

Industrial Relations Commission

New South Wales

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Case Name: Dumas v Industrial Relations Secretary (on behalf of Department of Communities and Justice )

Medium Neutral Citation: [2019] NSWIRComm 1071

Hearing Date(s): 6 June 2019

Date of Orders: 24 September 2019

Decision Date: 24 September 2019

Jurisdiction: Industrial Relations Commission

Before: Commissioner Murphy, Commissioner Sloan, Commissioner Webster

Decision: Leave to appeal refused

Catchwords: APPEAL - application for leave to appeal – whether exercise of discretion disclosed error – meaning of “impracticable” – grounds in support of leave to appeal not made out – leave to appeal refused

Legislation Cited: Fair Work Act 2009 (Cth)  
Industrial Arbitration Act 1940 (NSW)  
Industrial Relations Act 1996 (NSW) Ch 2 Pt 6, ss 84, 89, Ch 4 Pt 7, s 188

Cases Cited: Andrew Geza Schwartz and NSW Ministry of Health [2017] NSWIRComm 1034  
Australian Heritage Commission v Mr Isa Mines Pty (1997) 187 CLR 297  
Brookes v Watling (1995) 61 IR 163  
Burge v NSW BHP Steel Pty Ltd [2001] NSWIRComm 117  
Construction, Forestry, Mining and Energy Union and others v Australian Industrial Relation Commission (1998) 89 FCR 200  
Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Acciona Infrastructure Australia

Pty Ltd and Ferrovia Agroman (Australia) Pty Ltd t/as  
the Pacifico Acciona Ferrovia Joint Venture [2017]  
NSWIRComm 1029  
Dumas v Industrial Relations Secretary on behalf of the  
Department of Family and Community Services [2019]  
NSWIRComm 1018  
Fire Brigades Employees' Union of NSW (o/b Challinor)  
v Fire and Rescue NSW [2016] NSWIRComm 1050  
House v King (1936) 55 CLR 499  
Jones v Dunkel (1959) 101 CLR 298  
Leeds and Northup Australia Pty Limited v Hull (1997)  
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Liddell v Lembke (t/a Cheryl's Unisex Salon) (1994) 56  
IR 447  
Little v Commissioner of Police (2002) 112 IR 212  
Merrin v Mosman Municipal Council [2016]  
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Nguyen & Anor v Vietnamese Community in Australia  
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Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR  
186  
Public Service Association and Professional Officers  
Association Amalgamated Union of New South Wales v  
Roads and Maritime Services [2015] NSWIRComm 16

Texts Cited:

Online Macquarie Dictionary  
Online Oxford English Dictionary

Category:

Principal judgment

Parties:

Isabelle Dumas (Appellant)  
Industrial Relations Secretary (on behalf of Department  
of Communities and Justice )  
(Respondent)

Representation:

Counsel:  
D Chin with G Diggins (Appellant)  
M Seck with M Whitbread (Respondent)

Solicitors:  
McNally Jones Staff Lawyers (Appellant)

File Number(s): 2019/116862

Decision under appeal:

Court or Tribunal: Industrial Relations Commission of New South Wales

Citation: [2019] NSWIRComm 1018

Date of Decision: 12 March 2019

Before: Commissioner Constant

File Number(s): 2018/83952

## JUDGMENT

- 1 Ms Isabelle Dumas (“Appellant”) was employed as a Case Worker with the Child Protection Helpline of Family and Community Services (“FACS”) (as it was then known, now the Department of Communities and Justice) in Parramatta for about 9 years and 4 months when her employment was terminated on 8 March 2018 as a consequence of a sustained finding of misconduct against her (“Dismissal”).
- 2 The Appellant successfully brought an application under Ch 2 Pt 6 of the *Industrial Relations Act 1996* (NSW) (“Act”) against the Industrial Relations Secretary on behalf of the Department of Family and Community Services (Respondent) claiming that the Dismissal was harsh, unreasonable or unjust.
- 3 In her application, the Appellant sought reinstatement to her former position as a remedy. She was denied that remedy by the Commission and instead was awarded an amount of 14 weeks’ pay. The Appellant has appealed against the decision not to reinstate her to her former position.

## Background

- 4 The factual background of this matter is set out at length by the Commissioner in the first instance decision at [11]-[50] of *Dumas v Industrial Relations Secretary on behalf of the Department of Family and Community Services*

[2019] NSWIRComm 1018 (“Decision”). That background is not challenged in this appeal.

- 5 The Appellant experienced a series of difficulties in the workplace in the lead up to the Dismissal.
- 6 Between 2009 and 2014, the Appellant had a number of issues with her co-workers, in particular those in the Crisis Response Team (CRT) about the noise levels in the workplace, which she said affected her and others’ ability to do their work, and her health. In 2014, the Helpline was moved on to a different level away from the CRT.
- 7 After the Helpline team moved levels there were issues between the Appellant and other staff, including with a Ms Rae-Minshall (who supervised the Appellant from about 2009 or 2010), and a Ms Palmer. Issues were raised by and against the Appellant between 2014 and 2016. On 1 July 2016, Ms Palmer lodged a complaint about the Appellant’s conduct in the workplace, accusing her of staring and intimidating behaviours.
- 8 On 18 July 2016 Ms Moore of the Public Service Association (PSA) wrote to Ms Romeo, Acting Director Helpline, about a complaint made by Ms Rae-Minshall about the Appellant’s behaviour. Ms Rae-Minshall was offered to work from another location whilst the issues were reviewed and mediation. Both offers were declined.
- 9 After meeting with approximately five to six employees in respect of allegations in respect of the Appellant’s behaviour, on 23 December 2016 Ms Moore wrote to Ms Donnellan, Executive Director, Community Services Statewide Services of FACS, in the following terms:

“... Whilst the concerns regarding Ms Rae-Minshall have and are being addressed, the broader concerns regarding work health and safety within the Child Protection Helpline have not been addressed.

The Association acknowledges that Ms Rae-Minshall has been offered alternatives to provide her with respite from the behaviour of Ms Isabelle Dumas, however the behaviour of this particular individual is not limited to Ms Rae-Minshall. Ms Dumas has been shown to exhibit this nonverbal and aggressive behaviour towards others, to the point of this being [a] pattern and work health and safety concern.

The Association are aware of:

- Approximately five (5) hazard reports being lodged since July 2016 regarding Ms Dumas
- At least one other accepted workers compensation claim relating to Ms Dumas's behaviour exhibited to them
- The behaviour of Ms Dumas has continued since the alternatives were offered to Ms Rae-Minshall and Ms Dumas was advised to go onto level 9
- Four (4) members, we are aware of, whom have been psychologically intimidated and bullied by this individual.

As you would appreciate the Department of Family and Community Services have a duty of care to their employees to as reasonably as practical provide a safe workplace for their employees. There has been no change in Ms Dumas's behaviour, rather it has continued and is affecting several employees and, placing others employees whom she works with, at risk of being exposed to the intimidatory behaviour and possibly her.

The Association requests, as per cl 49 of the Work Health and Safety Act 2011, for the Department ... to consult with employees regarding work health and safety risks posed by the behaviour exhibited by Ms Dumas."

- 10 A few days after this letter was sent, on 27 December 2016, there was an incident involving the Appellant and Ms Palmer at Parramatta which ultimately led to the Dismissal. The Appellant was walking along the road and saw Ms Palmer coming from the opposite direction on the same side of the road as her. When Ms Palmer crossed to the other side of the street in order to avoid her, the Appellant followed her.
- 11 The Respondent engaged Ms Thane of Train Reaction Pty Ltd to conduct an investigation in respect of the incident on 27 December 2016, the outcome of which was delivered on 26 April 2017.
- 12 The Appellant was suspended on pay from 29 September 2017 while a further external investigation took place into the events of 27 December 2016, conducted by Ms Klaassen. Ms Klaassen found that on 27 December 2016 Ms Dumas deliberately followed Ms Palmer across the road three times, in what could be interpreted as intimidating behaviour towards her. She further found that the Appellant confronted Ms Palmer in the street after following her across the road three times and used words to the effect of "What's the game? Are you scared of me? What's the game" and/or "Stop your childish behaviour" which could be interpreted as intimidating behaviour.

- 13 Ms Klaassen additionally found that the Appellant had not been issued with a written direction to cease any type of intimidating behaviour towards other staff prior to the incident.
- 14 Ms Klaassen advised that although the matter could continue to be dealt with as a disciplinary matter, the issues could be dealt with by way of remedial action instead.
- 15 By letter dated 10 January 2018, Ms Donnell notified the Appellant that she adopted the findings of Ms Klaassen and was considering imposing a penalty on the Appellant and “the most severe penalty [she] would conceivably impose is: termination with the opportunity to resign.”
- 16 The Appellant responded to the misconduct allegations in writing and in person. However, despite her representations, a decision was made by the Respondent to terminate the Appellant’s employment after providing her with an opportunity to resign, which she did not take up. The Respondent effected the Dismissal on 8 March 2018.
- 17 The Commissioner at first instance found that the Dismissal of the Appellant was “too harsh a consequence” for the misconduct found. The Commissioner’s analysis of the evidence and her reasons for that determination are set out at [76]-[140] of the Decision.
- 18 The Commissioner’s reasoning with respect to the decision not to reinstate the Appellant is contained in [141]-[164] of the Decision.

### **Grounds of appeal**

- 19 Again, the Appellant appeals only from that decision of the Commission not to reinstate the Appellant. The Appellant’s grounds of appeal from the Decision are:

- “1. The Commissioner erred in finding that the Applicant had demonstrated ‘a lack of insight and lack of personal responsibility’ into her own behaviour towards Ms. Palmer, in circumstances where the Commissioner had found that the Applicant did not intend to intimidate, harass or humiliate Ms. Palmer and that Ms. Palmer was not generally afraid of or intimidated by the Applicant, such that it rendered reinstatement impracticable.

2. The Commissioner erred in finding that reinstatement was impracticable having regard to the findings regarding the fact that had the Applicant been told not to engage, or have dealings, with Ms. Palmer, she would not have

been dismissed, that management's approach to the entire issue was far from satisfactory and that the Applicant had for a long period (12 months) worked without incident when Ms. Palmer worked on a different floor.

3. The Commissioner erred in finding that reinstatement was impracticable, in circumstances where the Applicant had expressed contrition and indicated that she would not behave the same way in the future, in particular because the Commission did not reject the Applicant's evidence in that regard.

4. The Commissioner erred in taking into account an irrelevant consideration in determining whether reinstatement was impracticable, namely whether it would be extremely difficult if not impossible for a viable working relationship to be established between the Applicant and Mrs. Donnellan, Ms. Palmer, Ms. Burgess, Mr. Severin and Mr. Monte as well as between the Applicant and other employees of FACS who provided the PSA with information that was adverse to the Applicant, especially in circumstances where there was no evidence to support any such finding."

## Legislation

20 The primary remedy for unfair dismissal under the Act is reinstatement followed by re-employment. Relevantly, s 84(4) of the Act provides:

(4) An application may be made under this Part even though the applicant does not specify the nature of the remedy sought or requests compensation only. *However, this subsection does not affect the requirement under this Part that compensation is available only if the Commission considers that reinstatement or re-employment would be impracticable.*

(Emphasis added)

21 Section 89 provides:

### (1) Reinstatement

The Commission *may order* the employer to reinstate the applicant in his or her former position on terms not less favourable to the applicant than those that would have been applicable if the applicant had not been dismissed.

### (2) Re-employment

*If the Commission considers that it would be impracticable to reinstate the applicant*, the Commission may order the employer to re-employ the applicant in another position that the employer has available and that, in the Commission's opinion, is suitable.

...

### (5) Compensation

*If the Commission considers that it would be impracticable to make an order for reinstatement or re-employment*, the Commission may order the employer to pay to the applicant an amount of compensation not exceeding the amount of remuneration of the applicant during the period of 6 months immediately before being dismissed. If the applicant was on leave without full pay during any part of that period, the maximum amount of compensation is to be determined as if the applicant had received full pay while on leave.

(emphasis added)

### Submission on the test to be applied in deciding whether to reinstate

22 Arguing that leave to appeal should be granted, the Appellant contended that there is a need for a clear statement concerning the precise nature of the findings required to conclude that reinstatement is “impracticable” and the test to be applied in determining whether the reinstatement of an employee is “impracticable”. Although not contained in the grounds of appeal, this was a significant focus of the Appellant’s case, both in its written and oral submissions. In summary, the Appellant argued that:

- (1) the case of *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 has been largely misunderstood in that it does not establish a general test for, or constitute a statement of considerations relevant to, determining whether reinstatement is “impracticable”. Rather, it dealt with the consequences of a loss of trust and confidence between parties in an employment relationship in determining whether an order for reinstatement was “impracticable”;
- (2) the authorities relied upon in *Perkins* strongly support the notion that impracticability is not a matter of unfettered discretion and that the test as to impracticability is of very narrow compass, pointing to *Liddell v Lembke (t/a Cheryl’s Unisex Salon)* (1994) 56 IR 447;
- (3) impracticability is not established by an exercise akin to determining the balance of convenience or the weighting of factors that might exist in making an evaluative judgment such as that which is involved in determining whether or not a dismissal is harsh, unjust or unreasonable. Impracticability means that it is “practically impossible” to reinstate, and it is “practically impossible” to reinstate or it is not. It certainly is not a matter that should be approached like some exercise of unfettered discretion; and
- (4) the Commissioner applied, in substance, a test of whether reinstatement was “appropriate” rather than “impracticable”.

23 The Respondent opposed leave to appeal, arguing that, in substance, the Appellant was seeking to re-agitate the merits on the question of the impracticability of reinstatement and the threshold test for leave to appeal has not been met. In summary, the Respondent argued that:

- (1) section 89(1) provides the Commission with a discretion to order reinstatement which involves the application of a broad standard where latitude is given to the Commissioner to make an evaluative judgment;
- (2) the use of the word “consider” in section 89(2) in the phrase “If the Commission considers that it would be impracticable” means that the decision can be one based necessarily on impression and value judgments: *Australian Heritage Commission v Mr Isa Mines Pty* (1997)



187 CLR 297 at 304; *Construction, Forestry, Mining and Energy Union and others v Australian Industrial Relation Commission* (1998) 89 FCR 200 at 208C-D, 239E-G, 242F-G;

- (3) the matter of *Perkins* has been consistently and correctly followed and is authority of the proposition that a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable;
- (4) the requirement of impracticability is (to a point) a fetter on the discretion of the Commission in determining a remedy in unfair dismissal proceedings but the test is not one of very narrow compass as submitted by the Appellant;
- (5) the test of impracticability requires the Commission to take into account all relevant circumstances and does not depend “on the notions of loss of confidence in the employee”: *Liddell*;
- (6) the Court in *Perkins* adopted the approach of Wilton CJ in *Nicolson v Heaven & Earth Gallery Pty Ltd* (1994) 57 IR 50 at 61, emphasising the need to take into account all of the circumstances of the case and to evaluate the practicability of a reinstatement order in a common sense way: see also *Paulson v Industrial Relations Secretary (Department of Justice)* [2018] NSWIRComm 1004 at [21]; *NSW Health Services Northern Sydney Local Health District v Hargraves* [2012] NSWIRComm 123;
- (7) although the decision of *Nguyen & Anor v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 was determined in the context of the *Fair Work Act 2009* (Cth) (FW Act) where the Commission is to consider whether reinstatement is appropriate (rather than impracticable), the principles espoused in that decision are instructive in the Commission’s determination of whether it is impracticable to reinstate. In that regard they emphasised the Full Bench’s consideration of *Perkins* where it was stated at [23]: “*In speaking of ‘trust and confidence’ in this context we are concerned with that which is essential to make an employment relationship workable*”; and
- (8) disruption to workplace harmony can be and has regularly been accepted as relevant to the determination of whether reinstatement would be impracticable, noting that in *Paulson*, the Full Bench accepted that personality issues, and “*the nature of the appellant’s interpersonal relationship within the respondent’s workplace*” were relevant to the consideration of impracticability: see *Paulson* at [22]-[24] and *Little v Commissioner of Police* (2002) 112 IR 212 at [91].

### **The Commission’s approach to determining whether to order reinstatement**

- 24 The architecture of section 89 of the Act creates a hierarchy of remedy for unfair dismissals, with reinstatement being the primary remedy (along with relief relating to continuity of service and compensation for lost remuneration

before the reinstatement is given effect): *Burge v NSW BHP Steel Pty Ltd* [2001] NSWIRComm 117 at [34]; *Leeds and Northup Australia Pty Limited v Hull* (1997) 46 IR 11 at 14.

25 By the inclusion of the word “may” in section 89(1), the legislature conferred a discretion upon the Commission to order the remedy of reinstatement. The authorities have consistently affirmed that the decision whether to reinstate an employee unfairly dismissed is discretionary in nature: see for example, *Burge* at [34]; *Perkins* at page 188.

26 In deciding whether to exercise its discretion to reinstate an employee, the Commission must consider whether it is impracticable to reinstate the employee. As stated above, the Appellant argued that the word “impracticable” means “practically impossible”.

27 A number of authorities has considered the meaning of the word “impracticable” both in the context of the Act, and within other legislative contexts.

28 The Online Oxford English Dictionary defines “impracticable” to mean:

“1. Not practicable; that cannot be carried out, effected, accomplished, or done; practically impossible.

2. That cannot be put to use or practically dealt with; unmanageable, intractable, unserviceable.”

29 The Online Macquarie Dictionary defines “impracticable” as:

“1. not practicable; that cannot be put into practice with the available means; an impracticable plan.

2. unsuitable for practical use or purposes, as a device, material, etc.

3. (of ground, places, etc.) impassable.

4. Obsolete (of persons, etc.) hard to deal with because of stubbornness, lack of flexibility, etc.; intractable.”

30 The Industrial Arbitration (Unfair Dismissal) Amendment Bill (Bill) amended the *Industrial Arbitration Act 1940* (NSW) to introduce, for the first time, unfair dismissal provisions in the State’s industrial relations legislation. On 21 March 1991, the then Minister for Industrial Relations, the Honourable John Fahey stated in the second reading speech relating to the Bill:

“The bill provides for an application concerning an unfair dismissal to be dealt with by conciliation Commissioner sitting alone exercising conciliation and arbitration powers. Right of appeal is provided from the decision of the Commissioner to a single member of the Commission. The jurisdiction depends on the applicant satisfying the conciliation Commissioner that the dismissal was harsh, unreasonable or unjust. This test is the same as that provided for under South Australian and Victorian legislation and the standard federal award clause contains similar phraseology. There is much caselaw on the meaning of this phrase and the bill provides matters which may be considered by a Commissioner in determining a claim. Remedies provided by the bill are those of reinstatement and re-employment and in both these cases and order may be made for lost wages. *Provision is also made for a Commissioner to compensate a person where it is considered impracticable to make an order for reinstatement or reemployment. This may be the case where there is no available position or where mutual trust and confidence cannot be restored or a satisfactory employment relationship cannot be re-established.*”

(Emphasis added)

31 It is clear from the examples given in the second reading speech to the Bill that the legislature intended the word “impracticable” to be capable of capturing circumstances where:

- (1) there is no available position to reinstate an employee into;
- (2) mutual trust and confidence cannot be restored; or
- (3) a satisfactory employment relationship cannot be re-established.

32 In *Liddell* the meaning of “impracticable” was considered by the plurality at page 466:

“The precise meaning of ‘impracticable’ in this context should be left for another day; the question is one of general importance and it was not fully argued in this case. But, although ‘impracticable’ does not mean ‘impossible’, it means more than ‘inconvenient’ or ‘difficult’. The imposition of such a stringent limitation on the Court’s power to award compensation, rather than order reinstatement, is inconsistent with the notion that Parliament intended the Court to have an open discretion whether to intervene at all.”

33 In the matter of *Brookes v Watling* (1995) 61 IR 163 the Full Bench considered the meaning to be attributed to the word “impracticable”, confirming their view that the Commission need go no further than the *Shorter Oxford English Dictionary* definition, “*Not practicable; that cannot be carried out or done; practically impossible*”. In that matter, the employer’s business had ceased to operate and the employer argued that it was “impossible” to reinstate the employee, not “impracticable”. The Full Bench found at 170 that:

“...the appropriate exercise, in our view, is to consider whether the action under consideration fits within the words used in the statute, ‘impracticable’, rather than whether it also fits, or more appropriately fits, within the meaning of some other descriptive word.”

34 What is clear from the authorities is that there is a range of circumstances that may make reinstatement impracticable. In one context, it may be impracticable because it is impossible, for example where the position in question no longer exists. In another context, it may be impracticable to reinstate an employee because the break down in the employment relationship is such that it simply is “not practicable” to expect that the relationship issues that led to the dismissal of the employee can be overcome and the employment relationship effectively re-established. The later example was clearly envisaged in the second reading speech introducing the remedy scheme for unfair dismissals. This example also makes clear that whether it is practicable to reinstate an employee means something more than “possible”.

35 As stated by Wilcox CJ in *Nicholson* at pages 60-61:

“It is important to note that Parliament stopped short of requiring that, for general compensation to be available, reinstatement be impossible. The word ‘impracticable’ requires and permits the Court to take into account all the circumstances of the case, relating to both the employer and employee, and to evaluate the practicability of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously affect productivity, or harmony within the employer’s business, it may be ‘impracticable’ to order reinstatement, notwithstanding that the job remains available.”

36 As stated already, the level of trust and confidence that exists between the parties may be a relevant consideration in determining whether reinstatement is impracticable. Having said that, a loss of trust and confidence will not necessarily mean that it is impracticable for an employee to be reinstated: see *Perkins*. It will be a question of fact and degree, taking into account all of the circumstances of the case, in a commonsense way.

37 In *Perkins* the Court explicitly confirmed that “*Trust and confidence is a necessary ingredient in any employment relationship,*” later concluding that it accepted that the question whether there has been a loss of trust and confidence is a *relevant consideration* in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based: see page 191. The Court did not find that whether there has

been a loss of trust and confidence will be determinative of whether reinstatement is practicable, stating at page 191:

“Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of a loss of confidence in the employee.

Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of an employer, or some other in person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. In assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.”

38 In *Nguyen* a Full Bench of the Fair Work Commission summarised from the authorities, including *Perkins*, the impact of loss of trust and confidence on the question of reinstatement and on the question of the “appropriateness” of reinstatement:

“[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.

- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[28] Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.”

(Footnotes removed)

39 Although this Commission is required to consider whether it is impracticable to reinstate an employee in exercising its discretion, rather than if it is appropriate, we agree with the Respondent’s submission that the stated principles and considerations remain just as relevant to the analysis.

40 Ultimately there will need to be consideration of all of the relevant evidence before the Commission in deciding whether it is impracticable to reinstate an employee. This will often require the weighing of evidence that is both favourable and not favourable to a conclusion that it is impracticable to reinstate the employee. The Commissioner who hears the matter at first instance is best placed to evaluate the reliability of the evidence, which in the context of considering the capacity of the employment relationship to be restored (as a factor relevant to determining whether it is impracticable to reinstate the employee) may require judgement calls based on the credibility of witnesses evidence. As noted in *Burge* at [7]:

“The general principle is that an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge; in deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusions of the trial judge, but, once having reached its own conclusions, will not shrink from giving effect to it: *Warren v Coombes* (1978) 142 CLR 531 at 551. And, in addressing error, an appellate court should not interfere with the trial judge’s conclusions on fact unless it is of the opinion that they were not reasonably open (or were clearly wrong) on the evidence: *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 107; *Autobake Pty Ltd v Budd* (1986) 19 IR 18 at 25; *Ablos v Australian Postal Commission* (1990) 171 CLR 167 at 178 ff; *Haynes v C I & D Manufacturing Pty Ltd* (1994) 60 IR 149 at 153-155; and *Port Macquarie Fold Club v Stead* (at 59).”

41 It follows from what has been set out above that the Appellant’s submissions with respect to the Commission’s approach to reinstatement is not accepted for the following reasons:

- (1) The Appellant has not been able to establish confusion in the authorities with respect to the relevance of the principles espoused in *Perkins* on loss of trust and confidence as they relate to a determination of whether reinstatement is impracticable.
- (2) Whilst we agree that the scheme of s 89 is such that the Commission will be required to take into account whether it is impracticable to reinstate an employee in exercising its discretion, the decision to reinstate remains discretionary in nature. Whether it is impracticable to reinstate an employee is not a jurisdictional question to be determined by the Commission.
- (3) It will be necessary for the Commission to consider and weigh evidence for and against the exercise of its discretion to reinstate an employee, including whether it is impracticable.
- (4) “Impracticable” is to be given its ordinary meaning within the context of the case being considered. The legislature intended that it may be impracticable to reinstate “where mutual trust and confidence cannot be restored or a satisfactory employment relationship cannot be re-established.”

42 Further, there is nothing in the decision of the Commissioner at first instance which supports the Appellant’s contention that she did not apply the correct test. It is abundantly clear that the Commissioner considered whether the evidence made out that it was *impracticable* to reinstate the Appellant.

43 We now turn to consider the specific grounds of appeal as contained in the Appellant’s Notice of Appeal.

**Ground 1 & 3 – The “lack of insight” finding, Appellant’s contrition and undertaking to change**

44 It is convenient to consider the first and third grounds of appeal together relating to the Appellant’s lack of insight, her contrition and how she would behave in the future because these matters are connected in the Commissioner’s findings: see [19] above.

45 At [134]-[135] of the Decision, the Commissioner stated:

“[134] In her Bachelor of Applied Science degree, the applicant studied conflict management; interpersonal skills; mental health issues and managing ambiguity and change, amongst other subjects. The applicant should have apprehended that the chances of her behaviour bringing about a happy or peaceful resolution to the conflict between her and Ms Palmer were very low. The applicant displayed a lack of insight into her own behaviour and that of her colleagues, and the likely consequences of her actions, particularly for a person with the qualifications and experience of the applicant.

[135] The Helpline employees deal with matters of child protection which involve risks of serious harm to children. It is important that they are able to operate as a team and have insight into their own behaviours. It is also important that the applicant's supervisor is ready, willing and able to supervise the applicant and assist in complex or difficult matters."

46 The Commissioner continued at [147], [155] and [163]:

"[147] The applicant, despite giving evidence to the Commission that she would act differently in hindsight, effectively denies personal responsibility. There are other examples of the applicant's lack of insight in the applicant's evidence including her evidence regarding her interaction with Ms Rae-Minshall's husband. The applicant maintained a lack of insight into her behaviour during the hearing thereby underscoring the respondent's submission that she is unable to view her conduct from the perspective of others and therefore remains unable to appreciate the adverse impact of her conduct on her colleagues such as Ms Palmer. The lack of insight of the applicant weighs significantly against reinstatement to a role in Child Protection where the need for insight and a co-operative and professional relationship with one's supervisors and peers in this environment is patent.

...

[155] Given the Commission's view about the applicant's lack of insight it is relevant to consider whether the applicant can be generally contrite in these circumstances. The applicant responds to questions about her conduct with a response that she is not scary, displaying a lack of understanding of Ms Palmer's and Ms Rae-Minshall's perspectives. The Commission does not accept that the applicant's contrition can be entirely genuine without such an understanding.

...

[163] After weighing each of these matters, and in particular, the applicant's lack of insight and acceptance of personal responsibility, I am compelled to determine that it would be impracticable to make an order for reinstatement in this case, regardless of whether orders limiting the applicant's movement within the workplace, or other conditions are matters within the Commission's powers."

47 The Commissioner had evidence before her upon which she was able and entitled to make findings with respect to the Appellant's insight into her own behaviour and its impact. Significantly, the Commissioner had the advantage of being able to observe the Appellant first hand as she gave evidence which enabled her to make the relevant judgements in respect of her level of insight, the authenticity of her contrition and the likelihood she would act differently in the future.

48 The fact that the Commissioner found that the Appellant did not intend to intimidate, harass or humiliate Ms Palmer and that Ms Palmer was not generally afraid of or intimidated by the Appellant did not preclude the



Commissioner from making a finding (which she did) that the Appellant lacked insight into the impact of her behaviour on others. The Commissioner found that the Appellant should have apprehended that her actions on 27 December 2016 would not have brought about a happy outcome and that there was other evidence of her lack of insight, such as the interaction with the husband of Ms Rae-Minshall.

- 49 The Appellant made the point that the Commissioner drew a conclusion about the Appellant's work capacity based on her findings about the Appellant's lack of insight and acceptance of personal responsibility. The Appellant notes that no issue was taken by the Respondent with respect to the Appellant's work performance as a Case Worker. The Appellant has sought to construe the concept of work performance very narrowly in this submission. The concept of performance within modern workplaces goes beyond the delivery of defined outputs or outcomes, to expectations about the behaviours employees will exhibit in the workplace. There was evidence before the Commission with respect to the Appellant's relationships with others at work, including in respect of the incident that led to her termination and it was open to the Commissioner to draw the conclusion that there was a need for insight and co-operative and professional relationships with Appellant's supervisors and peers to be effective in her role and workplace.
- 50 It is also evident from the decision that the Commissioner took into account and considered the Appellant's evidence that she would act differently in hindsight, but implicitly rejected that evidence with her findings that the Appellant lacked insight into her own behaviour and did not accept personal responsibility. The Commissioner also considered the contrition shown by the Appellant, but again, implicitly rejected that evidence by not accepting that the Appellant's contrition can be "entirely genuine".
- 51 The Commissioner was entitled to make findings with respect to the level of insight the Appellant had into her own conduct, the genuineness of her contrition and the likelihood she would behave the same in the future and it was appropriate for the Commissioner to take those findings into account in

deciding whether it was impracticable for the Appellant to be reinstated to her position.

52 The Appellant has been unable to make out grounds of appeal 1 and 3.

**Ground 2 – Reinstatement not impracticable given management failings and Appellant’s 12 months’ work without incident.**

53 The second ground of appeal is set out above at [19 [Ref18510220](#)] above.

54 Although the Commissioner made findings with respect to how the Respondent could have better managed the interpersonal conflicts involving the Appellant, and indeed, if that had occurred, the incident leading to the termination of employment would not have occurred, this did not preclude her from finding that reinstatement was impracticable. We note in this regard, the Commissioner made findings against the Appellant with respect to her conduct in respect of the incident of 27 December 2016.

55 The fact that the Appellant had worked without any issues arising from the date of the incident on 27 December 2016 to the date of her suspension, did not preclude the Commission from making a finding that reinstatement was impracticable, particularly given the Appellant was the subject of a disciplinary investigation during that period.

56 The Appellant has been unable to make out ground of appeal 2.

**Ground 4 – Working relationship with Mrs. Donnellan, Ms. Palmer, Ms. Burgess, Mr. Severin and Mr. Monte as well as between the Appellant and other employees of FACS who provided the PSA with information that was adverse to the Appellant is irrelevant and there is no evidence to support the finding.**

57 The fourth ground of appeal is set out above at [19 [Ref18510220](#)].

58 The relevant findings are at [161] of the Decision:

“It would be extremely difficult, if not impossible, for a viable working relationship to be re-established between the applicant and Ms Donnellan, Ms Palmer, Ms Burgess, Mr Severin, and Mr Monte, as well as between the applicant and the other employees of FACS who provided the PSA with information which was adverse to the applicant. An order for reinstatement could be made that requires FACS to put in place conditions in respect of the way in which the employees interact with each other, such as an order that the applicant not present herself on a specific floor or specific area.”

- 59 During the hearing of the appeal, the Full Bench granted leave for both the Appellant and the Respondent to provide further written submissions with respect to this ground of appeal. We have taken those further submissions into account.
- 60 We consider that the findings in the Decision with respect to the working relationships of the Appellant with the individuals named above are relevant to the capacity of the employment relationship to be successfully re-established within the workplace.
- 61 The Commissioner had before her evidence that would enable her to make the findings she made, whether relating to the individuals named or more collectively. That evidence included the conduct that led to the termination as well as evidence of the Appellant's loss of confidence in the management of the Helpline: see [152] of the Decision. The Appellant gave evidence of having difficulty coping within the work environment including feeling she was being "attacked" and working in a "hostile" work environment.
- 62 Ms Palmer had directly made complaints with respect to the Appellant, as had Ms Rae-Minshall. Ms Moore on behalf of the PSA, representing five to six employees, raised health and safety concerns.
- 63 Some of the named individuals were within the Appellant's line of management within the Helpline and/or were involved in managing the conflict situations experienced by her. The Commission also had evidence with respect to these various conflict issues that had arisen in the Appellant's employment that were required to be managed in various ways by Ms Donnellan, Ms Burgess, Mr Sevrin and Mr Monte. While the Commission did not hear direct evidence from Ms Burgess, Mr Sevrin and Mr Monte, there was in evidence communications involving each of them relating to the Appellant which, combined with the evidence of Ms Donnellan, could form the evidentiary basis of the Commission's findings.
- 64 Ms Donnellan gave evidence that FACS had lost trust and confidence in the Appellant and that her reinstatement would create risks to the health and safety of the Respondent's employees including by exacerbating injuries of others within the workplace: at [28] of the Statement of Clare Donnellan, 25 July 2018.

65 The Appellant invited the Full Bench to draw an inference pursuant to the principles espoused in *Jones v Dunkel* (1959) 101 CLR 298 in respect of the Respondent's failure to call evidence from the Appellant's supervisors. In determining the impracticability of reinstatement, it is not required that the former employer call evidence from all those with whom the terminated employee may interact in the workplace, past, present or future. What is required is that the decision as to whether it is impracticable to reinstate be made in a commonsense way. It may be relevant and appropriate to take into account the evidence of managers and peers relating to the loss of trust and confidence in the employment relationship in determining whether the relationship can be satisfactorily restored, even if those giving evidence would no longer be required to work directly with the employee if reinstated. The Commission is not only directing its inquiry into the state of the relationship with particular individuals, but also the organisation as a whole.

66 We consider that the Commission properly took into account the evidence that was before her in making the relevant finding and that it was reasonably open to her to make that finding on the evidence. The capacity of an employee to establish a viable working relationship within a workplace is clearly a relevant matter to be considered in the context of determining whether reinstatement is impracticable. We can see no error in the findings the Commissioner has made in this regard.

### **Principles on leave to appeal**

67 An appeal to the Full Bench under Ch 4 Pt 7 of the Act may be made only with the leave of the Full Bench: section 188(1). The Full Bench is to grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted: section 188(2).

68 The principles relevant to leave to appeal are well settled and were summarised in *Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v Roads and Maritime Services* [2015] NSWIRComm 16 as follows:

[10] It is well settled that an appeal under the IR Act is an appeal in the strict sense: see s 191 of the IR Act and *King v State Bank of New South Wales (No 2)* [2002] NSWIRComm 353; (2002) 126 IR 407. In such an appeal the

appellate tribunal will only intervene to correct error: *About v State of New South Wales (Department of School Education)* [1999] NSWIRComm 449; (1999) 92 IR 32. In the case of discretionary decisions it is not enough that the appellate tribunal would have come to a different view. It must be shown that the primary judge had failed to properly exercise the discretion committed to him: *Mace v Murray* [1955] HCA 2; (1955) 92 CLR 370 and *House v The King* [1936] HCA 40; (1936) 55 CLR 499. It is important to bear these principles in mind in approaching the question of leave to appeal.

[11] The principles guiding the determination of leave were clearly set out in this often cited passage from *Hosemans v Commissioner of Police* (No 4) (2005) 150 IR 263:

[5] The law and practice governing leave to appeal is well settled and does not require restatement: see *Knowles v Anglican Church Property Trust (No. 2)* (1999) 95 IR 380. However, two principles warrant particular mention: first, leave will not be lightly or automatically granted (see *King v State Bank of New South Wales (No 2)* (2002) 126 IR 407 at [52]-[55] and *Knowles* at 381 - 382) and, subject to the requirements of s188(2) of the Act, will not, generally, be granted unless the appellant demonstrates that the appeal "raises substantial issues of principle or law or has wider implications for the jurisprudence of this Commission, including whether the decision has widespread practical application" (see *Knowles* at 382) or raises issues going to the proper administration of justice. Secondly, leave will rarely be granted where an appeal primarily seeks to challenge findings of fact which are otherwise reasonably open on the evidence: *Box Valley Pty Ltd v Price* (2000) 97 IR 484; *Austin v NF Importers Pty Limited* [2005] NSWIRComm 353 at [5]."

- 69 These principles have since been approved in a number of decisions of the Full Bench of the Commission: *Merrin v Mosman Municipal Council* [2016] NSWIRComm 1048 at [6]-[7]; *Fire Brigades Employees' Union of NSW (o/b Challinor) v Fire and Rescue NSW* [2016] NSWIRComm 1050 at [11]; *Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Acciona Infrastructure Australia Pty Ltd and Ferrovial Agroman (Australia) Pty Ltd t/as the Pacifico Acciona Ferrovial Joint Venture* [2017] NSWIRComm 1029 at [10]; *Andrew Geza Schwartz and NSW Ministry of Health* [2017] NSWIRComm 1034 at [8]; and *Paulson v Industrial Relations Secretary (Department of Justice)* [2018] NSWIRComm 1004.
- 70 We adopt these principles in determining the Respondent's application for leave to appeal the Decision.
- 71 We have considered and determined that there is no error in the Decision of the type described in *House v King* (1936) 55 CLR 499. The appeal does not

raise substantial issues of principle or law or have wider implications for the jurisprudence of the Commission.

72 For the reasons set out above, the Appellant has not made out a proper basis for leave to appeal.

**Conclusion**

73 In these circumstances, leave to appeal is refused.

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