

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7
NOVEMBER 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00806

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MR M GOLESWORTHY - BOARD MEMBER

HEARD : TUESDAY, 18 AUGUST 2020, WEDNESDAY, 19 AUGUST
2020

DELIVERED : THURSDAY, 17 SEPTEMBER 2020

FILE NO. : PSAB 23 OF 2019

BETWEEN : EDWARD PICKS
Appellant

AND

WA COUNTRY HEALTH SERVICE
Respondent

CatchWords : PSAB – Appeal against decision to dismiss under s 150(3) of the *Health Services Act 2016* (WA) – Dismissal was harsh, unfair and disproportionate – Decision to dismiss adjusted and replaced with a warning and improvement action in the form of training and development

Legislation : *Industrial Relations Act 1979* (WA) s 26(1), s 80I(d) & s 80L
Health Services Act 2016 (WA) s 6, s 145, s 150(3) & s 151

Result : Appeal upheld

Representation:

Appellant : Mr C Studsor (as agent)

Respondent : Ms S Waterton & Ms R Sinton (as agents)

Cases referred to in reasons:

B. Rose v Telstra Corporation Limited (Unreported, AIRC, Print Q9292)
Bercove v Hermes (No. 3) (1983) 74 FLR 315

Browne v Dunn (1893) 6 R 67

Cooper v Australian Taxation Office [2015] FWCFB 868

Gaudet v Commissioner Ian Johnson Department of Corrective Services [2013] WAIRC 00032

Orr v The University of Tasmania (1957) 100 CLR 526

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

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
 - 2 Mr Picks was employed by the WA Country Health Service (**Health Service**) at Bunbury Hospital from 2005. He was first employed as a Patient Care Assistant on a casual basis, then as Patrol Officer on a fixed term basis. Mr Picks was a permanent full time Security Officer from 1 January 2009.
 - 3 In July 2019, Mr Picks was convicted of assault occasioning bodily harm in relation to an incident between Mr Picks and a member of his extended family (**Conviction**). Mr Picks did not notify the Health Service about the criminal charge or Conviction.
 - 4 On 6 September 2019, the Regional Director of the Health Service wrote to Mr Picks and informed him that:

It has come to my attention you have recently been charged and convicted of a serious offence.

In accordance with Section 150(3) of the *Health Services Act 2016* (**the Act**), if an employee is convicted or found guilty of a serious offence the employing authority may take disciplinary action or improvement action, or both disciplinary action and improvement action, as deemed appropriate.
 - 5 On 19 September 2019, the Chief Executive of the Health Service wrote to Mr Picks and informed him that the Health Service proposed to take disciplinary action by way of dismissal in accordance with sections 6 and 150(3) of the *Health Services Act 2016* (WA) (**HS Act**).
 - 6 One day later, the Operations Manager at Bunbury Hospital wrote to Mr Picks and proposed to impose a final warning and training and development as a result of Mr Picks failing to report the charge and Conviction.
 - 7 Then in early November 2019, the Chief Executive informed Mr Picks by letter that the proposed disciplinary action of dismissal remained appropriate and was effective that day. Mr Picks was paid five weeks' salary in lieu of notice.
 - 8 Mr Picks appeals the decision made by the Chief Executive to dismiss him. He says that the Chief Executive did not adequately consider his excellent work history, the isolated nature of the offence and all the circumstances of the incident. Mr Picks asks that he be reinstated with no loss.
 - 9 The Health Service says that because of the nature of Mr Picks' conduct, and because the position Mr Picks held required him to provide security for patients, visitors and other WACHS staff, the decision to dismiss Mr Picks was appropriate and in accordance with the HS Act and established case law principles. It asks the Board to dismiss Mr Picks' appeal.
- What must the Board decide?**
- 10 The parties agree that assault occasioning bodily harm is a serious offence under the HS Act and that under s 145 of the HS Act an employee must report in writing a charge and a conviction of a serious offence within seven days. Mr Picks did not notify the Health Service after he was charged with and convicted of assault occasioning bodily harm.
 - 11 It is not in dispute that the Chief Executive had authority to, and did, dismiss Mr Picks.
 - 12 The appeal before the Board is a hearing de novo: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266. The question for the Board is whether the Health Service's decision to dismiss Mr Picks should be adjusted in the circumstances of this matter.

Legislation

13 Sections 145, 150(3) and 151 of the HS Act are relevant to this matter. They provide:

145. Duty of staff member to report certain criminal conduct and misconduct findings

- (1) A staff member who is charged with having committed, or is convicted or found guilty of, a serious offence must, within 7 days of the charge being laid or the conviction, report that fact in writing to the staff member's responsible authority.
- (2) A staff member who has a misconduct finding made against them under the Health Practitioner Regulation National Law (Western Australia) must, within 7 days of receiving notice of the finding —
 - (a) report that fact to the staff member's responsible authority; and
 - (b) provide the person to whom the report is made with a copy of the finding.
- (3) In subsection (2) —
misconduct finding includes a finding of unsatisfactory professional performance, unprofessional conduct or professional misconduct.

150. Disciplinary or improvement action where registration suspended or conditional or in case of serious offence

...

- (3) Despite the Sentencing Act 1995 section 11, if an employee is convicted or found guilty of a serious offence the employing authority may take such disciplinary action or improvement action, or both disciplinary action and improvement action, as the employing authority considers appropriate (having regard to section 151) with respect to the employee.

...

151. Protection of patients to be paramount consideration

The protection of a health service provider's patients must be the paramount consideration in relation to determining whether to take disciplinary action against an employee under section 150.

14 Mr Picks appeals the Health Service's decision to dismiss him and asks the Board to exercise its jurisdiction under s 80I(1)(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**) by adjusting that decision.

Should the decision to dismiss stand or should it be adjusted?

- 15 It is clear from the framework of the HS Act that dismissal was not the only option open to the Health Service. Rather, in exercising his discretion under s 150(3) of the HS Act, the Chief Executive could have decided to take no action or some other form of disciplinary or improvement action.
- 16 In determining this matter, the Board will need to decide whether the matters Mr Picks relies upon sufficiently outweigh the gravity of having been convicted of a serious offence, such that dismissal is not justified.

Mr Picks' evidence

- 17 Mr Picks gave evidence on his own behalf. He also called his father-in-law, Mr Peter Michael, and his former colleague, Mr Martin Fisher, as witnesses.
- 18 Mr Michael is an Aboriginal Elder who is regarded as a mentor within the South West of Western Australia. He is closely involved with a number of Indigenous organisations. Mr Michael is also recognised under his Indigenous culture as the grandfather of the man Mr Picks assaulted.

Mr Picks' and Mr Michael's evidence

- 19 Mr Picks and Mr Michael gave evidence that Mr Picks' marriage to his Indigenous wife some 28 years ago caused a rift between them and two members of his wife's extended family. They both described long-running and complex cultural tensions. Mr Michael said Mr Picks otherwise gets along very well with his many Indigenous relatives and is held in high regard in the community.
- 20 Mr Picks and Mr Michael also gave evidence that Mr Picks' wife is in very ill-health and struggling with complications including those caused by three kidney transplants. Shortly before the incident that led to the Conviction, Mrs Picks' third kidney transplant was failing. Mr Picks said the five years leading up to the incident had been particularly challenging in relation to his wife's health. As well as working full-time for the Health Service, Mr Picks worked for a private security firm and was also responsible for his wife's care. Mrs Picks needed dialysis three times per week and constantly had medical appointments in Bunbury and Perth. Mr Picks would drive her to most of those appointments. Medical records were tendered in support of Mrs Picks' ill health and medical appointments.
- 21 Mr Picks described being verbally abused by the two members of his extended family several weeks before the assault. On the night of the incident, Mr Picks was at a pub with his wife and daughter celebrating his daughter's pregnancy. Mr Picks was attempting to make peace with one of the members of his extended family member involved in the feud when that man suddenly hit him. Mr Picks reacted instinctively to the provocation and punched the man.
- 22 That incident resulted in Mr Picks being charged with assault occasioning bodily harm. Mr Picks cooperated with police at all times. Notwithstanding the provocation, Mr Picks pleaded guilty because he wanted to put the matter to rest, avoid protracting or exacerbating the family feud and avoid further stress to his very ill wife and himself.
- 23 In his evidence Mr Picks expressed much remorse about his actions. He gave evidence that the feud, tied into his worry at the time about his wife's ill health, became too much. Mr Picks said his reaction at the time of the incident was unacceptable and out of character. He is very embarrassed by his actions and knows he should have walked away.
- 24 Mr Picks and Mr Michael gave evidence that the family feud has been de-escalated as a result of Mr Michael's intervention as an Elder. The effect of Mr Picks' evidence was that the relevant relationships are now civil. The effect of Mr Michael's evidence was that the tensions were resolved. Mr Michael said he highly doubted there would be issues in future.
- 25 In summary, Mr Picks' evidence is that the incident was a one-off that took place in extenuating circumstances and in a very different environment to the workplace. He has always acknowledged that his actions were wrong and has expressed remorse for them. The triggers that led to the incident are not present in Mr Picks' workplace and the main driver, being the family feud, has now been resolved with Elder assistance.

- 26 Mr Picks gave evidence that he loved his job and was distraught to lose it. He had been unaware that he had an obligation to report the criminal charge and Conviction, and he did not have an induction when he started work with the Health Service.
- 27 Despite the Board reminding the parties about the rule in *Browne v Dunn* (1893) 6 R 67 the Health Service did not put to Mr Picks in cross-examination that his continued employment in a patient-facing role would compromise patient care.
- 28 The Board asked Mr Picks about whether he would work safely with patients, staff and visitors in future. He said:

I'm my harshest critic, in - in work I always try to be professional. I try to put the patients first. There is - there is, ah, situations that you can arise on and use tools to get you out of matters from aggressive people. And - and like I said, 13 years of being there we've dealt with dementia patients, we've dealt with people on drugs, we've dealt with psychosis. And for me not to act in those 13 years with these people it just seemed a bit harsh to me the outcome of what Mr Moffett was saying...

I would keep up the same standards going back to work. I had never let my standards down before this incident and I would not let my standards down when I'm at work, I'm very professional. I - I do my utmost. If I don't know something I don't go gung-ho at it, I'll always ask questions with the appropriate people. Um, so I can't see - I would not change that point of view of my work ethic, you know, that's always been me at my workplace, you know, that - that I'm upfront, I'm a very direct person, an upfront person. And, um, yeah, so that's where I - yeah, I just wouldn't let my standards down again. Yes, I regret what happened outside of work, I really do, if I could take it back I would, you know. But that's a cliché, you know. But - but I love my work, I'm good at my work, I enjoy my work, I enjoy the people that you get to meet at the hospital. Yes, they might be trying sometimes but you see them after they've been medicated up at the, ah - up at the wards they're a whole different person, they're actually apologising to you for their behaviour. So it's that gratitude that you - you just can't - it's - sometimes it's real heart-warming that you see this person that's come in, who's angry at you, angry and bursting but you know there's circumstances behind that. So the aggression side of - of that is never been at work for me, it's just the satisfaction. Yes, you get your nasty pasties that they're not going to change for anyone but you get a lot of good cases where medication, a couple of weeks up at the wards they're a whole different person, so it's gratitude just that someone to say thank you to you. You know, you - you don't get a lot of thanks in a job but when a patient says "Thank you, I'm - I'm very sorry for my behaviour", you know. So there's always light there for me and as - and - and everyone needs that human contact and I treat them like I don't judge them while I'm at work, you know. While I'm at work what it is what it is, they come in for a reason. Everyone's got a back story for it. So to me I wouldn't change myself because that's who I am, I do love my work, I do love working with these people and, yeah. And like I said, I'm good at it. And I've been at a big loss since I've been out of work from it. So, um, yeah, my guarantee is, yeah, I'll just keep on moving forward and that's all I can do.

- 29 Mr Picks said that he had expected the issues would be resolved with the Health Service imposing a final warning and improvement action, based on the letter he received from Mr Matters. He was shocked to then receive the letter from the Chief Executive proposing that Mr Picks be dismissed. Mr Picks said 'I just had pure panic in me.'
- 30 The effect of Mr Picks' evidence is that his relationship with his colleagues, his manager Mr Matters and the Health Service has not broken down. Mr Picks has always gotten along very well with his colleagues, including Mr Matters. Mr Picks said the staff at the Bunbury campus 'have been fantastic'. Mr Picks' evidence is that he does not present a risk to patients. He always follows clinical direction and knows to remove himself if necessary. Further, if Mr Picks were to find himself in a situation at work where he is confronted by an aggressive

person with whom he has a pre-existing relationship, he would let his work partner take the lead. Mr Picks gave evidence that he has worked for over 13 years with challenging, high risk patients in volatile environments without receiving any complaints.

- 31 Around 20 positive written references were tendered by Mr Picks. At least 10 were from senior clinicians employed by the Health Service who used to work with Mr Picks. It is fair to characterise them as glowing. For example:

This is a letter of reference and support for Mr Ted Picks, whom I believe was recently charged with assault. To say this was initially met with disbelief and shock is an understatement, for reasons I will attempt to objectively and succinctly describe.

In my former professional role of SRN3 Psychiatric Liaison/Triage Clinician at Bunbury Regional Hospital, I had many occasions to both observe and work alongside Mr Picks, over four years between 2005-2009. Given my primary role was assessment and management of often severely disturbed and volatile individuals, Mr Picks [sic] calm, non-judgemental and reassuring personality style was frequently pivotal in diffusing distressing and potentially aggressive incidents. Of particular note here, is that his approach to patient management or “tools of his trade” never included aggression, either direct or implied. This is rare amongst security staff. His ability to develop a rapport and assist in promoting compliance with both medical and psychiatric interventions was extremely helpful to both staff and patients. Medical and Nursing staff were always pleased to know “big Ted” was working their shift.

When this assault charge comes into discussion with my professional peers, we question what kind of severe threat to himself or those near him would cause him to react this way. We are all thoroughly certain it must have been defensive rather than assaultive. Another issue here is the possibility Mr Picks has been discriminated against because he is obviously a robust man of considerable strength. If Mr Picks loses his employment at the hospital, that loss will be shared by both patients and staff.

[Former SRN3 Psychiatric Liaison – Bunbury Regional Hospital]

Ted has shown himself time and again to be ideally suited to this work. Whenever the topic of the difficult and stressful ED work environment comes up, Ted’s name is discussed. His imposing physical presence goes a long way towards defusing potential physical altercations, and despite the incredibly demanding stresses of the work, I have never seen him lose his temper. He is invariably calm, professional and respectful towards even the most difficult of our clients and his help has been key in many difficult situations.

I have no hesitation in recommending Ted for any type of security work. I have worked in the ED setting for over 20 years and he is the best security guard I have ever worked with.

[Emergency Medicine Specialist Physician, Bunbury and Busselton Hospital Emergency Departments]

Ted has always been highly valuable in diffusing aggressive situations, and calming the disturbed with his professional, rational, and thoughtful approach. He has a wide experience of life and people and he is able to quickly establish rapport and engage

clientele, as well as make rapid and accurate assessments of potentially volatile situations. Ted deals with such situations quickly and effectively, with the minimum of fuss.

Ted is greatly loved and admired by the Emergency Department Staff, and is a famous and well-regarded presence. He has fantastic communication skills and which are often underestimated; for example in the 14 years I have known him I have seen him resort to physical methods on only a couple of occasions. He is always willing to help out, and often has valuable suggestions on how to manage difficult situations. I trust him totally; Ted is honest and forthright and reliable; a team-player, willing to help out provide solutions, credible to the healthcare personnel, and respected by all.

[Staff Specialist, Emergency Department Bunbury Hospital]

Edward has always capably performed a range of security and public liaison duties, working closely with colleagues, hospital staff, patients and members of the public. This included supporting staff and other people, and dealing with situations in the emergency department, hospital wards, mental health units, and public areas of the hospital. At times Edward has provided one-to-one support and supervision of patients.

Edward has strong skills in being able to 'read a situation' and respond appropriately. He engages people verbally as a priority, to understand and diffuse tense situations to achieve the best outcome for people and the hospital. Where necessary, Edward acted quickly and decisively to resolve issues that had the potential for violence or when it was displayed by agitated people.

Edward has always taken a proactive approach to maintaining the safety of people. And he regularly put forward suggestions and proposals to improve work procedures. He was extremely thorough in completing daily/safety reports, and also communicated effectively over the radio, phone and email. Edward conducted work site patrols, identified workplace hazards and was positive in embracing change.

Edward completed day and night shifts, working together with other security colleagues as part of a team. You could always rely [sic] on Edward's ability to achieve the best result in any given situation.

[A/Manager Administration and Support – Bunbury Hospital]

I understand that Ted Picks is attending court for an assault charge. When speaking to Ted it was clear he was distressed about the charge and remorseful of the incident that had occurred. To become physical and have this reaction is totally out of character for Ted.

I am confident in saying that Ted is a very well respected and competent security guard at our hospital. He has deescalated situations many times. He treats everybody with dignity and works well within our team. Ted is always respectful to all patients and staff. Many times Ted has diverted patient aggression with his verbal skills and this has kept the staff in a safe working environment. I personally will continue to trust Ted despite this charge.

[Shift co-ordinator/Registered Nurse, Bunbury Hospital Emergency Department]

I have worked closely with Ted in a number of very stressful and potentially dangerous situations regarding emergency department security scenarios and feel that I can confidently and categorically state that Mr. Picks has always demonstrated a consistently confident, professionally assertive, “kind but firm” role in security in our hospital. I’ve seen him maintain [a] calm, professional, courteous, demeanor, excellent verbal and non-verbal communication, and has become someone that I know that our staff can rely on in any situation.

I have never seen him flustered by verbally/physically assaultive patients, and know that when he is on shift, that patients and staff will be treated with respect and kindness, and that we can all go home safe and sound.

I couldn’t recommend someone more highly than Mr. Picks, and am more than happy to be contacted for verbal clarification of this reference.

I would happily work with Mr. Picks any time, and would consider any organization better off with him on service.

[Consultant Emergency Physician and A/HOD of Bunbury Emergency Department]

- 32 Finally, Mr Picks gave evidence that he is the sole income earner supporting a family of five, including his wife, who remains unwell, and their foster children. Mr Picks also financially supports his adult daughter.

Mr Fisher’s evidence

- 33 Mr Fisher gave evidence for Mr Picks. Mr Fisher has worked as a Clinical Nurse Specialist/Psychiatric Liaison Nurse for the Health Service in its various iterations for 20 years. Fifteen years ago Mr Fisher and a colleague established the Psychiatric Liaison Team, which is primarily based in the Emergency Department and also offers a Mental Health Service to the Bunbury campus. Mr Fisher has known Mr Picks for over 14 years and worked closely with him during that time.
- 34 Mr Fisher gave evidence about the way Mr Picks performs his key duties, in particular when accompanying medical staff as they transfer potentially violent, volatile and vulnerable patients from one part of the campus to another. Mr Fisher’s evidence is that Mr Picks interacts well with patients, deescalating situations, following ‘well-authorised process’ and behaving appropriately. Mr Fisher said Mr Picks is well known in the Indigenous community, uses common sense and de-escalation skills, has considerable life skills, uses humour where appropriate and doesn’t overstep boundaries. Mr Fisher said he was unaware, and he would know given the small size of the team, of any instance when Mr Picks has not followed clinical direction.
- 35 In relation to whether Mr Picks would pose a potential safety risk to patients or the public, Mr Fisher said:

[M]y experience of working with Mr Picks over 14 years I’ve never seen him become angry or actually threaten a patient or do anything which in any way was dangerous or - or at risk. Often we would have situations which were very uncomfortable and difficult to deal with and you would have - there's a process in ED where you actually have a - a debrief and it's a chance to actually express yourself and how difficult those situations were because sometimes patients can be very, very threatening, can be verbally antagonistic as well which can be very difficult to deal with but in all the time I've worked with Mr Picks I always found he was able to - certainly contained himself and never lost his temper or over used force with patients.

Mr Picks' submissions

- 36 Mr Picks' central submission is that his dismissal was harsh because it was disproportionate to the misconduct in question, having regard to the circumstances of the offence.
- 37 He argues that the Health Service has not adequately considered all the circumstances as required by *Gaudet v Commissioner Ian Johnson Department of Corrective Services* [2013] WAIRC 00032. In particular:
- a. Mr Picks was physically provoked as part of a longstanding, escalating family feud;
 - b. he was experiencing considerable stress related to his wife's recent deterioration in health due to a failing third kidney transplant;
 - c. Mr Picks pleaded guilty to the charge to resolve the matter and avoid worsening the family feud;
 - d. the family feud has been de-escalated following intervention by Elders;
 - e. Mr Picks acknowledges the seriousness of the matter and his responsibility for the offence. He is remorseful and disappointed in his actions;
 - f. the incident took place in an uncontrolled environment which is unlike his work environment; and
 - g. Mr Picks had an unblemished work history with the Health Service since 2005. He was highly regarded by clinical staff for his ability to manage and de-escalate potentially violent situations.
- 38 Mr Picks disputes the Health Service's argument that as a result of s 151 of the HS Act he is unsuitable to work in patient facing roles. There is no evidence of Mr Picks ever becoming violent or aggressive at work. On the contrary, the evidence shows that Mr Picks is respected by his colleagues for his calm demeanour and ability to de-escalate volatile situations.
- 39 Further, Mr Picks maintains the necessary trust and confidence still exists between him and his former employer. Mr Picks argues that when all the circumstances are weighed and considered alongside his work history and the controls in the workplace, it is apparent that dismissal is a disproportionate outcome in this case. Mr Picks argued that the Board should adjust the Health Service's decision such that some other outcome is imposed, for example a reprimand.
- 40 Mr Picks says in all the circumstances the Board should adjust the Health Service's decision to dismiss him, such that his employment is reinstated with no loss.

The Health Service's evidence

- 41 The Health Service called Mr Shane Bolton and Mr Jeffrey Moffet to give evidence.

Mr Bolton's evidence

- 42 Mr Bolton has held a number of roles with the Health Service since 2013. Relevantly he was Mr Picks' manager from April 2016 to October 2018 when Mr Bolton was the Coordinator of Resources and Planning.
- 43 Mr Bolton gave evidence about the key responsibilities and inherent requirements of a Security Officer working for the Health Service:

Security officers are required to interact with the consumer in a number of different ways. They're required to monitor site security by CCTV and work in the operations room to do that. They're required to patrol the grounds, they're required to patrol internally to demonstrate a security

presence. They have physical security responsibilities, locking up, unlocking and the like. They have responsibilities to respond to emergencies, non-clinical emergencies, largely violence and aggression emergencies and that includes the restraint of certain people and other non-clinical emergencies such as fire and smoke, potential bomb threats. They have responsibilities there as a responding team member. They have guarding responsibilities for high risk patients. They have responsibilities to report incidents, various types. They have responsibilities to interface with the police on a number of different matters and they have responsibilities to document their security activity throughout the day.

- 44 When asked to provide an outline of Mr Picks' work experience and personal attributes, Mr Bolton said 'My understanding of Mr Picks' work experience is that he's been a security officer for at least a decade. That's my understanding. That's his work history.' Mr Bolton said Mr Picks took his role professionally.
- 45 Mr Bolton gave evidence about the non-clinical positions available in the Health Service's South West region that do not require a particular qualification. He said 'The handyman's position does not require a qualification.' When pressed further, Mr Bolton said 'The supplies clerk is – is a non-qualified position but all other positions within the facilities management team require a trade qualification.' Mr Bolton gave evidence that 'they all have some sort of element of patient facing, you know, they're – they're not patient facing like a nurse but a facilities management will be at the bed head of a patient. A supplies clerk will be at the cupboard restocking the consumables that are used in the room so there is none to my knowledge that are not directly patient facing.'
- 46 It is apparent from Mr Bolton's testimony that he was asked to consider whether there were any suitable alternative vacant positions for Mr Picks. Mr Bolton's evidence is that at the relevant time the only available position Mr Picks could have done was 'one vacant handyman's position'. From Mr Bolton's understanding of the Commissioner's Instruction No. 23 (CI23), he thought that the casual employee working in the handyman's position 'had to be considered' for the position. In cross-examination Mr Bolton said that the casual employee was in the process of being assessed under CI23, (presumably for conversion to permanency), but that assessment was not yet complete.
- 47 Mr Bolton did not give evidence about why he or anyone else within the Health Service considered that Mr Picks could not work in a patient facing role.
- 48 In cross-examination Mr Bolton said there was no 'effort to find out exactly like the resume or anything from [Mr Picks] to understand exactly what skillsets he may have had that [Mr Bolton wasn't] aware of.'. In re-examination Mr Bolton said his knowledge of Mr Picks' skillset came from his understanding that 'Mr Picks had been a security officer for the good part of 10 years not a tradesman.'

Mr Moffet's evidence

- 49 Mr Moffet is the Health Service's Chief Executive. He is responsible for a broad range of matters including the dismissal of employees.
- 50 Mr Moffet gave evidence about how he made the decision to dismiss Mr Picks. Mr Moffet said he received a briefing note that brought the Conviction to his attention. That briefing note did not contain any analysis or a recommendation.
- 51 Mr Moffet's evidence is that he considered the briefing note, discussed the matter with his team and a day or two later he proposed that Mr Picks could no longer remain in the Security Officer role. Mr Moffet said 'I could not see that that was a viable option whatsoever. Um,

and, ah, ultimately, I guess, considering whether he could be found alternative employment, or in the alternative, if that was not possible, proposing termination. That was – that was really, ah, my thinking, um, I guess, my decision process.’

- 52 When asked if there were any other factors he considered in reaching the decision, Mr Moffet said:

Well, ah, I guess there were steps. Um, the first - the first point for me was to, um, ask for consideration around alternate employment options. Um, and I - you talk - I talked with the IR team around that and - and they went back through their, um, processes to engage, um, with his manager, I - ah, I think, at that time. I had also specifically contacted the Regional Director and, um - Ms Kerry Winsor, ah, and asked her to - to consider that issue. Ah, ultimately, um, once they had, I guess, made their own, sort of, assessment and determination around what positions were available, um, suitability and skills in terms of alternate employment, ah, the advice back to me was there were, um, no realistic options. Um, at that point, there was a proposal or a decision taken to propose termination to Mr Picks himself.

- 53 Mr Moffet said that in discussion with his IR team, he considered Mr Picks’ response to the proposal to dismiss and had a discussion with his Regional Director before making the final decision to dismiss Mr Picks. Mr Moffet described the matters Mr Picks raised, being his personal circumstances, employment record and the circumstances surrounding the Conviction. Mr Moffet gave evidence that ‘the first consideration is, ultimately, for patient safety, protection of – of – of the public and patient safety.’ Mr Moffet gave evidence about the emergency department and mental health areas being high risk environments because they are volatile and subject to a lot of provocation, as well as heightened emotions from patients and visitors. Mr Moffet said ‘ultimately, um, a person with a recent conviction for assault occasioning bodily harm really was not an appropriate person to be placed in that setting. Um, and we could not guarantee, um, or have confidence, ah, that patient safety, ah, would occur, and protection of patients, um, as – was, I guess, reasonably afforded. It was too – too high a risk, in our judgment.’

Mr Moffet gave evidence about his concern that it would be an unacceptable risk to have Mr Picks working as a Security Officer and that he was confident a robust search for alternative roles was done:

MOFFET, MR: I mean, for me, the tests, ah, are really about, ah, whether, in the future, if there was an, ah - an incident involving Mr Picks, um, that, ah, compromised the safety of a patient, staff member, ah, or a visitor, um, would - would that be a - a decision that, ah, I guess, a reasonable mind would think was okay. And ultimately, whilst an employee that might have a conviction of this type may be able to operate in other roles, and I think that's entirely acceptable, I - I don't think it's acceptable, and I didn't think it was acceptable at the time, to operate in a security role. I just don't think the risk could be managed in that manner. And I - I had no way of assuring myself about whether this was, um, a one-off in terms of, um, I guess, that type of conduct.

EMMANUEL C: Was there something before you to suggest that it was more than one incident?

MOFFET, MR: No, there was - there was nothing before me. Ah, but there was also, um, no evidence presented, um, ah, around, um - and when I wrote to Mr Picks, ah, obviously, he has opportunity to provide as much information as he would. And there were - beyond, I guess, a statement, which, understandably, um, one would - would make, that it was a one-off, I mean, I had to reach judgment about whether that was, um, sufficient to, um, I guess - to - to assure me that patient safety would be - would be guaranteed.

EMMANUEL C: Is there anything else you want to say about why your evidence is that you considered at the time - and perhaps you still consider - that you couldn't have confidence that patient safety would be assured in his presence? And that you also said that it was too high a risk. Can you tell us anything else about why you say that?

MOFFET, MR: Um, yeah, so - I mean, generically, if we are considering people to operate in security roles where - where, you know, a great deal of judgment and interpersonal skills, de-escalation, conflict management skills are required, um, we would never employ someone into that sort of a role with a recent conviction, ah, of assault occasioning bodily harm. It's - that's - that just would not make sense for us. It wouldn't pass the test. And I suspect it wouldn't in - in - in most sectors. So I guess - I mean, ultimately, that's the consideration for us, is - is, um, whether, ah, a conviction of that nature is - is consistent with the responsibilities of the role. Ah, and that's why I was at pains. I mean, I - I spoke twice to the Regional Director to see whether alternate employment options were available, because I accept that, um, you can have a conviction of that nature and be in a - a much lower risk role, or a non-patient-facing role. Um, and, ah, as I said, I - I had two discussions with the Regional Director in relation to that, and asked them to consider those issues. So, ah, you know, I - I was very mindful, um, that he was a sole income earner, ah, and - and had circumstances, um, in his family, um, that were difficult for him. Ah, we certainly would - I - I would have preferred that he was found alternate employment, but the reality is, um, roles have to be suitable and available, and he has to have the skills to match. And I - I was assured, um, at that time, um, that that - that was the case. They went through a robust test. And I have every confidence in, um, Mr Bolton and Ms Winsor that they are - they are really solid managers with a lot of integrity and a lot of commitment to their workforce.

EMMANUEL C: A robust test in the carrying out of that search for alternative options, you mean?

MOFFET, MR: Yes. Yep.

EMMANUEL C: Okay?

MOFFET, MR: I did, for example, um, ask them to consider, ah, alternate locations. I mean, Bunbury's large and, um, obviously has a number of jobs, but also alternate locations in - in or around the Southwest. So I know - I know that they searched further afield. Um, and at the same time, our - our IR team, um, made the same inquiry.

Health Service's submissions

- 54 The Health Service argues Mr Picks has not established that his dismissal was harsh in the circumstances.
- 55 Security Officers are responsible for providing patient, staff and visitor safety. That means there is a clear nexus between Mr Picks' conduct on the night of the incident and the inherent requirements of his role. The Health Service says it cannot be reassured that Mr Picks would not engage in aggressive behaviour again if provoked, nor that the family feud would not escalate in future. The Health Service says the character references tendered by Mr Picks are of limited value because some of the referees would not have been aware of the Conviction. Further, given Mr Picks has lost his security licence, it is 'disingenuous of him to purport that he is a fit and proper person to provide security services for patients, visitors and staff at public healthcare facilities.'
- 56 The Health Service says Mr Picks cannot do any patient facing role, although it does not explain in any detail why that is the case. When pressed, the Health Service said that given the nature of Mr Picks' conviction, there would be a risk in Mr Picks doing any patient facing role.

57 The Health Service argues the only role it could have placed Mr Picks in was the handyman role but the Health Service could not displace an employee deemed permanent under CI23 for an employee convicted of a serious offence.

58 For those reasons, taking into account that patient care is the paramount consideration in accordance with s 151 of the HS Act, the Health Service says dismissal remains the appropriate outcome. The Board should not adjust the Health Service's decision.

Consideration

59 The Board accepts Mr Picks' submission that 'all the circumstances of the offending and of the employment... need to be weighed in the balance' when deciding whether the decision to dismiss should be adjusted.

60 In short, the Board considers a real injustice has been done to Mr Picks. The decision to dismiss was a disproportionate response and that decision should be adjusted. We reach that conclusion for the following reasons.

61 All of the witnesses in this matter were reliable. Mr Picks' testimony was particularly forthcoming and credible.

62 We accept that Mr Picks' Conviction arose in unique circumstances. It was the culmination of provocation in the context of long-running, complex, cultural family tension and the stress of his wife's recent, problematic kidney transplant. It goes without saying that assault occasioning bodily harm is a serious matter. However the Board is satisfied that Mr Picks' continued employment does not pose an unacceptable risk to the Health Service.

63 The Board accepts Mr Michael's and Mr Picks' evidence that the family feud has been de-escalated as a result of Elder intervention. Further, the Board finds that in the unlikely event that Mr Picks were to be provoked at work by a person with whom Mr Picks had family or cultural tensions, Mr Picks would either remove himself from that situation or otherwise respond appropriately.

64 The Board is mindful of our obligation under s 153 of the HS Act to have regard to s 151 of the HS Act.

65 The Board accepts Mr Fisher's evidence about Mr Picks' ability to remain calm while working with violent, volatile and challenging people and situations. It is apparent, and the Board finds, that Mr Picks performed his role as Security Officer well for over 13 years. Mr Picks' employment record was unblemished. The Board considers that the evidence demonstrates that Mr Picks is able to perform the inherent requirements of the Security Officer role. Mr Picks is skilled at responding to violent, aggressive and volatile behaviours and emergencies. In the circumstances Mr Picks does not represent a threat to, or otherwise compromise patient, staff or visitor safety. On the evidence before us in this matter, we find that Mr Picks' ongoing employment is more likely to enhance patient care than compromise it.

66 The Board makes the findings at [65] without relying on Mr Picks' references. Clearly the references tendered by Mr Picks do not amount to sworn evidence. However the Board is not bound by the rules of evidence: s 80L and s 26(1) of the IR Act. In the circumstances of this matter, it would be difficult to find that the Health Service is prejudiced by the references being taken into account. The references were filed and served nearly four months before the hearing. Many of the references were from the Health Service's own senior employees. Indeed, many were written on the Health Service's letterhead. The Board considers, and the

Health Service concedes, the Health Service could have made enquiries of those employees. The Health Service did not.

- 67 Further, the Health Service does not seek to challenge the truthfulness of the references. Rather the Health Service said that it could not be known whether the referees knew about the Conviction and how it may have affected their view of Mr Picks. As was pointed out to the Health Service, it is apparent from the references that some of the referees were aware of the Conviction.
- 68 In our view, to the extent that the references are from Mr Picks' former colleagues and relate to his work performance and patient safety, they are relevant to the issue of whether Mr Picks' employment would compromise the protection of patients. We consider that it would be open to us and in accordance with s 26(1)(b) of the IR Act to place some weight on the references. However, as we say at [66], we make our finding that Mr Picks remains suitable to perform the Security Officer role without relying on the references.
- 69 Mr Moffet and the Health Service referred to 'discussions with the team' but there was no evidence or even submissions about what those discussions entailed. Relevantly, the only evidence before the Board is that the decision-maker considered it would not be possible for Mr Picks to work as a Security Officer or in any patient facing role because the risk was too great.
- 70 We note two matters in passing. First, the Chief Executive was unlikely to have been assisted by the briefing note, given it lacked the fundamental material one could reasonably expect would be included. At a minimum, the briefing note should have included analysis and a recommendation or recommendations for Mr Moffet to consider.
- 71 Second, the letter dismissing Mr Picks from his employment was decidedly lacking. In our view, an employee is entitled to be told the reasons why his employer has decided he should be dismissed. If, in response to a proposal to dismiss, an employee has put forward matters to be considered before the final decision is made, and those matters make no difference to the proposed decision, the employer should explain why that is so. It is unfortunate that in its letter to Mr Picks dated 7 November 2019, the Health Service did not explain the reasons why it considered dismissal to be appropriate, nor why the matters Mr Picks put forward made no difference to the outcome.
- 72 The circumstances in this matter are very different to those in the cases relied on by the Health Service. Mr Picks' actions cannot be reasonably compared to a senior government lawyer who ran an escort agency and engaged in tax fraud: *Bercove v Hermes (No. 3)* (1983) 74 FLR 315, a professor who had a sexual relationship with his student: *Orr v The University of Tasmania* (1957) 100 CLR 526, nor a public servant who committed two counts of indecency against a child: *Cooper v Australian Taxation Office* [2015] FWCFB 868.
- 73 The Health Service relies on *B. Rose v Telstra Corporation Limited* (Unreported, AIRC, Print Q9292) and submits that the Conviction:
- a. viewed objectively is likely to cause serious damage to the relationship between Mr Picks and the Health Service;
 - b. damages the Health Service's interests; and
 - c. is incompatible with Mr Picks' duty as an employee.

- 74 The Board does not accept those submissions. Viewed objectively, the Conviction was not likely to cause such serious damage to the employment relationship so as to warrant dismissal in the circumstances of this matter. Further, no evidence of damage to the Health Service's interests was led. The evidence does not support a finding that the Conviction is incompatible with Mr Picks' duty as an employee, such that the Health Service can no longer hold out Mr Picks as a suitable person to work as a Security Officer. Here there is not evidence that such a view could be said to be genuine, credible or rationally based. Applying the reasoning of the Full Bench in *Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2016] WAIRC 00236; (2016) 96 WAIG 408 at [106], the Board is satisfied that the employment relationship can and should be restored.
- 75 The Board considers that the Health Service has applied simplistic reasoning to a complex issue. The circumstances of the Conviction do not lead to the conclusion that Mr Picks cannot work as a Security Officer or in any other patient facing role.
- 76 In our view, the Health Service's approach would have been understandable if Mr Picks had assaulted a vulnerable person or someone in his care. While serious and clearly regrettable, the circumstances of the Conviction were not that. When viewed in context, and taking into account Mr Picks' exemplary employment record and demonstrated approach in diffusing violent situations at work, the fact of the Conviction does not lead to the conclusion that Mr Picks cannot work as a Security Officer or in any other patient facing role.
- 77 That Mr Picks has lost his security licence does not lead us to conclude he cannot work as a Security Officer or in any other patient facing role. We do not accept the Health Service's submission that 'it would be disingenuous for [Mr Picks] to purport that he is a fit and proper person to provide security services for patients, visitors and staff at public healthcare facilities.' The Board understands that the circumstances of the Conviction were not considered when Mr Picks' security licence was revoked. Rather, a conviction of that type automatically results in the revocation of the relevant security licence. Further, the Health Service does not require its Security Officers to hold a security licence.
- 78 Even if the Board had concluded that Mr Picks could no longer work as a Security Officer, we would have had serious concerns about the Health Service's search for an alternative role. In our view, such as it was, the 'search' can hardly be described as 'robust'. First, it was not reasonable to conclude that Mr Picks could not do any patient facing role. Second, in order to properly consider Mr Picks for a role other than the one he had done for over a decade, at a minimum the Health Service needed to ask Mr Picks about his skills and qualifications. It did not.
- 79 It was wholly inadequate to conduct a search for an alternative role without engaging with Mr Picks at all. That Mr Bolton knew of Mr Picks' skills in the context of his work as a Security Officer does not mean that Mr Bolton knew what else Mr Picks may have been able to do. Further, contrary to the Health Service's submission set out at [57], the evidence did not support a finding that a casual employee had been deemed permanent under CI23. Mr Bolton's evidence was that a casual employee was in the process of being assessed under CI23. Those circumstances do not preclude the Health Service from considering Mr Picks for that role.
- 80 The Board considers that Mr Picks has been treated harshly and unfairly indeed. We find that the decision to dismiss was harsh, unfair and disproportionate.

How should the decision be adjusted?

- 81 We consider that the matters set out at [37] sufficiently outweigh the gravity of the Conviction. Taking into account all of the circumstances of the matter, Mr Picks should not lose his job.
- 82 The decision to dismiss should be adjusted such that it is replaced with a decision to impose a warning and improvement action in the form of training. Mr Picks should be reinstated without loss and with continuity of employment benefits. His service should be deemed continuous for all relevant purposes.
- 83 In making our decision about how the Health Service's decision to dismiss should be adjusted, we have taken into account that Mr Picks failed to report the criminal charge and Conviction.
- 84 We will order accordingly.