

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1  
OCTOBER 2018**  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2020 WAIRC 00046

**CORAM** : PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER D J MATTHEWS- CHAIRMAN  
MR G LEE - BOARD MEMBER  
MR T DI LABIO - BOARD MEMBER

**HEARD** : TUESDAY, 23 JULY 2019, WEDNESDAY, 24 JULY 2019,  
THURSDAY, 25 JULY 2019, FRIDAY, 20 SEPTEMBER 2019

**DELIVERED** : FRIDAY, 17 JANUARY 2020

**FILE NO.** : PSAB 24 OF 2018

**BETWEEN** : CRAIG D'ROZARIO  
Appellant

AND

DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT  
Respondent

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**CatchWords** : Industrial law (WA) – Appeal against decision to terminate employment for substandard performance – No investigation held to determine whether or not the appellant’s performance was substandard – Failure to conduct an investigation under section 79(5) Public Sector Management Act 1994 open to be cured on appeal – In this case Public Service Appeal Board unable to determine question of substandard performance on evidence before it – Decision to dismiss quashed

**Legislation** : *Public Sector Management Act 1994 s78, s79*

**Result** : Appeal upheld  
Decision to dismiss quashed

**Representation:**

Counsel:

Appellant : In person  
Respondent : Ms M Jones (of counsel)

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**Case(s) referred to in reasons:**

*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355

*Re Railway Appeal Board; ex parte Western Australian Government Railways Commission*  
(1999) 21 WAR 1

*Director General, Department of Education v Patrick Guretti* (2014) 94 WAIG 425

*Reasons for Decision*

- 1 The appellant was employed by the respondent from 1 October 2012 until 1 October 2018, the latter date being that upon which his employment was brought to an end for substandard performance pursuant to section 79 *Public Sector Management Act 1994*.
- 2 The Full Bench of the Western Australian Industrial Relations Commission held in *Director General, Department of Education v Patrick Guretti* (2014) 94 WAIG 425 at [79] that:

Pursuant to s 79(5) of the PSM Act, prior to the employing authority forming the opinion that an employee's performance is substandard two steps must occur. Firstly, the provision contemplates that allegations of substandard performance must be put to the employee and the employee must not admit that his or her performance is substandard. After the denial is made, the employing authority **must cause an investigation to be held into whether or not the performance of the employee is substandard.** [Our emphasis.]
- 3 At [80] the Full Bench held that:

Prior to the commencement of an investigation, an assessment of performance of an employee would have to necessarily be made. Unless there is some prima facie evidence of substandard performance, it would be inappropriate for an employing authority to cause an investigation into the performance of an employee.
- 4 There is no definition of “investigation” in the *Public Sector Management Act 1994*. We are therefore content to rely on the Macquarie Dictionary meaning of “a searching inquiry in order to ascertain facts; a detailed or careful examination.”
- 5 As all that is required before an investigation is commenced is “prima facie” evidence of substandard performance and a denial, against that evidence, of substandard performance, it seems to us that it is obvious that the dictionary definition is that which should be applied to what follows, that being an “investigation” as per section 79(5) *Public Sector Management Act 1994*.
- 6 We are reinforced in that view by a consideration of the whole of the text of section 79(5) *Public Sector Management Act 1994*. The investigation is, according to section 79(5), to be held “into whether or not the performance of the employee is substandard.”
- 7 This, in our view, determines that the “investigation” is the process by which, as the dictionary definition suggests, facts are ascertained.
- 8 A finding about whether or not the performance of an employee is substandard could hardly be made before an investigation took place.
- 9 Further, such a finding could hardly be made without ascertaining facts.
- 10 It follows that the investigation is the stage in the process by which facts are ascertained.
- 11 The process said by the respondent in this case to be the investigation under section 79(5) *Public Sector Management Act 1994* was no such thing.
- 12 In July 2018 the Acting Director General of the Department of Transport wrote to a Mr Adrian Robinson at Beilby Consulting in the following terms:

“Dear Mr Robinson,

**SUBSTANDARD PERFORMANCE INVESTIGATION**

### **Appointment**

In accordance with Part 5, Division 2, Substandard Performance of the *Public Sector Management Act 1994*, I appoint you as the person to undertake the investigation of whether or not the performance of [the appellant] employed within the Finance and Procurement Services Directorate of the Department of Transport, is substandard. To assist in the process, Ms Alex Moore, HR Business Consultant, has been nominated to coordinate the management of this matter.

You will be given access to all relevant Department of Transport records and documentation relating to the matter except those that are legal privileged or commercial in confidence. You will be provided with the documents listed in Attachment 1 of this letter.

### **Conduct of Investigation**

The investigation will be undertaken expeditiously and in such a way as to ensure that the requirements of procedural fairness and natural justice are met.

In accordance with the Public Sector Commission's Managing Substandard Performance: A Guide for Agencies you will explore and reach a finding on the following:

- The criteria used to assess the employee were fair, objective, proper and equitable under the circumstances;
- Sufficient and appropriate evidence was gathered and assessed;
- The employee was provided with a reasonable opportunity to respond and supporting documentation was provided to them;
- Due consideration and regard has been given to the employee's response;
- Appropriate measures and improvement actions were taken to encourage the employee to meet the minimum standards required by the position;
- The employee was made aware of the consequences of continued substandard performance;
- The rules of procedural fairness were upheld during the process.

In conducting the investigation of the Department of Transport's behalf, I request that you:

- Review all documentation relevant to the matter, including but not limited to, the documented opinion of substandard performance and the response from the employee;
- Interview the employee to whom the opinion of substandard performance has been issued;
- Consider interviewing the line manager and if necessary relevant others who have information material to the matter;
- Document all statements and present them for verification and signature;
- Conduct follow up interviews as necessary to establish the facts;
- Provide a draft report for comment prior to submission of the final report;
- Prepare a detailed report that outlines your methodology, process and recommendation in respect to the opinion of substandard performance.

### **Report of Investigation**

You are required to provide me with a final report of investigation, which will include:

1. Your assessment of the process undertaken; and
2. Your recommendation as to whether or not the employee's performance is substandard.

Should you require further information or clarification please contact Ms Alex Moore Barrett, HR Business Consultant on 6551 6074.

Yours sincerely

**Nina Lyhne**

A/Director General”

- 13 Some parts of the letter seem to ask that some things occur which would be consistent with an investigation.
- 14 For instance, in the second lot of bullet points, Mr Robinson is “requested” to:
- Interview the employee to whom the opinion of substandard performance has been issued;
  - Consider interviewing the line manager and if necessary relevant others who have information material to the matter; and
  - Conduct follow up interviews as necessary to establish the facts.
- 15 However, Mr Robinson produced a report, the date of which we are unable to find within it, which reveals that he did not conduct anything like an investigation.
- 16 The report reveals that Mr Robinson’s “investigation” was, in truth, simply a review of what had gone before and an assessment of whether it had been fair.
- 17 Having read the report, we find within it no analysis at all of whether the applicant’s performance was substandard or not.
- 18 Mr Robinson simply says that “there is no evidence to suggest the criteria used to assess the employee was anything but fair, objective, proper and equitable”.
- 19 In relation to the “evidence” against the applicant, Mr Robinson says he has formed the opinion “that evidence gathered and assessed was sufficient and appropriate”.
- 20 The above are references to the work of others.
- 21 Other findings of Mr Robinson are of a similar nature, such as his findings that the appellant:
- was given reasonable opportunity to respond to claims against him;
  - due consideration was afforded to the appellant throughout the internal process;
  - the appellant was made fully aware of the consequences of substandard performance; and
  - the rules of procedural fairness afforded to the appellant were upheld during the process.
- 22 Mr Robinson concludes as follows:
- “The Investigator finds the performance of the applicant **TO BE SUBSTANDARD**”
- 23 An investigation would involve the investigator actually gathering evidence and applying the evidence to criteria relating to performance so as to make an assessment, applying one to the other, of whether or not the employee’s performance was substandard.
- 24 It is clear from a reading of the report that Mr Robinson did not do this. The report is really no more than Mr Robinson comforting the Acting Director General in relation to the fairness of the process conducted by her officers.

- 25 Mr Robinson's ultimate conclusion that the performance of the appellant is substandard is clearly not an original and substantive opinion based on his investigation into the matter.
- 26 Mr Robinson did not do what is required by section 79(5) *Public Sector Management Act 1994*.
- 27 It is true that Mr Robinson interviewed the appellant and his direct line manager, Ms Andrezza Fulfaro Ferreira. However, it is not clear from reading the report why he did this. Mr Robinson did nothing with the information he gathered other than to attach it to his report.
- 28 Mr Robinson notes that he was given some documents by the appellant during his interview of him but, in relation to those documents, writes in his report :

"It is important to note that the nature and content of the emails/documents received from [the appellant] does not form part of the investigative brief as to whether or not the performance of [the appellant] is substandard; and therefore, has not been considered or factored into the Investigator's finding."

- 29 This is tantamount to saying that the "investigation brief" was to not conduct an investigation.
- 30 On the whole, considering the letter to him, we agree. Overwhelmingly, the letter asked Mr Robinson to review what had been done and did not request him, let alone direct him, to conduct an investigation.
- 31 In any event, whatever may have been asked of Mr Robinson, no investigation under section 79(5) *Public Sector Management Act 1994* was carried out in this matter by him.
- 32 The question then is what are the consequences of a failure by the respondent to have conducted an investigation under section 79(5) *Public Sector Management Act 1994* before terminating the appellant's employment.
- 33 In our view, quoting from *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 at [74], that question:

"... is to be determined by asking whether the [respondent's] failure to follow the steps required by [section 79(5) *Public Sector Management Act 1994*] or the principles of natural justice amounted to a mere procedural defect in an otherwise proper exercise of jurisdiction, or a fatal flouting of a jurisdictional or statutory precondition which rendered the decision to terminate invalid."

- 34 We note that a decision on this is one the Supreme Court considered could and should be made by a body such as this one. That is, there can be no suggestion that by asking and considering the question we are encroaching into the territory of administrative review. So much is clear from [76] of the decision of the Chief Justice in *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1.
- 35 The significance of the answer to the question is laid out by the Chief Justice at [74] of *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 as follows:

Arguably, if it were a mere defect in an otherwise proper exercise of its jurisdiction under [section 79(5) *Public Sector Management Act 1994*], the Board would be required to determine whether to reverse the decision by having regard to both the substantive and procedural issues, as held in *Byrne v Australian Airlines* (1995) 185 CLR 410: see also Lord Evershed in *Ridge v Baldwin* [1964] AC 40 (at 86, 91-92). On the other hand, *Williamson v Commonwealth* (1907) 5 CLR 174, is authority for the proposition that there needs to be strict compliance with statutory procedural requirements, and the other authorities demonstrate a consistent principle.

- 36 So here, the question is as follows: “Is a failure to comply with section 79(5) *Public Sector Management Act 1994* something that may be cured on the appeal before us or is it a statutory procedural requirement requiring strict compliance such that, it being absent, the decision to dismiss must be quashed?”
- 37 Although the Supreme Court decision in *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 means that we **could** determine the matter in the appellant’s favour because of the failure to comply with section 79(5) *Public Sector Management Act 1994* we do not consider it to stand as authority for a proposition that we **must** do so.
- 38 In *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 a constituent authority of the Western Australian Industrial Relations Commission roughly equivalent to this one held that a decision to dismiss ought be quashed because of a failure to comply with a procedural requirement and the Supreme Court held that conclusion was within the body’s power.
- 39 However, the Supreme Court did not, on our reading of the case, find that the only thing the constituent authority could have done was that which it did.
- 40 Even if it had done so, the question arises before us in the context of a different legislative scheme.
- 41 Ultimately, of course, the consequences of a breach of a statute by a statutory body will depend on a decision maker’s interpretation of what Parliament intended should be the consequences of such a breach.
- 42 That matter was not considered in the present context by the Supreme Court in *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1.
- 43 Framing the question in the well-known language of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the question before us is: “Is it the intention of the *Public Service Management Act 1994* that a failure to comply with section 79(5) *Public Sector Management Act 1994* renders a decision to dismiss for substandard performance invalid or not?”
- 44 We note the relevant observations of McHugh, Gummow, Kirby and Hayne JJ at [91] of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355:
- An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied (63); there is not even a ranking of relevant factors or categories to give guidance on the issue.
- 45 In deciding what Parliament intended to happen in a case where the Public Service Appeal Board determines there has been a failure to comply with section 79(5) *Public Sector Management Act 1994*, we have been influenced by the following:

- (1) Parliament intended the Public Service Appeal Board to conduct appeals by way of a hearing de novo;
- (2) bodies within the Western Australian Industrial Relations Commission should, consistent with the overarching purpose of the Western Australian Industrial Relations Commission, aim to resolve disputes if it is possible to do so rather than to allow them to continue; and
- (3) the terms of section 78(5) *Public Sector Management Act 1994*.

46 If the Public Service Appeal Board is supposed to conduct appeals by way of a hearing de novo this suggests to us that Parliament intended that procedural defects may be cured at the hearing of the appeal if the Public Service Appeal Board is of a mind to allow this to occur.

47 We are emboldened in this by the terms of section 78(5)(a) *Public Sector Management Act 1994*.

48 Section 78(5)(a) *Public Sector Management Act 1994* provides:

“If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner’s instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board –

- (a) is not required to determine the reference or allow the appeal solely on that basis and **may proceed to decide the reference or appeal on its merits** [our emphasis].”

49 We consider that Parliament cannot have intended that a failure to comply with section 79(5) *Public Sector Management Act 1994* renders, as a matter of course, and without more, a decision to dismiss for substandard performance invalid and void in the present circumstances. We consider that we may exercise a power to decide the matter on its merits.

50 Being able to do so, we have to decide whether in this case it is appropriate to do so.

51 We have decided not to determine the matter on its merits.

52 We have decided that the appeal should be decided on the basis that a good challenge has been made out, being that section 79(5) *Public Sector Management Act 1994* was not complied with in that the matter of whether the appellant’s performance was substandard or not was not the subject of an investigation as contemplated by the subsection.

53 We have so decided because our view is that the lack of an investigation has had a real and significant effect on the quality and quantity of evidence before us.

54 In short, our view is that we are unable to come to any meaningful conclusion about the appellant’s work performance based on the evidence we have before us. We simply do not have good evidence to assist us one way or the other. For this reason we stop at the point of determining there has been a failure to comply with section 79(5) *Public Sector Management Act 1994*.

55 All we had before us in relation to the appellant’s work performance was the evidence of Ms Fulfaro Ferreira.

56 Ms Fulfaro Ferreira is to be commended for conducting a thorough, fair and high-quality “Performance Improvement Plan” process in relation to the appellant. We cannot praise her efforts highly enough.



57 However, the process she ran was one designed to improve the appellant's performance and not to judge it.

58 As the respondent's Manager of Employee Relations, Mr Scott Barrett, gave evidence at ts 320 to 321:

“So in relation to a PIP process, the owner of that process is the employee. So it's up to the employee to make the effort to be open to and to understand the issues and to rectify them. And it's a space for the manager to try and guide them in that.”

59 Ms Fulfaro Ferreira cannot be guiding an employee and also be, effectively, the final word on the employee's performance. If this were the case a person in her position would be irretrievably, and most unfairly, conflicted in the role they are supposed to play in a Performance Improvement Plan process. You cannot be both trying to assist an employee to improve in a process with that dedicated purpose and fairly and dispassionately assessing the employee's performance in a substantive way.

60 Further, it would be very unfair if a process that an employee was supposed to “own” ended up constituting the entirety of the evidence relied upon to determine that his performance was substandard.

61 We only heard substantive evidence about the appellant's performance from Ms Fulfaro Ferreira. No employee senior to her gave substantive evidence about the key matter of whether or not the appellant's performance was substandard.

62 Ms Fulfaro Ferreira's evidence related mainly to the Performance Improvement Plan and the conclusions she reached at the end of that process. For the reasons given above, that evidence cannot be enough to allow us to fairly judge the appellant's performance.

63 The Performance Improvement Plan process was not designed to judge the appellant's performance.

64 Insofar as the process allowed for judgments to be made, they could only be prima facie judgments. The respondent's policy provided that there would be another step after such judgments were formed. The *Public Sector Management Act 1994* requires it. The step was not taken and the result is we do not have enough evidence to assess for ourselves the appellant's performance.

65 Had we had evidence of matters considered, actions taken and information gathered during an investigation this may have allowed us to assess the appellant's performance on the merits. Absent that evidence we simply find ourselves unable to progress confidently or meaningfully into the realm of the merits.

66 In the absence of us hearing the kind of evidence an investigation should have produced, we consider ourselves unable to assess the appellant's performance for ourselves.

67 This appeal will succeed on the basis that the legislative process provided for by section 79(5) *Public Sector Management Act 1994* was not carried out.

68 We do not remit the matter back to the respondent to recommence the process at the point at which a prima facie opinion had been reached that the applicant's performance was substandard and that the applicant had denied that his performance was substandard.

69 Although Ms Fulfaro Ferreira conducted a truly impressive process to bring the respondent to this point, the process was conducted more than 18 months ago. The opinion based on it is now stale.