

**DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2019 WAIRC 00794

**CORAM** : PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER S J KENNER

**HEARD** : THURSDAY, 31 OCTOBER 2019  
WRITTEN SUBMISSIONS 4 AND 5 NOVEMBER  
2019

**DELIVERED** : THURSDAY, 7 NOVEMBER 2019

**FILE NO.** : PSAC 19 OF 2019

**BETWEEN** : CIVIL SERVICE ASSOCIATION (INC.)  
Applicant

AND

DEPARTMENT OF WATER AND ENVIRONMENTAL  
REGULATION  
Respondent

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**Catchwords** : *Industrial Relations Law (WA) - Application for interim relief under s 44 of the Industrial Relations Act 1979 - Application considered - Requisite opinion as to how continuation of employment would encourage the parties to exchange or divulge attitudes or information not formed - Actions of respondent do not evidence an attitude uncondusive to the exchange of information and attitudes - Application dismissed*

**Legislation** : *Industrial Relations Act 1979 (WA) ss 6, 26(1), 44(6)(ba), 44(9)*

**Result** : Application dismissed

**Representation:**

Counsel:

Applicant : Mr M Amati  
Respondent : Mr J Carroll of counsel

Solicitors:

Applicant : Civil Service Association of Western Australia Inc  
Respondent : State Solicitor's Office of Western Australia

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

*Civil Service Association of Western Australia (Inc.) v Department of Education*  
(2019) WAIRC 00644; (2019) 99 WAIG 1564

*Director General Department of Education v The State School Teachers' Union of WA (Inc)* [2011] WAIRC 00058; (2011) 91 WAIG 166

**Case(s) also cited:**

*Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 990

*Reasons for Decision*

- 1 The substantive claim in this matter is one brought under s 44 of the *Industrial Relations Act 1979* (WA) by the applicant on behalf of its member, Mr Byrnes, that his fixed term contract of employment be converted to an offer of permanent employment, in accordance with a document known as “Commissioner’s Instruction No. 23”. This document, published by the Public Sector Commission, sets out criteria for the conversion of fixed term contracts and casual employees engaged in the public sector, to permanency.
- 2 Mr Byrnes has been engaged on a series of fixed term contracts since in or about August 2015, it is alleged. A dispute arises between the parties as to whether Mr Byrnes’ employment history satisfies the terms of cl 2 of the CI, dealing with the criteria for converting or appointing a fixed term contract employee to a permanent position. Specifically, the issue is whether, in accordance with cl 2.1(a) of the CI, Mr Byrnes’ “reason for engagement on a fixed term contract” is, or is not, due to “a circumstance mentioned in the relevant industrial instruments”. If it is, then the criteria are not met. That is the nub of the dispute between the parties. It seems not to be in dispute that the relevant industrial instrument in this case, was s the Public Service Government Officers (CSA) General Agreement 2017.
- 3 The Arbitrator convened a s 44 compulsory conference between the parties on 31 October 2019. At the conference the parties put their respective positions. The remedy sought in the application seeks firstly, an extension of Mr Byrnes’ contracts of employment until such time, as it was described, as the process set out in the CI was finalised, including any possible arbitration of the dispute. Secondly, agreement that Mr Byrnes had worked for the respondent for over four years; that his service was not a circumstance mentioned in a relevant industrial agreement; and accordingly, he is eligible for conversion to permanency in accordance with the CI.
- 4 Whilst the s 44 application did not claim it as such, as the compulsory conference proceeded, it became clear that what in essence the applicant was seeking on behalf of Mr Byrnes, at least in so far as it relates to the first part of the relief claimed, was an interim order under s 44(6)(ba) of the Act. Accordingly, I granted the applicant leave to amend the s 44 application to make this explicit.
- 5 The parties were given an opportunity to file written submissions in support of the application for interim relief, which they have done. In the meantime, as a result of discussions at the compulsory conference, the respondent agreed to extend Mr Byrnes’ employment from its intended cessation date of 31 October 2019 through to 8 November 2019.

6 Section 44(6)(ba) of the Act deals with the Commission’s powers at or in relation to a compulsory conference and is in the following terms:

- (ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —
  - (i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter; or
  - (ii) enable conciliation or arbitration to resolve the matter in question; or
  - (iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question;

and

...

7 It is trite to observe that the exercise of the powers under this provision of the Act arising in the course of a s 44 compulsory conference, are not simply for the asking. Mere reference to s 26(1) of the Act and general notions of fairness are insufficient. The onus is on the party seeking interim orders to establish one or more of the relevant criteria specified in s 44(6)(ba). The Arbitrator must form the opinion, that one or more of the sub-pars (i), (ii) or (iii) are satisfied: *Director General Department of Education v The State School Teachers’ Union of WA (Inc)* [2011] WAIRC 00058; (2011) 91 WAIG 166. It is undoubted that s 44(6)(ba) is to be exercised in accordance with the requirements of the objects of the Act in s 6 and s 26(1). However, it is also trite to observe that s 26(1) is not a head of power, rather, it governs the manner of the exercise of the Commission’s powers in determining matters before it.

8 In its outline of submissions, the applicant relies on s 44(6)(ba)(iii) as I understood the submission. What the applicant submitted was a “material misunderstanding” by the respondent of the facts or the existence of erroneous records. As an extension of this proposition, the submission was made that to encourage the parties to exchange or divulge attitudes or information would in some way, result in a settlement of the matter. The applicant also referred to and relied upon my recent decision in *Civil Service Association of Western Australia (Inc.) v Department of Education* (2019) WAIRC 00644; (2019) 99 WAIG 1564. In that case, which also dealt with an application for interim orders, I had occasion to comment on the nature of the powers conferred on the Commission under s 44(6)(ba) of the Act, and subpar (iii) in particular. Whilst that matter involved a claim that the Union member concerned, who was stood down pending retirement on the grounds of ill health, be returned to work, I commented at pars 9 to 12 as follows:

9. In the earlier submissions of the Association there also seemed to be some reliance on s 44(6)(bb) although the present claim is not, as I have said, a claim of unfair dismissal. I think the applicant now accepts that it cannot rely on s 44(6)(bb)(ii) in those circumstances. Also, for the reasons that I expressed in an earlier decision of the Commission in *State School Teachers' Union v The Director General, Department of Education* (2017) 97 WAIG 1497, the citation of which has been provided to the parties for this afternoon's purposes, the other powers contained in s 44(6)(bb) especially subpar (i), do not provide any independent head of power to support an interim order in s 44 conference proceedings and I do not depart from that view.
10. Section 44(6)(ba)(iii) is a part of the Commission's broad s 44 powers which enables the Commission to do things in the course of an industrial dispute, dealt with by the Commission in a compulsory conference. In my view subpar (iii) of s 44(6)(ba) makes it clear on its plain language, that it is concerned with the Commission's powers to require the parties to exchange information or to divulge their views in relation to the matters in dispute, as an aid in the resolution of a particular industrial dispute. This may include for example, the production of documents or other materials. It may also include the exchange of statements of position on a matters, to reveal a party's position on an issue(s). There are many other examples in my view, which would be caught by this provision.
11. Whilst the s 44(6)(ba) powers are broad and should not be read down, I cannot see any connection between the terms of s 44(6)(ba)(iii) and the return of Mr Pinto to the workplace to restore the status quo, pending the outcome of the s 39 *PSMA* process. Such a proposed order has little to do with the exchange or divulging of information or attitudes and, is, in effect more in the nature of a mandatory injunction, overturning the current suspension. As I have said, in the case to which I have just referred involving Mr Buttery in the interim order application, there needs to be able to be identified a specific power for such an order and with defined criteria for its exercise. As no head of power under s 44 of the Act is available to support the interim order sought by the union in this case, given that s 44(6)(ba)(i) and (ii) are not relied on, in my view there are significant difficulties in the applicant obtaining an interim order on this occasion, as a matter of jurisdiction and power.
12. Even if my view as to the power under s44(6)(ba)(iii) is incorrect, I fail to see on what is before the Commission that such an order would "encourage the parties to exchange or divulge attitudes or information which would assist ... in the resolution of the matter in question" when, as the respondent rightly points out, "the matter in question" as identified in the s 44 application is, in terms of the relief sought, the return to work of Mr Pinto whilst the s 39 *PSMA* process takes its course. Therefore, in any event, the interim order sought is in fact the same as the final relief sought in the s 44 application, which in my view is a further basis for any such purported interim order to be beyond power.

- 9 The applicant sought to distinguish the above case on the facts. It was also submitted by the applicant that a prima facie case was demonstrated in its submissions and that the matter concerns the proper application of the policy intention of the CI.
- 10 The respondent, through its counsel, contended that there was nothing contained in the applicant's written submissions that supported any interim order being made by the Arbitrator. In particular, the contention was put that there is nothing before the Arbitrator that would suggest that maintaining Mr Byrnes in employment, albeit temporarily, would have the effect of encouraging the parties to exchange or divulge attitudes or information which would assist in the resolution of the matters in dispute. Furthermore, in referring to *CSA v Department of Education*, the respondent said that, in reliance on the above passages from my decision, they support the conclusion that there can be no foundation for the Arbitrator to form the required opinion that the making of the interim order sought would encourage the parties to exchange or to divulge attitudes or information. Additionally, it was submitted that there was no indication that the respondent was unwilling to exchange attitudes or information in any event.
- 11 As I have mentioned above, the making of interim orders are not based on general claims as to unfairness or the invocation of s 26(1) of the Act. It is incumbent on an applicant seeking interim orders in a compulsory conference under s 44(6)(ba) of the Act, to establish *how* any of the criteria in subpars (i) to (iii) are met if the order sought is made and how the Commission (in this case the Arbitrator), can reach the requisite opinion. With respect to the applicant's submissions, and the brief history of the dispute to date, what they highlight is a difference of view existing between the parties as to the operation and effect of the CI in relation to Mr Byrnes' employment history. There is nothing in the submissions in support of the application for interim orders, to enable the Arbitrator to reach the requisite opinion as to *how* it is, that Mr Byrnes' continuation in temporary employment at this stage would satisfy the criterion in subpar (iii) to "encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question". The ultimate determination of the matters in dispute in this case, will no doubt turn on the correctness or otherwise, of the parties' views as to the operation and effect of the CI, in the circumstances of Mr Byrnes' employment and his history of fixed term contract engagement.
- 12 Further, on the basis of the history of the matter to date, there is no suggestion to enable me to form the requisite opinion under s 44(6)(ba)(iii) of the Act, that the respondent has not been prepared to divulge information or to exchange attitudes. On the contrary, by its letter of 10 June 2019 to Mr Byrnes, informing him of the

outcome of its review of his circumstances in accordance with the CI, which seemed to have commenced many months prior, whilst concluding that it was its decision that Mr Byrne was not eligible under the CI for conversion to permanency “at this time”, he was invited to “offer information relevant to your employment and engagement that you believe we may not have considered prior to reaching our outcome”. There followed in the months after, substantial written and oral dialogue between the parties, which ultimately did not resolve the matter. This hardly evidences an attitude uncondusive to the exchange of information and attitudes in relation to the matters in dispute.

- 13 I should add too, if there is no resolution of the dispute through conciliation, then Mr Byrnes’ rights are preserved in the event that the dispute is referred for hearing and determination under s 44(9) of the Act.
- 14 Accordingly, not being satisfied that the terms of s 44(6)(ba) of the Act are met in this case, the application for interim orders must be dismissed.