

**APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY  
2020  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2021 WAIRC 00127

**CORAM** : PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER T EMMANUEL - CHAIR  
MS L WARD - BOARD MEMBER  
MR G BROWN - BOARD MEMBER

**HEARD** : TUESDAY, 23 FEBRUARY 2021

**DELIVERED** : THURSDAY, 6 MAY 2021

**FILE NO.** : PSAB 23 OF 2020

**BETWEEN** : ALESSANDRA GRANITTO  
Appellant  
  
AND  
  
DIRECTOR GENERAL OF THE DEPARTMENT OF  
EDUCATION  
Respondent

CatchWords : Public Service Appeal Board – Interpretation of sections 81(1) and 82A(2) of the *Public Sector Management Act 1994* (WA) – Power to take improvement action in the course of a disciplinary matter

Legislation : *Industrial Relations Act 1979* (WA): s 26(1)(b), s 26(1)(c) & s 80I(1)(a), *Public Sector Management Act 1994* (WA): s 29(ja), s 76(8), s 81 & s 82A

Result : *Appeal dismissed*

**Representation:**

Appellant : Ms M Saraceni (of counsel)

Respondent : Mr D Anderson (of counsel)

### *Reasons for Decision*

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Mrs Alessandra Granitto is employed by the Director General of the Department of Education (**Director General**) as a Level 2 Administrative Officer. She was the subject of a disciplinary process which began on 16 April 2019.
- 3 On or about 21 July 2020, Mrs Granitto received a letter from the Department of Education which confirmed that no breach of discipline finding had been made against her and required her to take improvement action ‘pursuant to s 82 [sic]’ of the *Public Sector Management Act 1994* (WA) (**PSM Act**).
- 4 Mrs Granitto has appealed this decision to the Board. She says that in the circumstances, the Director General did not have the power to order her to undertake improvement action under s 82A of the PSM Act. Mrs Granitto’s central argument is that the Director General made a finding that she did not commit any breach of discipline. Making that disciplinary finding concluded the disciplinary process such that there was no longer any ‘disciplinary matter’ for the purpose of s 82A and, accordingly, no power to impose improvement action under that section.
- 5 In her amended notice of appeal Mrs Granitto asks the Board to order:
  1. The Respondent’s decision as to the Disciplinary PIP be quashed; and
  2. The Respondent record on the Appellant’s personnel records that no Disciplinary PIP was issued to her following or in any way connected with the PIP.
- 6 The Director General denies that she made any disciplinary findings, but says that the legislative framework allows the Director General to take improvement action when no disciplinary findings have been made. The Director General says that in any event, she is authorised to take improvement action where appropriate under s 29 of the PSM Act.

### **What must the Board decide?**

- 7 In her amended grounds of appeal, Mrs Granitto says:
 

The question the subject of this appeal is how section 82 [sic] is to be interpreted in respect of the Respondent’s decision (recorded in a letter dated 4 May 2020 – see Attachments A and B) not to impose disciplinary action under section 81(1) of the [PSM Act] against the Applicant (after making a finding of no disciplinary breaches) but then proceeding to impose a performance improvement plan (**PIP**) on the Applicant (**Disciplinary PIP**) in accordance with, and in reliance on, s 82A(2)(a).

The questions for interpretation are whether:

  - (a) Section 81(1) of the PSM Act applies in circumstances where the Respondent, in purported completion of its disciplinary investigation, had concluded that the Appellant has not committed any breach of discipline; and
  - (b) There is any disciplinary matter to be dealt with under Division 3 of Part 5 of the PSM Act, such that s 82A(2)(a) applies.
- 8 At the hearing, the Director General raised a concern with the questions that Mrs Granitto had included in her amended notice of appeal. She said that Mrs Granitto’s questions were ‘premised on the assertion... that the respondent made a finding, a positive finding... that the appellant hadn’t committed any disciplinary breaches.’ The Director General says there is a

distinction to be drawn between a finding of guilt or innocence and no finding. The Director General says that she made no decision in relation to findings.

- 9 Instead, the Director General says that the question should be 'whether the respondent erred in her interpretation of section 81(1) and 82A(2)(a) of the Act when she decided after the completion of a disciplinary investigation to move away from disciplinary action and take improvement action and to later confirm no disciplinary findings had been made and impose improvement action.'
- 10 The Board must decide how, in the circumstances, sections 81(1) and 82A of the PSM Act are to be interpreted and whether the Director General erred in deciding to require Mrs Granitto to take improvement action.

### **Leave granted to amend the appeal**

- 11 Mrs Granitto filed an application to amend her appeal because when she filed her appeal she was not sure who would represent her. Mrs Granitto thought she should prioritise filing her appeal on time. After she received legal advice she made an application to amend her appeal.
- 12 The Director General objected to the Board granting Mrs Granitto leave to amend her appeal. She argued that although the reason for the amendment is reasonably explained, and the delay and costs are relatively insignificant, the amended grounds of appeal are not able to be reasonably argued as a basis for the relief sought.
- 13 The Board granted Mrs Granitto leave to amend her appeal because the Board considered that it was not able to conclude, at that preliminary stage and without the benefit of proper arguments from the parties, that the amended grounds of appeal could not be reasonably argued.

### **The Director General's application to dismiss the appeal**

- 14 At the hearing, the Director General made an application to the Board for the appeal to be dismissed. She argued that:

[T]he question which is posed in that amended form 8 is premised on the assertion that the respondent made a finding, a positive finding, if you like, that the appellant hadn't committed any disciplinary breaches.

And there's, you know, plainly a distinction to be drawn between a finding of guilt or innocence and no finding and where there's no finding, not only is it not a finding of innocence, it's simply not even a finding. So if you'd answered that question against - in the way that it's framed, it's simply not going to have any application to the appellant's circumstances and it's plainly then not in the public interest. The question that was reformulated overcomes that issue to a point.

...

To the extent that I sought to apply for the Board to refuse leave to amend the question, if there's a distinction to be drawn from that application to an application to strike out the proceedings, then I'll make that application now on the basis that I've just put to the Board, which is that it's plain on the face of the decision that the premise of the question is misconceived.

- 15 The Board considered that in circumstances where the matter had already been delayed, and the full hearing of the matter would not take much longer, it was appropriate to deal with the Director General's application for the matter to be dismissed as part of the substantive hearing and determination of the appeal.

## Evidence before the Board

- 16 At the parties' request, the Board heard from the parties in writing about programming the appeal. On the basis that there were no material facts in dispute and that the parties would not be calling any witnesses, the Board issued directions that the parties file a statement of agreed facts and bundle of agreed documents, and that each party file an outline of its submissions.
- 17 Following several months of delay (predominantly on the part of Mrs Granitto) during which the Board granted the parties extensions of time to comply with its directions, Mrs Granitto's representative filed a statement of agreed facts, an affidavit for Mrs Granitto, a bundle of documents that were not agreed and an outline of submissions.
- 18 The statement of agreed facts contained just one paragraph:

On or about 21 July 2020 the Appellant received a letter from Mr Nick Wells, A/Executive Director Professional Standards and Conduct, on behalf of the Appellant's employing authority, in which he confirmed that no breach of discipline finding had been made against the Appellant and ordered the Appellant to undertake improvement action pursuant to section 82 of the *Public Sector Management Act 1994* in the terms outlined in the letter sent by Mr Mike Cullen, Director, Standards and Integrity on behalf to the Applicant's employing authority dated 4 May 2020.

- 19 The parties handed up the two letters referred to in the agreed paragraph at the hearing. These two letters became Agreed Documents 1 and 2. Agreed Document 3 is a letter from Mrs Granitto's union to the Department of Education dated 29 May 2021.

## Mrs Granitto's application to file additional documents

- 20 Two of the four documents that Mrs Granitto sent to the Registry for filing, the 'Statement of Agreed Facts' and the document titled 'WAIRC Outline of Submissions 29-01-2021', were accepted for filing. The other two documents titled 'Signed Affidavit of Alessandra Granitto 29 Jan 2020' and 'Trial Bundle' were not documents that Mrs Granitto was directed to file and so were not accepted for filing by the Registry.
- 21 In circumstances where the Director General did not consent to the affidavit or bundle of documents being accepted for filing, Mrs Granitto made an application to the Board at the hearing for leave to file the bundle of documents that were not agreed. Mrs Granitto did not seek to file her affidavit.

## *Mrs Granitto's submissions about the additional documents*

- 22 Mrs Granitto said that under s 26(1)(b) of the *Industrial Relations Act 1979* (WA) (**IR Act**), the Board is not bound by the rules of evidence and under s 26(1)(c) of the IR Act, 'the Board shall have regard for the interests of persons immediately concerned'. She says the Board has 'the power to take into consideration other matters if it is satisfied they are relevant in helping it reach its decision'.
- 23 Mrs Granitto argued that the Board should accept her bundle of additional documents because the matters raised in her appeal are not hypothetical and it is important that the Board understand how the disciplinary process started. She argued the documents will allow the Board 'to make an informed decision as to the interpretation of sections 81(1)(a) and 82A(2)(a) of the Public Sector management Act.' Mrs Granitto's representative said:

The point of it really is what is the disciplinary process? We have to go to the Commissioner's instruction number 3 to define what the process is, see what occurred and this issue about whether there were no findings or there was a finding of no breach, to understand that needs to look at all

the interlocutory steps that were taken, otherwise I can make a submission to say the document that I've referred you to speaks for itself on its face.

It says there was no findings of breach, no breach findings made. But if there's an issue that my friend is going to raise as to whether there was no finding made or we say there was a finding made and the finding was no breach, then to understand the steps that were taken by the respondent to get to that part, we say is relevant for the Board to be fully informed. There's no need for evidence other than the documents which are the respondent's own documents.

*The Director General's submissions about additional documents*

24 The Director General opposed Mrs Granitto's application to file additional documents and said that the additional documents Mrs Granitto seeks to tender are inadmissible. They are not relevant to the question of whether the Director General erred in considering that s 82A(2)(a) of the PSM Act allowed her to require Mrs Granitto to take improvement action at the time she did.

25 The Director General argued that at the heart of this dispute are questions of interpretation, not matters of evidence, saying:

[I]t's not an evidentiary matter. It's not one in which process is an issue. It's a question of whether or not the respondent's at lawful authority or the boundaries of her authority and therefore we say all that evidence is wholly irrelevant.

*Consideration – additional documents*

26 After hearing from the parties, the Board dismissed Mrs Granitto's application to file additional documents.

27 The Board considers that, in essence, this matter is about interpreting sections 81(1) and 82A(2)(a) of the PSM Act. Specifically, it is about whether the Director General had the power, given those two sections of the PSM Act, to take improvement action, in circumstances where the disciplinary process commenced on 16 April 2019, an investigation had been completed and no finding of breach of discipline had been made.

28 We consider this is a question of legal interpretation. It is not relevant for the Board to consider facts about whether the Director General's decision to take improvement action was fair, nor to consider facts that arose after that decision was made. Accordingly, the additional documents are not necessary for the fair resolution of Mrs Granitto's appeal.

29 The application for leave to file additional documents was dismissed.

**Background**

30 Mrs Granitto was the subject of several allegations, which the Executive Director, Workforce referred to the Standards and Integrity Directorate as disciplinary matters under s 81(1)(a) of the PSM Act. The Director, Standards and Integrity (Mr Mike Cullen) made 'a number of enquiries regarding the allegations', considered 'a number of documents' and conducted interviews with staff members. Mr Cullen then wrote to Mrs Granitto on 4 May 2020 (**Agreed Document 1**) and said that he had 'formed a view that there was some substance to the allegations'. He then provided examples of the allegations, but did not say which of those allegations had substance. Finally, Mr Cullen informed Mrs Granitto that he had 'decided to move away from disciplinary action' and that he would instead take improvement action. Mr Cullen outlined the improvement action he intended to take and invited Mrs Granitto to provide a written response to his letter.

- 31 Mrs Granitto's union replied to Mr Cullen's letter on 29 May 2020 (**Agreed Document 3**), complaining about a lack of procedural fairness, ultimately proposing that the Department of Education 'confirm that no findings have been made against Mrs Granitto and that the disciplinary process is ceased.'
- 32 On 21 July 2020, Acting Executive Director Mr Nick Wells wrote to Mrs Granitto (**Agreed Document 2**). He confirmed that no breach of discipline findings had been made against her and that improvement action 'pursuant to section 82 of the [PSM Act]' in the terms outlined in Agreed Document 1 would be taken.
- 33 It is not in dispute that references in Agreed Documents 1 and 2 to s 82 of the PSM Act were intended to be references to s 82A of the PSM Act.

### **Legislative framework**

- 34 Part 5 of the PSM Act deals with substandard performance and disciplinary matters.
- 35 Section 81(1) provides that where an employing authority becomes aware that an employee may have committed a breach of discipline, the employing authority may decide to deal with the matter as a disciplinary matter.

#### **81. Suspected breach of discipline, employing authority's options as to**

- (1) If an employing authority of an employee is made aware, or becomes aware, by any means that the employee may have committed a breach of discipline, the employing authority may —
- (a) decide to deal with the matter as a disciplinary matter under this Division in accordance with the Commissioner's instructions; or
  - (b) decide that it is appropriate —
    - (i) to take improvement action with respect to the employee; or
    - (ii) to take no action.

...

*[Section 81 inserted: No. 39 of 2010 s. 97.]*

- 36 Section 82A sets out how disciplinary matters are dealt with.

#### **82A. Disciplinary matters, dealing with**

- (1) In dealing with a disciplinary matter under this Division an employing authority —
- (a) must proceed with as little formality and technicality as this Division, the Commissioner's instructions and the circumstances of the matter permit; and
  - (b) is not bound by the rules of evidence; and
  - (c) may, subject to this Division and the Commissioner's instructions, determine the procedure to be followed.
- (2) Even though an employing authority decides to act under section 81(1)(a), the employing authority may, at any stage of the process, decide instead that it is appropriate —
- (a) to take improvement action with respect to the employee; or
  - (b) that no further action be taken.

- (3) Subject to subsection (4) and section 89, after dealing with a matter as a disciplinary matter under this Division —
  - (a) if the employing authority finds that the employee has committed a section 94 breach of discipline, the employing authority must take disciplinary action by dismissing the employee; and
  - (b) if the employing authority finds that the employee has committed a breach of discipline that is not a section 94 breach of discipline, the employing authority must decide —
    - (i) to take disciplinary action, or both disciplinary action and improvement action, with respect to the employee; or
    - (ii) to take improvement action with respect to the employee; or
    - (iii) that no further action is to be taken.
- (4) The Minister —
  - (a) is bound by any finding in a report submitted as directed under section 81(2); and
  - (b) must, when making a decision under subsection (3)(b), have regard to, but is not bound by, a recommendation submitted as directed under section 81(2).

*[Section 82A inserted: No. 39 of 2010 s. 97.]*

37 Mrs Granitto also relies on s 76(8) of the PSM Act.

#### **76. Application and effect of Part 5**

...

- (8) Nothing in this Part limits the power of an employing authority under other provisions of this Act to take improvement action in relation to an employee in circumstances in which the employing authority considers it appropriate to do so.

*[Section 76 amended: No. 39 of 2010 s. 94.]*

### **Submissions**

#### *Mrs Granitto's submissions*

38 Mrs Granitto concedes that the Director General has the power to take improvement action in relation to an employee when the Director General considers it appropriate to do so under other provisions of the PSM Act.

39 Mrs Granitto relies on s 76(8) of the PSM Act:

[N]ot under the provisions dealing with substandard performance or disciplinary matters, but other provisions. So there's nothing limiting the power of an employing authority to take improvement action in relation to an employee in circumstances in which the employing authority considers it appropriate to do so...Essentially, the respondent, separate and having nothing to do with substandard performance or disciplinary matters, could issue an improvement - or could require improvement action, but not under part 5. When part 5 kicks in - and relevantly, for our purposes, it's the disciplinary matters - division 3 of part 5, we say that that section 76(8) open section doesn't apply, because that deals with other sections.

40 Relying on s 9 of the PSM Act, Mrs Granitto says that the Department of Education is required to comply with Public Sector Commissioner's Instruction No. 3 – Discipline – General

(**Instruction**), which sets out ‘the minimum procedural requirements to be followed by the employing authorities when dealing with suspected breaches of discipline or disciplinary matters and taking disciplinary action under Part 5 of the Public Sector Management Act’.

- 41 Mrs Granitto also draws the Board’s attention to the Department of Education’s discipline policy, submitting that ‘when discipline is - an investigation is finished, the process is concluded when it's decided no breach of findings and that's where it should end, nothing further should be - should occur.’
- 42 Mrs Granitto says that the Board should infer from the letter dated 21 July 2020 that there has been ‘a positive finding of no breach of discipline’. The disciplinary process concluded when this finding was made and ‘no action can be taken under Division 3 of Part 5’.
- 43 Mrs Granitto says that, having found there was no disciplinary breach and having ‘decided to move away from disciplinary action’, the Director General did not have the power to then direct Mrs Granitto to take improvement action under s 82A(2)(a) of the PSM Act. The Director General would only have had that power if she had continued to treat the matter as disciplinary.
- 44 In summary, Mrs Granitto’s argument is:

82A(2) says:

"Even though an employing authority decides to act under section 81(1)(a)" -  
and that section is to decide to deal with it as a disciplinary matter -

"the employing authority may, at any stage of the process, decide instead that it is appropriate to take improvement action with respect to the employee."

It is our submission that ‘any stage of the process’ is during the process, not once the process is completed. And once the decision is made, that there are no breach of discipline findings. At that stage, the horse has bolted, it is too late. What's not too late is if the Education Department decides, separate from any discipline, relies on section 76(8) to require improvement action, but it's not as a result of the same conduct which it's found there is no breach of discipline as such.

#### *Director General's submissions*

- 45 The Director General argues that the effect of s 82A(2)(a) of the PSM Act ‘is to allow an employing authority to re-visit a decision made pursuant to s 81 and re-exercise the discretion to deal with a suspected breach of discipline by taking improvement action.’
- 46 The Director General says that her decision was not a two-step process ‘such that [the Director General]’s decision to take improvement action pursuant to s 82A(2)(a) was only made after...a prior decision to end the process by deciding not to make disciplinary findings.’
- 47 Further, the Director General says that there was no express decision not to make disciplinary findings. The Director General decided to ‘move away from disciplinary action’ (being action which would necessitate disciplinary findings as a precursor) and instead take improvement action. Any inferred or implied decision not to make disciplinary findings flows from the re-exercise of her discretion to take improvement action, rather than treating the matter as disciplinary.
- 48 The language of s 82A(2)(a) is ‘plain in that it seems to allow an employing authority to decide to take improvement action at any stage of a process dealing with a disciplinary matter.’



49 The Director General says:

The respondent did not absolve the appellant of any wrongdoing at the completion of a disciplinary investigation. To the contrary, the respondent considered there was some substance in the allegations and decided to take improvement action in respect of the appellant. Improvement action is not de facto disciplinary action. Improvement action is recognised as action to improve an employee as such for the protection and/or furtherance of an employer's interests. A certain type of activity is designated as improvement action and defined by s 3 of the PSM Act. An employer might otherwise contractually require the same activity of an employee in the course of employment. In that sense, the power to impose appropriate improvement action provided by s 29(ja) of the PSM Act is the codification of the power implied in all employment contracts to allow for the same activity to be directed if appropriate. The respondent respectfully says the appellant is not entitled to the relief sought or any relief at all.

50 The Director General also argues that Mrs Granitto's submission that she was 'declared innocent, is clearly, on the face of all the evidence of the decision, at least, misconceived.'

51 In relation to Mrs Granitto's submissions about the Instruction, the Director General argues that improvement action does not form part of the disciplinary process:

It's not a - it's important that it's not considered to be a step in that - because it - dealing with it as a disciplinary matter leads you to a conclusion of findings, no findings, action, no action. And that's where it has to tail out. And then, the requirements overlaying the statutory procedure, as to the timeframes to which people are to be informed of such decisions.

But by re-exercising the discretion at 82A not to deal with it as a disciplinary matter, you come outside of that instruction, you get back to square one, and you deal with it on an alternative basis.

52 The Director General says that it is irrelevant that the Instruction suggests there are only two outcomes of a disciplinary matter, being a declaration of guilt or innocence, because the Instruction 'regulates how a disciplinary matter is treated. The whole point of 82A is you're not treating it as a disciplinary matter.'

### **Consideration**

53 While it is agreed that the disciplinary process in relation to Mrs Granitto had started by 16 April 2019, the parties are in dispute about when and how that disciplinary process ended.

54 In the Board's view, Mrs Granitto's questions and submissions are misconceived.

55 Noting that the questions set out in Mrs Granitto's amended notice of appeal are different to the questions set out in her submission, Mrs Granitto's questions and submissions are premised on:

- a. the Director General having made a finding or concluded that Mrs Granitto did not commit any breach of discipline; and
- b. the disciplinary process having ended as a result of the Director General having made a finding or concluded that Mrs Granitto did not commit any breach of discipline.

56 Contrary to Mrs Granitto's submission, it is clear that the Director General did not 'conclude that the Appellant has not committed any breach of discipline.' The Director General did not make a finding 'of no disciplinary breaches.'

57 The evidence before the Board, being the single agreed paragraph and the three Agreed Documents, makes it clear that the disciplinary process started on 16 April 2019 and an investigation was completed before 4 May 2020.

- 58 The Board considers that no findings were made by the Director General. There was the absence of a finding. As the Director General submits, the absence of a finding is not the same thing as a finding that something did not occur.
- 59 Section 82A(2) refers to the employing authority being able to decide that it is appropriate to take improvement action *at any stage of the process*, notwithstanding that the employing authority decided to act under s 81(1)(a) of the PSM Act. The plain wording of s 82A(2) of the PSM Act makes it clear that as long as the employing authority is engaged in the process of dealing with the disciplinary matter, the employing authority may decide instead to take improvement action.
- 60 The Board does not accept Mrs Granitto's submission that the disciplinary process had ended because the Director General made a finding or concluded that Mrs Granitto had not committed a breach of discipline. The Agreed Documents show that no such findings were made or conclusions drawn. To the extent that the Director General came to a conclusion, it was that after the investigation was complete and before any findings were made, the Director General decided that she should not pursue disciplinary proceedings any further but she should instead take improvement action.
- 61 That the investigation was complete and no findings were made does not mean that there was no longer any disciplinary matter to empower the Director General to act under s 82A(2) of the PSM Act. The disciplinary matter still existed. The disciplinary process was on foot. At that stage the Director General could have pursued the disciplinary process. Alternatively, instead of pursuing the disciplinary process, under s 82A(2) of the PSM Act it was open to the Director General to decide to move away from the disciplinary process and impose improvement action. The Director General did so in the course of dealing with the disciplinary matter. It was that decision, being a decision to deal with the disciplinary matter by instead imposing improvement action, that ended the disciplinary matter and process.
- 62 For the reasons outlined at [59], the Board does not accept Mrs Granitto's submission that 'the powers conferred under s 82A(2) of the PSM are only enlivened if the Respondent had continued to treat the matter as a disciplinary matter as defined in section 81(1)(a) of the PSM Act.'. The matter was treated as a disciplinary matter up until the point that the Director General decided to instead impose improvement action. Further, to the extent that Mrs Granitto argues that disciplinary findings are necessary before improvement action can be imposed under s 82A(2) of the PSM Act, the Board does not agree. The legislative framework does not require disciplinary findings before improvement action can be imposed under s 82A(2) of the PSM Act. Indeed the plain wording of s 82A(2), *at any stage of the process*, indicates as much. This is in contrast to s 82A(3), under which the taking of disciplinary action, improvement action or no further action is dependent on disciplinary findings having been made.
- 63 We do not consider that Mrs Granitto's submissions about s 76(8) of the PSM Act assist her case. Section 76(8) of the PSM Act merely provides that nothing in Part 5 limits the employing authority's power under other provisions of the PSM Act to take improvement action in relation to an employee. Here the Director General took improvement action under s 82A(2), which is in Part 5 of the PSM Act. Accordingly s 76(8) is not relevant.
- 64 The Board considers that in the circumstances of this matter, the decision to impose improvement action was within power under the PSM Act. In short, it was open to the Director General to do what she did.

- 65 The Director General did not err in her interpretation of sections 81(1) and 82A(2) of the PSM Act when she decided after completion of a disciplinary investigation to move away from disciplinary action and to take improvement action.
- 66 This appeal is dismissed.