APPEAL AGAINST A DISCIPLINARY DECISION TO SUSPEND WITHOUT PAY ON 10 DECEMBER 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00302
CORAM	**:**	SENIOR COMMISSIONER S J KENNER - CHAIRMAN MS A KACZMAREK - BOARD MEMBER MS J VAN DEN HERIK - BOARD MEMBER
HEARD	**:**	MONDAY, 17 FEBRUARY 2020, WEDNESDAY, 22 APRIL 2020
DELIVERED	**:**	TUESDAY, 2 JUNE 2020
FILE NO.	**:**	PSAB 29 OF 2019
BETWEEN	**:**	MEREDITH ELISE ARCUS Appellant AND NORTH METROPOLITAN HEALTH SERVICE Respondent

---

Catchwords	**:**	Industrial Law (WA) – Public Service Appeal Board - Appeal against decision to suspend appellant without pay - Whether appellant was afforded procedural fairness – Suspension without pay not justified - Powers of Appeal Board – Appeal upheld and order issued
Legislation	**:**	*Health Services Act 2016* (WA) ss 164; 172(2) *Industrial Relations Act 1979* (WA) s 80I *Public Sector Management Act 1994* (WA) s 78(1)(b)
Result	**:**	Appeal upheld and order issued

Representation:

Counsel:

Appellant	**:**	Mr M Williams of counsel
Respondent	**:**	Mr J Carroll of counsel

Cases(s) referred to in reasons:

Szbel v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

Mijatovic v Legal Practitioners Complaints Committee (2008) 37 WAR 149

Purcell v Western Australia Police [2020] WAIRC 00246

Case(s) also cited:

Reasons for Decision

Appeal and brief background

1 The appellant commenced employment with the respondent as Director Clinical Services at the Women and Newborn Health Service on a fixed term contract from 10 December 2018 to 10 December 2023. The appellant's employment is also regulated by the *WA Health System - Medical Practitioners - AMA Industrial Agreement 2016.* In this senior executive position, carrying an annual remuneration of $413,085 per annum, the appellant is responsible for the provision of safe, high quality and efficient patient care within the Health Service. The appellant's position reports to the Executive Director of the Health Service, who reports to the Chief Executive Officer of the respondent.

2 On 2 October 2019, the appellant received a letter from the Executive Director, Dr Graham to the effect that the appellant was suspected of committing a breach of discipline. No reference was made in the letter as to what this suspected breach of discipline was, other than to say these would be the subject of subsequent correspondence. In the same letter, Dr Graham informed the appellant that under s 164 of the *Health Services Act 2016* (WA) the appellant was to be suspended on full pay with immediate effect. Whilst no mention was made of this in Dr Graham's letter, it must be taken to be the case that the appellant's suspension on full pay was a decision made under the respondent's "Suspension Guidelines" which require that a decision maker must consider several factors before making such a decision. We will return to this issue later in these reasons.

3 A week later, on 11 October 2019, Dr Graham again wrote to the appellant and set out several allegations of suspected breaches of discipline against the appellant. Whilst some seven allegations are set out in the letter, allegations one and seven are said by the respondent to be the most serious. Allegation one contends that the appellant allowed five doctors employed at the Health Service to be credentialled on a temporary basis, contrary to the respondent's relevant policy and proper clinical practice. Allegation seven contends that the appellant either disbanded or did not facilitate four key committees within her area of responsibility. The appellant was asked to respond by 25 October 2019.

4 On 17 October 2019 the appellant's solicitors wrote to the Health Service and requested more information in relation to the allegations, copies of documents referred to in Dr Graham's letter of 11 October, in addition to other documents including a copy of the employees' contracts of employment, CredWA records, and also requested that the appellant have access to her work emails to have a

reasonable and fair opportunity to respond. An extension of time to reply was given to the appellant.

5 By letter of 31 October 2019, the appellant wrote to Dr Graham responding to the breach of discipline letter of 11 October 2019. Despite her solicitor's request in their letter of 17 October 2019, no requested documents were supplied, and nor access given to the appellant to her work emails, before her response. The appellant maintained that the lack of documents impeded her ability to recollect the temporary credentialing of several of the five doctors concerned. As to others, whilst the appellant recalled some details in relation to their engagement and temporary credentialing, she had not recollection of any concerns raised with her. As to one from her recollection, the appellant maintained there was some doubt as to whether in the circumstances the doctor had to be credentialled and sought confirmation of any decision of the Credentialing Committee. As to the allegation about disbandment of committees and them failing to meet, the appellant denied that she disbanded any key committees, or engaged in a breach of policy. The appellant did accept that due to excessive workloads, she did not ensure that some of these committees met as they should have.

6 On 15 November 2019 Dr Lawrence, the CEO of the Health Service, wrote to the appellant and informed her of her decision to have a disciplinary investigation conducted in relation to the suspected breaches of discipline. And Dr Lawrence informed the appellant she was proposing to continue suspension of the appellant but without pay, given the seriousness of the allegations. The appellant was invited to respond. She did so through her solicitors by letter of 22 November 2019. In the letter, the appellant's solicitors pointed out that suspension without pay under the respondent's Suspension Guidelines should only occur in the most serious circumstances, and there had been no change in circumstances since the respondent's initial decision to suspend the appellant on full pay.

7 It was contended that such a suspension for the appellant, as a senior medical practitioner, would cause her profound reputational damage. Also, there was no prima facie case for the allegations of breach of discipline and no such conclusion could be reached, given the appellant's response dated 31 October 2019. And, some said that there could be no basis to conclude that the appellant would pose a serious risk to employees, patients or to public safety generally. Finally, there was no indication that the Health Service had considered alternatives to suspension, as a part of risk management. There was no basis for the respondent's decision to suspend the appellant without pay.

8 In a response of 10 December 2019, Dr Lawrence advised the appellant that the suspension without pay was considered appropriate and that:

> Based on the information available to date, the seriousness of the alleged conduct has not been mitigated and given the seniority and influence associated with your position as

> Director Clinical Services at Womens and Newborns Health Service the financial, reputational and industrial risk to North Metropolitan Health Services is significant.

9 The letter also informed the appellant that the alleged breaches of discipline would be referred to an external investigator to conduct a disciplinary investigation. As at the date of these proceedings, the appellant had not been interviewed by the investigator and there was no clear indication of the timeframe over which the disciplinary investigation would be conducted. Given the procedural steps required under the respondent's Disciplinary Policy (AB70 - 75) it appears this could involve some time before its final resolution.

10 It is from this decision of the respondent to suspend her without pay that the appellant now, under s 172(1)(c) of the HS Act, brings this appeal. The appellant seeks orders she be restored to her position as Director Clinical Services pending the outcome of the disciplinary investigation and that she be paid for her loss of remuneration meanwhile. Alternatively, the appellant seeks orders that if she is to remain suspended, then she be so on a full pay basis and that she be paid an amount in relation to her loss of remuneration which, as at 19 April 2020, was $148,258.

11 For completeness, we should add that on 22 January 2020, after this appeal was commenced, but well after the opportunity to respond to her suspension without pay had passed, the appellant received a further letter from Dr Lawrence. It set out more specifics of allegations one and seven. Despite having been requested on 17 October 2019 by her solicitors, the temporary credentialing documents for these doctors were provided to the appellant, along with extracts from the Credentialing Standard and the appellant was offered the opportunity to review her work emails. The concluding paragraphs of the letter referred to a contact person for the appellant to speak to if she wished to review her work emails.

12 And if having done so, the appellant wished to make a supplementary submission, it would be forwarded to the investigator. The last reference clarifies that any further submission of the appellant is to be considered part of her response to the allegations of breach of discipline and not the Health Service’s decision to suspend the appellant without pay. We note that under the Suspension Guidelines, any suspension from employment must be kept regularly under review. Thus, it is surprising that the appellant was not, because of the provision of documents sought months before her proposed suspension, invited to make a further submission regarding her suspension without pay.

The allegations

13 For these proceedings, as we have noted, allegations one and seven are relied upon by the respondent to support the Health Service's decision to suspend the

appellant without pay. These two allegations are set out in Dr Graham's letter of 11 October 2019:

1 You allowed Medical Practitioners to work at WNMS[sic] without being properly credentialed, thereby breaching the WA Health Code of Conduct (the Code) requirements for you to:

- Act professionally and ethically
- Comply with all applicable WA Health System Policy Frameworks in particular the Credentialing and Defining the Scope of Clinical Practice Policy and related documents
- Perform duties to the standard reasonably expected
- Avoid conduct that could bring the WA Health system or any of its Staff, patients or clients into disrepute
- Act in a way which protects and promotes the interests of the WA Health system

Specifically:

- There are a number of doctors at WNHS who have received temporary credentialing in excess of 90 and 180 days. The relevant WA policy allows for 90 days of temporary credentialing to be given by a Director of Clinical Services. Extensions are only allowed pursuant to the WA Health Credentialing and Defining the Scope of Clinical Practice Policy and related documents for credentialing of medical staff if the relevant criteria are met.
- There have been five doctors identified at WNHS who have received in excess of 180 days credentialing. These doctors include: Dr Emmeline Lee, Dr Ravinder Dhillon, Dr Jane Whitaker, Dr Alexandra Cottam and Dr Matilda Oke.
- This has resulted in emergency credentialing of these doctors by the North Metropolitan credentialing committee to mitigate the risk experienced by the health service. How long these doctors have worked without credentialing is under investigation.
- For example, Dr Matilda Oke is a Junior Doctor who was issued and accepted a contract with Sexual Assault Resource Centre (SARC) in January 2019 as a Health Service Medical Practitioner Year 1.
- Under the terms of this contract Dr Oke was required in accordance with the WA Health Credentialing and Defining the Scope of Clinical Practice Policy and related documents to achieve credentialing approval.
- The responsibility for credentialing of medical staff at WNHS is your responsibility as the Director of Clinical Services
- Dr Oke's CredWA records do not indicate that the relevant criteria had been considered and or met.
- Following a second temporary credentialing period there is no capacity to offer a third period of temporary credentialing and Dr Oke's credentialing

application was withdrawn and she was not referred for credentialing to the NMHS credentialing committee.

- Dr Oke continued to work in the SARC without the [sic] being credentialed to perform the work required of her role. This placed Dr Oke and the health service at risk because of the inability of the organisation to cover uncredentialed doctors within the organisations liability insurance.

…

7. You disbanded and/or did not facilitate four key committees thereby breaching the WA Health Code of Conduct requirements for you to;

    - Act professionally and ethically
    - Perform duties to the standard reasonably expected
    - Avoid conduct that could bring the WA health system or any of its Staff, patients or clients into disrepute
    - Act in a way which protects and promotes the interests of the WA Health System

    Specifically:

    - As Director of Clinical Services WNHS, you were responsible for ensuring that the following four key committees were convened on a regular basis;

        1) Medical Advisory Committee (MAC)
        2) Clinical Alerts Committee (Alerts)
        3) Health Information Committee (HIC)
        4) Information and Communications Committee (ICC)

    - You did not facilitate or disbanded these committees without appropriate authority or governance to do so.

    - As a consequence,

        - MAC – Medical staff have not been engaged with or able to have a voice
        - Alerts – WNHS has failed to comply with WA Mandatory Policy, implementation and education thereof, including compliance measures of the policy.
        - HIC – WNHS has been unable to progress key issues associated with clinical documentation, coding, and discharge summaries.
        - ICC – WNHS site issues have not been discussed, represented, or escalated to NMHS as necessary to inform the overall ICT Strategy

14 The appellant did not give evidence in these proceedings. She was content to rely on the agreed bundle of documents, including her response to these allegations dated 31 October 2019. Whilst lengthy, her position in respect of these two

allegations is best set out in her own words. By way of introduction and as to allegation one the letter reads:

> You have invited me to provide a written submission in relation to your decision to suspend me from duty or in relation to the terms of my suspension. You have also invited me to provide you with a response to the suspected breaches of discipline by acts of misconduct. My written submission and response to both matters is set out below.
>
> Out the outset,[sic] I wish to reiterate that Section 8 of the WA Health Discipline Policy required your letter dated 11 October 2019 to provide me with particulars of the allegations against me and include appropriate documents relevant to the allegations. Your letter dated 11 October 2019 does not properly particularise all of the allegations against me. It also did not enclose any documents relevant to the allegations, notwithstanding that the allegations themselves refer to and concern multiple documents. My lawyers, MinterEllison, requested in their letter to you dated 17 October 2019 further details of the allegations and copies of various documents referred to in the allegations. They also requested that I have access to the emails that I have received at and sent from my Department of Health email address in order to have a reasonable and fair opportunity to respond to the allegations. You have refused those requests. I consider your refusal constitutes non-compliance with the discipline policy and a breach of the rules of procedural fairness.
>
> Set out below is my response to the suspected breaches of discipline by acts of misconduct. I have prepared my response to the best of my ability without the further details of the allegations, the documents referred to in the allegations or access to my emails. My written submission in relation to your decision to suspend me from duty is set out after my response to the allegations.
>
> **1. Allegation 1 - Temporary Credentialing**
>
> 1.1 You have alleged that I allowed medical practitioners to work at the Women and Newborn Health Service without being properly credentialed. Based upon the specifics of this allegation, I understand the allegation to be that I approved and/or extended a temporary scope of clinical practice for Dr Emmeline Lee, Dr Ravinder Dhillon, Dr Jane Whitaker, Dr Alexandra Cottam and Dr Matilda Oke in excess of 180 days.
>
> 1.2 I deny that I allowed Dr Oke to work at the Women and Newborn Health Service without being properly credentialed and I deny that I breached the WA Health Code of Conduct. I am otherwise unable to respond to the allegation because you have denied me procedural fairness.
>
> **Emmeline Lee**
>
> 1.3 To the best of my recollection, Dr Lee is a consultant anaesthetist who is employed on a fixed term basis from August 2016 to August 2021. I have no recollection of anyone informing me that the Credentialing Committee had not made a determination on the scope of her clinical practice at the start of her contract term (which was well prior to me commencing employment as Director Clinical Services on 10 December 2018). I also have no recollection of anyone informing me that the duration of Dr Lee's credentialing and scope of clinical practice had expired at any time prior to or after I commenced employment as Director Clinical Services. I

have no recollection of anyone informing me of any issue in relation to Dr Lee's credentialing and am unaware of any issue in relation to her credentialing.

1.4 I also have no recollection of approving and/or extending a temporary scope of clinical practice for Dr Lee. You have refused to provide me with documents relevant to Dr Lee's employment and temporary credentialing. I have no means of refreshing my memory regarding the circumstances in which I may have approved and/or extended a temporary scope of clinical practice for her (if I in fact did so). I am therefore unable to respond further to this allegation. Your request that I respond in these circumstances is a breach of the rules of procedural fairness and I reserve my rights in this regard.

Ravinder Dhillon

1.5 I have no recollection of Dr Dhillon. I also have no recollection of approving and/or extending a temporary scope of clinical practice for her. You have refused to provide me with documents relevant to Dr Dhillon's employment and temporary credentialing. I have no means of refreshing my memory regarding the circumstances in which I may have approved and/or extended a temporary scope of clinical practice for her (if in fact did so). I am therefore unable to respond further to this allegation. Your request that I respond in these circumstances is a breach of the rules of procedural fairness and I reserve my rights in this regard.

Jane Whitaker

1.6 To the best of my recollection, I first became aware of Dr Whitaker in May or June 2019 when the Women and Newborn Health Service's credentialing officer informed me that Dr Whitaker had not submitted all or some relevant documentation to support her application for re-credentialing. You have refused to provide me with documents relevant to her application for re-credentialing and temporary credentialing. I have no means of refreshing my memory regarding the circumstances in which I may have approved and/or extended a temporary scope of clinical practice for her (if I in fact did so). I am therefore unable to respond further to this allegation. Your request that I respond in these circumstances is a breach of the rules of procedural fairness and I reserve my rights in this regard.

Alexandra Cottam

1.7 I recall being informed at some point that a discrepancy had been identified in relation to Dr Cottam's qualifications (specifically, whether she held a specialist fellowship). However, I have no recollection of approving and/or extending a temporary scope of clinical practice for Dr Cottam. You have refused to provide me with documents relevant to her employment and temporary credentialing. I have no means of refreshing my memory regarding the circumstances in which I may have approved and/or extended a temporary scope of clinical practice for her (if I in fact did so). I am therefore unable to respond further to this allegation. Your request that I respond in these circumstances is a breach of the rules of procedural fairness and I reserve my rights in this regard.

Matilda Oke

1.8 To the best of my recollection, I signed (on behalf of the Women and Newborn Health Service) a contract of employment between the Women and Newborn

Health Service and Dr Oke within a week of commencing employment as Director Clinical Services on 10 December 2018. The contract was to work at the Sexual Assault Referral Centre as a Health Service Medical Practitioner Year I. The Recruit to Fill (RTF) Form and N1 Request to Appoint Form were signed by Dr Maire Kelly (the Sexual Assault Referral Centre's Head of Department) and Associate Professor Graeme Boardley (the Acting Executive Director of the Women and Newborn Health Service).

1.9 At the time I signed Dr Oke's contract, I believed the Credentialing and Defining Scope of Clinical Practice for Medical Practitioners Standard applied to her and that she was required to be credentialed. I believed she had submitted an application for credentialing via CredWA and that the application would be considered at the next scheduled Credentialing Committee meeting. I therefore approved a temporary scope of clinical practice for Dr Oke.

1.10 Prior to making any decision in relation to Allegation 1, I request that you determine whether the North Metropolitan Health Service's Credentialing Committee has made a decision regarding whether the Credentialing and Defining Scope of Clinical Practice for Medical Practitioners Standard in fact applies to Dr Oke. If the Credentialing Committee has decided this issue in the negative:

(a) Dr Oke was not required to be credentialled to work in the Sexual Assault Referral Centre; and

(b) there is no basis for alleging that her work in this regard has placed her and the Women and Newborn Health Service at risk because the Women and Newborn Health Service cannot cover Dr Oke within its liability insurance.

15 As to allegation seven the appellant said:

7. Allegation 7 -Disbanding and/or not facilitating four key committees

7.1 I deny that I disbanded any key committee or that I breached the WA Health Code of Conduct by not ensuring that the Medical Advisory Committee, Clinical Alert Committee, Health Information Committee and Information and Communications Committee convened on a regular basis after I commenced as Director Clinical Services in December 2018.

7.2 I had a significant workload when I commenced as Director Clinical Services. I subsequently performed the additional following roles over various periods:

(a) Acting Medical Co-Director;

(b) Manager Health Information Administrative Services;

(c) Manager Library;

(d) Medical Administration Manager.

7.3 I had to prioritise my time to achieve the best outcomes for patient safety and protect and promote the interests of the WA Health System as best as I was able with the resources available to me. My workload was not assisted by the constant changes in my Executive Assistant staff and a subsequent decrease in the number of staff available to assist me.

7.4 I either chaired or attended the Women and Newborn Health Service Occupational Safety and Committee, the Medication Safety Committee, the Drugs and Therapeutics Committee, the Morbidity and Mortality Committee, the Women and Newborn Health Service Credentialing Committee, the Pathwest North Metropolitan Health Service Committee, the Medical Equipment Replacement Program Subcommittee and the Research and Ethics Committee.

7.5 In relation to the committees referred to in the allegation:

Medical Advisory Committee

7.6 I did not disband the Medical Advisory Committee. Dr Pachter is the Chair of the Medical Advisory Committee. I assumed he would convene the Medical Advisory Committee at regular intervals without prompting from me. It did not come to my attention that Medical Advisory Committee meetings were not taking place and, given my competing priorities, I did not have an opportunity to identify this and discuss with Dr Pachter why the meetings had not been convened.

Clinical Alert Committee

7.7 I acknowledge that I did not ensure that meetings of the Clinical Alert Committee were convened regularly. This was due to my increased workload and lack of administrative support and the need to prioritise my time to achieve the best outcomes for patient safety. I met with the four clinical leads and requested that clinical alerts be managed by the individual clinical leads until the meeting could be held. In retrospect, I should have prioritised meetings of the Clinical Alert Committee in preference to one of the committees I mentioned in paragraph 7.4.

Health Information Committee

7.8 The Health Information Committee was convened once after I started as Director Clinical Services. During that meeting, the committee agreed that the Forms Committee would continue to meet but the Health Information Committee would not continue to meet for the time being. I acknowledge that I did not ensure that meetings of the Health Information Committee were convened regularly. This was due to my increased workload and lack of administrative support and the need to prioritise my time to achieve the best outcomes for patient safety.

Information and Communications Committee

7.9 I also acknowledge that I did not ensure that meetings of the Information and Communications Committee were convened regularly. Again, this was due to my increased workload and lack of administrative support and the need to prioritise my time to achieve the best outcomes for patient safety.

16 The appellant, as to the respondent's decision to suspend her, made these comments:

8. Decision to suspend me from duty

8.1 The Department of Health's Discipline Policy's Explanatory Notes provide that:

(a) you may determine whether the seriousness of the allegations against me means that I should be suspended from duty on full pay, partial pay or no pay (Phase 3 Step 2);

(b) the decision may be varied at any time (Phase 3 Step 2);

(c) you should be satisfied that appropriate grounds exist to suspend me from duty (clause 3.2.3);

(d) a suspension will generally take immediate effect due to the seriousness of the circumstances; and

(e) you may vary the decision to suspend or the terms of the suspension at any time during the disciplinary management process.

8.2 These provisions of the Explanatory Notes make it clear that an employee should only be suspended from duty when the allegations against the employee are sufficiently serious to warrant that suspension.

8.3 Suspending a medical practitioner from duty inevitably causes profound reputational damage, irrespective of whether the decision-maker finds that the suspected breach of discipline is substantiated or not substantiated. The disciplinary process and the decisionmaker's findings are not publicised or known publicly, whereas suspension from duty is a very public matter. Suspension from duty inevitably causes a public perception that a Health Service has a prima facie basis for making serious allegations against the medical practitioner in question.

8.4 In order to have had reasonable grounds for suspending me from duty, you should have had a prima facie basis for making serious allegations against me. While I do not dispute that Allegations 1, 2, 3, 4, *5* and 7 are serious (and I am treating them as such), I do not believe you had a prima facie basis for making those allegations on the information available to you or reasonably obtainable by you. I also do not believe you can, after reading my response to the allegations (above), reasonably continue to believe that there is a prima facie basis for making those allegations. In particular:

(a) In relation to Allegation 1:

(i) I approved a temporary scope of clinical practice for Dr Oke believing she had submitted an application for credentialing via CredWA and that the application would be considered at the next scheduled Credentialing Committee meeting;

(ii) if the North Metropolitan Health Service's Credentialing Committee has recently decided that the Credentialing and Defining Scope of Clinical Practice for Medical Practitioners Standard does not [apply] to Dr Oke, Dr Oke was not required to be credentialled to work in the Sexual Assault Referral Centre;

(iii) you have not provided me with sufficient information to respond to the balance of the allegation, which has denied me procedural fairness and prevented me from providing a full response;

(iv) should you continue to believe that there is a prima facie basis for alleging that I committed a breach of discipline in relation to the matters the subject of this allegation, my response above does not give you a reasonable basis to continue to believe that my conduct in question is sufficiently serious to justify suspending me from duty, particularly when you have not provided me with proper particulars of the majority of Allegation 1 nor documents relevant to the allegation.

…

(g) Should you continue to believe that there is a prima facie basis for alleging that I committed a breach of discipline in relation to the matters the subject of Allegation 7, my response above does not give you a reasonable basis to continue to believe that my conduct in question is sufficiently serious to justify suspending me from duty.

The statutory and policy framework

17 It is common ground in this appeal that it proceeds within a specific statutory and policy framework. The respondent is, under s 32 of the HS Act, a Health Service Provider. The respondent as a HSP, is constituted under cl 8 of the *Health Services (Health Service Providers) Order 2016*. The employment and related provisions of the HS Act for a HSP are set out in Part 9. This includes s 140, which enables a HSP to employ employees and exercise a range of management responsibilities. Part 10 of the HS Act deals with substandard performance and disciplinary matters. For these provisions, s 162 enables an employer to deal with a matter as a disciplinary matter. In such cases, the employer while dealing with a disciplinary matter, may, under s 164, suspend an employee on full pay, partial pay or without pay. Such a decision may be varied or removed.

18 Under ss 26 and 27 of the HS Act, the CEO of the Department of Health may issue policy frameworks. A duly issued policy framework binds each HSP to which it applies and its staff members. The effect of these provisions is to impose a legal obligation on both an HSP and its employees to comply with a policy framework. A failure to comply with a policy framework would constitute a contravention of s 27 of the HS Act.

19 The Disciplinary Policy is set out at AB45-79. It comprises five phases. Phase 3 deals with the commencement of the disciplinary process. It contains an express obligation to afford an affected person procedural fairness. Phase 3 Step 1 requires a relevant decision maker to inform the employee in writing of, amongst other things, the particulars of the allegations and to provide "appropriate documents relevant to the allegations". At Step 2, before or after Step 1, the decision maker may determine whether the:

"seriousness of the suspected breach of discipline means the Respondent should be suspended from duty on full pay, partial pay or no pay".

20 Disciplinary Policy Explanatory Notes accompany the Policy. The Explanatory Notes in relation to Phase 3 Stage 1 indicate that the letter setting out allegations of a suspected breach of discipline, should identify each allegation and specify the details of each and where appropriate, include copies of information or documents relevant to the allegation. The Explanatory Notes also refer to possible suspension if there are grounds to support it.

21 There are Suspension Guidelines. The Guidelines (AB127 - 130) are designed:

"to assist decision makers to determine circumstances in which it is permissible to remove an employee from the workplace, and the circumstances in which it is considered appropriate to consider suspension with pay, without pay or on partial pay."

22 As to statutory power, the Guidelines provide:

Suspension by s 164(1)(a) of the Health Services Act 2016

An employee may be suspended after a decision has been taken to pursue the matter as a disciplinary matter as a result of the Preliminary Assessment Form (PAF).

In reaching a decision to suspend, consideration must be given to whether the alleged conduct poses a serious risk to:

a) employee/public safety; or

b) the integrity of evidence relevant to the disciplinary matter; or

c) the operations of the organisation; or

d) the investigation of the disciplinary matter.

An employee must not be suspended without first having an opportunity to respond to the proposed suspension, unless the Decision Maker reasonably holds a belief that the employee's presence in the workplace poses a serious or undeniable risk to one or more of the matters set out above.

23 The Guidelines refer to circumstances of a suspension. A suspension can be on full pay, partial pay or without pay. A suspension without pay should only be considered in the most serious of circumstances. Matter relevant to a decision to suspend without pay include the gravity and seriousness of the alleged conduct; the strength of the evidence against the employee; and the impact on the organization if the allegations are made out. Other matters personal to the employee, including their financial capacity to withstand a suspension without pay can also be considered. Any submission by an employee in response to a proposed suspension must be genuinely considered by the employer and the decision to suspend should be kept under review, and it may be varied or lifted.

24 The next policy framework for present purposes is the Clinical Governance Safety and Quality Policy Framework. This policy framework comprises the Credentialing and Defining the Scope of Clinical Practice Policy and the

Credentialing Standard. These documents are at AB 131-186. The stated purpose of the Credentialing Standard is set out at par 3 and is:

> To ensure there is a clear framework for credentialing and defining the scope of clinical practice for medical practitioners practicing in the WA Health System.

25 And the key principles underpinning the Standard are set at out par 3:

> The key principles which underpin credentialing and defining scope of clinical practice processes include:
>
> - *Patient safety* – by ensuring medical practitioners practice within their capability of education and training and within the capacity of the Health Care Facility in which they are working;
> - *Consistency* – by ensuring alignment with recognised National Safety and Quality Standards; and
> - *Natural justice and procedural fairness* – by ensuring credentialing and scope of clinical practice processes are underpinned by natural justice and procedural fairness.

26 Several definitions are set out in the Standard at par 2 relevant for present purposes and these include:

> **Credentialing and Scope of Practice Committee** or **CASOP** or **Credentialing Committee** - the formally constituted committee of practitioners and managers who collectively analyse and verify the information submitted by an applicant, conduct referee checks and make a determination on the scope of clinical practice for a medical practitioner.
>
> **Credentialing Committee Approval Date** - the date of the Credentialing Committee's final determination of credentialing and scope of clinical practice.
>
> **Credentials** - the formal qualifications, training and experience of the medical practitioner.
>
> **CredWA** - the web portal used to administer the credentialing process.
>
> **Defining the Scope of Clinical Practice** - the process of delineating and articulating the extent of an individual medical practitioner's clinical practice within a particular Health Care Facility based on the individual's credentials, competence, performance and professional suitability, together with the needs and capabilities of the Health Care Facility.
>
> …
>
> **Health Care Facility** or **Health Care Facilities** - a place or places (however titled) in which a medical practitioner undertakes clinical practice including, but not limited to, a hospital, a mental health facility or community health service under the control of a Health Service Provider.
>
> **Health Service Provider** or **HSP** – a body corporate established under the Health Services Act to provide health services and provide teaching, training and research which supports the provision of health services.

27 At par 6 of the Standard the responsibility of HSPs is set out:

> **6. Health Service Provider Obligations**
>
> Health Service Providers have a responsibility to ensure that all health care provided to patients is safe, appropriate and within the capability and role of the service.
>
> Credentialing and defining the scope of clinical practice for medical practitioners is a core responsibility of Health Service Providers to ensure that the medical workforce is appropriately skilled and competent to undertake their clinical workload.
>
> All Health Care Facilities are required to be covered by a Credentialing and Scope of Practice Committee (hereafter known as a Credentialing Committee) that operates under this Standard.
>
> Credentialing Committees may be created at any level of a Health Service Provider (for example: region, site or department). However a Health Service Provider wide Credentialing Committee has the benefit of supporting the management of medical practitioners who work across multiple Health Care Facilities.
>
> Health Service Providers will:
>
> - maintain a Credentialing Committee covering each Health Care Facility or Credentialing Committees covering any combination of Health Care Facilities or a single Credentialing Committees covering all Health Care Facilities; and
>
> - designate a Principal Medical Administrator for each Health Care Facility or group of Health Care Facilities, as the case requires.
>
> Health Service Providers that operate multi-purpose sites, aged care facilities or residential care facilities must ensure that credentialing of medical practitioners who provide services in these facilities is carried out to at least the minimum standard required for facility accreditation to the National Safety and Quality Health Service Standards. The scope of clinical practice should be consistent with the normal primary care role provided by the medical practitioner.

28 Obligations on a Credentialing Committee are set out at pars 7 and 8 of the Standard and they specify:

> **7. Credentialing Committee Obligations**
>
> Credentialing Committees ensure that a rigorous peer review process is undertaken for credentialing and defining scope of clinical practice for medical practitioners.
>
> It is the responsibility of a Credentialing Committee to verify a medical practitioner's credentials and determine a clinical scope of clinical practice in accordance with the *WA Health Clinical Services Framework 2014-2024* or its replacement.

> The determinations made by a Credentialing Committee are to specify the scope of clinical practice, any conditions attached and the reasons for any limitations on the duration of credentialing approval or the scope of clinical practice.
>
> A determination by a Credentialing Committee cannot of itself give rise to employment or other engagement of a medical practitioner.
>
> Medical practitioners must be credentialed and have a prescribed scope of clinical practice before commencing clinical practice in any capacity.
>
> …
>
> **8. Credentialing and Defining the Scope of Clinical Practice Process**
>
> Credentialing is the formal process used to verify the qualifications, experience and professional standing of medical practitioners for the purpose of ascertaining their competence, performance and professional suitability to provide safe, high quality health care services within a particular Health Care Facility.
>
> Defining the scope of clinical practice is the process of delineating and articulating the extent of an individual medical practitioner's clinical practice in a particular Health Care Facility based on the individual's credentials, competence, performance and professional suitability, and in consideration of the needs and capabilities of the Health Care Facility. It defines the clinical practice that a medical practitioner is permitted to conduct at a particular Health Care Facility. A scope of clinical practice is sometimes referred to as "clinical privileges".

29 Most relevantly, are the provisions in the Credentialing Standard in relation to temporary credentialing of medical practitioners. These provisions are set out at pars 9 and 9.1 of the Standard in these terms:

> **9. Temporary (Interim) Credentialing and Scope of Clinical Practice Process**
>
> Temporary credentialing and scope of clinical practice is known as 'interim' credentialing within the CredWA system.
>
> The Principal Medical Administrator can approve a temporary scope of clinical practice for up to a maximum of 90 days in the following circumstances:
>
> 1. short-term appointments where the period of employment or engagement will cease prior to convening of the next Credentialing Committee meeting (e.g. short term locum appointments). These approvals are to be tabled at the next Credentialing Committee meeting for purposes of governance and notification to the committee membership; or
> 2. where an application is pending ratification at a meeting of the full Credentialing Committee, the next Credentialing Committee meeting must occur before interim credentialing period expires.
>
> As a minimum, before approving a temporary scope of clinical practice the Principal Medical Administrator must ensure the following requirements are satisfied:

- the medical practitioner has current registration in the appropriate category with the MBA;
- the scope of clinical practice is consistent with any conditions or undertakings on that registration;
- the medical practitioner provides an up-to-date curriculum vitae with no unexplained gaps in employment;
- the medical practitioner holds the qualifications mandatory to the appointment (for example: specialist fellowship). Registration can be accepted as providing evidence; and
- a reference check from the candidate's most recent place of employment (or, in the case of locums, the most recent locum posting) is undertaken. This may be obtained as a verbal reference, but must be documented by the officer who receives the reference.

Where temporary credentialing is approved it is the responsibility of the Principal Medical Administrator to ensure that they are satisfied that the medical practitioner does not present a risk to the safety and well-being of patients and/or staff.

9.1. Extending Temporary Credentialing and Scope of Clinical Practice Status

Temporary credentialing and scope of clinical practice may be extended past the initial 90 days for an additional maximum of 90 days in the following circumstances only:

- the medical practitioner is under review by the MBA and the Credentialing Committee's decision is pending the outcome of an MBA decision;
- the medical practitioner is under review by the Credentialing Committee pending the outcome of an internal investigation or a Health Care Facility clinical supervised performance review process; or
- the medical practitioner's application is pending the submission of additional documentation required by the Credentialing Committee.

9.2 Temporary Credentialing and Scope of Clinical Practice: Further Opinion by Private Psychiatrist

Under section 182 of the *Mental Health Act 2014* (WA) a patient has the right to request an independent further opinion.

Private psychiatrists providing further opinion (including via teleconference) are required to be credentialed. Where a private psychiatrist is not credentialed and is required to provide a further opinion on a case by case basis, the temporary (interim) credentialing process is to be followed.

Contentions of the parties

30 The appellant made several submissions. These went to both the procedural and substantive unfairness of the respondent's decision to suspend her without pay. First, the appellant contended that the respondent failed to comply with the policy

framework in relation to discipline. The appellant focused on the letter from Dr Lawrence of 10 December 2019, confirming the employer's decision to suspend the appellant without pay. It was contended by the appellant that this letter evidenced the employer's failure to have any regard to the profound financial impact of the decision on her (having regard for her age now at 60 years and that the fixed term contract is to run to just before her 64th birthday); that most allegations are not, properly construed, breaches of discipline at all rather substandard performance matters in relation to which a suspension without pay is not available; that the inevitable length and complexity of the disciplinary investigation made a suspension without pay unreasonable; and there has been no indication given as to how the appellant's presence at work would impede the conduct of the investigation or constitute a risk to the respondent's organization. The appellant contended that the fact there was no reference to these matters or the substance of her lengthy letter of response dated 31 October 2019, has the clear inference these matters were not "genuinely considered" as required by the policy framework.

31 Second, the appellant contended as to procedural fairness generally, that by its letter of 15 November 2019, whereby Dr Lawrence proposed to suspend the appellant without pay, made under "Step 2 of Phase 3" of the disciplinary management process, the respondent was obligated to afford the appellant procedural fairness in responding to the allegations. This included the appellant's request at an early stage she be provided with more particulars of the allegations; copies of documents as requested and referred to in Dr Graham's letter of 11 October 2019 and also, access to her work emails so she could respond to and assess the strength of the evidence possessed by the respondent.

32 The appellant maintained that the refusal to provide this information denied her a reasonable and proper opportunity to respond to the allegations against her.

33 Third, and allied to the first point, the appellant maintained that the respondent's failure in Dr Lawrence's letter of 10 December 2019, to expressly consider, the detail of the appellant's response of 31 October 2019, leads to an inference that no consideration was given to it, contrary not just to the policy framework, but also general principles of procedural fairness.

34 As to the respondent's letter of 22 January 2020, referred to above, written after the commencement of this appeal, the appellant contended this is equal to an admission of a failure to provide procedural fairness by the respondent, and an endeavor by it to remedy the situation in these de novo proceedings

35 As to the merits of the suspension without pay, the appellant submitted that the respondent relies only on allegations one and seven to support its decision. The appellant maintained that contrary to the respondent's position, no clear prima

facie evidence of a breach of discipline in relation to allegation one has been disclosed. The submission was made that in relation to the temporary credentialing of doctors, the mere act of signing a Temporary Credentialing Form, as contained at AB197-215, for temporary credentialing for a period greater than 180 days, is not of itself, prima facie evidence of a breach of discipline without evidence of the surrounding circumstances.

36 In relation to the five doctors the subject of this allegation, the appellant submitted there are several issues for argument and investigation that arise regarding four. As to Dr Oke, as mentioned by the appellant in her response of 31 October 2019, on 16 October 2019 (see AB259) the respondent's Credentialing Committee referred Dr Oke's application for credentialing back to KEMH as it appeared there was some doubt whether the Credentialing Standard actually applied to her. In relation to Dr Lee, the documents themselves show that Dr Graham herself also signed a Temporary Credentialing Form on 23 October 2019, where Dr Lee had already been temporarily credentialed for greater than 180 days, and thus in contravention of the Credentialing Standard (see AB197-199 and 200). Shortly after this, on 31 October 2019, which was after the appellant was suspended, Dr King, who was appointed the Acting Director Clinical Services, signed a Temporary Credentialing form for Dr Whitaker from late October 2019 to 11 January 2020 (see AB209) in circumstances where Dr Whitaker had been temporarily credentialed for greater than 180 days before this time.

37 As for Dr Dhillon, the appellant submitted that materials in evidence show he was temporarily credentialed by the appellant at KEMH in late November 2018 to late February 2019 and then again from the beginning of March 2019 to late May 2019. The appellant submitted that the total period in issue is six months and not greater than six months. As to the next period for Dr Dhillon from the end of May 2019 to the end of August 2019, the temporary credentialing was for Breast Screen WA (see AB214) and the same for the period from the end of August 2019 to the end of November 2019. The appellant contended that first, BSWA is a separate Health Care Facility for the Credentialing Standard and second, the total period of temporary credentialing for BSWA was six months and not greater than six months.

38 In relation to allegation seven, the appellant contended there is no evidence she committed a breach of discipline in relation to these matters. This is especially so given the appellant's response of 31 October 2019.

39 In terms of the respondent's position, it was submitted that credentialing is important for maintaining patient safety and that the suspension without pay option is available to the employer under the policy framework and guidelines in the "most serious" of circumstances. The respondent accepted that it had and has

an obligation to afford procedural fairness, with the requirements of such procedural fairness to be determined under the relevant statutory scheme and the circumstances of the case: *Szbel v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Mijatovic v Legal Practitioners Complaints Committee* (2008) 37 WAR 149.

40 The respondent accepted that under the policy framework the employer had to take certain matters into account in its decision to suspend the appellant without pay. These factors included the gravity of the conduct; the strength of the evidence against the employee; the impact on its organisation if the allegations are established; and matters personal to the employee, such as financial capacity to withstand a suspension without pay. And the respondent submitted that other matters may also be considered if those matters have a rational connection to the decision to suspend and are not otherwise excluded by the statutory or policy framework.

41 In summary, the respondent contended that allegations one and seven are potentially very serious and on the face of the material in evidence, the suspected breaches of discipline were sound. As to the temporary credentialing of doctors, the respondent submitted that if the breach of discipline is ultimately established, this would pose a serious risk to patient safety and raise liability issues for the employer.

Evidence and consideration

42 There can be no doubt that credentialing is an important process in ensuring that healthcare in this State is provided safely and in accordance with a HCP's obligations under the HS Act. There is also no doubt on the evidence before the Appeal Board that credentialing of medical practitioners and oversight of compliance with clinical and corporate governance is an important responsibility of the appellant's position as Director Clinical Services.

43 The importance of this process was explained in the evidence of Dr Menzies, a medical practitioner and specialist in medical administration. Dr Menzies is presently based at the Sunshine Coast Hospital in Queensland. Dr Menzies has previously worked on a locum basis as the Acting Clinical Health Director at KEMH for a period of about two months. This position seemed to be the same position held by the appellant as the Director Clinical Services. Dr Menzies outlined the role of Credentialing Committees and the responsibility of the Director Clinical Services position to oversee the provision of proper material to a credentialing committee in order that it may properly consider an application by a medical practitioner for credentialing. The process has as its objective, to ensure that a clinician has the necessary qualifications and experience for a job.

This is in the context of the needs of the specific location where the medical practitioner will practice, for example a hospital or other facility. The scope of clinical practice described by Dr Menzies involves a consideration of both the individual medical practitioner's skills and experience and the needs of and facilities available at a hospital, for example. A Credentialing Committee according to Dr Menzies, may be established at either hospital or district level. If a medical practitioner is not credentialled then they are not permitted to practice in a hospital or other healthcare facility.

44 Dr Menzies also gave some evidence in relation to the temporary credentialing process. He described the process as one of sudden or urgent need. The Director Clinical Services effectively acts as the Credentialing Committee by credentialing a medical practitioner on an interim basis before the practitioner's application for credentialing goes before the Credentialing Committee. Dr Menzies said that temporary credentialing is available for a maximum period of 90 days, unless the application for credentialing is before a Credentialing Committee, in which case at par 9.1 of the Credentialing Standard (set out above), the Committee may enable an extension for a further 90 days maximum. Dr Menzies testified however, that this should only be done with the oversight of the Credentialing Committee. Once an application is before a Credentialing Committee, Dr Menzies said that it is the Committee that must grant the further extension.

45 Dr Menzies was also asked about the scope of the HS Order in cross-examination and the place of the respondent under it. He testified that the North Metropolitan Health Service is a HSP for a number of facilities including Graylands Hospital, KEMH, Sir Charles Gairdner Hospital and Osborne Park Hospital. He also said that BreastScreen WA is included as a health care facility under the responsibility of the North Metropolitan Health Service. According to Dr Menzies, medical practitioners need to make separate applications for credentialing at each hospital as a separate health care facility, including BreastScreen WA.

46 The issue of credentialing was also referred to in the evidence of Dr Graham, called by the respondent. Dr Graham is the Executive Director of Women and Newborn Health Service and the person to whom the appellant reports. She is responsible for the operation of the Health Service which has approximately 1,600 staff. As to credentialing, Dr Graham testified that prime responsibility for this was with the appellant, with Dr Graham providing oversight. She described it as a core function of the Health Service. Sometimes Dr Graham may have to provide credentialing if the situation is urgent. In the case of temporary credentialing, Dr Graham said that this may be done by the Director Clinical Services in cases of some urgency or if the Credentialing Committee is not

meeting for some time. The period is for a maximum of 90 days, which may be extended for a further 90 days, in certain situations.

47 Dr Graham was taken in her evidence to the circumstances of Dr Lee's temporary credentialing (See AB197-200). On 23 October 2019 Dr Graham signed the Temporary Credentialing Form for Dr Lee for the period "31 September 2019 to 29 November 2019". However, as Dr Lee was previously temporarily credentialed to 30 August 2019, it may well be that there was a mistake on the form, and it should read from "31 August 2019" instead. When she signed the temporary credentialing form, Dr Graham said that she was aware that Dr Lee had been temporarily credentialed for greater than 180 days prior to this, but as the appellant had been suspended from duty at this time and the Credentialing Committee could not be meeting for a while, she had no choice.

48 In the case of Dr Whitaker (See AB204-209) Dr Graham testified that Dr King spoke to her about further temporarily credentialing Dr Whitaker. The form was signed on 31 October 2019 for the period 28 October 2019 to 11 January 2020 (AB209). Dr Graham said that she gave her approval for this on the basis that again, there was not going to be a meeting of the respondent's Credentialing Committee for some time. We pause to note at this stage, that as set out at AB204-205, the temporary credentialing of Dr Whitaker by Dr Farrell, signed on 7 December 2018, appears to have been approved retrospectively to 6 July 2018. There was no evidence before the Appeal Board as to why this was so which would also appear to be anomalous under the Credentialing Standard. Dr Graham said that if Dr Whitaker was not temporarily credentialed on these occasions, she would not have been able to work. We also note that the temporary credentialing for Dr Lee signed on 30 May 2019, for the period 30 May 2019 to 30 August 2019 (AB199), that being the temporary credentialing prior to that authorized by Dr Graham, refers on the form to the "WNHS LOCATION" as "BREASTSCREEN WA". We will return to this below when considering the temporary credentialing of Dr Dhillon in particular.

49 In her evidence in cross-examination, Dr Graham accepted that where both herself and Dr King signed the temporary credentialing forms, they did not have the policy authority to do so and there would be no liability insurance cover, if issues arose subsequently.

50 In relation to the appellant's response to the allegations dated 31 October 2019, in relation to Dr Lee, it seems there were two doctors by this name. The appellant responded in relation to a Dr Lee not referred to in the allegations letter, and the appellant was not informed of this in subsequent correspondence. Further, in relation to Dr Oke, the minutes of the NMHS Credentialing Committee of 16 October 2019, show that Dr Oke's application for credentialing was considered on this day and was referred to KEMH. This was the day prior to the

appellant's solicitors' letter of 17 October 2019 (see AB14-16). But the appellant was not informed of this prior to the submission of her detailed response to the allegations on 31 October 2019.

51 In relation to Dr Dhillon, Dr Graham said that as far as she was aware, he has always worked for BreastScreen WA and there was no need for two separate temporary credentialing applications to be signed. She assumed that BreastScreen WA and KEMH were used interchangeably and noted that there was some confusion amongst staff members between the two.

52 From all of the evidence before the Appeal Board, both documentary and oral, we are of the view that the respondent failed to comply with the policy framework in relation to discipline, binding upon it. Contrary to the policy framework, the letter to the appellant of 11 October 2019 failed to provide the appellant relevant documents in order for her to properly consider and respond to the allegations. In her solicitor's letter of 17 October 2019, the appellant specifically sought copies of relevant documents and, also sought access to her work emails. Logically, taken together with the temporary credentialing documents, access to the appellant's emails may have enabled her to place the signing of the relevant documents for the doctors concerned in context, by way of any particular reasons why extensions of temporary credentialing were made. That there may well have been such circumstances is amply illustrated on the evidence of Dr Graham, as to why both she and Dr King signed the temporary credentialing forms that they did.

53 The fact that the respondent refused to provide these documents to the appellant, without reasons, and refused to give her access to her work emails at the relevant time, denied the appellant a reasonable and proper opportunity to respond to the allegations, in addition to there being noncompliance with the policy framework. The allegations concern matters that are not straightforward and involve the temporary credentialing in some cases, over one year prior to the suspected breach of discipline matters being first raised with the appellant. No explanation was given as to why the appellant was refused access to these materials. From the terms of the appellant's letter of 31 October 2019, the appellant was clearly prejudiced by her inability to access this material. The failure to provide this material and in particular to give access to her work emails at the time of the solicitor's request, in order to properly and fully respond to the allegations, was unreasonable, unfair and prejudicial to the appellant.

54 It is not to the point for the respondent to now say that the appellant was offered access to this material by its letter of 22 January 2020, over three months after her request and well after the decision of the respondent to suspend the appellant without pay. The decision had been made. The horse had well and truly bolted. Furthermore, the invitation in the letter of 22 January 2020, for the appellant to

make a further submission, as mentioned earlier in these reasons, was plainly not for the purpose of reconsidering the employer's decision to suspend the appellant without pay, but was for the purpose of responding to the allegations themselves, which response would be sent to the investigator as a part of his investigation.

55 In relation to the respondent's letter of 10 December 2019 suspending the appellant without pay, in accordance with the Suspension Guidelines, it is only in the most serious of circumstances, that such a decision should be taken. It is to be accepted that the issue of credentialing of a medical practitioner to practice in the health system is a serious matter. This is evident from the materials in evidence and is a core responsibility of the Health Service and the appellant in conjunction with others such as Dr Graham and the relevant Credentialing Committees. The appellant by her response, acknowledged as much.

56 However, it is not just the seriousness of the subject matter that is relevant. The respondent has acknowledged the need to establish a prima facie case of a breach of discipline, in terms of the criteria in the Suspension Guidelines of "the strength of the evidence". Another factor, of moment in this case, is the financial impact of a suspension without pay on an employee. As to the first matter, there was no reference made at all to the content of the appellant's detailed response dated 31 October 2019, in the respondent's letter of 10 December 2019. No reference was made at all to the "strength of the evidence". No reference was made to the obvious and profound financial impact on the appellant if she was to be deprived of her very substantial income, at her stage in life and having regard to the terms of her fixed term contract of employment. This is especially so in the context of there being no finite time for the investigation to conclude and the length of the process as set out in the Disciplinary Policy. In response to a question from the Appeal Board, the appellant by letter of 30 April 2020, advised that in order to maintain her registration as a medical practitioner, she was working in a private practice for six hours a fortnight as a contractor, but has not done so since 17 March 2020. The appellant was not due to see any patients until 23 May 2020. Otherwise, the appellant has taken some accrued paid leave. She has no other employment.

57 There was no reference at all by the respondent to the matters raised by the appellant's solicitors in response to the proposed suspension without pay, in the solicitor's letter of 22 November 2019. In this letter (see AB34-35), several matters were raised as to why the appellant should not be suspended without pay. Apart from acknowledging the receipt of the letter, the decision of the respondent to suspend the appellant without pay did not refer to any of the issues raised in that correspondence, or the specific content of the Suspension Guidelines. It is open to infer and we do infer, that this failure to address any of the foregoing

matters, leads to the conclusion that these matters were not properly considered by the respondent in its decision to suspend the appellant without pay.

58 For the same reasons, we have come to the conclusion that not only did the respondent fail to comply with the policy framework, but also that such failure to comply constituted a breach of procedural fairness, which the respondent was obliged to observe as a part of its disciplinary processes in any event.

59 As to the allegations themselves, a number of issues arise in relation to the temporary credentialing of the named doctors. Firstly, if it is the respondent's case that the breach of discipline is constituted by the signing of Temporary Credentialing Forms and no more, (see AB197-215), and that is the benchmark, then, on the evidence, both Dr Graham, Dr King and Dr Farrell may also have a case to answer. Secondly, Dr Graham's evidence as to why she said she had no choice but to sign the Temporary Credentialing Form for Dr Lee and to approve Dr King signing the Temporary Credentialing Form for Dr Whitaker, only goes to underscore the need to investigate the relevant surrounding circumstances. This has not occurred in the appellant's case because she was not given access to material that may well shed light on the circumstances in her case. The act of signing the Temporary Credentialing Form in each case does not disclose this. No doubt these matters will be or are the subject of the present investigation.

60 Thirdly, real issues arise in our view, on the face of the documents themselves, in the context of other evidence before the Appeal Board. As the appellant's counsel submitted in his outline of submissions, of the five doctors referred to in allegation one, questions need to be asked in relation to four of them. As to Dr Oke, as mentioned in her letter of 31 October 2019, the appellant understood that Dr Oke was required to be credentialed and applied to the Credentialing Committee. However, as noted above, the Credentialing Committee referred Dr Oke's application back to KEMH for further consideration. Dr Graham acknowledged this but said that as there was then no Committee at KEMH, one had to be formed. This was because the NMHS Credentialing Committee is only for specialists. It would appear that Dr Oke was at the time a junior medical practitioner and the Credentialing Committee minutes of meeting (See AB259) in her case refer to "site processes for credentialing of non-consultant medical practitioners and medical practitioners working under supervision". We note that the Credentialing Standard documents do not apply to registered medical practitioners enrolled in a recognised training program or those working under supervision (see AB151).

61 In relation to Dr Dhillon, the Temporary Credentialing Forms refer to temporary credentialing for KEMH and for BreastScreen WA. The first two Temporary Credentialing Forms (see AB212-213) refer to Dr Dhillon at the KEMH location. Both Temporary Credentialing Forms total six months and no longer. The

second two Temporary Credentialing Forms for Dr Dhillon (see AB214-215), are again for six months but not greater but have the location "BreastScreen WA" on them. Under the HS Order all public health services facilities are declared to be health service areas. Part 2 deals with the NMHS. In cl 7(b) BreastScreen WA is described as a separate "public health service" and is prescribed as a "health service area" This is along with several other public health services, covering different types of health services. By cl 8 the NMHS is established as an HSP for a number of health service areas, as set out in cl 7. From a combined reading of the HS Act and the HS Order it seems at least strongly arguable that KEMH and BreastScreen WA are separate health service areas. That would seem to accord with Dr Menzies' evidence as to his understanding of the scheme. That being so, it is not at all clear from the Temporary Credentialing Forms for Dr Dhillon, that there has been an apparent contravention of the Credentialing Standard, without further enquiry and examination.

62 As for Dr Whitaker, we have already made reference to the evidence of Dr Graham in relation to her discussion with Dr King, who approved further temporary credentialing of Dr Whitaker, even though she had already on the face of the documents, been temporarily credentialed for greater than 180 days. Nothing further is known of these circumstances other than Dr Graham's evidence that Dr Whitaker could not continue to work unless she was further temporarily credentialed.

63 Finally, is Dr Lee (see AB197-200). As mentioned above, Dr Graham gave approval for further temporary credentialing of Dr Lee on 23 October 2019 in circumstances where she said she may not have had policy authority to do so. Prior to this, Dr Lee had been temporarily credentialed for KEMH on two occasions for 180 days in total. On the third occasion, from 30 May 2019 to 30 August 2019 (AB199), Dr Lee, as with Dr Dhillon, was temporarily credentialed for BreastScreen WA for 90 days, and not for KEMH. The final temporary credentialing signed by Dr Graham, was for KEMH.

64 As in the case of Dr Dhillon, and the case of Dr Lee, the circumstances of these changes are unknown, but given the terms of the HS Order, read with the HS Act, they would appear on their face, to require separate temporarily credentialing.

65 In addition to these matters, is the terms of the Credentialing Standard itself. We have already referred to the evidence of Dr Menzies and his views on the provisions of the Credentialing Standard for the temporary credentialing of medical practitioners. Both pars 9 and 9.1 of the Credentialing Standard, have been set out above. They deal with temporary credentialing and extensions to temporarily credentialing, respectively. However, taking Dr Menzies' opinion to be the correct view for the purposes of argument, Dr Graham contravened the Credentialing Standards. Also, if Dr Menzies is correct and there should not be

temporary credentialing beyond 90 days before an application goes before a Credentialing Committee, then it may be arguable that there was evidence of contraventions by persons other than the appellant (See AB197-215).

66 Additionally, as to par 9.1, the three dot points set out, seemingly, are the only circumstances where temporary credentialing may be extended beyond 90 days. Questions of interpretation arise as to the meaning of some provisions of this paragraph, in particular the last dot point. It was Dr Menzies' view that by this stage, any extension is at the discretion of the Credentialing Committee only. This is despite the initial temporary credentialing in par 9, being approved by the Principal Medical Administrator (in this case the appellant). However, the introductory words to par 9.1 are silent as to who may approve the additional maximum period of 90 days. Dr Menzies' view is certainly arguable, but it is not clear cut.

67 Therefore from all of the foregoing, separate to the appellant being denied procedural fairness and there being noncompliance with the policy framework, we have real doubts as to the strength of the evidence of a breach of discipline, in the absence of further evidence in relation to the circumstances surrounding each of the doctors' temporary credentialing in allegation one. In this connection, if the proper construction of par 9.1 is that all three dot points refer to an application being before a Credentialing Committee and only the Credentialing Committee may grant an extension of temporary credentialing, then there is no evidence before the Appeal Board at all, and none before the Health Service when it made its decision to suspend the appellant without pay, at least that was disclosed to her, apart from the minutes of the meeting for Dr Oke, as to whether any other of the circumstances set out in par 9.1 applied to any of the other doctors.

68 The foregoing merely serves to illustrate the need for a fulsome investigation to establish whether the alleged breach of discipline is made out or not.

69 Finally, is allegation seven. In her response of 31 October 2019, as set out above, the appellant admitted that three committees were not convened regularly as they should have been. As to one, the Medical Advisory Committee, the appellant said that she did not disband the committee and assumed that it was meeting as it was chaired by another doctor. The appellant said that given her workload at the time, and in the interests of maintaining patient safety, she had to prioritise her time given her other commitments. Whether or not ensuring that these committees met as they should have, constitutes a breach of discipline, may be an open question. Even if so however, such conduct falls far short of "the most serious of circumstances" to warrant suspension without pay.

70 We have concluded that the appellant was denied procedural fairness in the circumstances leading to her suspension without pay. Also, that the respondent failed to comply with the relevant policy framework in relation to discipline. We also conclude that the respondent has not established justification to exercise the power of suspension without pay in this case. In these circumstances, we consider that the appellant's suspension without pay to be procedurally, substantively, and industrially unfair. We now turn to the issue of remedy.

Remedy

71 The appellant seeks an order to the effect that her suspension without pay be cancelled and that she be restored to her position of Director Clinical Services without loss. Alternatively, the appellant seeks an order that she be suspended with pay and that she be paid for her loss of income.

72 The respondent contended that the Appeal Board has no power to make the first order sought by the appellant. The respondent submitted that the Appeal Board may not "adjust" the respondent's decision by returning her to her full-time duties. The respondent maintained that this is because the appellant was initially suspended on full pay. Subsequently, the appellant was suspended without pay and it is from that decision that the appeal is brought. The respondent submitted that it is clear from ss 164(1)(a) and 172(1)(c) of the HS Act read together, that an appeal may not be brought against an employer's decision to suspend on full pay. Accordingly, as the argument ran, it is not open to mount a collateral attack on a decision not otherwise open to challenge, that being the decision by the respondent to suspend the appellant on full pay.

73 Under s 80I of the Act, the Appeal Board may in relation to various appeals brought before it, "adjust" such matters referred to. Recently, in *Purcell v Western Australia Police* [2020] WAIRC 00246, the Appeal Board had occasion to consider the meaning of the Appeal Board's power to "adjust" matters. At pars 23 - 26 the Appeal Board said:

> 23 For the following reasons, we do not accept the respondent's contentions. Section 80I of the Act is in the following terms:
>
> > **80I. Board's jurisdiction**
> >
> > (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
> >
> > (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;

> (b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (c) an appeal by a government officer under the Health Services Act 2016 section 172 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (d) an appeal, other than an appeal under the Public Sector Management Act 1994 section 78(1) or the Health Services Act 2016 section 172(2), by a government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).
>
> [(2) *deleted*]
>
> (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the Public Sector Management Act 1994 section 94 or 95A.

24 The meaning of "adjust" as used in s 80I was considered by the Industrial Appeal Court in *State Government Insurance Commission v Terence Hurley Johnson* (1997) 77 WAIG 2169. In that case, the Court considered the powers of the Appeal Board under s 80I of the Act to "adjust" a decision of an employer to dismiss a manager for misconduct. The issue had been referred to the Full Bench of the Commission as a matter of law, that being whether the Appeal Board had the jurisdiction to award compensation in a case of unfair dismissal, as a standalone remedy. In this case, in upholding the appeal, Anderson J (Franklyn and Scott JJ agreeing) said at 2170:

> The word "adjust" has various applications in common parlance and in any given case it obtains its precise meaning or sense from the context in which it is used. In this legislation, the context is provided by each of the paragraphs (a) to (e) of s 80I(1) and in the case under consideration the context is provided by para (e). The only "matter" which is referred to in that paragraph is "a decision, determination or recommendation ... that the Government officer be dismissed". It is that, and only that, which may be "adjusted" in the exercise of this particular aspect of the Board's jurisdiction. The power to "adjust" a decision or determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is, by altering the period of notice. He made only a claim for monetary compensation on the ground that the decision of dismissal itself was unfair. Hence, the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus to adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss.

25 It is clear that his Honour considered that "adjust" takes its meaning from the context in which it is used. Scott J at 2171 made observations to that effect also. In *Johnson,* the context was an appeal under s 80I(e) of the Act from a decision by the employer to dismiss the employee. That being so, Anderson J considered ways in which a decision to dismiss may be "adjusted". As his Honour concluded, one obvious way to reform such a decision is to reverse it. There may be other ways, such as a change to any period of notice, but that was not sought by the respondent

> in that case. What the respondent sought in that case was an entirely different decision, which did not involve any change to the decision to dismiss.
>
> 26 In this case, the meaning of "adjust" is to be considered in the context of an appeal under s 80I(b) of the Act. That is an appeal against a decision or finding referred to in subsection (1)(b) of s 78 of the *Public Sector Management Act 1994* (WA). Thus, to obtain the precise meaning of "adjust" in this context, one must go to s 78(1)(b) of the PSM Act to determine the "matter" i.e. the decision or finding that is under challenge. In this case, the relevant "decision" is one to take "disciplinary action" under s 82A(3)(b) of the PSM Act.

74 In this case, the appeal is brought under s 80I(1)(c) of the Act from a decision or finding under s 172(1)(b) of the HS Act. The relevant decision is a decision made under s 164 to suspend a government officer or other employee on partial pay or without pay. The Appeal Board's jurisdiction and powers are conferred by the Act, the *Public Sector Management Act 1994* (WA) and the HS Act. By s 172(2) of the HS Act, a relevant person "aggrieved by a disciplinary decision or finding" (which in this case means a decision under s 164 to suspend on partial pay or without pay) may appeal against *that* decision … under s 80I of the Act. It is that decision that the Appeal Board is empowered to adjust.

75 It is clear from the notice of appeal at Annexure A par 1, that the decision appealed against in this case is the decision of Dr Lawrence set out in her letter of 10 December 2019 to suspend the appellant without pay. The statutory right of appeal under s 172(1) of the HS Act is not from the decision taken by Dr Graham on 2 October 2019. The statutory entitlement to appeal under s 172(1)(c) of the HS Act is not a power to appeal against suspensions generally, but a power to appeal against suspensions of a particular kind i.e. "on partial pay or without pay". The respondent is correct to submit that there is no statutory entitlement to appeal against a decision to suspend a government officer or employee on full pay. Parliament has conferred only a limited right of appeal from a suspension.

76 Given the statutory provisions referred to, we prefer the respondent's approach to this matter. On an appeal, such as this, it is open to the Appeal Board to adjust the employer's decision to suspend on partial pay or without pay. In a case of suspension on partial pay, the obvious way to adjust such a decision would be to reverse it and to restore the employee's full pay. In the case of an appeal from a decision to suspend an employee without pay, such a decision could be adjusted by modifying it to a suspension on partial pay or on full pay, depending on the circumstances. It is not open however, to adjust such a decision by overturning the suspension itself and restoring the appellant to her position. That would involve much more than "adjusting", as explained above, in terms of modifying the decision to suspend without pay, which is the relevant decision the subject of the present appeal.

Conclusions

77 For all the foregoing reasons we would uphold the appeal. An order will be made that the respondent's decision of 10 December 2019 to suspend the appellant without pay be adjusted by reversing it, such that the appellant be suspended on full pay and that the appellant be paid her remuneration over the period from 10 December 2019 to the date of the order. Of course, it will be a matter for the respondent to consider, in light of this decision, whether it wishes to maintain the appellant's suspension or to consider the alternatives open to it under the Disciplinary Policy, such as a variation to the decision to suspend and a temporary relocation of the appellant to other duties.