Bartier Perry LAWYERS

NSW Government CONNECT

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Inside this issue

WELCOME

As 2019 draws to a close, we look back on a year that has been eventful.

Workplace culture, and in particular social media misuse, has remained ever topical. In this bulletin, we discuss the High Court of Australia's decision in *Banerji* and its implications for the NSW government sector. We also look at the case of *Fussell* where we successfully defended the decision to terminate employment for inappropriate out of hours conduct towards a female colleague.

The Industrial Relations Commission has handed down some important decisions this year. The decision of *Davie* was particularly significant in examining whether the discretion to dismiss senior executives was free from review. In another Commission case, we successfully argued that a government agency was not covered by a public sector award.

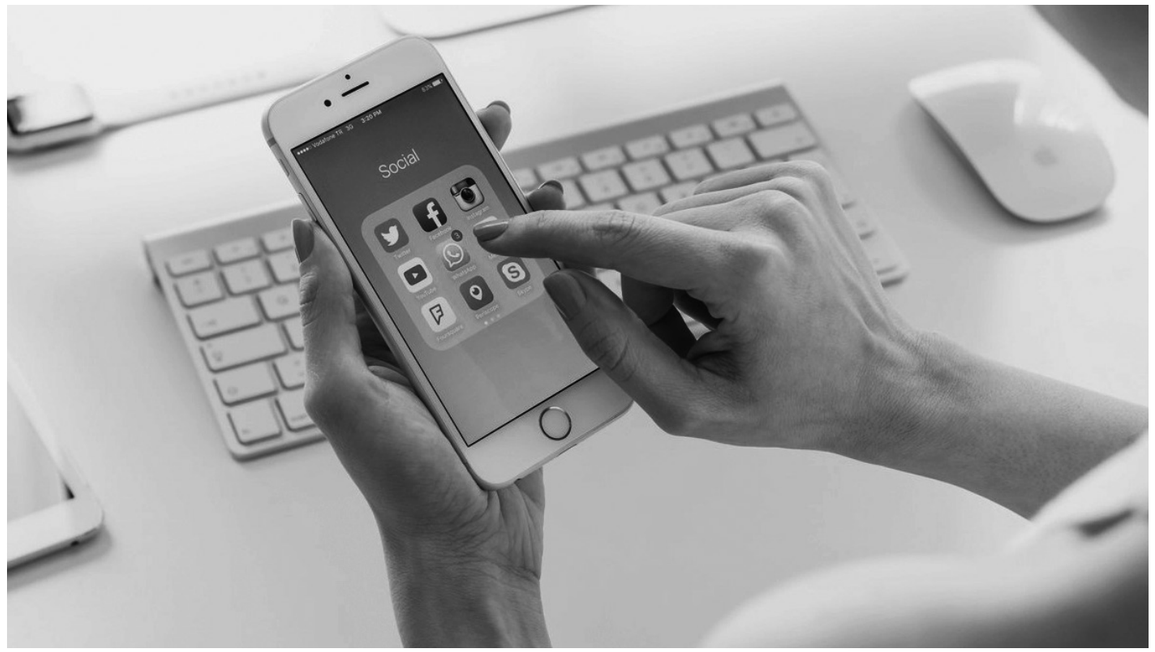
Workplace investigations remain relevant to HR practitioners, though they are becoming ever more complicated and time-consuming. Earlier this year, we successfully defended an investigation in the Supreme Court for Macquarie University, and the Court made some important observations about the nature of investigations.

Looking ahead, the Commonwealth whistleblower laws which commenced on 1 July 2019 will make carefully responding to complaints more important than ever, for some organisations. It is important to note that some State based organisations may be captured by the new laws.

Unfair dismissal continues to be an area of interest. In this bulletin we discuss a number of decisions that demonstrate long, exemplary service itself is not a shield to an otherwise fair dismissal.

Wishing you all a safe and happy New Year.

James Mattson
(and the Workplace Law & Culture Team)



HIGH COURT URGES CAUTION ON SOCIAL MEDIA USE IN THE WORKPLACE

Commentators and unions have said the High Court of Australia decision in *Comcare v Banerji* [2019] HCA 23 will have a *"chilling"* effect on free speech for public servants. Such a proposition is nothing more than a 'beat up'.

Ms Banerji was lawfully dismissed for anonymous and intemperate tweets in breach of her statutory obligations; not for merely having a view on political matters.

We can have our own views on many topics, but it is the choices we make, and the obligations we owe, that determine when and how any views are to be expressed. The employment contract is a two-way street with mutual obligations. Public sector employees have important statutory and contractual obligations to fulfil which cannot be cast aside simply because we may have a political view to express.

The facts

Ms Banerji was employed in the Australian Public Service, by the then Department of Immigration and Border Protection.

Over many years, and under an alias Twitter handle, Ms Banerji posted over 9,000 tweets. The tweets were described as *"highly critical"* of the then Government, the then Minister, the Immigration portfolio and her superior in the Department. All her tweets, except one, were made during her own time (i.e. not at work) and using her own phone.

The Department investigated the tweets following complaints by employees. Ms Banerji initially denied it was her, but the Department found she was the owner of the Twitter handle. Eventually, after a fair process, the Department terminated Ms Banerji's employment. Ms Banerji, on being informed of her termination, suffered post-traumatic stress disorder and claimed workers' compensation.

The legal question was whether her dismissal was reasonable management action. This turned on whether Ms Banerji had a freedom to communicate about political matters.

Statutory obligations

The *Public Service Act 1999* (Cth) provides:

- APS employees must *"at all times"* behave in a way that upholds the APS Values and the integrity and good reputation of the Australian Public Service (section 13(11)); and
- The Australian Public Service is apolitical, performing its functions in an impartial and professional manner (section 10(1)(a)).

The Australian Public Service also issued guidelines about social media and the making of public comments, cautioning employees to take care and *"reflect"* to ensure they do not behave *"in a way that suggests they cannot act apolitically or impartially in their work"*.

The High Court said

The High Court found that Ms Banerji had no special protections to engage in twitter activity contrary to her obligations as an APS employee.

The High Court extensively examined the purpose of the Commonwealth *Public Service Act* and concluded *"[t]here can be no doubt that the maintenance and protection of an apolitical and professional public service is a significant purpose"* and that *"it is highly desirable if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections"*. The High Court held that the *Public Service Act* did not therefore infringe the implied freedom of political communication. Ms Banerji was not entitled to compensation related to her dismissal.

The implications

On a narrow view, the High Court's decision is only precedent in relation to Commonwealth public servants (and perhaps, State). Under the *Government Sector Employment Act 2013* (NSW), there are provisions relating to NSW government employees dealing with impartiality and being apolitical:

> ***"Integrity***
>
> *(a) Consider people equally without prejudice or favour.*
>
> *(b) Act professionally with honesty, consistency and impartiality.*
>
> *...*
>
> *(d) Place the public interest over personal interest.*
>
> ***Trust***
>
> *...*
>
> *(c) Uphold the law, institutions of government and democratic principles.*
>
> *...*
>
> *(e) Provide apolitical and non-partisan advice."*

In our view, given these above values, the High Court's decision has relevance to NSW government employees.

Broader matters

There are broader matters also falling from the decision, including:

- whether the anonymous nature of posts or tweets provide an employee protection; and
- whether employers can, without fear, sanction employees for expressing their views.

The High Court was unimpressed with any reliance on the anonymity of the tweets, with the plurality saying, *"an assumption that "anonymous" communications are more deserving of protection ... is not necessarily sound"* and provided the following cogent warning:

> *"[A]s a rule of thumb, anyone who posts material online, particularly on social media websites, should assume that, at some point, his or her identity and the nature of his or her employment will be revealed. The risk of identification which justifies that rule of thumb is obvious"*.

The High Court was, however, at pains to point out that dismissal is not always the outcome in these matters: *"It is not the case that every employee of the APS who commits a breach ... by broadcasting public "anonymous" communications is liable to be dismissed"*. Any discretion to dismiss must be exercised reasonably and dismissal must not be harsh, unjust or unreasonable.

While all circumstances need to be considered before dismissing an employee for social media misuse, Edelman J identified six factors of significance:

> *"(i) the seniority of the public servant within the APS; (ii) whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities; (iii) the location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy discussion; (iv) whether the public servant intended, or could reasonably have foreseen, that the communication would be disseminated broadly; (v) whether the public servant intended, or could reasonably have foreseen, that the communication would be associated with the APS; and (vi) if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities"*.

> "Public sector employees have important statutory and contractual obligations to fulfil which cannot be cast aside simply because we may have a political view to express."

A STRONG STANCE ON INAPPROPRIATE BEHAVIOUR OUTSIDE OF WORK

Sexually harassing behaviour has increasingly become less tolerated – by employers, employees and the community. Rightly so. It makes for a more productive and importantly, a more dignified and safer environment for all. So, what can, and should, employers do when such conduct occurs outside of work hours?

Such behaviour was the subject of a decision in *Fussell v Sydney Trains* [2019] FWC 1182 in which Bartier Perry successfully defended Sydney Trains' dismissal decision in the Fair Work Commission.

What did Mr Fussell do? He sent a picture of his penis to a female colleague.

Despite admitting the conduct, Mr Fussell claimed his dismissal from Sydney Trains was unfair because the offending picture was sent in error! Deputy President Bull agreed with Sydney Trains saying, *"I am satisfied that the offending image was deliberately sent and Mr Fussell's attempts to suggest otherwise strain credulity beyond any reasonableness."*

> *"An employer should not [normally] delve into and concern itself with the private activities of its employees which occur outside working hours."*

Out of hours conduct

Mr Fussell sent the offending image out of hours while chatting with the fellow employee on social media from his personal mobile phone. So, does that make the conduct outside the concern of the employer?

According to the decision, the starting position is:

> *"An employer should not delve into and concern itself with the private activities of its employees which occur outside working hours."*

And sure, we agree, an employer should not have a far reaching and unrestricted ability to govern what employees do in their personal life. But, when there is a sufficient connection to the workplace, it becomes a legitimate concern of the employer:

> *"[W]here the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employer and employee, damage the employer's interests, or is incompatible with the employee's duties as an employee … in essence the relevant conduct must indicate a repudiation of the employment contract by the employee."*

Despite the conduct having occurred out of hours, there was a sufficient nexus to the employment:

- the employees had not met outside work;
- the social media policy of Sydney Trains expressly extended to out of work conduct;
- the conduct was brought to the attention of other Sydney Trains employees and management; and
- the victim of the conduct was concerned about having to work with Mr Fussell again.

A double win

Of course, Sydney Trains wanted to win – but also forefront of mind in defending these proceedings was sending a strong message that such behaviour is not tolerated.

Sydney Trains was successful at sending this important message and having Mr Fussell's unfair dismissal application dismissed.

A Snap-shot

Out of hours conduct can form the basis for dismissal. It doesn't necessarily matter whether out of hours conduct is expressly stated to be covered by a policy. However, it makes it easier. In this decision, the social media policy expressly extended to out of hours conduct – and it made it that little bit easier to argue that this conduct between two employees, whether out of hours or not, was relevant in the workplace.

We recommend that policies be reviewed and at least drafted to warn employees that out of hours conduct can have an impact on employment.

COMPLAINT HANDLING:
BLOWING THE WHISTLE ON MISCONDUCT

On 1 July 2019, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (Cth) came into effect, permitting employees and others to make disclosures about *"misconduct, or an improper state of affairs or circumstances"*.

The Bill amended the *Corporations Act 2001* (Cth) to introduce vastly expanded whistleblower provisions, including: a significantly longer list of *"eligible whistleblowers"* who may make a protected disclosure (including anonymous disclosures), a broader range of disclosable matters that may attract whistleblower protections and the imposition of significant obligations on *"regulated entities"* as to confidentiality and protection from victimisation. Significant penalties for breaches were also introduced – up to $1.05 million for an individual and, generally speaking, up to $10.5 million for a corporation.

But the question remains – are NSW government entities captured by these new provisions?

Who is subject to the whistleblower provisions?

Only *"regulated entities"* as defined under the *Corporations Act* need to comply with the new provisions. The definition includes:

> *"(a) a company;*
>
> *(b) a corporation to which paragraph 51(xx) of the Constitution applies"*

On this definition, NSW government departments and agencies are not captured by the new provisions as they are not a company nor a Constitutional corporation.

However, there are other NSW government entities that are a trading corporation for the purposes of the Constitution. These entities may very well be captured by the new laws. Each entity will need to assess its own separate circumstances. But if the entity is found to meet the definition of a *"regulated entity"* as discussed above, it will need to comply with the whistleblower provisions.

What about other 'whistleblower' like legislation?

There is nothing to indicate that the new whistleblower provisions are intended to 'cover the field' and exclusively regulate all whistleblower protections within Australia. It appears that the whistleblower provisions apply *in addition* to any relevant State or Territory legislation.

Within NSW, relevant legislation includes the *Public Interest Disclosures Act 1994* (NSW).

In the event of an inconsistency between the *Corporations Act* and any State or Territory legislation, the *Corporations Act* will prevail. On a reading of the relevant legislation, there appears, however, to be no direct conflict between the legislation. The whistleblower provisions contained in the *Corporations Act* impose more stringent obligations in some areas, meaning that regulated entities ought to comply with the higher standards.

The key whistleblower protections

The key obligations imposed on regulated entities under the *Corporations Act* include:

> *1. A regulated entity must not disclose the identity, or any information that is likely to lead to the identification, of a discloser. Only very limited exemptions to this prohibition exist, such as if the person consents to their identity being disclosed;*
>
> *2. A regulated entity must not subject a person who makes, or is believed to have made, a disclosure to any detrimental conduct. Detrimental conduct is broadly defined to include dismissal of an employee, alteration of an employee's employment, discrimination, harm or injury, including psychological harm to the person, and damage to the person's property;*
>
> *3. Although there are no formal investigation or response requirements under the whistleblower provisions, it is prudent for a regulated entity to keep eligible whistleblowers informed of any action taken as a result of the disclosure. Failure to do so may result in the person making a protected public interest disclosure to a member of Parliament or a journalist.*

Is it time to assess whether your organisation is covered by the Commonwealth whistleblower laws?

> "There is nothing to indicate that the new whistleblower provisions are intended to 'cover the field' and exclusively regulate all whistleblower protections within Australia."

DOES LONG SERVICE MAKE A DISMISSAL UNFAIR, OR DOES IT JUST MEAN THEY SHOULD KNOW BETTER?

In *Richie Robles v Health Secretary in respect of Western Sydney Local Health District (No. 2)* [2019] NSWIRComm 1051, the Industrial Relations Commission recently reaffirmed that an employee's long service and clean record will not of itself render a dismissal harsh, unjust, or unreasonable.

Bartier Perry recently represented Western Sydney Local Health District in unfair dismissal proceedings commenced by a nurse of 11 years' service, with no previous warnings for performance or conduct. The nurse was the team leader on a night shift in a mental health facility where a patient tragically attempted self-harm.

After an investigation, the team leader nurse was found to have failed to follow several policies. It is likely that those failings played a role in the incident with the patient.

In proceedings before the Commission, the employee argued that his good record and length of service rendered the dismissal decision harsh. Ultimately, the Commission found that the nurse's failure to comply with policies and procedures in an acute mental health setting could not be overlooked. The dismissal was not unfair.

> "the Industrial Relations Commission recently reaffirmed that an employee's long service and clean record will not of itself render a dismissal harsh, unjust, or unreasonable."

Throughout the case, Mr Robles blamed management for having breached its own requirements, seemingly trying to divert attention away from his own failings rather than face up to them. We submitted that a person with Mr Robles' considerable experience and qualifications should know better. The Commission agreed with us.

Consistent decisions

The *Robles* decision has similarities to a recent Fair Work Commission decision in which we acted for Sydney Trains: *Singh v Sydney Trains* [2019] FWC 182. There, the Commission found that an employee's long period of exemplary service, his advanced age, and unlikely prospects of alternative employment, could not outweigh his failure to follow safety policies and procedures, which resulted in two 'near-miss' train incidents: *Singh*, per DP Sams at [345].

A timely reminder

These recent decisions are reminders that, if a fair process is followed, an employee's significant breach of policies and procedures can rightly be grounds for dismissal.

NO EVIDENCE, NO WORRIES

In many investigations there will not be any witness to the alleged conduct, or only two parties involved with a 'he said, she said' scenario. Despite these apparent limitations, factual findings need to be made. How do you do this?

The Supreme Court in *Alajmi v Macquarie University* [2019] NSWSC 1026 upheld the reasonableness of findings made by an expert investigation panel into allegations of plagiarism, despite no direct evidence of cheating. How was this finding sustained?

The *Alajmi* decision confirms the obligation on an investigator is simply to carefully consider the material before it but not be constrained or misled by legal principles such as the often cited *'Briginshaw standard'*. An investigation is not a judicial or legal process, but a fact-gathering exercise, and the making of factual findings based on the information available.

The dispute

Mr Alajmi was a PhD student at Macquarie University completing a thesis.

He admitted that he used an overseas company called All Answers to assist him with his thesis, but said it was only for editorial purposes as opposed to preparing intellectual content.

Mr Alajmi argued that his capacity to read, speak and write in English was limited, however his PhD supervisors believed he read, spoke and wrote English well.

An anonymous complaint

In January 2015, an email from an anonymous source was received alleging that Mr Alajmi had *"purchased his thesis from an online essay company called allanswers.co.uk"*.

The source said he was a friend of Mr Alajmi and had seen *"years of exchanges"* on his computer with the company.

Mr Alajmi argued that an investigation could not be commenced based on an anonymous email. The Court rejected this submission, finding the complaint was sufficiently serious and contain sufficient information to warrant the commencement of an investigation.

An expert panel

Under the relevant policies of Macquarie University, an expert panel of academics was convened to assess the plagiarism allegations.

Mr Alajmi sought to attack the panel's investigation report by arguing there was no evidence available for the panel's finding that his thesis was not his *"own work"*. It was asserted that the decision reached was therefore unreasonable.

The information gathered

The investigation panel, in its review, unearthed a number of Microsoft word versions of the thesis that contained margin comments made by Mr Alajmi.

The Court found, *"a large number of comments … were plainly drafted by Mr Alajmi in the form of directions to a third person about the substantive content of the draft thesis and there were comments from third parties … who I find was one of the recipients of those instructions, contained in the documents"*.

Mr Alajmi claimed those margin comments were instructions to himself, written in the third person, to reflect the feedback from his supervisors. To try to explain his writing in this fashion, Mr Alajmi argued English was not his native language. Possible?

No direct evidence: the 'Briginshaw standard'

Mr Alajmi argued that there was no evidence that the thesis was not his own work, other than the marginal comments, for which there was another explanation.

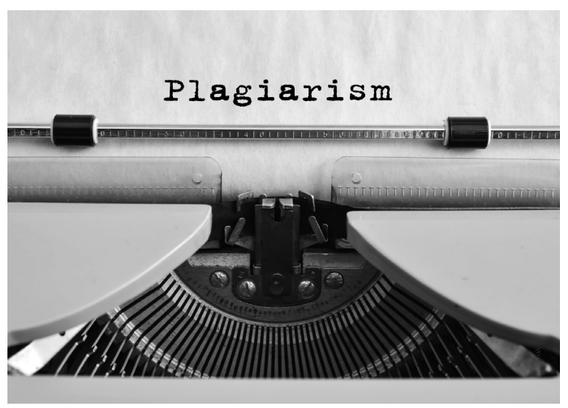
He relied on the High Court decision of *Briginshaw v Briginshaw* (1938) 60 CLR 336 to argue that the findings of the investigation panel were unreasonable as they were predicated on mere conjecture and speculation. In *Briginshaw* the High Court said:

> *"… it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

The University argued *"The Briginshaw standard is not relevant to the question of the weight to be attributed to potentially competing items of evidence. In circumstances where the Panel was tasked with undertaking a process where the rules of evidence do not apply and where there is no onus of proof, there was no applicable standard of proof"*.

The Court ceremoniously rejected the argument that the *'Briginshaw standard'* applied to investigations. The Court held at [200]:

> *"The rules of evidence did not apply to the Panel's deliberations. There was no onus of proof or applicable standard of proof for the Panel's findings. The Panel was not required to apply the Briginshaw standard before reaching its conclusions. Notwithstanding this, the Panel instructed itself to apply the standard of comfortable satisfaction, which is derived from Briginshaw and found that this standard was met"*.



> "An investigation is not a judicial or legal process, but a fact-gathering exercise, and the making of factual findings based on the information available."

Reasonable conclusions were reached

The Court rejected Mr Alajmi's arguments of unreasonableness predominantly on two grounds.

Firstly, it held the Court was not in a position to assess the academic judgment of an expert panel, who is better placed to determine these matters of plagiarism. *"The core subject matter, alleged plagiarism, is a matter best suited to consideration by academics who are involved every day in the relevant field of discourse"*, the Court said. It was apparent the panel applied its understanding of academic standards to its investigation such that it could not be said its findings were unreasonable.

Secondly, there was objective evidence on which the investigation panel could make its findings that the thesis was not Mr Alajmi's *"own work"*. As the Court said: *"the inferences drawn by the Panel … were reasonably open, in the sense of being logically available"*.

There were at least 68 marginal notes, containing instructions, and some responses from a third party. All Answers was an organisation known to assist in writing content for clients. A careful consideration of the marginal notes resulted in the panel making a determination that *"was not legally unreasonable"*. The Court said:

> *"The suggestion made at various times in oral address by Ms Nolan [Mr Alajmi's counsel] that direct rather than circumstantial evidence was required in this case should be rejected. Even in criminal cases, requiring the most exacting proof, circumstantial evidence may give rise to a strong case."*

Lessons

Investigations are difficult and challenging, but they merely require the investigator to carefully consider the facts and then make a factual finding based on a reasonable and logical basis.

The lack of direct evidence, or the existence of a 'he said, she said' situation, does not mean serious allegations cannot be sustained. Reliance on the *'Briginshaw standard'* (properly understood) is prudent, but it is often not a legal requirement.

DISCRETION TO DISMISS SENIOR EXECUTIVES NOT ENTIRELY UNFETTERED

The *Government Sector Employment Act 2013* (NSW) (**GSE Act**) does not confer an entirely unfettered discretion to dismiss Public Service Senior Executives, according to a recent and important decision by the Full Bench of the Industrial Relations Commission.

Davie v Industrial Relations Secretary (Department of Justice, Corrective Services NSW) (No. 2) [2019] NSWIRComm 1056, concerned the appeal of a decision which effectively prevented a Public Service Senior Executive Employee, Mr Davie, from obtaining relief under the freedom from victimisation provisions of the IR Act because of ss 41 and 58 of the GSE Act.

Section 41 of the GSE Act permits an employer of a Public Service Senior Executive to terminate the employment of the executive *"at any time, for any or no stated reason and without notice"*. The freedom couldn't be any clearer, right?

Section 58 of the GSE Act provides that the Public Service Senior Executive employment (broadly defined) is not an industrial matter for the purposes of the *Industrial Relations Act 1996* (NSW) (**IR Act**). It further provides that the unfair dismissal, public sector disciplinary appeals and unfair contracts provisions of the IR Act *"do not apply to or in respect of the employment of an executive employee."*

Mr Davie – what's his story?

Mr Davie had 37 years' experience working in custodial services. On 22 August 2016, Mr Davie commenced employment in the Department of Justice (Corrective Services NSW) as Director Custodial Corrections (Metropolitan East). His contract of employment indicated that his employment was 'ongoing employment' and would continue until he resigned, or his employment was terminated.

In March 2016, Corrective Services NSW introduced a reform agenda known as *"Better Prisons"* involving a process of 'benchmarking' by setting performance metrics and staffing changes to create resource parity between prisons in different jurisdictions and public and private prisons.

Mr Davie was involved in consultations with union and staff representatives in relation to the benchmarking process. In the course of the consultation process, Mr Davie made a series of complaints to senior officials of Corrective Services NSW, including to the Assistant Commissioner and Commissioner, to the effect that the proposed staffing levels were unsafe.

On or around 19 April 2018, the Assistant Commissioner removed Mr Davie from his responsibilities with respect to overseeing the benchmarking project and the Assistant Commissioner directed that those duties be undertaken by the Director of Custodial Corrections, Metro North.

On 25 June 2018, Mr Davie was asked to attend a meeting with the Assistant Commissioner. At the meeting, Mr Davie was handed a letter signed by the Secretary of the Department stating that he had decided to terminate Mr Davie's employment pursuant to section 41 of the GSE Act with immediate effect.

Round one to the employer

Mr Davie commenced proceedings under the freedom from victimisation provisions of the IR Act (found in Chapter 5, Part 1). Mr Davie alleged that he had been *"subjected to detriment for reasons including that he had made a complaint about a workplace matter that he considered was not safe and/or a risk to health"*.

Under section 213 of the IR Act, the Commission can order the reinstatement or re employment of an employee found to have been victimised.

At first instance, the employer raised a jurisdictional objection on two grounds, namely that:

- the provisions of the GSE Act dealing with Senior Executives (and in particular section 41), impliedly repealed the victimisation provisions in Chapter 5 Part 1 of the IR Act to the extent that those provisions might otherwise apply to the termination of employment of a Senior Executive; and
- section 58 of the GSE Act (and section 58(7) in particular), excluded the power of the Commission to grant any relief in proceedings under section 213 to enforce section 210 of the IR Act with respect to Senior Executives.

The employer's case drew heavily on the High Court's decision in *Commissioner of Police v Eaton* [2013] HCA 2 (**Eaton's case**).

> "Section 41 of the GSE Act permits an employer of a Public Service Senior Executive to terminate the employment of the executive *"at any time, for any or no stated reason and without notice"*."

The employer succeeded at first instance. Commissioner Murphy accepted the employer's submissions that not only is there no requirement for the employer to give a reason under section 41, but there is not even any express requirement to have a reason.

Commissioner Murphy found that the words *"at any time"* of the phrase *"for any or no stated reason and without notice"* in section 41(1) of the GSE Act provide a sufficient *'indication of repugnancy'* such as to render the making of the orders sought by Mr Davie beyond the power of the Commission.

Commissioner Murphy also found that section 58(7) of the GSE Act: *"represents, … the expansion of the scope of the excluded matters from 'the appointment or failure to appoint a person to an executive position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment" to "a matter that is declared by this section not to be an industrial matter for the purposes"* of the IR Act, including termination of employment of an executive employee.

A successful appeal

Mr Davie appealed the decision of Commissioner Murphy. The Full Bench granted leave to appeal due to the importance of the question, and it being in the public interest for the appeal to be heard.

On appeal, the employer again heavily relying on *Eaton's case*, contended that section 41(1) of the GSE Act confers on the employer an unfettered discretion to terminate the employment of a Senior Executive, in terms *"strongly indicative of Parliament's intention that there not be any examination or review of the reasons for termination"*. It also submitted that an employer has an unfettered discretion to dismiss a Senior Executive *"without interference of any kind"*.

However, the Full Bench found that *Eaton's case* is not authority for the proposition that language such as in section 41(1) of the GSE Act necessarily exempts an employer from any and all legal obligations which might arise in connection with the dismissal of a Senior Executive.

The Full Bench decided that while section 41 of the GSE does not allow for a review of the merits of any decision to dismiss, it should not be construed as allowing the termination of Senior Executives on grounds that would make the terminations unlawful. The Full Bench found that the better construction is that, assuming that the dismissal is lawful, it cannot otherwise be the subject of review.

The Full Bench also disagreed with the first instance finding that section 58(7) of the GSE Act rendered the victimisation relief sought by Mr Davie as *"beyond the power of this Commission to grant"*.

The Full Bench therefore granted the appeal, dismissed the previous finding of no jurisdiction, and remitted the matter back to Commissioner Murphy for determination of the substantive proceedings.

So what does it mean?

It can no longer be presumed that terminations of Public Service Senior Executive contracts are excluded from challenge by reason of sections 41 or 58 of the GSE Act.

Although section 41 of the GSE Act permits dismissal of a Public Service Senior Executive *"at any time, for any or no stated reason and without notice"*, it cannot be presumed to be an unfettered discretion to dismiss a Senior Executive without interference of any kind. The judgment emphasises that only lawful dismissals of Public Service Senior Executives are free from review. Therefore, it is open for a Public Service Senior Executive to allege that their dismissal is tainted by unlawfulness, whether or not a reason is given.

WELL-MANAGED POOR PERFORMANCE

Do you know the story of the employee who argued every step of the way rather than just focussing on getting on with their job? Well, that employee is not a protected species.

In the decision of *Cunneen v Secretary of the Department of Transport* [2018] NSWIRComm 1081, the NSW Industrial Relations Commission endorsed the decision of Transport for NSW (**TfNSW**) to terminate the employment of a long serving employee whose performance did not improve following a performance improvement plan.

> “if Ms Cunneen devoted as much effort to improving her performance as she did to disputing the PIP, she might not have been dismissed at all.”

Sustained under performance

Ms Cunneen had, at the time of her dismissal in September 2018, worked for the NSW government continuously for approximately 31 years; the last five years being with TfNSW. Her role was to assist in the management of TfNSW’s light motor vehicle fleet.

In about November 2017 there was a *“reallocation of tasks”* among members of her team. Ms Cunneen was directed to attend a formal counselling session. There had been previous informal discussions about her performance, but no improvement.

The counselling meeting took place on 27 November 2017, commencing the performance improvement plan under the relevant policy for managing unsatisfactory performance.

Over the next seven weeks, TfNSW conducted regular reviews with Ms Cunneen, but her performance did not improve.

On 15 January 2018, Ms Cunneen took leave for four months to care for a terminally ill family member. Upon returning to work, Ms Cunneen received an email from her manager to *“refresh her memory”* about her tasks and remind her that the performance improvement plan was ongoing.

Accordingly, the regular reviews continued, and Ms Cunneen was regularly informed that her conduct was not improving.

On 6 July 2018, Ms Cunneen was informed that the performance improvement plan had concluded and that her performance remained unsatisfactory. She was subsequently notified that her employment would be terminated. She was given the opportunity to resign, which she did not take.

“My dismissal was unfair”

Ms Cunneen said the decision to terminate her employment was unfair because there was nothing wrong with her performance. This was undermined by the fact she had in 2016 and 2017 rated herself as *“did not meet expectations”* in all areas.

Remarkably, Ms Cunneen claimed that she was denied procedural fairness because she was not allowed to prepare her feedback to the performance improvement plan during work hours. The Commissioner said:

> *“…the fact is that the PIP was directed towards her failure to perform particular tasks in a timely manner, or at all. It would have been counter-productive for work time to be devoted to responding to correspondence (to the extent that the correspondence called for a response) as opposed to addressing the perceived deficiencies in her performance.”*

One interesting argument made by Ms Cunneen was that she did not have access to the group email account she was asked to use during the performance improvement plan making it impossible for her to complete one of the key requirements. However, she failed to advise her manager that she was unable to access that inbox for a period of seven months. This led Commissioner Sloan to suggest that:

> *“The impression from the evidence is that throughout the PIP process Ms Cunneen did not always act in her own best interests. There is more than a suggestion that she took umbrage at being put through the PIP process. She seems to have become distracted by the process rather than focusing on what was being asked of her.”*

Put another way, if Ms Cunneen devoted as much effort to improving her performance as she did to disputing the PIP, she might not have been dismissed at all.

Finally, Ms Cunneen suggested the dismissal was harsh. She relied upon the fact that she was a member of a defined benefits scheme, she was a widow with a mortgage, her father’s recent death and issues to do with his estate and her length of service. The Commission recognised Ms Cunneen’s personal circumstances but ultimately found that the dismissal was not harsh, unjust or unreasonable. In his conclusion, Commissioner Sloan said:

> *“She seems to have taken issue with the process from the outset and focused on that, rather than seeking to engage with her managers to address the concerns they had raised. Her apparent unwillingness to accept the criticism levelled at her and her challenge to the process now undermines her claims that the outcome was harsh, unreasonable or unjust.”*

Takeaways

It is important to stay the course when implementing a performance management plan. To their credit, the managers at TfNSW were not distracted by factors which could have easily derailed the process. They focussed on the tasks that the employee needed to perform and gave her support to improve.

The decision should also remind employees that, when faced with a performance improvement plan, they will be best served by directing their energies to improving their performance as opposed to challenging the existence or validity of their employer’s concerns.

AWARD FREEDOM!

IS YOUR GOVERNMENT AGENCY REALLY PUBLIC SERVICE CONDITIONS AWARD COVERED?

Bartier Perry was recently successful in defending Destination NSW against a bid by the PSA to have the *Crown Employees (Public Service Conditions of Employment) Review Award 2019* (**Conditions Award**) declared as covering Destination NSW staff.

In *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary & Anor (Destination NSW)* [2019] NSWIRComm 1052, the NSW Industrial Relations Commission found that the Conditions Award does not apply to Destination NSW staff by reason of exclusion rules in the coverage clause of the Conditions Award.

This judgment may impact other NSW government agencies, especially if there is a history of administrative arrangements to engage non-public servant staff from special employment divisions as was recognised by the former *Public Sector Employment and Management Act 2002* (NSW) (**PSEM Act**) and now preserved by Schedule 4 of the *Government Sector Employment Act 2013* (NSW) (**GSE Act**).

Destination NSW is the lead government agency dealing with tourism and major events for the State of NSW. It competes with private sector organisations and legitimately employs staff on flexible, private sector-like conditions. Its stakeholders also require flexible, fast response times, often outside regular business hours. It is also an international business with operations in 13 international offices across nine countries, with the attendant time zone challenges.

When Destination NSW was created by its founding legislation in 2011, it was unable to directly employ staff by reason of section 47A of the *Constitution Act* 1902 (NSW). But it could arrange for use of services of any staff (whether by way of secondment or otherwise) from other government agencies or from special employment divisions to enable Destination NSW to exercise its functions. This is similar to wording now found in section 59 of the GSE Act.

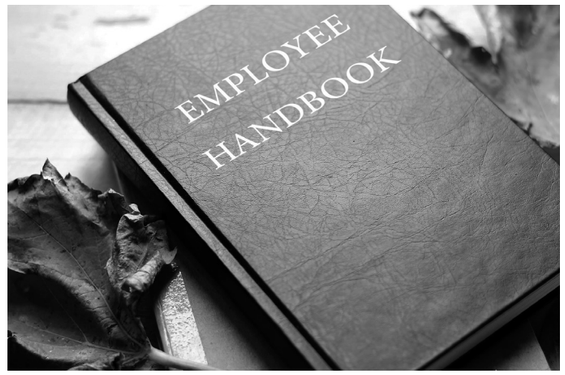
> "In the IRC hearing, the parties were at odds as to how the words *"industrial instrument or arrangement"* should be interpreted as exclusions from the application of the Conditions Award."

When Destination NSW came into existence, the Destination NSW Special Employment Division (**Division**) commenced to provide personnel services to Destination NSW. The Division, which changed its name by various administrative orders over time, was initially staffed by employees from different non-public sector and public sector bodies.

The staff who work for Destination NSW had common law contracts of employment. With respect to the new recruits, the Division has a standard form employment agreement, and allows employees to negotiate specific terms to suit personal and work flexibility arrangements. Destination NSW also has an Employee Handbook which includes policies that apply to Destination NSW staff and provides further entitlements and benefits.

Prior to 24 February 2014, non-executive staff members of Destination NSW were not public servants as defined by the PSEM Act, because the entities staffing Destination NSW at different times were not listed in Schedule 1, Part 1 of the PSEM Act. This meant that they were not covered by the Conditions Award, which read at the time:

> *"The provisions of this award shall apply to Officers, Departmental temporary employees and Casual employees (as specified in the award) as defined in the Public Sector Employment and Management Act 2002 employed in the Departments listed in Schedule 1, Part 1, to the Public Sector Employment and Management Act 2002."*



From 24 February 2014, the status of Destination NSW staff changed with the commencement of the GSE Act, and it was an agency listed in Schedule 1 of the GSE Act. The GSE Act repealed the PSEM Act subject to certain matters contained in Schedule 4 of the GSE Act (**Savings Provisions**). Clause 9 of the Savings Provision however preserved the existing conditions of employment of public service employees applying under the former PSE Act, ensuring that those conditions continued under the GSE Act.

Also, on 24 February 2014, the coverage clause of the Conditions Award came into operation with a variation made by consent on 12 December 2014 to apply retrospectively to all non-executive public service employees, including of Public Service agencies listed in Schedule 1 GSE Act, *"except where another industrial instrument or arrangement applies to the employees."*

The Conditions Award was again varied with effect from 3 March 2017 by a Full Bench of the Commission to its current form to still apply to public service employees, including of Public Service agencies listed in Schedule 1 GSE Act, but a list of different exclusion rules that rely on whether *"another industrial instrument or arrangement applies to a group of employees"*.

In the IRC hearing, the parties were at odds as to how the words *"industrial instrument or arrangement"* should be interpreted as exclusions from the application of the Conditions Award.

The PSA argued that because Destination NSW staff had been engaged on individual contracts, negotiated on an individual basis, they were not covered by an *"industrial arrangement"* applying to *"a group of employees"*. Thus, the PSA claimed that there was no existing industrial arrangement applying to employees working within Destination NSW to which the exclusion rules applied.

While the IRC recognised there was some force in the PSA's submission that the context of the Award supports its interpretation of the coverage clause as meaning collective arrangements, it found that the word "arrangement" contained in the coverage clause should not be read narrowly.

The IRC instead favoured a broader interpretation, to recognise that an arrangement included the common law contract arrangements entered into with Division employees which *"stood alone and were comprehensive"*. Therefore, the Conditions Award did not apply to the non-executive staff at Destination NSW.

Although not referred to in the judgment, during the hearing the Commission considered evidence involving over a dozen NSW government agencies that may be in a similar position to Destination NSW.

If you are unsure about the status of your agency, we would be pleased to provide further advice.

We believe in helping workplaces work and organisations and people prosper.

WANT TO KNOW MORE?

Our dedicated team of lawyers have a wealth of knowledge and expertise from working with NSW Government.

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Deanna has gained a wealth of experience and knowledge in employment and industrial relations over the last 16 years, having advised a range of corporations on various employment issues and industrial disputes.

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YOUR THOUGHTS AND FEEDBACK

Thank you for taking the time to read our NSW Government Connect publication. We hope you found it informative.

If you have any comments on this issue, or suggestions for our next issue, we'd love to hear from you.

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