

**A STAY OF OPERATION OF THE ORDER IN MATTER NO. CR 15 OF 2018 WHICH IS
THE SUBJECT OF FBA 5 OF 2020
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00342

CORAM : CHIEF COMMISSIONER P E SCOTT

HEARD : WRITTEN SUBMISSIONS – THURSDAY, 11 JUNE 2020,
TUESDAY, 16 JUNE 2020

DELIVERED : WEDNESDAY, 17 JUNE 2020

FILE NO. : PRES 1 OF 2020

BETWEEN : DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
WESTERN AUSTRALIA
Applicant

AND

STATE SCHOOL TEACHERS' UNION OF WA
(INCORPORATED)
Respondent

CatchWords : Industrial law (WA) – Stay application – Special circumstances –
Consent to stay order

Legislation : *Industrial Relations Act 1979*, s 49(11)

Result : Stay order issued by consent

Representation:

Applicant : Mr J Carroll (of counsel)
Respondent : Ms R Cosentino (of counsel) and with her, Mr C Fogliani (of
counsel)

Case(s) referred to in reasons:

Director General, Department of Education v The State School Teachers' Union of WA (Inc) 2010
WAIRC 01111; (2010) 90 WAIG 1857

Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd [2019] WASCA 141

Reasons for Decision

- 1 The applicant seeks a stay of orders 1 and 2 in the Commission's decision of 29 May 2020 (2020 WAIRC 00301). Those orders are:
 - (1) the applicant's member be returned to employment with the respondent within 21 days of the date of this order and, as soon as practicable, be returned to work at a school other than Busselton Senior High School;
 - (2) the service of the applicant's member with the respondent be deemed continuous for all relevant purposes;
- 2 The respondent consents to the stay being granted in the circumstances where undertakings have been made by the applicant. Those undertakings deal with what is to happen between now and the determination by the Full Bench of this Commission in appeal FBA 5 of 2020 and may be said to seek to alleviate to some extent the adverse effects on the respondent's member by the granting of the stay.
- 3 The test for a stay of an order of the Commission is set out in *Director General, Department of Education v The State School Teachers' Union of WA (Inc)* 2010 WAIRC 01111; (2010) 90 WAIG 1857 at [16] (Smith AP). See also in respect of matters before the Court of Appeal and generally, *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2019] WASCA 141 at [47] – [48].
- 4 A successful litigant is ordinarily entitled to the benefits of an order made in their favour while an appeal against that order is dealt with. It is for the applicant for a stay of the order to demonstrate that there are special circumstances that justify the stay being made. It is also normally appropriate that the prospects of success of the appeal be considered, along with the balance of convenience.
- 5 In this case, the orders sought to be stayed would have returned the respondent's member to employment with the applicant within a matter of days. The grounds of appeal relate to issues of the respondent's member's fitness to work and to issues of trust and confidence in the employment relationship. In those circumstances, it may be said that to not stay the orders would render the appeal nugatory.
- 6 As the parties have reached agreement on the terms for a stay to apply, I do not intend to assess the prospects of success of the appeal, except to say that where some of the grounds of appeal assert that there is a failure to address the law or to explain the rationale for some findings, on a brief reading of the Reasons for decision, these grounds may have some validity. However, ultimately, the lack of those things may be more a matter of form rather than substance, or may make no difference to the outcome. In any event, the grounds raise some, at least arguable, issues.
- 7 The arrangements reached between the parties also reduce, to a large degree, some of the inconvenience or hardship to the respondent's member that might otherwise have applied if the stay were granted.
- 8 In those circumstances, I conclude that orders 1 and 2 of the Commission's order of 29 May 2020 ought to be stayed and an order to that effect will issue.