balancing act": p 5 transcript at first instance. The learned Commissioner expressly referred to the factor of an excessive delay, which may be a decisive factor and the need for timeliness in the context of employment relationships: p 5 transcript at first instance; pars 13 to 17 reasons for decision at 149 AB.

28 The learned Commissioner expressly acknowledged the appellant's submissions as to the cost of litigation: pp 10 to 11 transcript at first instance. In his reasons for decision at pars 19 to 21, he referred to the appellant's submissions as to the cost of litigation and the appellant's competence to represent himself in the

proceedings to challenge the disciplinary penalties. The learned Commissioner however concluded that the appellant made a conscious choice and a tactical decision to not do so at the time. Those considerations, however, could not overcome the issue of excessive delay and the employer could not be expected to wait for a person to consider themselves able to competently represent themselves in any proceedings: AB149.

29 As to the contention that the appellant will be prejudiced now because as a result of the dismissal of the applications, he would not be able to challenge historic disciplinary matters, the learned Commissioner plainly took this into account. He concluded that the appellant was aware of his right to challenge the disciplinary penalties in proceedings before this Commission at the time they were imposed: par 18 reasons for decision AB149. Indeed, the letter informing the appellant of the outcome of the disciplinary proceedings and the imposition of the disciplinary penalty, expressly referred to the right to challenge the employer's decision on an appeal to the Industrial Relations Commission: AB139.

30 These matters were clearly taken into account by the learned Commissioner and there was no error demonstrated by the appellant in this respect. Moreover, as in *Johnston*, set out above, the appellant could not now complain about the respondent bringing an application under s 27(1)(a) of the Act that his claims be dismissed and that he will be denied the ability to challenge the historical findings, when he made a conscious decision at the material time to not do so. This ground is not made out.

Ground 2

31 This ground asserted that the learned Commissioner did not pay any or sufficient regard to the public interest in his decision to dismiss the application. This contention is unsustainable. I have referred to the relevant cases in relation to the exercise of powers such as s 27(1)(a) of the Act earlier in these reasons. Whilst the learned Commissioner did not identify s 27(1)(a)(ii) of the Act specifically in his reasons for decision, it is clear from his reference to "as a matter of public interest" at par 13 of his reasons (AB148), that he had this provision in mind.

32 The test in this jurisdiction is not the Australian Institute of Administrative Law paper as set out in the appellant's submissions, although, as it is clear from the above cases, there is a requirement for the Commission to engage in a balancing process and to weigh up various factors, without necessarily giving equal weight to each. As the transcript references I have already identified make plain, the learned Commissioner was clearly aware of his obligations in this regard.

33 At pars 13 to 22 of his reasons for decision, the learned Commissioner did refer to the public interest and the need for certainty in employment relationships and that after the passage of time, an employer should be able to conduct its affairs in accordance with the circumstances then in existence. If an employee, in the case of an employment dispute, has accepted and not challenged a disciplinary outcome, despite the legal right to do so, which legal right has been expressly drawn to their attention, the employer is quite entitled to presume the continued existence of this state of affairs.

34 This is subject to the issue of the length of the delay in the bringing of any proceedings to challenge this state of affairs. In this case, the delay was very lengthy, being more than one year and five months after the imposition of the penalty in application 11 of 2019 and more than one year and eight months after the imposition of the penalty in application 14 of 2019. This was a period of over two and a half years since the relevant events occurred in the case of the former application and almost two years and four months in the case of the latter application. The learned Commissioner concluded, having regard to the length of the delay, that it was not reasonable and there was no good reason advanced by the appellant for it: par 14 reasons for decision at AB149. The length of the delay is plainly a matter of great weight and is to be considered by the Commission as a part of the balancing exercise, in determining where the public interest lay in the context of employment matters. No error has been identified by the appellant in relation to this ground of appeal.

Ground 2A

35 The appellant submitted that the Commission did not take sufficiently into account, the interests of the employee and overly focussed on the interests of the employer, inconsistent with the requirements of the public interest.

36 As I understood it, this ground was somewhat of a modified re-statement of the appellant's contentions in relation to ground 1, that the interests of the employee, and the hardship factor, were not or were not adequately considered by the Commission. The appellant referred to par 13 of the learned Commissioner's reasons (AB148) which dealt with the public interest and focussed on the nature of the employment relationship, which I have referred to above in discussing ground 2. The contention by the appellant was that this conclusion overlooks the position with a large organisation like the respondent. The submission was that it may be applicable to a small business. There was also a further reference by the appellant to an employee not being able to afford legal representation and that self-representation always confers a disadvantage in proceedings before the Commission.

37 As with my conclusions in relation to ground 1, I am far from persuaded that the learned Commissioner did not have regard to the interests of the appellant and only placed weight on the interests of the employer. Whilst the appellant focussed on the Commission's conclusions at par 13 of his reasons (AB148) as being evidence of this, this was central to his conclusion as to where the balance of public interest considerations lay. It does not mean, read in the context of the reasons for decision and the transcript of the proceedings, that the learned Commissioner did not have regard to other factors, particular to the employee. It is clear from the rest of the reasons, although shortly expressed, that the appellant's circumstances were taken into account too.

38 This ground of appeal is not made out.

Ground 2B

39 By this ground it was contended by the appellant that the learned Commissioner did not apply the "fair go all around" principle, as a part of the industrial relations system. The appellant complained of the general imbalance in relation to the financial resources of large employers and difficulty in challenging decisions of employers because of the cost of litigation. According to the appellant, this gives an unfair advantage to employers who may potentially exploit this situation by relying on historical findings of misconduct. It was said that this leads to an undermining of Australian values in society generally.

40 This ground of appeal and the submissions made in support of it by the appellant do not allege or identify any error of the kind in the decision of the learned Commissioner, necessary to make out a ground of appeal. Whilst they may represent a somewhat philosophical approach to what the appellant sees as his grievance, it is not a basis for a ground of appeal and accordingly this ground is not made out.

Ground 3

41 As to this ground, the appellant contended that the learned Commissioner erred because even though he found no actual or presumptive prejudice to be suffered by the employer, he nonetheless dismissed the application. According to the appellant, the Commission's conclusion of no prejudice to the employer should have led to the dismissal of the s 27(1)(a) application. The appellant also submitted that prejudice was a main ground of the respondent's application to dismiss the three matters.

42 At pars 17 and 22 of his reasons for decision (AB149) the learned Commissioner concluded that no prejudice, real or presumptive, to the respondent was established. He also said that the respondent "did not point to any prejudice, actual or presumptive, …" It is the case that in applications 11 and 14 of 2019, prejudice to the respondent was raised as a ground for the requested exercise of the Commission's discretion under s 27(1)(a) of the Act (see AB30 in FBAs 8 and 10 of 2019). It was contended by the respondent that as "the conduct the subject of the disciplinary action occurred almost three years ago a delay of such length would result in the Applicant suffering serious prejudice at a hearing of Application 11 of 2019" (AB30). Furthermore, in the written submissions filed by the respondent in its application to dismiss, the respondent referred to the request by the learned Commissioner for submissions on this issue, which the respondent then set out at pars 4 to 11 of its outline (AB60 to 61). Reference was made to delay as one of the "five paramount matters" as discussed in *Barminco*.

43 Prejudice raised by the respondent was said to arise in at least two respects. First, it was contended by the respondent that the passage of time necessarily eroded the reliability of witnesses in terms of their recollections of events and clarity of detail. The second issue raised by the respondent because of delay, was unfairness if the respondent was to call the relevant students as witnesses, several years after the events. It was further said by the respondent that they may not be able to be called as witnesses in any event, as they refused to be interviewed or to participate in the investigation process at the time of the relevant incidents. This would mean prejudice to the respondent, if the substantive applications were heard.

44 The issue of prejudice to the respondent was raised in the proceedings before the learned Commissioner (see pp 22 to 28; 32 to 34; 47 and 47 to 50 transcript at first instance). At 55 to 56 of the transcript at first instance on the second day of the hearing, the learned Commissioner informed the parties that the respondent's application to dismiss the appellant's three applications, was not going to be decided on the basis of prejudice but on the issue of delay. In terms of the learned Commissioner's conclusions at par 22 of his reasons, that the respondent did not point to any actual or presumptive prejudice, this in my view, was not a correct characterisation of the respondent's position. I think the respondent did so as the summary of grounds and submissions outlined above, referred to the issue of prejudice and proffered an explanation as to why it should be found to exist by the Commission.

45 Given the period of time since the relevant conduct complained of by the respondent had occurred, as at the date of the hearing, it is a natural consequence of the passage of time for memories to fade and for relevant events to lack the clarity in the minds of those involved, compared to at or closer to the time of the

relevant incident. The question of "presumptive prejudice" was discussed in *Howley*, and reference was made to the judgement of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. At 551, McHugh J referred to the potential loss of evidence which was not known to exist where His Honour said "time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose… The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time the cause of action arose".

46 These considerations were relevant to the matter at first instance. It was open for the learned Commissioner to have reached the conclusion that the respondent had established at least presumptive prejudice, which would contribute to unfairness at the hearing of the three applications.

47 Nonetheless, it is still for the appellant to establish error in the decision of the Commissioner at first instance. Prejudice to the respondent, whether it be actual or presumptive, is not decisive and is one but a range of considerations. Even assuming the lack of prejudice of any kind being made out, that does not mean that conclusion, in and of itself, would lead to the refusal to exercise the discretion under s 27(1)(a) of the Act. The learned Commissioner made clear that he considered the passage of time and the delay alone, in terms of a workplace relationship, with the respondent's entitlement to assume there would be no challenge to its decision to impose disciplinary penalties, to be decisive. Indeed, this factor, of people (in this case the respondent employer) being able to organise their affairs on the basis that no claims would be commenced against them was expressly recognised by McHugh J as part of "The effect of delay on the quality of justice…" in *Brisbane South* at 552.

48 No error has been identified by the appellant in relation to this ground of appeal.

Ground 4

Ground 4.1

49 As to this ground, the appellant contended that references by the learned Commissioner in the course of the hearing in connection with the Deed in application 13 of 2019 to "a plea of guilty" (see for example p 17 transcript at first instance) tainted his approach to the appellant and amounted to a display of bias against him.

50 A review of the transcript at first instance, read with the learned Commissioner's reasons at par 10 (AB64) make it clear that his conclusions were based on the fact of the entering into the Deed by the appellant, as part of the compromise of his claim, and his agreement to not take further claims against the respondent in connection with the disciplinary action. The terms of the Deed are contained at AB33 to 39. The Deed recites the fact that the appellant was the subject of an Investigation Report in July 2015, leading to the imposition of a disciplinary penalty of a reprimand and a fine of one day's pay. The appellant disputed the outcome and commenced a claim in this Commission to challenge it. It was common ground that the appellant was represented by a solicitor in those proceedings.

51 It was also common ground that as a result of conciliation proceedings before the Commission, the appellant's claim was settled. Some compromise was reached in relation to aspects of the Investigation Report, as reflected in par 3 of the Deed. Also, the Deed in par 3, recorded that the appellant disagreed with certain conclusions in the Investigation Report, and a submission in relation to this aspect, prepared by the appellant, would be included in his disciplinary file. In accordance with terms usual for such Deeds, the appellant's application was to be discontinued; he would release and discharge the respondent from "all claims, suits, actions, causes of action and other demands whatsoever which the Employee now has or at any time in the future may have or, but for the execution of this Deed, might have had, against any of the releasees in respect of, arising from, or in any way relating to the Disciplinary Process" (AB36).

52 Further, the terms of cl 7 of the Deed contained the provision enabling the respondent to raise the appellant's entering into the Deed as "as an absolute bar to all future and existing claims, suits, actions, causes of actions and other demands brought, or attempted to be brought, by the Employee in respect of, arising from or in any way relating to the Disciplinary Process." (AB36)

53 When the above provisions of the Deed were highlighted by the Full Bench with the appellant in the course of his submissions on the appeal, the appellant accepted that the terms of the Deed meant what they say; that he did compromise his claim and promised to not bring a fresh claim in relation to the disciplinary proceedings; and in breach of this promise, the appellant did so (see p 21 transcript). It was at this point, that the appellant moved to ground 6, dealing with alleged duress at the time of signing the Deed, which will be dealt with later in these reasons.

54 There was no prejudice or bias displayed by the learned Commissioner against the appellant in relation to the Deed issue. He focussed on the facts set out immediately above, and that the Deed, on its face, was conclusive against the commencement of application 13 of 2019. This is subject to what is said below

in relation to ground 6. No error has been identified by the appellant and this ground is not made out.

Ground 4.2

55 This ground alleges that the material placed before the Commission, in the form of the Investigation Report, which was annexed to an affidavit sworn by the respondent's counsel, in relation to application 11 of 2019, was so prejudicial to the appellant that it tainted the learned Commissioner's view of him. As I understood the submission and as it was put, this was said by the appellant to have created in the mind of the learned Commissioner, that the appellant was a "bad person", found guilty of misconduct, and that the whole proceedings below were accordingly tainted (see p 25 transcript).

56 The respondent contended that the Investigation Report was made available at the request of the learned Commissioner at the conclusion of the first day of the hearing. The respondent's counsel accepted that it was her oversight and that this material should have been filed for the purposes of the hearing on 29 April 2019. At pp 27 to 28 of the transcript at first instance, there is a discussion between the learned Commissioner and counsel for the respondent, where the learned Commissioner requests the provision of affidavit material, so that he may properly consider the prejudice issue raised by the respondent. In the course of the proceedings on 29 April 2019, given the way in which the hearing unfolded, the appellant responded to the respondent's application as to why the s 27(1)(a) application should not succeed. The learned Commissioner then informed the appellant at p 29 of the transcript at first instance, that he would be given an opportunity to respond to any material filed by the respondent, by filing further material of his own. It was common ground that the appellant chose to not do so.

57 The matter was relisted on 10 June 2019 at which further submissions were made by the respondent in relation to prejudice and which witnesses the respondent may try and call in support of its case. The appellant responded at length to the respondent's submissions on the prejudice issue. Apart from a discussion about potential witnesses referred to in the Investigation Report, there was little or no reference by the parties or the learned Commissioner to the content of the Investigation Report itself. The respondent submitted to the Full Bench that any suggestion that it engaged in inappropriate conduct, by placing this material before the Commission, should be rejected. The respondent contended that the Investigation Report was put before the Commission in order to provide the full background and context of the matters in issue, following the learned Commissioner's request.

58 Ultimately, this ground of appeal can be answered in the following way. Regardless of the purposes for the tender of the Investigation Report, and I do not accept the appellant's allegation against the respondent to any extent, even if there was substance to the suggestion that the respondent in some way attempted to "poison the well" against the appellant by the submission of such material, with respect to the appellant, this is irrelevant to the conclusions reached by the learned Commissioner. It was a matter of objective fact, that the two applications relevant to FBA 8 and 10 of 2019 involved a very lengthy delay. It was also the case that the appellant did not provide a reasonable explanation, as a matter of fact, as to why he did not challenge the disciplinary findings in a timely manner, in accordance with the learned Commissioner's conclusions. This was despite that his ability to do so was drawn to his attention by the respondent at the time, meaning the appellant was aware of it. The learned Commissioner's view as to whether the appellant may be a "bad person" or there was created in some way, a negative impression of him, was not germane to these conclusions.

59 In relation to the Deed issue, again any suggestion of the appellant that the tender of the Investigation Report negatively impacted on him in the learned Commissioner's eyes, was irrelevant to the objective fact of the entry by the appellant into the Deed and his promise to not commence any further proceedings arising from the disciplinary action, which promise he did not keep.

60 Accordingly, this ground of appeal is not made out.

Ground 4.3

61 I need not deal with this ground any further and I refer to my reasons above in relation to ground 4.2. Largely the same issues are raised. I reach the same conclusions. This ground of appeal is not made out.

Ground 5

Ground 5.1

62 This ground of appeal asserted that the learned Commissioner was biased against the appellant because he gave the respondent an opportunity to adduce further evidence in relation to the prejudice issue, which evidence was the subject of consideration on the second day of the hearing on 10 June 2019. The nub of the appellant's argument in this respect was that the respondent was given a "second chance" to put its case, rather than for the learned Commissioner to decide the matter based on the submissions of the parties on the first day of the hearing on 29 April 2019. This was also said to be contrary to the objects of the Act in

s 6(c), in relation to the objective of the resolution of disputes with the maximum of expedition.

63 As noted above, the respondent's counsel accepted that she omitted to place relevant material before the Commission for its consideration on the first day of the hearing. In this respect, most of the hearing on this day, as I have mentioned above, was taken up by the appellant's opposition to the respondent's application. It is the case that this material should have been before the Commission as a part of the respondent's application. However, the fact of the adjournment of the application to enable not just the respondent, but also the appellant to file further material in relation to the dismissal application, did not mean that the learned Commissioner was biased against the appellant. The Commission's procedures in dealing with industrial matters under the Act, within limits, are flexible having regard to the nature of the matters coming before it for determination, as s 26(1) of the Act makes clear (see also regs 32A, 33, 34, 37 and 39 *Industrial Relations Commission Regulations 2005*). It is important for the Commission in an application of the kind below, to have all relevant material before it in order that the Commission may make a fully informed decision.

64 It is also the case, as the learned Commissioner pointed out in the course of the hearing, if the respondent's application at the end of the first day was simply refused, there would be nothing precluding a fresh application being made under s 27(1)(a) of the Act at a later time. In that sense, the procedure adopted by the Commission enabled the matter to be fully heard and determined in accordance with s 26(1) of the Act.

65 Irrespective of this however, the additional material filed by the respondent in the form of the Investigation Report ultimately made no difference to the outcome of the application to dismiss. This is because the Commission decided the matter solely on the basis of delay and that there was no reasonable explanation advanced by the appellant for it. Prejudice, whether it be actual or presumptive, was not relied upon by the learned Commissioner and therefore in the final analysis, there was no prejudice to the appellant by the course adopted by the learned Commissioner. In any event, the appellant was given an opportunity to respond to this further material with further material of his own, which he elected not to do.

66 This ground of appeal is not made out.

Ground 5.2

67 This ground contended that the learned Commissioner showed bias towards the appellant because he refused to consider the tender of documents in support of the appellant's case. The appellant referred to the transcript at first instance at p 13. Reference was made to the Standards and Integrity Initial Reporting Form annexed to the Investigation Report (as part of annexure RMH1 to the affidavit of Ms Hartley (AB33 to 137)). At p 2 of this document, the author, Ms Ward under the heading "Background Information" at par 6, referred to reasons why year 11 students should not engage in the Certificate III course. Whilst it was not entirely clear, the appellant seemed to submit to the learned Commissioner that there may be some records in the school computer system (at the time of the hearing) showing that in 2018 some students had been enrolled in the Certificate III, suggesting inconsistency in approach by the respondent. However, beyond that assertion in submissions, no document or other material was produced, in this connection, that the appellant tried to have tendered.

68 Furthermore, at p 15 of the transcript at first instance, the appellant attempted to refer to documents that he said were relevant to the Deed he signed in relation to application 13 of 2019. The learned Commissioner made it clear to the appellant that he was not prepared to permit the appellant to go behind the Deed or to attempt to undo it in some way, unless he was going to contend that the Deed was signed under duress or he relied on poor legal advice. The appellant confirmed that this was not his argument (see p 16 transcript at first instance). In these circumstances, there was no error in the learned Commissioner's rejection of an attempt by the appellant to go behind the Deed, unrelated to duress or some such contention. The learned Commissioner's approach in this respect was consistent with the conclusiveness of the settlement reached and the principle of finality of litigation.

69 This ground of appeal is not established.

Ground 5.3

70 The appellant maintained in this ground of appeal that the learned Commissioner asked him an excessive number of questions compared to the respondent. This was submitted to be indicative of bias by the learned Commissioner against the appellant. I do not consider this ground has any substance. Whilst on a fair reading of the transcript at first instance on occasions, the exchanges between the appellant and the learned Commissioner could be described as robust, at several points the learned Commissioner was asking the same question repeatedly, as the appellant was not providing a direct answer. On other occasions, the learned

Commissioner was attempting to understand the contentions advanced by the appellant and expressing reservations about the points being made. An example of this is at p 41 of the transcript at first instance, cited by the appellant in this ground of appeal, when discussing the Deed and the meaning of the qualifications contained in it. This was referring to what the appellant called his "Form 4A submission", which was the attachment to his application 13 of 2019 at AB41 to 48 in FBA 9 of 2019. At pp 41 to 42 is the following exchange:

MAGYAR, MR: Because - - -

MATTHEWS C: Because you now seek to withdraw your agreement to it and that makes it contentious?

MAGYAR, MR: No, your Honour. The deed refers to a companion document which is my Form 4A submissions. The Form 4A submissions refer to another companion document called Statement of Evidence 19, your Honour. So you need to really to read the bundle of three documents as a whole before you form a view - - -

MATTHEWS C: And what will I learn at the end of doing that? Tell me in a - in a paragraph what will I learn?

MAGYAR, MR: That the employee does not accept that he committed an act of misconduct.

MATTHEWS C: Mr Magyar.

MAGYAR, MR: You haven't - - -

MATTHEWS C: Are you saying that you're on that one - you dispute that you conducted - that you misconducted yourself despite the fact that you signed a deed of settlement and release in which you agreed you had misconducted yourself?

MAGYAR, MR: The - the - - -

MATTHEWS C: Is that what you're trying to tell me? Yes or no?

MAGYAR, MR: This does not contain any admission of guilt, your Honour. There's no admission of guilt in the deed of settlement. And once you read the two companion documents I've mentioned you would see that that position is sustainable.

MATTHEWS C: Sure. And you make that - you make that argument at the hearing.

MAGYAR, MR: Yes. All right, then I will, your Honour. I will then move on to now - - -

MATTHEWS C: But no, but I want to deal with this. You say that under the deed of settlement and release you are exonerated. I want to deal with this now. Tell me how you're exonerated by the deed of settlement and release?

MAGYAR, MR: Well, you need to have before you - - -

MATTHEWS C: Well, give them to me then.

MAGYAR, MR: You need to have before you - - -

MATTHEWS C: Give them to me then.

MAGYAR, MR: - - - three documents.

MATTHEWS C: Yes. Give them to me then.

MAGYAR, MR: But once you've read the three documents then you - - -

MATTHEWS C: Are you going to give them to me or not?

MAGYAR, MR: The three documents. The - well, I asked the question in the email I sent to your Associate.

MATTHEWS C: Don't worry about the communication between myself and my Associate. Do you plan to give those documents to me now?

MAGYAR, MR: I gave them to you actually at the last hearing, your Honour.

MATTHEWS C: All right, so I've got the deed of settlement and release.

MAGYAR, MR: And then you've got my Form 4A.

MATTHEWS C: I've got the Standards and Integrity Directorate investigation report. I presume that I need that, yes?

MAGYAR, MR: You have - I - I tendered and I don't know whether you accepted or not my Form 4A.

MATTHEWS C: I wouldn't need to accept that. It would be on the file, would it not?

MAGYAR, MR: Well, I would, yes. So then I would be then - then - - -

MATTHEWS C: Yes, okay, so what paragraph do you want to take me to on that?

MAGYAR, MR: Well, you need to look at the last three pages of my Form 4A.

MATTHEWS C: How? Okay.

MAGYAR, MR: You need to really read that document - - -

MATTHEWS C: I've got the - I've got the pages. I've got - - -

MAGYAR, MR: - - - to understand what I'm getting at.

MATTHEWS C: I've got the Form 4A now.

MAGYAR, MR: And then you see the last three pages, your Honour?

MATTHEWS C: How many pages is the document?

MAGYAR, MR: It's about six pages. The last three pages is the - is the submissions to the WAIRC.

MATTHEWS C: Version 1, yes.

MAGYAR, MR: And it says eight reasons why the investigation report is flawed.

MATTHEWS C: Yes, okay. Now, you're telling me I need to read the deed of settlement and release taking that into account.

MAGYAR, MR: That's the first - you need to read three documents in total.

71 There is no doubt that a party to proceedings before the Commission is entitled to a fair hearing free from bias. Procedural fairness requires a party to proceedings before the Commission to be given every reasonable opportunity to put their case, without any actual or apprehended bias: *Palermo v Rosenthal* [2011] WAIRC 00069; (2011) 91 WAIG 129. In *Palermo*, the Full Bench discussed the issue of the conduct of a fair hearing before the Commission and at pars 124 to 127 Smith AP and Beech CC observed as follows:

> 124 The appellant also raises an issue in grounds 1 and 10 that the hearing was not fairly conducted. This raises the issue whether the appellant has had a proper opportunity to advance his defence to the applicant's claims. In *Michael v The State of Western Australia* [2007] WASCA 100 Steytler P with whom McLure JA and Miller AJA observed [63]: When the contention is one of an unfair trial, the test to be applied, according to Kirby A-CJ and Meagher JA (who agreed with Kirby A-CJ), is whether the impugned behaviour has "created a real danger that the trial was unfair": *Galea* at 281. If so, the judgment must be set aside: *Galea* at 281; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146. In *R v Mawson* [1967] VR 205, in which there had been excessive involvement or interference by the trial judge in the conduct of the case, the Court (Winneke CJ, Adam and Barber JJ) regarded the test as being whether there had been "such a departure from the due and orderly processes of fair trial as to amount to a miscarriage of justice".
>
> 125 However, when considering the responsibilities of a judicial decision maker, it is important to bear in mind the tension between the need to control the proceedings, on

the one hand, and to be, and be seen to be, dispassionate and impartial, on the other, with the result that the line between acceptable and unacceptable behaviour can be difficult to draw. This is compounded when one of the litigants is self-represented: *Michael* (Steytler P) [55]. Whilst the appellant was not self-represented he was and is represented by a lay agent. In *Michael* Steytler P said in relation to acceptable conduct [65] - [66]: [I]t will often be necessary, particularly with self-represented litigants, for a trial judge to intervene in order to stop irrelevant matters being raised (*Love* (1983) 9 A Crim R 1 at 26) and to prevent unnecessary delays or disruptions: *R v Morley* [1988] 2 WLR 963; *Galea* at 279; *Lars* (1994) 73 A Crim R 91 at 125. In *Johnson* at [13] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:

> 'At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.' Indeed, a trial judge who does not intervene to prevent undue delay and to ensure that the parties focus on the crucial issues may be criticised by an appellate court: *R v Wilson and Grimwade* [1995] 1 VR 163; *Thompson* at [39]. Next, a judge is entitled to ask questions of a witness, not only for the purpose of clarifying evidence, but also to test that evidence (*R v Gardiner* [1981] Qd R 394 at 406, 415; *R v Senior* [2001] QCA 346 at [36] per McMurdo P, Davies and Thomas JJA), although he or she should do no more than is absolutely necessary in that respect and should be careful not to take on the role of counsel.

126 As to conduct by a decision maker that oversteps the mark of acceptable conduct Steytler P said [71] - [72]: Every judge knows that it is his or her duty to proceed in accordance with due process, independently, impartially and fairly. While judges are human, and can be expected to react with impatience or irritation from time to time, they are not expected to be rude: *Lars* at 133 (where the Court said that, while judges may be strong and forceful when necessary, they should, no matter what the provocation, always comport themselves with dignity). In *Love*, at 3, Wickham J said (in what might be a counsel of perfection) that:

> '… [F]ortunately the time has passed in the administration of the law in this State when a litigant, a witness or counsel is expected to put up with impatience or rudeness from the trial judge. Such conduct on the part of the judge may be understandable because of illness or provocation or stress due to the difficulties of the case, but it can never be excused. It is professional misconduct and should be roundly condemned. Such conduct does not necessarily lead to a miscarriage of justice but it might do so particularly where the trial is a trial by jury. Justice however will not often miscarry on that ground alone; usually other factors will be present to lead to that result.' There is, in this respect, an important distinction between conduct that might be regarded only as discourteous or impatient or even rude (in the sense that it leads to no other consequence), on the one hand, and conduct which (whether or not discourteous, impatient or rude) obstructs counsel in the doing of his or her work (*R v Hircock* [1970] 1 QB 67 at 72 per Widgery LJ; *Love*, at 11) or which invites the jury to disbelieve the accused or his or her witnesses, on the other. A judge's interventions should not be such as to create the impression that he or she has identified himself or herself with one of the parties: *Tousek v Bernat* (1959) 61 SR (NSW) 203 at 209; *Galea* at 280.

127 When assessing whether the conduct of a decision maker amounts to actual bias, apprehended bias or results in an unfair trial the conduct is to be assessed in the context of the whole of a hearing: *Michael* [77] (Steytler P); see also *Galea v Galea* [1990] 19 NSWLR 263 (279 - 280) (Kirby ACJ). Judges and arbitrators are human and from time do react to provocation. As Steytler J in *Michael* points out [79]:

> It is important, also, to evaluate the conduct of a trial judge in the light of any provocation offered to him or her. Judges are not superhuman. While they are expected to exercise restraint and, in the vast majority of cases, to resist anything other than a measured reaction to provocation, there will be occasions (hopefully, very rare) when this is extremely

> difficult or even impossible. In such circumstances an isolated outburst, or even a few isolated outbursts, will not necessarily result in a mistrial. So, for example, in *Love* the appellant was told by the trial Judge, on more than one occasion, that he was "sick and tired of him" (at 10). However, the appellant in that case "broke all the rules of fair combat" despite the trial Judge's efforts to maintain order (at 11, per Wallace J) and had defied the trial Judge. He had also taken advantage of the position that had arisen (at 26, per Pidgeon J). The Court was not persuaded that there was any miscarriage in those circumstances.

72 The extract of the transcript at first instance above, is an exchange between the appellant and the learned Commissioner in relation to the Deed and a "companion document" that the appellant was, quite insistently, maintaining that in some way exonerated him or minimised his misconduct. This was despite not continuing with application 13 of 2019 and settling it by signing the Deed, which contained qualifications and accepted the penalty of a reprimand. As I have previously indicated, unless the appellant contended the Deed was vitiated by duress or undue influence or some other factor, the learned Commissioner's refusal to countenance what, in essence, were repeated attempts by the appellant to go behind the Deed in some way, is entirely unsurprising. The above exchange and others between the appellant and the learned Commissioner, fall far short of any suggestion of bias by the Commission in favour of the respondent and against the appellant. The questions were not inappropriate, excessive or unduly disruptive, such that the appellant did not receive a fair hearing.

73 This ground of appeal is not made out.

Ground 6

74 By this ground, which relates only to FBA 9 of 2019, the appellant contended that the learned Commissioner did not have regard or sufficient regard to duress he was placed under by the respondent when he signed the Deed. The alleged duress was said to be the conduct of the respondent in misleading the appellant at the time, that he was responsible for making the school's information technology network unstable. The duress was said to be that the appellant at that time had no way of disproving this.

75 This matter was debated at some length between the learned Commissioner and the appellant at pp 15 to 24 of the transcript at first instance. The appellant wanted to introduce into evidence a forensic report in relation to the respondent's information technology system, done it seems, at least a year, perhaps longer, after the relevant incident in September 2015. This incident involved an allegation that the appellant had improperly given a student an IP address for internet access on the school's internet. The allegation was sustained, and the appellant had a penalty of a reprimand and a fine of one days' pay imposed.

76 The appellant endeavoured to persuade the learned Commissioner that this forensic report, which seems to have been undertaken by the school itself when investigating another matter, in some way vindicated him. However, as the exchange continued between the learned Commissioner and the appellant at pp 20 to 21 of the transcript at first instance, it became clear that the matter referred to by the appellant in the proceedings below, was the subject of the qualifications which were finally inserted in pars 3(a)(i), (ii) and (b) of the Deed itself. In particular, the reference in par 3.13 to the Investigation Report in this matter, dealt with the conclusion that the appellant's actions led to the instability of the school information technology system. This was disputed by the appellant at the time in his response to the investigation, and the Deed expressly acknowledged this. At p 22 of the transcript at first instance, the learned Commissioner stated to the appellant that if in the final hearing of the appellant's challenge to his dismissal (the subject of separate proceedings before the Commission), it emerges that the respondent relied upon matters expressly qualified in par 3 of the Deed, then those are matters that the appellant would be able to pursue in those proceedings.

77 The learned Commissioner was further of the view expressed at p 23 of the transcript at first instance, that this does not require or involve an "undoing" of the Deed, in effect, because the appellant's position is protected by the qualifications in par 3 of it. The discussion on this point concluded at p 24 of the transcript at first instance with the learned Commissioner asking the appellant "So we are OK on that one then?". The appellant responded "Yes, your honour. Yes".

78 An agreement to settle and compromise legal proceedings such as the Deed, is a contract where the parties enter into a legally binding agreement to settle their dispute on the terms set out in it. The general principle is that the subject matter of the dispute, compromised and recorded in a contract of settlement, may not be raised again in a later legal proceeding: *Holsworthy Urban District Council v Holsworthy Rural Council* [1907] 2 Ch 62. As a contract, the Deed is subject to the usual principles of contract if a party to it seeks to have it set aside on proper grounds. In the case of duress, in *Heydon on Contract* 2019, the learned author notes at par [16.10]:

> ***Duress and Related Conduct***
>
> **[16.10] Definition of "duress"**
>
> The doctrine of duress operates both in contract and in other fields. Of late its significance in relation to the law of contract has grown. So far as it operates in contract, duress is a form of pressure: which is regarded by the law as illegitimate; which is usually created by a threat coupled with a demand; which has the purpose of inducing the plaintiff to enter into a contract or a variation to a contract; which leaves the plaintiff no reasonable alternative but to do so; and which operates as a cause of the plaintiff's entry into the contract or the

> variation.[1] There can be overlap between the ingredients of pressure, illegitimacy and causative effect.[2] There are enactments which are derived from duress but which are not discussed in this chapter.[3]
>
> Duress is conventionally grouped into three categories: duress to the person, duress of goods and economic duress. The first two are of some antiquity. Their operation is relatively clear. The third, at least under the name "economic duress", is novel. The courts have endeavoured to develop it in order to meet what they perceive as evils. But in many respects the applicable principles are quite unclear, both in formulation and application. For this reason it has attracted much attention from writers.[4]

79 Thus, the essence of duress is an illegitimate threat. A contract affected by duress is voidable and not void. The affected party's will is not overborne but is deflected: *Heydon* at par [16.50]. In this case, there was nothing at first instance to suggest duress in this sense. There was no evidence of a threat or illegitimate pressure being brought to bear on the appellant to enter the Deed. On the contrary, as the discussion between the learned Commissioner and the appellant referred to above reveals, there was a compromise reached and the appellant persuaded the respondent, presumably with the assistance of his solicitor then acting for him, to modify its position where it would no longer rely on certain parts of the Investigation Report. The appellant's objection to certain conclusions reached by the respondent were recorded and acknowledged. No duress was established at first instance and this ground of appeal is not made out.

Conclusions

80 No appealable error in the exercise of the learned Commissioner's discretion has been established by the appellant. The appeals are dismissed.

EMMANUEL C:

81 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.

WALKINGTON C:

82 I also have read the draft reasons of the Senior Commissioner. I too, agree with those reasons and have nothing further to add.