[2021] WASCA 14

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION -v- STATE SCHOOL TEACHERS' UNION [2021] WASCA 14
CORAM	:	BUSS J MURPHY J LE MIERE J
HEARD	:	5 AUGUST 2020
DELIVERED	:	29 JANUARY 2021
FILE NO/S	:	IAC 2 of 2019
BETWEEN	:	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Appellant AND STATE SCHOOL TEACHERS' UNION Respondent

---

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
Coram	:	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
Citation	:	[2019] WAIRC 00755
File Number	:	FBA 15 of 2018

Catchwords:

Industrial law - Industrial relations - Appeal from the Full Bench of the WA Industrial Relations Commission - *Industrial Relations Act 1979* (WA) s 90(1)(b) - Whether the Full Bench erred in its construction or interpretation of s 23 of *Industrial Relations Act 1979* (WA) - Appeal dismissed

Industrial law - Industrial relations - Whether s 23(2a) of the *Industrial Relations Act 1979* (WA) applied to exclude the jurisdiction of the Commission - Whether the matter is in relation to a procedure that has been prescribed under the *Public Sector Management Act 1994* (WA) - Jurisdiction of the Commission is not excluded - Appeal dismissed

Industrial law - Industrial relations - Whether s 23(1) of the *Industrial Relations Act 1979* (WA) empowers the Commission to award compensation for the unfairness of the refusal to employ a worker where the Commission also orders the employer to employ the worker - Any order made by the Commission must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction - Sufficient relationship between compensation order and refusal to employ - Appeal dismissed

Legislation:

Criminal Code (WA)
Industrial Relations Act 1979 (WA)
Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 (WA)
Public Sector Management Act 1994 (WA)
Working with Children (Criminal Record Checking) Act 2004 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr R J Andretich & Mr J Carroll
Respondent	:	Ms P Giles

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	Slater and Gordon

Case(s) referred to in decision(s):

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union (2006) 86 WAIG 1193

Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia (Union and Workers) (1975) 55 WAIG 543

Cliffs WA Mining Co Pty Ltd v The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia (1978) 58 WAIG 1067

Director General, Department of Education v State School Teachers' Union of WA [2019] WAIRC 00754

Director General, Department of Justice v Civil Service Association of Western Australia Inc (2005) 149 IR 160

Federated Miscellaneous Workers Union of Australia, WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service (1994) 56 IR 62

Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia (1992) 45 IR 392

Kwinana Construction Group Pty Ltd v Electrical Trades Union of Workers (WA Branch) (1954) 34 WAIG 51

Metropolitan (Perth) Passenger Transport Trust v Gersdorf (1981) 61 WAIG 611

RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch) (2000) 80 WAIG 2437

Robe River Iron Associates v Association of Draughting Supervisory and Technical Employees of Western Australia (1988) 68 WAIG 11

State School Teachers' Union of WA (Inc) v Director General, Department of Education [2018] WAIRC 00820

JUDGMENT OF THE COURT:

Summary

1 The appellant, the Director General of the Department of Education, appeals from the decision of the Full Bench of the Industrial Relations Commission by which the Full Bench dismissed an appeal from an order of Senior Commissioner Kenner. The Senior Commissioner ordered the Director General to offer a contract of employment to Mr Buttery and, upon Mr Buttery accepting the offer, to pay to Mr Buttery an amount reflecting the salary and benefits he would have earned if he had been employed by the Director General from 2 October 2017, the date on which the Senior Commissioner found the Director General had unfairly refused to employ Mr Buttery. Mr Buttery is a member of the respondent, the State School Teachers' Union of Western Australia (the Union).

2 For the reasons which follow the appeal should be dismissed.

Relevant background

3 The circumstances leading to this appeal are conveniently summarised by the parties in their written submissions.

4 Mr Buttery was employed by the appellant, the Director General, as a teacher from 2008. Mr Buttery commenced as a teacher at Greenfields Primary School in around July 2011.

5 Following an incident between Mr Buttery and a year 4 student on 31 August 2016 at the school, Mr Buttery was charged with common assault in circumstances of aggravation contrary to s 313(1)(a) of the *Criminal Code* (WA).

6 On 8 November 2016 Mr Buttery was issued with an interim negative notice under the *Working with Children (Criminal Record Checking) Act 2004* (WA) (WWC Act). On 10 November 2016 the Teacher Registration Board cancelled Mr Buttery's registration as a teacher.

7 By letter of 11 November 2016 the Director General dismissed Mr Buttery from his employment due to the existence of the interim negative notice.

8 The interim negative notice did not become final. On 21 December 2016 Mr Buttery was issued with an assessment notice under the WWC Act.

9 On 23 December 2016 the Union notified the Director General of the change in Mr Buttery's circumstances and requested that Mr Buttery be reinstated to his position at the school.

10 On 4 January 2017 the Teacher Registration Board reinstated Mr Buttery's registration.

11 By letter of 16 January 2017 the Director General refused the Union's proposal that the Director General re-employ Mr Buttery.

12 By letter of 24 January 2017 the Union again requested that the Director General re-employ Mr Buttery. By letter of 3 February 2017 the Director General refused to re-employ Mr Buttery.

13 On 2 February 2017 the teaching vacancy that was created following Mr Buttery's dismissal was filled by an employee contracted to work on a 12 month fixed term basis.

14 On 21 February 2017 the Union made an application to the Industrial Relations Commission under s 44 of the *Industrial Relations Act 1979* (WA) (IR Act) seeking that the Director General employ or re-employ Mr Buttery.

15 On 19 June 2017 the criminal charge against Mr Buttery was discontinued.

16 On 20 June 2017 the Union again wrote to the Director General requesting that the Director General employ Mr Buttery as a teacher at the school.

17 By letter of 2 October 2017 the Director General advised Mr Buttery that she was satisfied that he had acted in a manner inconsistent with the Code of Conduct, that he had engaged in excessive physical contact with a student, that his employment record would remain marked 'not suitable for future employment' by the Department and that she imposed a reprimand.

18 On 12 March 2018 the Commission referred the matter, being the matter set out in the Memorandum of Matters Referred for Hearing and Determination under s 44 of the IR Act dated 12 March 2018

(the Memorandum), for hearing and determination pursuant to s 44(9) of the IR Act.

19 The matter was heard by the Senior Commissioner Kenner between 30 July and 2 August 2018. Following the trial, Senior Commissioner Kenner:

(a) held that s 23(2a) of the IR Act did not exclude the jurisdiction of the Commission to enquire into and deal with the matter;

(b) found that it was unfair for the Director General to have refused to employ Mr Buttery from 2 October 2017; and

(c) made orders requiring the Director General to:

(i) offer Mr Buttery a contract of employment as a primary school teacher, at a level and salary commensurate with Mr Buttery's qualifications and experience, upon Mr Buttery presenting himself to the Director General's head office on 4 December 2018; and

(ii) pay Mr Buttery an amount reflecting the salary and benefits he would have otherwise earned if he had remained employed by the Director General from 2 October 2017 to the date of any acceptance of the above offer of re-employment, less any income received by Mr Buttery from other employment over the same period.[1]

20 The Director General appealed to the Full Bench of the Industrial Relations Commission from the Senior Commissioner's decision on eight grounds. Ground 1 alleged that the Senior Commissioner erred in law in failing to find that the Commission had no jurisdiction to enquire into and deal with the matter as a result of s 23(2a) of the IR Act. Ground 8 alleged that the Senior Commissioner erred in law in ordering the Director General to pay Mr Buttery an amount of compensation for what he would have earned if he had remained employed by the Director General for the period 2 October 2017 until the date he accepted an offer of employment, on the basis that there is no power for the Commission to make such an order absent a legal right to compensation.

[1] ***State School Teachers' Union of WA (Inc) v Director General, Department of Education*** [2018] WAIRC 00820.

21 The Full Bench unanimously dismissed ground 1 of the Director General's appeal. Ground 1 of the appeal to this court essentially alleges that the Full Bench erred in dismissing that ground.

22 The Full Bench by majority dismissed ground 8 of the Director General's appeal to the Full Bench. In dissent, Chief Commissioner Scott held that the Commission had no power to award compensation to Mr Buttery. Ground 2 of the appeal to this court alleges that the majority of the Full Bench erred in dismissing that ground, essentially for the reasons that the Chief Commissioner held in respect of ground 8.

Appeal from Full Bench to this court

23 Section 90(1) of the IR Act 1979 provides that an appeal lies to this court from a decision of the Full Bench -

> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter; or
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground.

24 It appears that the Director General brings her appeal in reliance upon s 90(1)(b). Specifically, the Director General submits that the decision of the Full Bench is erroneous in law in that the Full Bench erred in the construction or interpretation of s 23(2a) of the IR Act in the course of making the decision appealed against.

Appeal ground 1

25 Appeal ground 1 is:

> 1) The Full Bench erred in law in deciding section 23(2a) of the *Industrial Relations Act 1979* (WA) did not apply to exclude the jurisdiction of the Commission in these proceedings because an order to employ made by the Commission to dispose of a refusal to employ application did not involve the filling of a vacant office, post or position.

PARTICULARS

(a) Section 23(2a) of the *Industrial Relations Act* prevents the Commission from embarking on an inquiry into any 'matter' referred to in that sub-section.

(b) The Full Bench considered that section 23(2a) of the *Industrial Relations Act* only limits the relief that can be granted by the Commission, and does not prevent the Commission from enquiring into a 'matter' referred to in that sub-section.

Appeal ground 1 - the Director General's argument

26 Section 23(1) of the IR Act confers on the Commission jurisdiction 'to enquire into and deal with any industrial matter'. It is common ground that the matter set out in the Memorandum was an industrial matter and hence the Commission had jurisdiction to enquire into and deal with the matter, unless its jurisdiction was otherwise excluded. The Director General submits that the jurisdiction of the Commission is excluded by IR Act s 23(2a) which provides:

> Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act.

27 Section 97(1)(a) of the *Public Sector Management Act 1994* (WA) (PSM Act) provides that the functions of the Commissioner under pt 7 of the PSM Act include the making of recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures for, amongst other things, employees and other persons to obtain relief in respect of the breaching of Public Sector standards.

28 Section 98(a) of the PSM Act provides that the Governor may, under s 108, make regulations prescribing procedures referred to in s 97(1)(a) and specifying those employees and persons, if any, who are not eligible to seek relief in accordance with those procedures.

29 Public Sector standards are issued by the Public Sector Commissioner pursuant to PSM Act s 21. PSM Act s 21(1)(a)(i) provides for the Public Sector Commissioner to issue instructions establishing Public Sector standards setting out minimum standards of merit, equity and probity to be complied with in the Public Sector in, amongst other things, the recruitment, selection and appointment of employees.

30 By notice published in the *Gazette* on 11 February 2011 pursuant to PSM Act s 21(1)(a)(i), the Public Sector Commissioner published a Commissioner's Instruction entitled Employment Standard, which applies to employees employed by employing authorities of public sector bodies, which includes the Department.

31 Having regard to the provisions of the PSM Act to which we have referred and the Employment Standard, the effect of IR Act s 23(2a) is that the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure for employees to obtain relief in respect of the breaching of the Employment Standard is prescribed under the PSM Act.

32 The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA) (Breaches of Standards Regulations) made under the authority of the PSM Act, prescribes a procedure for dealing with claims for relief for breach of reviewable decisions.

33 Regulation 6 of the Breach of Standards Regulations provides that if a person considers that, in making a 'reviewable decision', a relevant employing authority (which includes the Director General) of a public sector body has breached the Public Sector standard and the person is adversely affected by the breach, the person may make a claim for relief to the public sector body. A 'reviewable decision' means a decision made by the employing authority as the result of the completion of a process to which a Public Sector standard applies. See reg 3(1).

34 Therefore, the jurisdiction of the Commission to enquire into and deal with the matter set out in the Memorandum that was referred to it on 12 March 2018 for hearing and determination pursuant to IR Act s 44(9) is excluded by IR Act s 23(2a), if that matter is a matter in respect of a decision made by the Director General as a result of the completion of a process to which the Employment Standard applies and hence is a matter in respect of which a procedure referred to in IR Act s 97(1)(a) has been prescribed under the PSM Act.

35 That analysis is consistent with the decision of this court in ***Director General Department of Justice v Civil Service Association of Western Australia Inc***,[2] on which the Director General relies.

[2] ***Director General, Department of Justice v Civil Service Association of Western Australia Inc*** (2005) 149 IR 160.

36 The Director General submits that the matter referred for hearing and determination by the Commission is a matter in respect of which the Employment Standard applies and hence is a matter in respect of which a procedure referred to in IR Act s 97(1)(a) has been prescribed under the PSM Act and therefore the jurisdiction of the Commission to enquire into and deal with that matter is excluded by IR Act s 23(2a).

The Employment Standard

37 It is critical whether the matter before the Commission was a matter to which the Employment Standard applies. It is therefore necessary to refer to the Employment Standard in some detail.

38 The Employment Standard states that it applies:

> When filling a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting) in the Western Australian Public Sector.

Vacancy is defined as:

> A vacant post, office or position within the public sector. A vacancy can result from the creation of a new office, post or position or by the temporary or permanent movement of another employee. For redeployment purposes a vacancy is defined as all offices, posts or positions, newly created, recently vacated or to be filled on a temporary basis in excess of six months.

39 The Employment Standard requires four principles to be complied with when filling a vacancy. The first is the Merit Principle which is stated in these terms:

> The Western Australia public sector makes employment decisions based on merit. Merit usually involves the establishment of a competitive field. In applying the merit principle a proper assessment must take into account -
>
> (a) the extent to which the person has the skills, knowledge and abilities relevant to the work related requirements and outcomes sought by the public sector body; and
>
> (b) if relevant, the way in which the person carried out any previous employment or occupational duties.

Competitive field is defined as:

> A field which includes more than one person who meets the requirements of the vacant position; competitive fields are generally achieved through the advertising of a vacancy.

Employment decision is defined as:

> A decision to recruit, select, appoint, transfer, second or act [as] an employee.

Recruitment is defined as:

> The process used by an agency to attract, assess and select applicants to fill a vacancy.

40 The fourth principle is the Transparency Principle which is that decisions are to be transparent and capable of review.

Ground 1 - Full Bench reasons

41 Commissioners Emmanuel and Walkington agreed with the Chief Commissioner's reasons in relation to ground 1.

42 The Chief Commissioner found that the circumstances of the case do not meet the circumstances which are dealt with in the Employment Standard and therefore the Commission's jurisdiction is not excluded and ground 1 of the appeal was not made out.

43 After referring to IR Act s 23(2a); PSM Act s 97(1)(a); the Breaches of Standards Regulations; the decision of this court in ***Director General Department of Justice v Civil Service Association of Western Australia Inc***;[3] evidence before the Senior Commissioner; and the contentions of the Director General, the Chief Commissioner said that the question that arises is whether the current circumstances require or relate to the filling of a vacancy as covered by the Employment Standard.

44 Having posed the question whether the Commission's jurisdiction is excluded by the existence of the Employment Standard and the provision for review under the Breaches of Standards Regulations, the Chief Commissioner said:

> What is sought in the matter referred for hearing and determination is that the Director General re-employ Mr Buttery. The Standard and CI 2 are specified as dealing with the filling of a vacancy. They appear to cover all possible options relating to filling a vacancy. However, they do not say that a person cannot be employed without there being a vacant position.

[3] ***Director General, Department of Justice v Civil Service Association of Western Australia Inc*** (2005) 149 IR 160.

> Ms Barnard's evidence demonstrates that when positions are abolished, some teachers remain employed, that is, in a contract of service with the Director General, until they can be formally allocated to a position, whether that position be vacant due to the incumbent, for example, acting up, taking leave or being on secondment. Alternatively, there may be a vacant position into which they can be transferred at level.
>
> In this case, the Commission was asked to order the Director General to re-employ Mr Buttery in his former position. However, the Commission is not bound to the limits of the remedy sought (s 26(2) of the IR Act). In this case, the [Union] made clear that while it sought re-employment in Mr Buttery's former position at Greenfields Primary School, another position in the area would be acceptable.
>
> In the circumstances, then, what was sought was the re-establishment of the employment relationship. It might mean that Mr Buttery would be supernumerary until he could be placed in a particular position. The re-employment, that is, the re-establishment of the employment relationship, would be a step prior to the filling of a vacancy, or the other steps dealt with in the Standard. The Standard would come into play after the re-establishment of the employment relationship, if Mr Buttery is to be placed in a vacant position.
>
> In this way, the learned Senior Commissioner did not err. The matter excluded by s 23(2a) relates to procedures prescribed for the filling of a vacancy. It is to be distinguished from the creation or re-establishment of the employment relationship. The filling of the vacancy is the next step. It is the next step which is the matter excluded due to the prescribed procedure.
>
> Therefore, where the ground of appeal alleges error in two ways, firstly regarding the Commission's jurisdiction being excluded by s 23(2a) and secondly, that the Director General could not accede to a request to re-employ because of the Standard, I would dismiss this ground.[4]

The matter heard and determined by the Commission

45 IR Act s 44 provides for the Commission to conduct a compulsory conference. IR Act s 44(9) provides that where at the conclusion of a conference any question, dispute or disagreement in relation to an industrial matter has not been settled, the Commission may hear and determine that question, dispute or disagreement and may make an order binding the parties to that question, dispute or disagreement.

46 The question, dispute or disagreement heard and determined by the Senior Commissioner is set out in the Memorandum. The

[4] ***Director General, Department of Education v State School Teachers' Union of WA*** [2019] WAIRC 00754 [233] - [238].

Memorandum is a lengthy eight page document. The Memorandum sets out in some detail the circumstances leading to, and subsequent to, the termination of Mr Buttery's employment; the various applications and hearings before the Commission; and the submissions and contentions of the parties.

47 The Memorandum states that the Union seeks the following orders:

1. the Director General reinstate or re-employ Mr Buttery on terms and conditions that are no less favourable than his previous position with the Department; and

2. the Director General pay Mr Buttery the amount that reflects the income (including superannuation) he would have earned for the period from 21 February 2017 to date; or

3. in the event Mr Buttery is found to have engaged in misconduct sufficient to justify termination of his employment, the Director General pay Mr Buttery an amount that reflects the income and superannuation he would have earned from 21 February 2017 to 2 October 2017.

Error alleged by Director General

48 The Director General submits that it is clear from the Memorandum that the subject matter of the dispute before the Commission was the Director General's refusal to employ Mr Buttery in a teaching position at Greenfields Primary School. The Director General also submitted that the Union's written opening submissions at first instance make it clear that what was sought was an order that the Director General reinstate or re-employ Mr Buttery to a teaching position at Greenfields Primary School, and further that Mr Buttery accepted under cross-examination that the requests made by the Union for him to be employed were requests that he be employed in his former position at Greenfields Primary School. In those circumstances, the Director General submitted that the whole subject matter of the dispute referred for hearing and determination was the issue of the Director General's refusal to employ Mr Buttery to a teaching position at Greenfields Primary School, or at least some position, on the same terms and conditions upon which he was previously employed.

49 The Director General submits that the Chief Commissioner erred in construing s 23(2a) of the IR Act in that the Chief Commissioner

considered that because the Commission had the power to 'deal with' the 'matter' by ordering that the employment relationship be established rather than ordering that the Director General appoint Mr Buttery to a position, the 'matter' was not excluded.

50 The Director General submits that IR Act s 23(2a) provides that the Commission does not have jurisdiction 'to enquire into and deal with' any matter in respect of which a relevant procedure is prescribed. Therefore, the Director General submits the Commission is prevented from embarking on any inquiry into the 'matter' of public sector appointments to vacancies, which includes both a position and the creation of a new position. The whole subject matter of the dispute, the Director General submitted, was the Union's dissatisfaction with the Director General's refusal to employ Mr Buttery in a position as a teacher at Greenfields Primary School or a teacher with the same terms and conditions of his previous position. Such a 'matter' is a matter excluded from the jurisdiction of the Commission and the Full Bench erred in holding that the Senior Commissioner did not err in deciding otherwise.

Evaluation of ground 1

51 We do not agree with the Director General's submission. The matter referred to the Commission was the question, dispute or disagreement in relation to an industrial matter contained in the Memorandum. The 'matter' is the controversy between the Director General and the Union comprised of the substratum of facts and claims representing or amounting to the question, dispute or disagreement between them. It is not the specific claim for relief by the Union. It is the whole controversy referred to the Commission in respect of which it was the function of the Commission to enquire into and deal with. It included at least the Union's claim that the Director General had refused to employ Mr Buttery and her refusal was unfair and the Union's claim that the Director General employ Mr Buttery. The Chief Commissioner found in effect that the Director General's decision not to employ Mr Buttery was not a decision as the result of the completion of a process to which the Employment Standard applies.

52 We agree with the Union that establishing an employment relationship is different from filling a vacancy under the Employment Standard. It may be that, ordinarily within the public service, persons are only employed to fill a vacancy. However, the Full Bench found, in effect, that the Director General may employ (including re-employ) a

person without filling a vacancy, that is, without appointing the person to a vacant post, office or position. The Full Bench made a finding of fact that there are a substantial number of persons employed by the Department who do not occupy any office, post or position.

53 The Director General, in her grounds of appeal, said that the Full Bench erred in that it considered that s 23(2a) of the IR Act only limits the relief that can be granted by the Commission and does not prevent the Commission from enquiring into and dealing with a 'matter' referred to in that subsection. We do not agree that the Full Bench so erred.

54 At [235] the Chief Commissioner said:

> In this case, the Commission was asked to order the Director General to re-employ Mr Buttery in his former position. However, the Commission is not bound to the limits of the remedy sought (s 26(2) of the IR Act). In this case, the [Union] made clear that while it sought re-employment in Mr Buttery's former position at Greenfield Primary School, another position in the area would be acceptable.[5]

55 The Chief Commissioner was there dealing only with the relief that the Commission was being asked to grant. The Chief Commissioner was not there defining the 'matter' before the Commission. The 'matter' is not confined to any specific relief sought by the Union. The Chief Commissioner found, correctly, that the 'matter' was the controversy between the Director General and the Union. The controversy was the Director General's refusal to employ Mr Buttery in the circumstances set out in the Memorandum. That is apparent from the following paragraphs of the Chief Commissioner's reasons.

56 At [211] the Chief Commissioner found that the Commission's jurisdiction was not excluded because 'the circumstances of the case do not meet the circumstances which are dealt with in the Standard'.[6]

57 At [233] the Chief Commissioner said:

> What is sought in the matter referred for hearing and determination is that the Director General re-employ Mr Buttery. The Standard in clause 2 as specified is dealing with the filling of a vacancy. They appear to cover all possible options relating to filling a vacancy.

---

[5] ***Director General, Department of Education v State School Teachers' Union of WA*** [2019] WAIRC 00754.

[6] ***Director General, Department of Education v State School Teachers' Union of WA*** [2019] WAIRC 00754.

> However, they do not say that a person cannot be employed without there being a vacant position.[7]

58 At [236] the Chief Commissioner said:

> What was sought was the re-establishment of the employment relationship. It might mean that Mr Buttery would be supernumerary until he could be placed in a particular position. The re-employment, that is, the re-establishment of the employment relationship, would be a step prior to the filling of a vacancy, or the other steps dealt with in the Standard. The Standard would come into play after the re-establishment of the employment relationship, if Mr Buttery is to be placed in a vacant position.[8]

59 The Chief Commissioner found therefore that the Employment Standard did not apply to the Director General's refusal to employ Mr Buttery. Even if the Chief Commissioner erred in making that finding, it is not an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making her decision, within s 90(1)(b) of the IR Act and hence an appeal does not lie to this court from the decision, because the Employment Standard is not an Act, regulation, award, industrial agreement or order. See, generally, s 21 of the PSM Act in relation to the status of the Employment Standard.

60 In any event, we are not satisfied that the Chief Commissioner erred in making that finding. The Employment Standard applies to filling a vacancy. There was no vacancy to fill. The matter referred to the Commission for hearing and determination was not confined to the Union demanding that Mr Buttery be appointed to the position at Greenfields Primary School which he had previously held. That position was held by another person and was not vacant. The Union's claim was more broadly that the Director General had unfairly refused to employ Mr Buttery and should employ him. The claim was not limited to the assertion that he be appointed to fill a particular vacancy.

61 The Full Bench made no error in construing s 23(2a) of the IR Act or in finding that s 23(2a) did not apply to exclude the jurisdiction of the Commission to hear and determine the matter referred to it as set out in the Memorandum. Ground 1 of the appeal is not made out.

---

[7] ***Director General, Department of Education v State School Teachers' Union of WA*** [2019] WAIRC 00754.

[8] ***Director General, Department of Education v State School Teachers' Union of WA*** [2019] WAIRC 00754.

Appeal ground 2

62 Appeal ground 2 is:

> 2) The majority erred in law in concluding that section 23 when read with section 44(9) of *the Industrial Relations Act 1979* (WA) conferred upon the Commission an implied power to award compensation for the unfairness for the refusal to employ Mr Buttery from 2 October 2017.
>
> PARTICULARS
>
> (a) Neither section, nor when read together, either expressly or by implication confers a power to award compensation or the unfairness of a decision.
>
> (b) The award had no connection with the order made that Mr Buttery be employed from the date he presented himself for employment.
>
> (c) No order was made pursuant to section 39(3), as it could have, that Mr Buttery be employed from 2 October 2017, in the event that there were special circumstances that made it fair and right to do so.

63 The question raised by this ground is whether IR Act s 23(1) empowers the Commission to order an employer to pay money to a worker as compensation for the salary and benefits lost by the worker as a result of the employer unfairly refusing to employ the worker, where the Commission orders the employer to employ the worker. That is a question of the proper construction of s 23(1) of the IR Act.

The IR Act

64 The IR Act is an Act to consolidate and amend the law relating to the prevention and resolution of conflict in respect of industrial matters, the mutual rights and duties of employers and employees, the rights and duties of organisations of employers and employees and for related purposes.[9]

65 Subject to the Act, the Commission has the cognisance and authority, that is jurisdiction and power, to enquire into and deal with any industrial matter.[10]

[9] *Industrial Relations Act 1979* (WA) (IR Act), Long Title.
[10] IR Act s 23(1).

66 The term 'industrial matter' is broadly defined in IR Act s 7 to mean any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein. Furthermore, the refusal to employ any person in any industry is expressly included. An industrial matter also includes, excluding matters not presently relevant, any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute. The controversy between the Director General and the Union, including the refusal of the Director General to employ Mr Buttery, is an industrial matter.

67 The general powers of the Commission are set out in s 23 of the IR Act. The Commission has authority to 'enquire into and deal with' any industrial matter. The power to 'deal with' an industrial matter is a very wide power. The usual meaning of 'deal with' is to take action in order to achieve something or in order to solve a problem. The power in s 23(1) is confined by the scope and purpose of the Act as well as the express restrictions stipulated. In general, the power is a power to make orders reasonably appropriate and adapted to preventing or resolving conflict in respect of industrial matters.

68 The Director General submits that the Commission has no power to award compensation for the unfairness of the refusal to employ a person. The Director General's argument is based upon the ***Pepler*** line of cases to which we will now turn.[11]

Authorities before *Pepler*

69 A number of cases under the IR Act and its predecessor, the *Industrial Arbitration Act 1912* (WA), confirmed the jurisdiction of the Commission to order the reinstatement or re-employment of dismissed employees and compensation for wages lost during the cessation of employment.

70 In ***Kwinana Construction Group Pty Ltd v Electrical Trades Union*** (***Kwinana Construction***),[12] the Court of Arbitration considered whether the Conciliation Commissioner, acting under delegated power from the Court, had power to order re-employment under the *Industrial Arbitration Act* which conferred on the court jurisdiction and power 'to

[11] ***Robe River Iron Associates v Association of Draughting Supervisory and Technical Employees of Western Australia*** (1988) 68 WAIG 11 is commonly known as ***Pepler's*** case.
[12] ***Kwinana Construction Group Pty Ltd v Electrical Trades Union of Workers (WA Branch)*** (1954) 34 WAIG 51, 51.

settle and determine … all industrial matters and disputes'. The President, Justice Jackson, with whom Member Davies agreed, held:

> … in determining a dispute consequent on a dismissal the Court has power to make an order for reinstatement and such other incidental matters, including payment of wages from the time of dismissal, as the Court considers just and equitable. To hold otherwise would be to imply some restriction on the Court's powers of settling and determining a dispute for which there was no warrant in the Act.[13]

71 In 1975 this court confirmed the power of the Commission, under the *Industrial Arbitration Act*, to order an employer to employ a worker it had unfairly refused to employ, and to pay a sum of money representing lost wages during the period the employer had refused to employ the worker.

72 In ***Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia (Union and Workers)***[14] (the ***Princess Margaret Hospital*** case), the hospital agreed to employ one Brown as a senior radiographer. Before he commenced work Brown was advised that his services would not be needed. The hospital objected that there was no jurisdiction as it was not an industrial matter because, at least following the hospital's decision, there was no contract of employment and therefore no employer and employee relationship. Justice Burt, with whom Wickham and Wallace JJ agreed, said that there had been a refusal to employ. They also said that the refusal was an industrial matter and that an order to employ Brown was an order within power, being an order made 'determining the industrial matter in dispute'. Further, the court held that the Commission had jurisdiction to make an order requiring the employer to employ the worker if he presented himself for work, and to order the payment by it of a money sum representing the amount lost by the worker between the date of the employer's refusal to employ him and the date on which he accepted employment.

73 In ***Metropolitan (Perth) Passenger Transport Trust v Gersdorf***,[15] this court had to decide whether the Commission had jurisdiction under

---

[13] ***Kwinana Construction Group Pty Ltd v Electrical Trades Union of Workers (WA Branch)*** (1954) 34 WAIG 51, 51.
[14] ***Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia (Union and Workers)*** (1975) 55 WAIG 543.
[15] ***Metropolitan (Perth) Passenger Transport Trust v Gersdorf*** (1981) 61 WAIG 611.

the IR Act to order re-employment of the worker who had been dismissed and to make an order in the nature of damages in favour of the employee. Justice Brinsden observed that in a series of decisions the right of the Commission to order re-employment was clearly recognised. His Honour observed that both in the ***Kwinana*** case and in the ***Princess Margaret Hospital*** case, the right of the Commission to make a supplementary order, not only ordering re-employment but also that the employer compensate the employee for lost wages between the date of cessation of the employment and the re-employment, was recognised. His Honour added:

> The present Act [ie the IR Act] is silent as to what orders the Commission may make if it finds that an employee had been unfairly dismissed but it seems that it may make an order for an amount to be paid to the employee representing the wages lost during the period of unemployment less whatever the employee may have earned from employment with another employer during the same period, by reason of the definition of 'industrial matter' in the Act. Such an order may be likened to an order in the nature of damages.[16]

74 It can be seen that prior to the decision of this court in the ***Pepler*** case, to which we will shortly turn, it was well established that the Commission had power to order that an employer compensate a dismissed employee for lost wages between the date of cessation of his employment and his re-employment. Similarly, in the case of an unfair refusal to employ it was established that the Commission had power to order that an employer employ the worker and compensate the worker for loss resulting from the unfair refusal to employ them represented by the wages they would have earned between the date of the refusal to employ and the commencement of employment pursuant to the order of the Commission.

The *Pepler* cases

75 Until 1988 the Commission awarded compensation in unfair termination cases where the applicant was not seeking reinstatement or re-employment.[17]

76 In 1986 the Association of Drafting Supervisory and Technical Employees sought a conference pursuant to IR Act s 44 upon the ground that it disputed the dismissal of three members of the salaried

[16] ***Metropolitan (Perth) Passenger Transport Trust v Gersdorf*** (1981) 61 WAIG 611, 614.
[17] Eg ***Cliffs WA Mining Co Pty Ltd v The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia*** (1978) 58 WAIG 1067.

staff of Robe River, including Mr Pepler. The dispute could not be settled by agreement and the Commissioner determined the matter by arbitration.

77 The Commissioner found that Mr Pepler and the two other employees were unfairly dismissed. It found that the relationship between Mr Pepler and the respondent had broken down irretrievably and so awarded Mr Pepler compensation but did not reinstate him. An appeal by Robe River to the Full Bench was unsuccessful. On appeal to this court, the court allowed the appeal and set aside the order awarding compensation.[18]

78 Justice Kennedy posed the question whether, if in the exercise of its discretion, the Commission declines to order an employer to re-employ a dismissed employee 'it has the jurisdiction to make an order that the employer compensate the employee, and in particular, that the employer compensate the employee beyond any amount which the employee could reasonably have recovered at common law'. His Honour answered the question negatively, holding that the Commission did not have power to order compensation without ordering re-employment.

79 Justice Olney observed that in the ***Kwinana Construction*** case Jackson J took the view that the power of the court to order payment of wages from the time of dismissal was a power incidental to the power to make an order for reinstatement. Justice Olney said:

> There is nothing in the Act to justify the exercise of a jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement or re-employment.[19]

80 Justice Rowland held in effect that the power to award compensation depended upon the existence or reactivation of an employment relationship:

> … the order for reinstatement or re-employment retains or reactivates the industrial basis for the dispute ie the relationship of employer and employee. There is no such nexus involved with relief that does not retain that relationship. Where the dispute, like the present, is resolved solely on the issues in the dispute between the particular former

[18] ***Robe River Iron Associates v Association of Draughting Supervisory and Technical Employees of Western Australia*** (1988) 68 WAIG 11, 17, commonly known as ***Pepler's*** case.
[19] ***Pepler's*** case, 20.

> employer with the particular ex-employee, there is no charter to make orders that are not part of a reactivated industrial relationship.[20]

81 It is clear that in ***Pepler's*** case the court did not doubt the jurisdiction of the Commission to order compensation where the Commission ordered an employer to re-employ a dismissed employee or to employ a worker unfairly refused employment.

82 In ***Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia***,[21] the Commission awarded a redundancy payment to a truck driver who had been dismissed in accordance with the provisions of the award. The court held that the Commission did not have power to do so. Justice Owen, with whom the other members of the court agreed, adopted the 'employment relationship' approach of Rowland J in ***Pepler's*** case. Justice Owen said, in a statement which has been often repeated:

> The judgments in ***Pepler*** suggest that the decision rests upon a point of principle, namely, that jurisdiction depends on the present or future existence of the employer/employee relationship. Unless, at the time when the application is made, the relationship actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an 'industrial matter' is missing. The very language of the judgments carries this implication.[22]

83 It is clear that in ***Kounis***, the court did not doubt the jurisdiction of the Commission to order compensation where the Commission ordered an employer to re-employ a dismissed employee or to employ a worker unfairly refused employment.

84 In ***Federated Miscellaneous Workers Union of Australia WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service***,[23] the appellant union asked the court to overrule its decision in ***Pepler's*** case. The respondent dismissed four employees. Shortly after the dismissals the respondent disposed of its business to an unrelated company. The Commission found the dismissals were harsh and unfair. Re-employment was not possible as the respondent had gone out of business. The Commission ordered the respondent to pay monetary compensation to the unfairly dismissed employees.

---

[20] ***Pepler's*** case, 22.
[21] ***Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia*** (1992) 45 IR 392.
[22] ***Kounis***, 402 - 403.
[23] ***Federated Miscellaneous Workers Union of Australia, WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service*** (1994) 56 IR 62.

85 On appeal, this court found that there was a cogent argument for overruling ***Pepler's*** case. Justice Anderson, with whom Kennedy and Franklyn JJ agreed, said:

> The doctrine laid down in Pepler's case is not that the authority of the Commission ceases with the cessation of the employment, but that there is a limitation on the powers of the Commission in such circumstances, in the particular way the Commission may thereafter 'deal' with the matter.[24]

Justice Anderson held that the continuation of the contract of service is not a jurisdictional fact. His Honour continued:

> As long as the jurisdiction of the Commission continues in respect to a matter on the ground that it is an industrial matter there is much to be said for the view that the Commission has full authority to 'deal' with it. As to how it may be dealt with, by reference to the scope and objects of the Act it is apparent that in the case of an industrial matter in the form of an industrial dispute over dismissals the Commission may deal with it by settling it. It has long been accepted that an appropriate method of settlement or resolution may be to order re-employment, and payment of compensation to those who accept re-employment. It is not readily apparent why it should be regarded as always beyond power to make orders for compensation to those who are not re-employed. Arguably each case should be treated on its merits, and the question whether compensation should be ordered in a particular case should not depend on whether the person is or is not re-employed but only on whether compensation is truly ordered for the purpose of resolving a matter that is truly an industrial matter, and whether, in the particular case, a compensation payment (both of itself and as to its amount) is appropriate to the industrial matter and has a natural tendency to dispose of the dispute comprising the industrial matter.[25]

Justice Anderson recognised that there may be cases in which the claim by, or on behalf of, a dismissed employee for compensation has an insufficient industrial character. Justice Anderson continued:

> In this case there is no doubt the matter began as an industrial matter in the form of a dispute about conditions of employment and job security. It was properly before the Commission as a matter within jurisdiction. After jurisdiction had been invoked by the s 44 application the employer dismissed the union members concerned. That certainly did not resolve the dispute although it necessarily altered the way in which the Commission could 'deal' with it. For a time reinstatement was available as a means of resolving the matter. By the time of remedy,

---

[24] ***Federated Miscellaneous Workers Union of Australia, WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service*** (1994) 56 IR 62, 66.

[25] ***Federated Miscellaneous Workers Union of Australia, WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service*** (1994) 56 IR 62, 66 - 67.

> however, by reason of the actions of the employer in the restructuring of its operations, that was not possible. On those facts I do not find it easy to see why, in point of principle, the Commission should be stopped on jurisdictional grounds from settling the dispute by ordering payment of a money sum to the affected persons. The salutary and remedial nature of such a determination might go beyond the particular workers and affect the employer's attitude to the employer/employee relationship generally, and the employer's future industrial behaviour, to the benefit of its other employees.[26]

86 However, the court declined to overrule ***Pepler's*** case. Justice Anderson explained:

> Having said that, however, I think it is now too late for us to hold that the Commission does have authority to make orders for compensation to dismissed workers who are not also re-employed. ***Pepler's*** case is of comparatively long standing, and was decided after careful consideration and a thorough examination of the question. In this area of law there is as much need for certainty and continuity as in any other. Even if we were to conclude that a conclusion different from the conclusion reached in ***Pepler's*** case is to be preferred that would not be a sufficient ground to overrule ***Pepler's*** case. The question is by no means free from doubt and it cannot be said that ***Pepler's*** case is obviously or manifestly wrong, or that the principle established by it goes against principles established elsewhere in Australia as regards the jurisdictional limits of industrial courts and tribunals. And there has been ample opportunity for Parliament to change the law.[27]

87 Subsequently, Parliament did change the law. Section 23A was introduced into the IR Act in 2002. Section 23A(6) provides that if the Commission considers reinstatement or re-employment would be impracticable, the Commission may order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.

88 The ***Pepler*** line of cases was considered by this court in ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)***.[28] The case was concerned with the insertion into an award of a 'freedom of choice' clause to allow future employees to decide whether they would be employed under the *Workplace Agreements Act*

---

[26] ***Federated Miscellaneous Workers Union of Australia, WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service*** (1994) 56 IR 62, 67.
[27] ***Federated Miscellaneous Workers Union of Australia, WA Branch v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service*** (1994) 56 IR 62, 67 - 68.
[28] ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)*** (2000) 80 WAIG 2437.

or on a contract of employment to which the award applied. In considering the power of the Commission to insert such a clause, Parker J, with whom Kennedy J agreed, referred to some decisions preceding ***Pepler's*** case. His Honour noted that:

> These decisions correctly focus attention on the terms of the definition of industrial matter and illustrate something of the breadth of the true scope of the general introductory words.[29]

89 Justice Parker then considered the ***Pepler*** line of decisions. His Honour regarded Owen J's statement of the 'employment relationship' doctrine in ***Kounis*** as qualified by the unanimous decision in the ***Nappy Happy*** case and noted:

> Once again, in the ***Nappy Happy*** case, the attention of the members of the court focused directly on the express words of the definition, to which effect was given.[30]

90 Justice Parker focused on the sufficiency of the relationship or remoteness of the order made to the relevant jurisdictional fact enlivening the Commission's jurisdiction:

> … The point of the Pepler line of cases may, therefore, be a concern to draw the line between those matters such as reinstatement which are to be accepted as sufficiently directly related to a dismissal so as to be within the jurisdiction of the Commission, and those other matters which are insufficiently closely related to the jurisdictional fact of dismissal so that they are beyond the power of the Commission to deal with them. Necessarily, questions such as this involve fine and difficult distinctions. Views may differ as to their appropriate resolution as is evident from the discussion of this issue in the reasons in the ***Nappy Happy Hire*** case. In the Pepler decision that line may be seen to have been drawn to exclude a claim for compensation for loss of income for a period following a dismissal in circumstances where it was the decision of the Commission that the employment should not be reinstated …[31]

91 Justice Parker held that the application raised an industrial matter and in finding that it did not the Commission had fallen into error by the view it took of the effect of the ***Pepler*** line of cases:

---

[29] ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)*** (2000) 80 WAIG 2437 [69].
[30] ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)*** (2000) 80 WAIG 2437 [76].
[31] ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)*** (2000) 80 WAIG 2437 [77].

> … the matter sought to be raised is the policy of WSL, which was confirmed in evidence before the Commission, that in filling its existing vacancies in the industry, vacancies which at the time of the application it was actively seeking to fill by offering employment to prospective employees, it would only employ persons who agree to enter into a workplace agreement. By committing itself to this policy WSL refuses, and has indicated it will continue to refuse, to employ in the vacancies it is offering persons who comprise an identifiable class, ie those who wish to be employed pursuant to the award that would apply if no workplace agreement is entered into. There is no existing contract of employment between WSL and any of the prospective employees who have been offered employment, but employment was clearly in immediate contemplation. Given the terms of the application to the Commission and the evidence that has been led at first instance, if the position remains in essence as it was at the time of the application and hearing, it seems to me that it would be open to the Commission to conclude that the application raised a matter within the definition of an 'industrial matter' being, or relating to, a refusal by WSL to employ in the industry that class of persons. The Commission was persuaded against this essentially because of the view it took of the effect of the Pepler line of cases. For the reasons given earlier, in my respectful view the Commission fell into error of law in so doing.[32]

92 Justice Parker found that whether or not the proposed amendment to the award was within power, depended on whether there was a sufficient relationship between the order, in that case the proposed amendment to the award, and the refusal of the employer to employ a class of persons.[33]

93 Similarly, in ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining***[34] Le Miere J held, with the concurrence of Wheeler and Pullin JJ:

> A refusal by an employer in an industry to employ a person may be an industrial matter even though that person is not employed by the employer and had never been employed by that employer in the past. Further, an employer may be obliged when seeking to employ a person in a vacancy to make an offer of employment to a particular person: ***RGC Mineral Sands v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch*** (2000) 80 WAIG 2438 at 2445 per Parker J. The effect of s 23(1) of the Act is that the commission has power to 'deal with' the industrial matter

[32] ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)*** (2000) 80 WAIG 2437 [80].
[33] ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia (WA Branch)*** (2000) 80 WAIG 2437 [83].
[34] ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union*** (2006) 86 WAIG 1193 [78] commonly known as ***Brandis*** case.

> constituted by the refusal to employ a person. Once the jurisdiction of the Commission is enlivened it has the power to make an order to 'deal with' the industrial matter. Any order made by the Commission must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction, that is the refusal of the employer to employ the person: see ***RGC Mineral Sands v CFMEU*** (supra) per Parker J. An order to employ a person is sufficiently related to the industrial matter constituted by a refusal to employ that person so as to be within the power of the Commission to deal with that industrial matter.[35]

94 The principle of the ***Pepler*** cases, as explained and qualified in ***RGC Mineral Sands*** and the ***Brandis*** case is that any order made by the Commission must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction, in this case the refusal of the Director General to employ Mr Buttery.

95 An order to pay compensation is sufficiently related to the refusal of the employer to employ the person if it 'deals with' the refusal to employ the person by ordering the employer to employ the person and, upon the person becoming employed, pay to the person an amount representing the loss to the person arising from the employer's refusal to employ them.

96 That conclusion is consistent with all of the authorities to which we have referred. Indeed, it is supported by ***Pepler's*** case. In ***Pepler's*** case, the court did not doubt the power of the Commission to order compensation incidentally to an order for re-employment of a dismissed employee, and therefore to order compensation incidentally to an order for employment of a worker unfairly refused employment. The point of the case was that the Commission did not have power to order compensation to a dismissed employee when the Commission did not order re-employment of the dismissed employee.

97 In the circumstances of this case, there is a sufficient relationship between the compensation order and the refusal of the Director General to employ Mr Buttery so that the compensation order is within the power of the Commission to 'deal with' the relevant industrial matter - the refusal of the Director General to employ Mr Buttery.

98 Ground 2 of the appeal is not made out.

Conclusion

[35] ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union*** (2006) 86 WAIG 1193 [78].

99 The appeal should be dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

TW
Associate to the Honourable Justice Buss

29 JANUARY 2021