

**APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTERS
U 28/2023 AND B 28/2023 GIVEN ON 8 OCTOBER 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2025 WAIRC 00820

CORAM : CHIEF COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL
COMMISSIONER T B WALKINGTON

HEARD : WEDNESDAY, 12 MARCH 2025, TUESDAY, 1 APRIL
2025

DELIVERED : WEDNESDAY, 1 OCTOBER 2025

FILE NO. : FBA 21 OF 2024

BETWEEN : PHILLIP TRESTRAIL
Appellant

AND

CITY OF KARRATHA
Respondent

ON APPEAL FROM:

Jurisdiction : **WESTERN AUSTRALIAN INDUSTRIAL
RELATIONS COMMISSION**

Coram : **COMMISSIONER C TSANG**

Citation : **2024 WAIRC 00882**

File Nos : **U 28 OF 2023; B 28 OF 2023**

Catchwords : Industrial Law (WA) - Appeal against decision of Commission - Alleged unfair dismissal and denied contractual benefit claims - Summary dismissal for misconduct - Relevant principles applied - Procedural fairness - Requirements under *Local Government Act 1995* (WA) regarding Senior Employees - Requirements not met - Contractual terms - Allegations of serious breach of contract and wilful and grave misconduct not made out - Contractual benefits claim established - Dismissal harsh, oppressive and unfair - Orders to issue

Legislation : *Corruption Crime and Misconduct Act 2003* (WA) s 4(d), s 45M(c)
Fair Work Act 2009 (Cth) s 313(1)(a), s 323(1), s 324, s 324(1), s 324(1)(a), s 324(1)(d)
Family Law Act 1975 (Cth) s 75, s 79
Income Tax Assessment Act 1997 (Cth) s 4.10(2), s 4.15(1), s 6.5(2)
Industrial Relations Act 1979 (WA) s 23A, s 29(1)(d), s 49
Industrial Relations Legislation Amendment Act 2021 (WA)
Local Government Act 1995 (WA) s 5.36(1) and (2), s 5.37, s 5.37(2)
Local Government (Model Code of Conduct) Regulations 2021 (WA) Schedule 1 Subclauses 6(a) and (b)
Minimum Conditions of Employment Act 1993 (WA) s 17D(1), s 17D(1)(a), s 17D(1)(c)
Superannuation Guarantee (Administration) Act 1992 (Cth)

Result : Appeal upheld

Representation:

Counsel:

Appellant : Mr M Cox of counsel
Respondent : Mr N Ellery of counsel

Solicitors:

Appellant : MDC Legal
Respondent : Mills Oakley

Case(s) referred to in reasons:

Amin v Burswood Resort Casino (1998) 78 WAIG 2441
BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191; (2002) 82 WAIG 2013
Bi-Lo Pty Ltd v Hooper [1992] 53 IR 224
Blyth Chemical v Bushnell [1933] HCA 8; (1933) 49 CLR 66
Briginshaw v Briginshaw (1938) 60 CLR 336
Callan v Smith [2021] WAIRC 00216; (2021) 101 WAIG 1155
CFMEU v BHP Billiton Iron Ore Pty Ltd [2004] WAIRC 13424; (2004) 84 WAIG 3787
Clouston & Co Ltd v Corry [1906] AC 122
Concut Pty Ltd v Worrell [2000] HCA 64; (2000) 75 ALJR 312
Cornwell v The Queen [2007] HCA 12; (2007) 231 CLR 260
Devries v Australian National Railways Commission [1993] HCA 78; (1993) 177 CLR 472
Director - General Department of Justice v Civil Service Association [2025] WAIRC 00146; (2025) 105 WAIG 428
Drinkwater v Caddyrack Proprietary Limited [1997] NSWSC 431
Fagan v Minister for Corrective Services [2024] WASCA 167; (2024) 105 WAIG 1
Fox v Percy (2003) 214 CLR 118
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893
Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 46 IR 98
Heard v Monash Medical Centre (1996) 39 AILR ¶3-203
House v The King [1936] HCA 40; (1936) 55 CLR 499
Jupiter General Insurance Co Ltd v Adeshire Bomanji Shroff (1937) 3 All ER 67

Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd (2001) 207 CLR 1

Lockwood Security Products Pty Ltd v Doric Products Pty Ltd (2004) 217 CLR 274)

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152

Magyar v Department of Education [2019] WAIRC 00781; (2019) 99 WAIG 1595

McHugh v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs (No. 2) [2020] FCA 843

Miles v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385

Minister for Health v Drake-Brockman: [2012] WAIRC 00150; (2012) 92 WAIG 203

Momcilovic v The Queen [2011] HCA 34; (2011) 245 CLR 1

North v Television Corp Ltd (1976) 11 ALR 599

Parnell v The Roman Catholic Archbishop of Perth [2021] WAIRC 00102; (2021) 101 WAIG 186

Rankin v Marine Power International Pty Ltd [2001] VSC 150

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) HCA 6; (2003) 214 CLR 1

Schaale v Hoescht Australia Ltd (1993) 47 IR 249

Shire of Esperance v Mouritz (No 1) (1991) 71 WAIG 891

Skinner v Broadbent [2006] WASCA 2

State Rail Authority (NSW) v Earthline Construction Pty Ltd (in liq) (1999) 73 ALJR 306

Thompson v Groote Eylandt Mining Co Ltd [2003] NTCA 5

University of Wollongong v Metwally (No. 2) [1985] HCA 28; (1985) 60 ALR 68

Warren v Coombes & Anor (1979) 142 CLR 531

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2024] WAIRC 00139; (2024) 104 WAIG 322

Whooley v Shire of Denmark [2019] WASCA 28; (2019) 99 WAIG 87

Wilkinson v Wilson Security Pty Ltd (No.3) [2024] FCA 705

Young v Queensland Trustees Ltd (1956) 99 CLR 560 at 567

*Reasons for Decision***THE FULL BENCH:****Brief background**

- 1 The appellant was formerly employed by the respondent as its Director - Corporate Services. He commenced employment with the respondent in June 2012. At that time, the appellant was employed as the Manager of Human Resources. The appellant was promoted to the position of Director - Corporate Services in April 2013. In May 2023, the appellant was summarily dismissed by the respondent for misconduct. The reason for the appellant's dismissal was that he had commenced an arrangement in about April 2019, by which he postponed his salary increases, which monies were to be received by the appellant as backpay at some point in the future (the Pay Arrangement). The Pay Arrangement was not documented by the appellant and the respondent's current and former Chief Executive Officers were not aware of it. On the discovery of the Pay Arrangement, in March 2023, the respondent undertook an investigation which led to the appellant's dismissal for misconduct.

Unfair dismissal and denied contractual benefits claims*The claims*

- 2 The appellant commenced two proceedings before the Commission. The first was a claim that he had been unfairly dismissed and the second was a claim that he had been denied contractual benefits by the respondent. In his unfair dismissal claim the appellant contended that the respondent unfairly dismissed him from his employment with the respondent in May 2023. The appellant maintained that his summary dismissal was grossly unfair as his conduct at its highest, was a mistake, and the procedure undertaken by the respondent leading to his summary dismissal was grossly unfair and unjust. As to his contractual benefits claim, the appellant maintained that he was entitled to receive payment for the balance of his fixed term contract in the sum of \$245,419.

Agreed facts

- 3 The parties filed a statement of agreed facts at first instance. It was in the following terms:

The Applicant's employment with the Respondent

1. The Applicant was at all material times an employee of the Respondent.

2. The Applicant commenced employment with the Shire of Roebourne (as the Respondent was then known) in the position of Manager - Human Resources on 25 June 2012.
3. On 16 April 2013, the Applicant was promoted to the newly created role of Director - Corporate Services.
4. The Applicant's duties were outlined in part in a Position Description dated March 2013, which was the last position description agreed to by the parties, and which duties changed over time.
5. The Applicant reported directly to the Chief Executive Officer (CEO). The Applicant did not report to any other 'senior employee' within the Respondent.
6. The Applicant acted as a City of Karratha (City) representative from time to time in the course of his duties.
7. The Applicant had broad oversight of the following departments in his role with the Respondent:
 - (a) Finance;
 - (b) Information Technology;
 - (c) Governance;
 - (d) Human Resources (until January 2023); and
 - (e) Marketing and Communications (until January 2023).

The Applicant's deferral of pay rises

8. In or around April 2019, the Applicant's pay increases were postponed (**Pay Arrangement**). The Applicant's request was not documented.
9. In an email of 17 March 2023, the Applicant explained that he intended to receive the unpaid amount at a later stage in the form of backpay.

The termination of the Applicant's employment

10. The Pay Arrangement was the subject of an anonymous report to the City on 10 March 2023.
11. On 12 March 2023, Ms Miltrup made enquiries with Ms Kayla Harrison (Manager Human Resources) in relation to the Applicant's pay.
12. On 14 March 2023, Ms Miltrup emailed the Applicant to ask why he had made the request to defer his pay rises, and how this arrangement was documented and accounted for in the financials. Ms Miltrup requested a response by 17 March 2023,
13. The Applicant responded to Ms Miltrup's email on 17 March 2023.
14. On 26 March 2023, Ms Miltrup reported the matter to the Public Sector Commission by way of a 'Notification of minor misconduct' form.
15. Ms Miltrup met with the Applicant on 28 March 2023 to issue him with a letter dated 28 March 2023 with the subject line "Suspected Minor Misconduct", which stated she had initiated a formal misconduct investigation and requested his

response to a series of questions by 31 March 2023 (**Suspected Misconduct Letter**).

16. The Applicant provided Ms Miltrup with his response to the Suspected Misconduct Letter on 3 April 2023, after being granted a three-day extension.
17. On 4 April 2023, Ms Miltrup received a letter from the Public Sector Commission stating they had referred the matter to the Corruption and Crime Commission.
18. Ms Miltrup emailed Ms Michelle Reynolds, CEO of the City of Perth, on 6 April 2023 to request she be part of a confidential panel reviewing the Applicant's response to the Suspected Misconduct Letter.
19. On 11 April 2023, Ms Miltrup emailed Ms Kelly Nunn, then acting Mayor of the City of Karratha, to request that she be part of the investigation panel. Ms Miltrup forwarded to Ms Nunn her previous email correspondence with Ms Reynolds.
20. Both Ms Nunn and Ms Reynolds were provided the following documents to review as part of the investigation:
 - a. Ms Miltrup's notification to the Public Sector Commission dated 26 March 2023;
 - b. the Suspected Misconduct Letter;
 - c. the Applicant's response to the Suspected Misconduct Letter dated 3 April 2023; and
 - d. the notification from the Public Sector Commission dated 4 April 2023 that they have referred the matter to the Corruption and Crime Commission.
21. On 11 April 2023, Ms Miltrup advised the Applicant that the investigation panel would consist of herself, Ms Nunn and Ms Reynolds, who was to be an independent panel member.
22. In emails of 13 April 2023 and 14 April 2023, the Applicant sought an update from Ms Miltrup as to the status of the investigation.
23. The Applicant emailed Ms Miltrup on 21 April 2023 to confirm the points discussed in a meeting between Ms Miltrup and the Applicant on 14 April 2023.
24. On 27 April 2023, Ms Miltrup advised the Applicant via email that the investigation had closed, and he would be provided with a written response by no later than 28 April 2023.
25. That same day, the Corruption and Crime Commission informed the Respondent that it had closed its file and referred the matter back to the Public Sector Commission because it was unable to form a reasonable suspicion of serious misconduct on the basis that no corrupt intent was identified.
26. The Applicant ceased to have IT access in the evening of 28 April 2023.
27. On 29 April 2023, the Applicant received a show cause letter dated 28 April 2023 (**Show Cause Letter**) advising him that he was stood down and requiring him to show cause as the Respondent had formed a preliminary view that his conduct may amount to misconduct warranting disciplinary action.

28. The Applicant provided Ms Miltrup with a response to the Show Cause Letter on 4 May 2023 (**4 May Response Letter**).
29. On 5 May 2023, the Public Sector Commission informed Ms Miltrup that it was referring the matter back to the Respondent.
30. The Applicant received a letter on 11 May 2023 from Ms Miltrup advising him that the Respondent had formed a preliminary view that his conduct amounted to serious misconduct justifying summary termination, and requesting a written response by 12 May 2023 (**11 May Letter**).
31. The Applicant sought an extension to provide his response to the 11 May Letter, which was granted by Ms Miltrup.
32. The Applicant provided his response to the 11 May Letter on 16 May 2023.
33. On 22 May 2023, the Council of the City of Karratha held a Special Council Meeting and it reported that it approved Ms Miltrup's recommendation to terminate the Applicant's employment.
34. On 23 May 2023, the Applicant was notified that his employment was terminated by the Respondent effective immediately.
35. On 2 June 2023, the Applicant received payment of his unused leave entitlements and backpay.

Findings of the Commission

- 4 In response to the appellant's claims at first instance, the respondent contended that by his conduct, as a senior officer of the respondent, the appellant had, by entering into the Pay Arrangement without the knowledge or approval of the respondent's CEO, breached his duty of good faith to the respondent. It was further maintained that the consequence of the Pay Arrangement, conferred a significant benefit on the appellant not available to other employees of the respondent. Furthermore, the Pay Arrangement also involved a contravention of various statutory obligations imposed on the respondent, the appellant's contract of employment and the respondent's Code of Conduct. Additionally, it was maintained by the respondent that the appellant also obtained significant tax advantages from the Pay Arrangement.
- 5 The matter was heard over three days on 15, 16 and 27 November 2023. In a decision handed down on 4 October 2024, in careful and detailed reasons, the learned Commissioner dismissed the appellant's claims. In doing so, she found and concluded as follows:
 - (a) As to matters of principle, summary dismissal may be justified where the employee's conduct is 'repugnant to the relationship of employer/employee': *Rankin v Marine Power International Pty Ltd* [2001] VSC 150;

- (b) That in applying *Bi-Lo Pty Ltd v Hooper* [1992] 53 IR 224 and *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893, the Commission must make findings of fact regarding the conduct leading to the dismissal, having due regard to the evidentiary onus on the employer as discussed in *Minister for Health v Drake-Brockman*: [2012] WAIRC 00150; (2012) 92 WAIG 203;
- (c) That the employer does not need to establish actual guilt of the employee in committing the misconduct, but it must establish that it undertook a proper enquiry and in the circumstances had ‘reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged and that, taking into account any mitigating circumstances either associated with the misconduct or the employee’s work record, such misconduct justified dismissal’: *Drake-Brockman* at [66];
- (d) That it was not necessary for the respondent to establish that the Pay Arrangement constituted breaches of relevant legislation, superannuation, taxation and financial reporting obligations, the appellant’s contract of employment and the Code of Conduct. It was sufficient that there was a real and substantial risk of such a breach;
- (e) As to the terms of the appellant’s contract, and payment obligations under the *Fair Work Act 2009* (Cth), the *Minimum Conditions of Employment Act 1993* (WA) and the *Local Government Officers (Western Australia) Award 2021*, the Pay Arrangement, to the extent that the appellant did not receive his pay when it was due each fortnight, constituted a breach of the obligations imposed by these instruments;
- (f) That the appellant’s refusal to concede that the Pay Arrangement had the effects contended for by the respondent, affected the appellant’s credibility as a witness;
- (g) The effect of the above paragraph (e), is that the appellant, also by his conduct, contravened the respondent’s Code of Conduct in that he failed to act lawfully, and be seen to act lawfully, in accordance with statutory requirements;
- (h) That whilst, in the absence of detailed submissions from the parties, the conclusion could not be reached that the appellant contravened income tax legislation, there was a real and substantial risk that the respondent’s (pay as you go) obligations under the legislation were contravened;
- (i) Likewise, given the obligation on an employer to make superannuation contributions under the relevant superannuation legislation, there was a real

and appreciable risk that the Pay Arrangement did lead to a breach of the respondent's superannuation obligations;

- (j) That the Pay Arrangement was not similar to employees receiving backpay as a result of delays in the completion of performance reviews; nor was it similar to employees' rights to purchase annual leave or the delayed lodgement of expense reimbursement claims;
- (k) The appellant's failure to disclose his full income for tax purposes over the years the Pay Arrangement was in effect, a benefit to him in those income years. The appellant's refusal to accept that this was a benefit to him impacted on his credibility as a witness. Furthermore, the appellant's failure to disclose his full income for the 2019/20 and 2020/21 financial years, meant that income he disclosed to his former wife in property settlement proceedings, was lower than that actually received. His denial of this also affected his credibility;
- (l) That the appellant failed to appreciate that in directing his subordinate, Ms Harrison, the then Human Resources Manager, to implement the Pay Arrangement for him, he failed to have regard to his position as Director - Corporate Services. This involved a misuse of his position as the Director to obtain a personal benefit for himself, and his behaviour throughout the disciplinary investigation process, to acknowledge and accept this was disingenuous;
- (m) That the Pay Arrangement was entered into in secrecy and was not transparent;
- (n) In relation to the documentation of the Pay Arrangement, the appellant's assertion that the existence of the 'spreadsheet' evidenced documentation, was an obfuscation of the lack of documentation, rather than a genuine attempt to provide the same, as were the appellant's attempts to contend his payslips and pay increase letters were evidence of documentation. This obfuscation by the appellant further impacted his credibility;
- (o) That the failure to document the Pay Arrangement was contrary to the *Local Government Act 1995* and as a senior employee of the respondent, contrary to his knowledge of the obligation to maintain proper records, he did not do so; that contrary to the appellant's assertions, the failure to document the Pay Arrangement was not a matter of oversight, rather it was a deliberate act done in secrecy, which exposed the respondent to compliance and governance risks;
- (p) That the respondent had discharged the onus of establishing that the appellant's Pay Arrangement constituted serious misconduct justifying his summary dismissal;

- (q) That the process that the respondent engaged in to investigate the appellant's conduct was fair and the appellant had every opportunity to respond to the allegations and overall his summary dismissal was not procedurally unfair. Specifically that:
- (i) The instigation of the investigation from a whistle blower-type of notification was a necessary and legitimate response;
 - (ii) There was nothing unfair in Ms Miltrup reporting the appellant's conduct to the PSC and the CCC which she was obliged to do;
 - (iii) The respondent's investigation was comprehensive; the appellant had every opportunity to understand and respond to the allegations as set out in the correspondence;
 - (iv) Ms Miltrup was not obliged to involve the Panel more than she did and her communications with the Panel did not lead to procedural unfairness. There was no obligation to prepare a report based upon her communications with the Panel;
 - (v) The appellant had no right to address the Panel or the Council;
 - (vi) The decision making in the investigation and the conclusions reached were a matter solely for Ms Miltrup as the CEO of the respondent. Accordingly nothing turned on the various statements she made to either the Panel or the Council, or for that matter the Auditor;
 - (vii) Given the similarity in their content, there was no procedural unfairness in Ms Miltrup providing the Council with the appellant's 4 May 2023 response letter but not the 16 May 2023 response letter;
 - (viii) The appellant had every reasonable opportunity to respond to the allegations that he committed misconduct warranting his summary dismissal; and
 - (ix) The appellant's personal circumstances along with his work record, were taken into account by the respondent in its decision to dismiss; and
- (r) Finally, the direction given to the appellant not to discuss the allegations made against him by the respondent with colleagues or any other person, was contravened by the appellant which constituted a further ground for summary dismissal for misconduct.

Appeal to the Full Bench

6 The appellant now appeals against the learned Commissioner's findings and conclusions. There are 16 grounds of appeal and multiple sub-grounds. The grounds are to a degree prolix and there is considerable overlap and duplication between many grounds. This has made the navigation of the issues arising on the appeal more difficult. We do not set all of the grounds out at this point, but we will deal with each of them in turn below. The general, preliminary contention in ground 1 is as follows:

1. The Appellant, Mr Trestrail, brings this appeal pursuant to s. 49 of the *Industrial Relations Act 1979* (WA) (**IR Act**) on the basis that, by reason of the matters set out in the following grounds of appeal, the learned Commissioner erred in *Trestrail v City of Karratha* [2024] WAIRC 870 in finding:
 - a) the City discharged the onus upon it to demonstrate that it had reasonable grounds for an honest and genuine belief that circumstances existed to justify summary dismissal of Mr Trestrail;
 - b) the City conducted a proper and as thorough an inquiry as was necessary in the circumstances, and Mr Trestrail was afforded procedural fairness;
 - c) the City's legal right to dismiss Mr Trestrail was not exercised so harshly and or oppressively as to amount to an abuse of that right; and
 - d) therefore, the learned Commissioner erred in dismissing Mr Trestrail's applications in relation to:
 - (i) unfair dismissal pursuant to s 23A of the IR Act arising from the Respondent summarily terminating Mr Trestrail's employment on 23 May 2023; and
 - (ii) a denied contractual benefit (**DCB**) pursuant to s 29(1)(d) of the IR Act in the form of a liquidated payment equivalent to 9 months' salary upon termination in accordance with clause 11.2(3) of Mr Trestrail's Employment Contract,

(together, the **Applications**).

(See submissions at [22]-[28])

7 The appellant seeks the following orders:

- (a) On the above grounds the Mr Trestrail seeks orders pursuant to s.49(5)(b) of the IRA that the decision of learned Commissioner be set-aside and Mr Trestrail be reinstated in his role with the City with no loss of pay.
- (b) Alternatively, if reinstatement is deemed to be impracticable, Mr Trestrail seeks orders that the City pay him:
 - (i) the notice stipulated in clause 11.2(3) of his Employment Contract; and
 - (ii) six months' salary as compensation for unfair dismissal.

- 8 An appeal to the Full Bench is an appeal by way of a rehearing: *Fagan v Minister for Corrective Services* [2024] WASCA 167; (2024) 105 WAIG 1 per Buss J at [58]-[59]; Smith AUJ at [134] (Seaward J agreeing). Insofar as the unfair dismissal claim is concerned, the appeal is from a discretionary decision of the Commission and the relevant principles to apply on appeal from a discretionary decision are well established. In *Magyar v Department of Education* [2019] WAIRC 00781; (2019) 99 WAIG 1595 Kenner SC (as he then was) said at [12]:

- 12 Given that the three appeals before the Full Bench arise from a discretionary decision of the Commission at first instance, the well-known principles set out in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 apply. That is, it is not sufficient for an appellant to persuade the Full Bench that it should reach a different decision to that of the learned Commissioner. It is necessary that the appellant establish an error in the exercise of the Commission's discretion, such as the learned Commissioner acting upon a wrong principle; making a material mistake in relation to the facts; failing to take into account relevant considerations or taking into account irrelevant considerations; or allowing extraneous or irrelevant matters to affect his decision making: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2003) 203 CLR 194. Kirby J in *Coal and Allied* at par 72, emphasised that an appeal court, considering an appeal from a discretionary decision, should proceed with appropriate caution and restraint.

Appeal grounds

- 9 Given the number of appeal grounds, we will set out each ground, the contentions of the parties in relation to it, followed by our consideration of each ground. Where the grounds may be conveniently dealt with together, grouped under the headings in the appeal grounds, we will do so. We will adopt the description of each ground of appeal, as set out in the appellant's written submissions, for ease of reference. Ground 1 has been set out above and is a general summary of the appellant's contentions. The appellant was granted leave to amend his appeal grounds by the addition of a new ground 1A and a further particular (f) to ground 13. Apart from the new ground 1A, the general Ground 1 is particularised in the separate grounds dealt with below.

Ground 1A – Real and substantial risk

- 10 This additional ground is as follows:

The learned Commissioner erred in law at [44]-[45] of her Reasons for Decision in holding that for the respondent to prevail, it suffices if the Commission finds that there was a **real and substantial risk** that the Pay Arrangement breached some or all of the legislative and corporate obligations referred to by the respondent as the reasons for termination. In adopting this approach the learned Commissioner misapplied the principles for

determination of unfair dismissal applications that she referred to in her Decision at [14] and [15]) and in particular those set out in *Donald Andrew Parnell v The Roman Catholic Archbishop of Perth* [2021] WAIRC 00102 at [95] to [119] and [288]-[292] and in *Minister for Health v Drake-Brockman* [2012] WAIRC 00150 at [66].

- 11 As to the question of the learned Commissioner's conclusion in the alternative that there was a real and substantial risk of a breach of the appellant's Contract etc, she addressed this issue in global terms, when considering the respondent's contentions at first instance that the conduct of the appellant led to various 'governance and compliance risks'. At [43]-[45] of her reasons (see AB582) the learned Commissioner said:

43 The City submits that the Pay Arrangement exposed the City to various risks: [41] above. Mr Trestrail denies the Pay Arrangement exposed the City to these risks: [42(a)(i)] above.

44 The City argues that while I may make findings based on the available material, for it to succeed, it does not necessitate that all of the Pay Arrangement's potential breaches of superannuation, taxation and financial reporting obligations, the Contract, and the Code of Conduct be established. Instead, for the City to prevail, it suffices if I find that there was a real and substantial *risk* that the Pay Arrangement breaches some or all of these legislative and corporate obligations.

45 As outlined at [14]-[15] above, the parties agree on the principles applicable to determining this matter, and applying these principles I agree with the City's submissions at [44] above.

- 12 Given this issue underpinned a number of the learned Commissioner's alternative findings in relation to the effect of the Pay Arrangement, it is important to deal with this issue at this juncture.

Contentions

- 13 The appellant submitted that the learned Commissioner's conclusions at [45] of her reasons involved a misinterpretation of relevant principles applicable to cases of summary dismissal for misconduct. In this respect, the appellant referred to the decision of the Full Bench in *Parnell v The Roman Catholic Archbishop of Perth* [2021] WAIRC 00102; (2021) 101 WAIG 186. In this case, reference was made to an earlier decision of the Full Bench in *Drake-Brockman*, in which case the Full Bench considered the approach to determining unfair dismissal claims arising from summary dismissal for misconduct. The Full Bench in *Parnell* referred to the Full Bench's consideration in *Drake-Brockman* of the well-known decision of the Industrial Commission of South Australia in *Bi-Lo*.
- 14 The appellant contended that the decision in *Bi-Lo*, requires the employer to have an honest and genuine belief, based on reasonable grounds, that the employee was guilty of the misconduct alleged. The appellant also referred to the statement in *Bi-Lo*, endorsed by the Full Bench in *Parnell* and *Drake-Brockman*, that

having regard to any mitigating circumstances, the relevant misconduct justified the dismissal. Finally, the appellant referred to ***Bi-Lo*** to the effect that a failure to establish any of the matters set out in that case, in relation to procedural and substantive fairness, would probably mean that a dismissal was harsh, oppressive or unreasonable.

- 15 The appellant emphasised in his submissions, that the requirement for an honest and genuine belief, based on reasonable grounds, that the employee was guilty of the misconduct, ‘leaves no room whatsoever for the proposition that you can simply be satisfied on reasonable grounds that there is a risk that the misconduct occurred’ (appeal transcript at p 19).
- 16 On this basis, the appellant submitted that the learned Commissioner was in error in her approach. It was submitted that the Commission had to be satisfied that the respondent had an honest and genuine belief that the appellant was guilty of a breach of his contract of employment, industrial relations laws and tax and superannuation laws etc, and a belief as to a real and substantial risk of such a breach was insufficient.
- 17 As to this issue, the respondent contended that the misconduct of the appellant was the Pay Arrangement. As to the reference to the risk of a breach of various kinds considered by the learned Commissioner, in the case of a senior executive, such as the appellant, this is enough to sustain a finding that summary dismissal was warranted. In the alternative however, if the learned Commissioner was in error in taking into account the risk of a breach, then irrespective of this, she found that the breaches did occur, which sustained the learned Commissioner’s ultimate findings that the dismissal was not unfair.

Consideration

- 18 As a matter of general principle, the exercise of the right to summarily dismiss an employee, derives from the common law. A leading authority in relation to the basis for the exercise of the power to summarily dismiss an employee is found in the joint judgment of Smithers and Evatt JJ in ***North v Television Corp Ltd*** (1976) 11 ALR 599 at 609 where their Honours said:

For purposes of the application of the common law principles to the facts of this case, the remarks of the Master of the Rolls in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287 and 289 are in point. He said:

“... since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service ... I ... think ... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and ...

therefore ... the disobedience must at least have the quality that it is ‘wilful’; it does (in other words) connote a deliberate flouting of the essential contractual conditions.”

“... Until the terms of the contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract.”

- 19 Further, in *Concut Pty Ltd v Worrell* [2000] HCA 64; (2000) 75 ALJR 312, Kirby J, in dealing with an appeal from the Court of Appeal (Qld) concerning the summary dismissal of a senior manager of a company, relevantly said at [51]:

...

3. The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law:

“[c]onduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. ... [T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises.”

...

4. It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer, judged irrelevant to the [sic] Some breaches may be duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee like Mr Wells, will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal.

- 20 As to the degree to which relevant conduct will constitute grounds for summary dismissal, this will usually be a question of fact in each case: *Blyth Chemical v Bushnell* [1933] HCA 8; (1933) 49 CLR 66 per Starke and Evatt JJ at 73 (citing and applying *Clouston & Co Ltd v Corry* [1906] AC 122). In this case, the

relevant conduct, that is the existence of the Pay Arrangement, was an agreed fact. Ultimately, the question for determination was the characterisation of that conduct, and whether, in the circumstances of the appellant's employment as a senior executive of the respondent, it constituted conduct that was 'incompatible with the fulfillment of an employee's duty, or involves opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee...': *Blyth Chemical* at 81.

- 21 In the case of the appellant's unfair dismissal claim, the long standing authority of the Industrial Appeal Court in *Miles v Federated Miscellaneous Workers Union of Australia* (1985) 65 WAIG 385 applies, to the effect that in such cases, it is not the exercise of the legal right of the employer that is in issue, but rather whether in all of the circumstances there has been an abuse of the employer's legal right to terminate the contract of employment, in circumstances that render it harsh, oppressive or unfair. Whilst a lack of procedural fairness in effecting a dismissal may be a basis to conclude a dismissal is unfair, such a conclusion is not automatic: *Garbett* per EM Heenan J (Parker J agreeing) at [73], citing and applying *Shire of Esperance v Mouritz* (No 1) (1991) 71 WAIG 891.
- 22 The appellant's contractual benefits claim was to be determined on a different basis: the issue was ultimately whether the appellant's contract was terminated unlawfully, rendering it wrongful at law, so as to entitle the appellant to damages or the recovery of a liquidated sum as a debt: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152. Also, it is not the case that all dismissals effected unlawfully will be unfair. They may be. It will depend of the gravity of the breach, and its consequences: *Garbett* per EM Heenan J (Parker J agreeing) at [85].
- 23 The general approach in summary dismissal cases where dishonesty is involved, is set out in the decision of the Full Bench of the Industrial Commission of South Australia in *Bi-Lo*. At [229] in that case, the Full Bench observed:

In a case such as the present one where the employee is dismissed for misconduct in respect of dishonest dealing with the employer's property we do not believe it is a correct test to state as did the learned trial judge that the employer must prove, on the balance of probabilities, on the evidence submitted to the Commission, that the employee actually stole the goods, before it will escape a finding that a dismissal based upon such an alleged theft is to be treated as harsh, unjust or unreasonable.
- 24 As to the obligation to afford procedural fairness, the Full Bench went on to say further at [229]:

An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs

are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.

Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

- 25 This approach has been referred to with approval in a number of decisions of this Commission and by the Full Bench, most recently in *Drake-Brockman* and *Parnell*. As a part of the obligation to afford procedural fairness, the Full Bench in *Bi-Lo* further noted at [230] that:

Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations

- 26 What falls from these cases is that generally, whilst proof on the balance of probabilities of the actual occurrence of the misconduct in an unfair dismissal case is not required, the employer's honest and genuine belief, and the reasonable grounds for that belief, must be that the misconduct occurred. It is not sufficient for the belief, and the grounds for it, that a 'risk' or a 'real and substantial risk' of misconduct existed.
- 27 The learned Commissioner referred at [14] and [15] of her reasons (see AB552-553) to the parties' submissions in relation to the relevant principles applicable to summary dismissal for misconduct. In particular, at [15] in referring to the Full Bench decision in *Parnell* at [112]-[118], the learned Commissioner said at [15(d)];

- (d) An employer discharges the evidential burden which falls to it if the Commission considers the process of investigation undertaken and the conclusions and belief of the investigator, and concludes that having regard to all of the circumstances and 'the totality of what was before the Investigators and what is before the Commission, ... it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred.'

- 28 Whilst the general statement of principle immediately above is correct, the learned Commissioner appears to have then accepted a submission from the respondent to the effect that it was sufficient for the respondent to succeed at first instance, if it established a 'real and substantial risk' that the Pay Arrangement led to the contraventions alleged. The learned Commissioner then appears respectfully, to have misapplied the principles she referred to at [14]-[15] of her reasons, to conclude that the respondent's submissions should be accepted. However, in applying the approach in *Bi-Lo*, adopted and applied by the Full Bench of the Commission, the relevant belief must be that the employee *was guilty of the misconduct alleged*. A belief as to a real and substantial risk of misconduct is not sufficient. In this respect, in adopting the approach urged upon her by the respondent, the learned Commissioner erred.
- 29 In the circumstances of the matters before the Commission at first instance, it is important to assess the issues arising from this ground in the context of the Contract. It was the Contract that marked out the rights and obligations of the parties, to be considered in light of relevant common law principles. The Contract dealt with termination of employment at cl 11. Clause 11.3(1) referred to summary termination as follows:

11.3 Termination by the City - Director's default

(1) Summary termination

The CEO may summarily terminate the employment of the Director before the expiry of the Term by notice in writing if -

- (a) the Director is *guilty of any wilful or grave misconduct* or wilful neglect in the performance of the Functions;
- (b) the Director wilfully disobeys any reasonable and lawful order or direction by the CEO;
- (c) the Director *commits a serious breach of any of the provisions of this Contract*; or
- (d) the Director is convicted and under sentence for a crime or has been convicted of a 'serious local government offence' within the meaning of that term in section 2.22 of the Act. (Our emphasis)

- 30 Clause 11.3(1)(a) specifically dealt with summary termination for misconduct. The contractual right to terminate the Contract without payment was conditional on the appellant being '*guilty of any wilful or grave misconduct*'. Similarly, cl 11.3(1)(c), also relied on by the respondent, required a *serious breach* of a provision of the Contract, to be committed. Neither the exercise of the contractual right to terminate summarily for misconduct, nor the right to terminate summarily for a serious breach of a provision of the Contract, were exercisable in the presence of a 'real and substantial risk' of either misconduct or

a material breach by the appellant. This is a complete answer to the issue arising on this ground of appeal.

- 31 The Contract marked out the grounds on which the respondent could exercise its right to summarily terminate it, without making the additional payments otherwise payable on termination. The standard by which the conduct of the appellant would be judged, in circumstances of misconduct, were agreed by the parties to the Contract. Relevantly for present purposes, cl 11.3(1)(a), as we have noted above, required the appellant to be *guilty of wilful or grave misconduct*, before the rights conferred by this provision of the Contract could be exercised by the respondent to impose what is the most severe sanction an employer may impose, to terminate the employment without any notice or additional payments.
- 32 It is also important to bear in mind that there were two distinct claims before the Commission for determination. The claim of unfair dismissal involved a discretionary decision by the Commission, as to whether the appellant's dismissal was an abuse of the respondent's legal right to terminate the Contract. Having regard to all of the circumstances of the case, and balancing the interests of both the employer and the employee, the question to be answered in a claim of this kind, was whether the respondent abused its legal right to terminate the Contract, such that as a matter of industrial fairness, the dismissal should be regarded as harsh, oppressive or unfair
- 33 The second claim before the Commission was a claim for the enforcement of a term of the Contract for payment of entitlements, on the basis that the appellant contended his dismissal was wrongful. This was a separate common law claim, which did not attract the same approach as the unfair dismissal claim. The question was one of fact, or perhaps mixed fact and law, that being did the evidence establish, as cl 11.3(1)(a) of the Contract required, that the appellant was guilty of grave or wilful misconduct, such as to enable the respondent to exercise its rights under the Contract to terminate it summarily without notice.
- 34 Given the respondent exercised this contractual right provided by cl 11.3(1)(a) of the Contract, the burden was on it to establish on the balance of probabilities, that the appellant did commit grave or wilful misconduct. For the purposes of the contractual claim, an honest and genuine belief, based on reasonable grounds, after a proper inquiry, that the appellant was guilty of misconduct, would be insufficient. Alternatively, did the appellant commit a serious breach of any provision of the Contract, under cl 11.3(1)(c)? Again, as a matter of fact or mixed fact and law, this was required to be established by the respondent on the balance of probabilities, as the basis to exercise the contractual right to terminate the Contract summarily without notice.

- 35 We raise this matter because from the written and oral submissions of the parties at first instance, it appears that there was a conflation of the claims, and the approach set out in *Bi-Lo* was argued as the appropriate test to apply globally. The approach in *Bi-Lo* had no application to the determination of the contractual benefits claim. They were separate and distinct claims and the tests are different. The unfair dismissal claim did not turn on the exercise of the legal right to dismiss, but the contractual benefits claim did. The remedies available under the *Act* in respect of each claim are different. This conflation appears in the summary of principles referred to by the learned Commissioner at [14]-[15] of her reasons. No reference is made to the requirement in the denied contractual benefits claim, for it to be established that the appellant was actually guilty of grave and serious misconduct under the Contract, for the respondent's contractual right to summarily dismiss to be enlivened (see AB552-553). In effect, given that both claims were concurrently before the Commission for determination, the establishment by the respondent of the guilt of the appellant of grave and serious misconduct, on the balance of probabilities, for the purposes of the contractual benefits claim, would defeat both claims.
- 36 Despite the above, based on a reading of her reasons as a whole, in the context of her conclusion at [163] (see AB595), we consider that the learned Commissioner did reach the overall conclusion that the appellant engaged in serious misconduct, warranting his summary dismissal.
- 37 Somewhat unusually, we will next deal with sub-ground 8(g) and ground 15, given the considerable overlap between the two grounds. These both deal with allegations that the appellant was denied procedural fairness before the respondent's Council.

Ground 8 – Failure to consider relevant matters

Denial of procedural fairness

- g) In relation to the Council who had statutory responsibility under s5.37(2) of the *LG Act* to assess whether to approve or not approve Ms Miltrup's proposal to terminate Mr Trestrail, the Commissioner failed to give due consideration to the fact that he was denied procedural fairness in several significant respects including:
 - (i) The Council were provided with misleading information about the matter exaggerating the temporal extent and quantum of the Pay Arrangement. The material provided by Ms Miltrup:
 - A. lacked detail of any accurate time frame for the alleged misconduct or Pay Arrangement, and instead suggests it extended over a longer period than it did;
 - B. lacked detail of an accurate statement of the quantum of the pay arrangement;

- C. provided no evidentiary basis for factual findings or findings of serious misconduct;
 - D. contains Ms Miltrup's speculative view without any evidence that: '*...the CEO has formed the view that Phil Trestrail sought to gain a personal advantage (either through the underpayment of income, seeking a tax advantage or otherwise).*' The implication clearly is that he **wrongfully** obtained a personal advantage, otherwise there would be no reason for disciplinary action. Yet no wrong was specified.
- (ii) The Council was not provided with relevant information including Mr Trestrail's letter dated 16 May 2023 responding to Ms Miltrup's letter requiring him to show cause why he should not be terminated for serious misconduct.
 - (iii) Ms Miltrup was the only source of information to the Council in relation to her proposal to terminate Mr Trestrail.
 - (iv) Mr Trestrail was not provided an opportunity to address the Council, or at least to ensure the material and information provided to the Council to inform its statutory function was accurate and complete. In fact, not all the material that was provided to Council by Ms Miltrup in persuading them to approve her decision has been disclosed to Mr Trestrail.

Ground 15 – Denial of procedural fairness before decision maker

15. The Commissioner erred in law and or fact by finding that the Appellant suffered no denial of procedural fairness in relation to the Council, and at [181], that the information that Ms Miltrup presented to the Council was a matter for her professional discretion and judgment given that:
 - a) Despite Ms Miltrup's evidence that the decision to terminate the Appellant was hers to make at [33(t)], section 5.37(2) of the *Local Government Act 1995 (LG Act)* provides (emphasis added): 'that the Council may accept or **reject the CEO's recommendation** to dismiss a senior employee but if the Council rejects a recommendation, it is to inform the CEO of the reasons for its doing so'.
 - b) In accordance with the *LG Act*, the Council is the ultimate decision maker, and as such the Appellant had a right to be heard by the Council and Ms Miltrup had an obligation to provide all relevant information to the Council in order for it to make its decision.
 - c) Further and or alternatively, Mr Trestrail at the very least had the right:
 - (i) to have all of his show cause responses presented to the Council (rather than Ms Miltrup selecting which of his responses she would provide), including his letter of 16 May 2024; and

- (ii) to have balanced, objective and accurate information provided to the Council as decision maker, rather than the incorrect, incomplete material and information provided by Ms Miltrup.
- (iii) The Report provided to the Council did not include relevant information regarding Mr Trestrail's long and exemplary work record, the personal impact (including loss of his housing and loss of community after 11 years given the high likelihood they would need to leave Karratha) on Mr Trestrail's and his partner who was also an employee of the City, nor did the report include anything to Council taking into account any mitigating circumstances.

Contentions

- 38 The appellant submitted that the learned Commissioner's conclusions at [181] of her reasons that the appellant had no right to address the Council as a matter of procedural fairness, and the information provided by the CEO to the Council was a matter for her professional discretion and judgment, was erroneous. It was submitted that the decision of the Council under s 5.37(2) of the *LG Act* requires the Council to accept or reject a CEO recommendation to dismiss a senior employee. If the recommendation is rejected, the Council is obliged to provide reasons to the CEO for this decision. It was submitted that on this basis, in effect, it was the Council that was the ultimate decision maker and accordingly, the appellant had a right to be heard by the Council and furthermore, all relevant information should have been provided by the CEO to the Council in order for it to reach its decision. Absent the Council's approval, the appellant submitted that he could not have been summarily dismissed, as the Council and not the CEO, are the ultimate decision maker in relation to such matters.
- 39 In terms of the confidential Report by the CEO to the Council dated 22 May 2023 (see AB926-929), the appellant submitted that it contained inaccurate, incomplete and misleading information concerning the allegations against the appellant regarding the Pay Arrangement. This inaccurate information included the amount of the deferred salary, and the timeframe over which it was in effect. It was submitted that also contained in the Report were inaccurate statements of fact and law that the appellant had induced the respondent to breach industrial laws; taxation and superannuation laws; and the *Corruption Crime and Misconduct Act 2003* (WA), for which the respondent faced potentially very large penalties. The appellant submitted that the Report also suggested that he had committed minor misconduct as defined in s 4(d) of the *CCM Act*, without disclosing that no such finding had been made by either the CCC or the PSC.
- 40 Furthermore, in relation to these various allegations, the appellant contended that the CEO provided the Council with no evidentiary foundation to support them. It was said that the views expressed by the CEO to the Council in the Report,

contained her speculative views as to the appellant obtaining a personal advantage through the Pay Arrangement, but without specifying how any such advantage was wrongful.

- 41 In terms of the appellant's responses to the various show cause letters issued by the CEO, the appellant contended that whilst the Council was provided with some of this correspondence, the appellant's response letter dated 16 May 2023, which contained additional information and explanations for his conduct, was not included in the material given to the Council. It was submitted that these omissions were material to the Council's decision to either approve or not approve the summary dismissal of the appellant.
- 42 Further matters of procedural fairness were raised by the appellant, including that he was given no opportunity to directly provide information to the Council and nor was he given an opportunity to address it in relation to the allegations and the respondent's proposed course of action. In summary, the appellant contended that the CEO denied the appellant the opportunity to be heard by either the Panel or the Council, and additionally, she provided both with inaccurate information upon which to make decisions. In this light, the appellant contended that it is even worse that when Councillors approached him to discuss these matters, it was put as a further ground justifying his summary dismissal.
- 43 In this latter respect, the appellant submitted that all of the relevant correspondence should have been provided to the Council, including the appellant's show case response letter of 16 May 2023, which was not provided. Furthermore, the appellant submitted that the CEO's Report to the Council was highly misleading and incomplete.
- 44 In addition to these matters, the appellant submitted that the Council was not informed in the CEO's Report about the length of service and exemplary work history of the appellant, the effect the summary dismissal would have on the appellant personally and on his partner, who was also an employee of the respondent, which would mean a loss of his housing and involvement in the community of 11 years or so, given that they would most likely have to leave Karratha. Furthermore, the appellant contended that the CEO's Report also did not refer to any mitigating circumstances, contrary to the appellant's right for the Council to receive balanced, objective and accurate information upon which to make its decision.
- 45 It was contended that given the foregoing misleading and inaccurate information provided to the Council, it was little wonder that the Council endorsed the CEO's recommendation that the appellant be summarily dismissed.
- 46 In relation to the role of the Council, the respondent submitted that the learned Commissioner was correct in the conclusions that she reached at [174]-[177] of

the reasons for decision. The appellant had no entitlement to address the Council, as it was the responsibility of the CEO, as the substantive decision maker to make a decision. The role of the Council, under s 5.37(2) of the *LG Act* makes it clear that it is the CEO who is the decision maker and the role of the Council was a limited one, with oversight and a potential veto. Accordingly, the fairness of the procedure relates to the approach taken by the CEO and not the Council, and also not what the CEO may have told the Council.

- 47 As to the assertion by the appellant that the failure to provide the Council with his letter of response dated 16 May 2023, the respondent contended that there is no substance to this submission. It was submitted that the appellant's earlier letter of 4 May 2023, reflected the tenor and substance of the letter of 16 May 2023, as the learned Commissioner found at [183] of her reasons. This is particularly so, according to the respondent, given the limited oversight role that the Council played in the appellant's dismissal. The appellant's complaints about other matters in relation to the Council should be seen in the same light, according to the respondent.

Consideration

- 48 As to the role of the Council in the process leading to the dismissal of the appellant, the learned Commissioner concluded at [174]-[181] as follows:

174. Mr Trestrail had no right to address the panel nor to address the Councillors.
175. The decision to undertake the investigation and its conclusions were for Ms Miltrup, as the CEO, to make. This was within her authority and discretion as the City's CEO.
176. Therefore, I find that nothing turns on the statements that Ms Miltrup made to the panel nor to the Councillors. Likewise, nothing turns on the statements that Ms Miltrup made to the Auditor: [34(z)-(bb)] above.
177. Furthermore, I am satisfied that there was nothing procedurally unfair in Ms Miltrup not sharing the legal advice she obtained during the investigation with Mr Trestrail: [24(b)] and [34(p)] above.
178. I find that Ms Miltrup had reasonable grounds for reaching the conclusion that Mr Trestrail engaged in serious misconduct, and she arrived at this conclusion honestly and genuinely: *Parnell* [112]-[118] at [15(d)] above.
179. The City treated Mr Trestrail's and Ms Harrison's conduct in a consistent manner, as both their actions were investigated. Following the respective investigations, both of their contracts of employment were terminated.
180. Mr Trestrail contends that the Show Cause Letter does not mention his employment being at risk: [23(q)(x)] above. He contends that he was only informed of this risk in the 11 May Letter. The significance of this contention is that it suggests it would have been procedurally unfair for the Council not to have been provided with the 16 May Response, where Mr Trestrail claims he addressed the prospect of his

employment being at risk for the first time.

181. As found at [174]-[176] above, Mr Trestrail had no procedural right to address the Council directly, and furthermore, the information that Ms Miltrup presented to the Council was a matter for her professional discretion and judgment.

49 Part 5 Division 4 of the *LG Act* deals with local government employees. A CEO is to be employed in accordance with ss 5.36(1) and (2). The CEO is responsible for the employment of other employees. Other than the CEO, there is an identified class of employee designated as a ‘Senior Employee’ in s 5.37. It was common ground that as the Director, the appellant was a Senior Employee. The employment and dismissal of a Senior Employee is subject to the conditions set out in this provision which relevantly provides as follows:

5.37. Senior employees

- (1) A local government may designate employees or persons belonging to a class of employee to be senior employees.
- (2) The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in section 5.39(1a), and the council may accept or reject the CEO’s recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.

...

50 Relevant to the terms and effect of s 5.37(2) of the *LG Act*, is the decision of the Industrial Appeal Court in *Whooley v Shire of Denmark* [2019] WASCA 28; (2019) 99 WAIG 87. In this case, the appellant, Mr Whooley, was employed by the Shire as its Director of Infrastructure Services. On 5 June 2015, the CEO of the Shire summarily dismissed Mr Whooley by letter of the same date. Mr Whooley challenged his dismissal on the grounds that it was invalid, as there had not been compliance with s 5.37(2) of the *LG Act*. In that case, there had not been any conferral by the CEO with the Council in relation to Mr Whooley’s dismissal. A further basis of his challenge to his dismissal is not relevant for present purposes. At first instance, the Commission found in favour of Mr Whooley and held that his dismissal was invalid and ineffective, and ordered the Shire to pay Mr Whooley \$43,893.71.

51 The Shire appealed the Commission’s decision to the Full Bench. By a majority (Smith AP and Emmanuel C; Kenner C dissenting), the appeal was upheld and the decision of the Commission was quashed. Mr Whooley appealed the decision of the Full Bench to the Industrial Appeal Court. The primary issue before the Court was the effect of s 5.37(2). Mr Whooley contended that the Full Bench was in error to conclude that non-compliance with s 5.37(2) did not render the termination of his contract of employment invalid and ineffective.

52 In its judgment, the Court (Buss, Le Miere and Murphy JJ) upheld the appeal. As to appeal ground 1, raising the s 5.37(2) issue, in the context of the facts not in dispute, the Court observed at [17]-[18] as follows:

17 LGA s 5.37 deals with senior employees. Section 5.37(1) provides that a local government may designate employees or persons belonging to a class of employee to be senior employees. It is common ground that Mr Whooley was a senior employee for the purposes of s 5.37(1). Section 5.37(2) provides that:

The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in s 5.39(1a), and the council may accept or reject the CEO's recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.

Section 5.39(1a) is not presently relevant.

18 The CEO did not inform the council of the proposal to dismiss Mr Whooley and the council did not accept a recommendation to dismiss Mr Whooley. The Commissioner found that the termination of Mr Whooley's employment was invalid and ineffective because the CEO had not complied with LGA s 5.37(2).

53 In concluding that the ground of appeal was made out and that Mr Whooley's dismissal was invalid and ineffective, the Court went on to state at [24]-[28] as follows:

24. LGA s 2.7 provides that the council governs the local government's affairs. Section 5.41 provides for the functions, which includes powers, of the CEO. Section 5.41(g) confers on the CEO the power to dismiss employees. That provision distinguishes between senior employees and other employees. By s 5.37(1), the local government (not the CEO) designates employees or persons belonging to a class of employee to be senior employees. By s 5.39, relevantly, the employment of a person who is a senior employee must be governed by a written contract in accordance with s 5.39. The CEO may dismiss other employees, but his or her power to dismiss senior employees is subject to s 5.37(2). The effect of s 5.37(2) is that if the CEO proposes to dismiss a senior employee, then the CEO must inform the council of the proposal and make a recommendation to the council that the senior employee be dismissed. Further, by s 5.37(2), the council may accept or reject the CEO's recommendation. *The power and responsibility to determine whether a senior employee is to be dismissed rests with the council, not the CEO. The CEO's power to dismiss a senior employee, pursuant to the function conferred on the CEO by s 5.41(g), is not enlivened unless the CEO has complied with s 5.37(2) and the council has accepted the CEO's recommendation that the senior employee be dismissed.*

25 To interpret s 5.41(g) as rendering effective a purported dismissal of a senior employee by the CEO without the council having been informed of the proposal and accepting the recommendation is to disregard the statutory scheme, which distinguishes between the dismissal of senior employees and other employees, and to disregard the scheme in relation to the dismissal of senior employees.

26 Further, such an interpretation ignores the language of s 5.41(g) that the power of

the CEO to dismiss employees is 'subject to' s 5.37(2) in relation to senior employees.

27 Furthermore, the consequence of construing s 5.41(g) such that a dismissal of a senior employee by the CEO is effective without the council having been informed of the proposal and having accepted the recommendation, *is to remove from the council the power and responsibility for deciding on the dismissal of senior employees, which is expressly conferred upon it by the LGA.*

28 The only power conferred on the CEO to dismiss an employee is the power conferred by s 5.41(g). That power is expressly subject to s 5.37(2) in relation to senior employees. The CEO has no power to dismiss a senior employee unless the CEO has informed the council of the proposal to dismiss the senior employee and the council has accepted the CEO's recommendation. The CEO did not inform the council of his proposal to dismiss Mr Whooley and the council did not accept a recommendation of the CEO to dismiss Mr Whooley. Therefore, the CEO had no power to dismiss Mr Whooley. The CEO's letter of 5 June 2015 was ineffective to terminate Mr Whooley's employment. (Our emphasis)

54 The clear effect of the decision in **Whooley**, is that it is not the CEO who has the power and responsibility to dismiss a Senior Employee. It is the Council that has that power and responsibility. In the context of the present matter, Ms Miltrup, the respondent and the learned Commissioner, all proceeded on the foundation that it was Ms Miltrup as the CEO, and not the Council of the respondent, who was the primary decision maker in relation to the appellant's summary dismissal. This is quite evident from Ms Miltrup's evidence referred to at [33(t)] of the learned Commissioner's reasons (see AB575). This approach informed the learned Commissioner's conclusions at [175]-[176] of her reasons, to the effect that the outcome of the investigation was a matter entirely for the CEO and what statements the CEO made to the Council were not material. This conclusion was in error.

55 Both the appellant and the respondent in their written submissions at first instance (see AB270 and 285) referred to s 5.37(2) of the *LG Act*. However, s 5.37(2) was not referred to by the learned Commissioner in her reasons for decision. Very regrettably, the judgment of the Court in **Whooley** was not brought to the learned Commissioner's attention, and it ought to have been. On the basis that s 5.37(2) was not referred to by the learned Commissioner, it is open for the Full Bench on appeal to conclude that she did not have regard to it and most importantly, the crucial decision making role of the Council, as affirmed by the Court in **Whooley**.

56 The failure to have regard to s 5.37(2), and the failure of the parties to bring **Whooley** to the learned Commissioner's attention, and its ratio to the effect that, in the context of the present matter, it was the Council and not Ms Miltrup as the CEO, who possessed the power and responsibility to determine whether the appellant should be summarily dismissed, means that the learned Commissioner

erred in law and failed to have regard to, as a relevant consideration, the crucial importance of the Council, as the ultimate decision maker.

- 57 As the ultimate decision maker, it is implicit in s 5.37(2), that the Council be fully and accurately informed of the facts and circumstances surrounding the allegations against the appellant. As was referred to by the appellant in his oral submissions before the Full Bench on the appeal, the *Local Government (Model Code of Conduct) Regulations 2021* (WA) contains at Schedule 1, a Model code of conduct, setting out general principles to guide the behaviour of council members. Subclauses 6(a) and (b) require a council member to base decisions on factually correct and relevant information and to make decisions on merit, in the public interest, in accordance with statutory obligations and principles of good governance and procedural fairness.
- 58 This is especially so in the present case where the Council's decision making power is being sought to exercise the ultimate sanction of summary dismissal, with all of the consequences that would entail for the appellant, both financial and non-financial. This is particularly pertinent to the terms of cl 11.3(1) of the Contract. As discussed above, this required the Council to be satisfied that the appellant *was guilty of 'wilful or grave misconduct' and/or that he committed 'a serious breach of the provisions of this Contract'*.
- 59 There is ample authority for the proposition, some of which is discussed above having regard to the common law position, that the conduct of an employee summarily dismissed for misconduct, must be incompatible with the ongoing employment of the employee, and constitute a renunciation or a rejection of the contract of employment: *North* per Smithers and Evatt JJ at 609. Having regard to the seriousness of the consequences of summary dismissal for breach or renunciation of a contract of employment, as stated in Mark Irving *Contract of Employment* 2nd Edition at [13.26]:
- The party alleging that it has the right under an express term or the common law to terminate bears the onus of proving the satisfaction of the conditions giving rise to the right, the repudiatory breach or the renunciation. An employer seeking to prove that misconduct meets this high standard carries a heavy burden. The misconduct must be proved on the balance of probabilities. Often the seriousness of the allegations made against the employee will justify the conclusion that the weight of the evidence required to satisfy the court must rely on more than inexact proofs, indefinite testimony, or indirect inferences. Further, the gravity of the consequences flowing from a finding of misconduct dictates that findings of repudiatory breach or renunciation should meet 'the *Briginshaw* level of satisfaction'.
- 60 It is clear, from all of the evidence and the submissions made at first instance, that the respondent proceeded on the footing that it was Ms Miltrup, as the CEO, who was the decision maker in this case. The learned Commissioner was persuaded to accept this proposition. However, on a proper construction of the

law, as the ultimate decision making authority, it was crucial that the Council had before it relevant, accurate and fulsome material, upon which to make its decision in the exercise of its statutory power. There were a number of difficulties with the CEO's Report to the Council dated 22 May 2023 (see exhibit R29 and AB925-931).

- 61 First, at par 5 of the Report, it is stated, as a bare conclusion, that the CEO was of the view that the 'arrangement was deliberately undocumented'. There was no attempt to explain the basis for the formation of this view. Second, at par 7, reference was made to the estimate of the quantum of the Pay Arrangement but this was subsequently discovered to be inaccurate, including the initial estimate of the time period involved. A significant sum of money was additionally due to the appellant resulting from payroll errors by the respondent. Third, at par 8, was an assertion that the appellant 'has breached his contract of employment. Further, the City has breached various employment and tax legislations [sic] for the proper processing of employee wages'. There was no explanation of what tax legislation was breached and how, and as dealt with in relation to ground 4 at [119] below, that was not so. Fourth, the assertion of the imposition of penalties for the late payment of superannuation contributions is also open to question, as discussed below at [120]. There was no indication in the Report of the time period over which the Pay Arrangement had been in effect.
- 62 In connection with this, in the Report under the heading 'Statutory and Legal Implications' and the heading 'Employment Legislation', reference is made to the appellant inducing the respondent to breach the *MCE Act*, in relation to payment of wages, and the *Act*, as a result of a breach of the *LGO Award*, in relation to payment of wages. The penalties for bodies corporate for these contraventions, with a maximum of \$65,000 and for serious contraventions of \$650,000 are referred to. The inescapable inference to be drawn from the inclusion of this information as to penalties, is that the Council was being informed of possible outcomes as a result of the appellant's conduct. Otherwise, there would be no purpose served by referring to it. There are two major difficulties with referring to these matters in this way.
- 63 The first is that at the time the Pay Arrangement was in effect, from April 2019 to September 2021, the respondent was in the national industrial relations system and was not subject to the *MCE Act* or the *Act*. The respondent did not become subject to this legislation until January 2023, with the transition of the Local Government sector into the State industrial relations system.
- 64 Second, and irrespective of this, even if there were any proceedings commenced by the appellant for a breach of the instruments referred to, which would be highly unlikely, it is inconceivable that a court would impose penalties remotely close to those set out in the Report, if at all, having regard to the approach to the

imposition of penalties, as set out by the Full Bench in *Callan v Smith* [2021] WAIRC 00216; (2021) 101 WAIG 1155. This is so because it was the appellant's conduct and not that of the respondent, that would be responsible for any breach.

- 65 Reference is then made in the Report to the *CCM Act*, and s 4(d) dealing with 'minor misconduct' is set out. Immediately following, reference is made to 'serious misconduct', as constituting corruption and a crime, which may lead to criminal charges. In the context of the preceding section of the Report referring to various breaches of law and the *Award*, again, the irresistible reference to be drawn from this inclusion is that the appellant did commit at least minor misconduct. However, in this regard, there is no reference in the Report to the fact that the CCC did not find any evidence of corrupt intent in the actions of the appellant, and closed its file. Also there is no reference in the Report to the fact that the PSC did not make any finding of minor misconduct, and referred the matter back to the respondent for its further investigation. All of the above matters were crucial context, and their absence undermined the overall statement made by the CEO at part 9 of the Report 'that serious misconduct has occurred'.
- 66 Furthermore, whilst the appellant's letter of response of 4 May 2023 (see exhibit R14 AB870-874) was provided to the Council with the Report, the appellant's subsequent response letter of 16 May 2023 was not provided to the Council (see exhibit R28 AB921-924). A comparison of the two letters was provided to the Full Bench as a part of the appellant's written submissions, which was assembled as a composite document, showing in separate colours, the appellant's 4 May 2023 response, overlayed with his 16 May 2023 response. This shows material differences. In the 16 May 2023 letter from the appellant, compared to the 4 May 2023 letter, the appellant:
- (a) Referred to there being no finding by the PSC that he had committed minor misconduct but rather, this referred to Ms Miltrup's suggestion that the appellant may have done so;
 - (b) Referred to the PSC request that the respondent update the PSC of the progress of the matter within 12 weeks (or a longer period with an update), suggesting that the PSC did not see the matter as having the degree of seriousness that the CEO suggested;
 - (c) Provides further explanations for his conduct;
 - (d) Refers to advice that he received to the effect that the Pay Arrangement did not contravene taxation and superannuation legislation or industrial relations legislation, and that as to the latter even if so, no penalties would apply in the circumstances;

- (e) Referred to documents in existence such as those kept by the respondent's payroll officer, and material in his personnel file and pay records, reflecting his entitlements and payments; and
- (f) Referred to other matters including the actions of the Human Resources Manager, and that he did not misuse information or material acquired by him in his position as Director.

- 67 Contrary to Ms Miltrup's evidence set out at [35(jj)] of the learned Commissioner's reasons (see AB580), and the learned Commissioner's conclusions at [182]-[183] of her reasons (see AB597), given the summary set out at (a) to (f) above, we do not consider it to be a correct statement to say that the May 16 letter 'substantially' covered the same content as the 4 May letter. There were material differences. There is no evident reason why the Council was not also given the more fulsome response from the appellant, as a part of its deliberations. For the reasons set out above, as the ultimate decision maker, it should have been provided with this further material. This may have reflected Ms Miltrup's incorrect view that the decision to summarily dismiss the appellant was hers, and that the Council had only a limited oversight role.
- 68 Additionally, in cases where the possible dismissal of an employee is contemplated, any relevant mitigating circumstances are to be taken into consideration. In the circumstances of this case, it was not in dispute that the appellant had an unblemished record of service with the respondent. Consideration should also be given to the impact of a dismissal on an employee, and in this case, the appellant's partner, who was also employed by the respondent. This was because a dismissal would lead to their need to relocate away from Karratha. None of these mitigating circumstances were referred to in the Report to the Council.
- 69 As to the allegation that the appellant should have been entitled to address the Council, we do not consider that the appellant had such an entitlement, having regard to s 5.37(2). The obligation of a CEO is to inform the Council of a proposal to dismiss a Senior Employee. The CEO clearly is intended to act as the conduit of information, to fully appraise the Council of the proposal in order to seek the Council's decision. Given that the CEO has that function under s 5.37(2), it is crucial that any report seeking the exercise of the Council's powers and responsibility, is fulsome, accurate and relevant to the issues to be determined.
- 70 Finally, the Panel comprised the CEO of the City of Perth and also, a Councillor who was the Acting Mayor. The only correspondence in evidence between Ms Miltrup and the Acting Mayor is an email of 11 April 2023, setting out in some detail, Ms Miltrup's process to date, relevant documents, matters for

consideration and issues relevant to whether the Pay Arrangement may have constituted public sector misconduct. Ms Miltrup expressed the view to the Acting Mayor that she thought it was, and set out her thinking as to why she considered this to be so (see exhibit R26 at AB917-918). The same email was sent to the CEO of the City of Perth (see AB912-914).

- 71 It appears to us that the decision to include the Acting Mayor as a member of the Panel, again, presumably reflecting Ms Miltrup's view that the decision whether to summarily dismiss the appellant was hers and hers alone, was potentially problematic. Involving a member of the ultimate decision maker, being the Council, comprising the Acting Mayor, in an investigation, is fraught with risk. Information may be shared and views expressed that may lead to prejudgment. We note that in the Report to the Council of 22 May 2023, Ms Miltrup referred to seeking a confidential peer review from the CEO of the City of Perth. However, no reference was made to the role of the Acting Mayor on the Panel.
- 72 We have a sense of unease in what occurred in this respect. We cannot conclude on the evidence before the learned Commissioner that there was prejudgment, but given the role of an Acting Mayor, and the possibility that her views may have been influential amongst members of the Council, this possibility cannot be discounted. Such a situation should be avoided. This is especially so given that under s 5.37(2), the roles of the CEO and the Council are clearly separate. In so far as Senior Employees are concerned, s 5.37(2) of the *LG Act* reflects the intention of the legislature that there be a separation of the functions of the administrative and the elected branches of Local Government. In relation to the dismissal of a Senior Employee, it is for a CEO to investigate and recommend and it is for the Council to decide.
- 73 In summary, Ms Miltrup, the respondent, and ultimately the learned Commissioner, with respect, misunderstood the crucial role of the Council and its power and responsibility to dismiss the appellant. As a consequence, the Council, as the ultimate decision maker, did not have fulsome, relevant and accurate information before it in order for it to make an informed decision. We would uphold these grounds of appeal. Given the vital role played by the Council, in light of the deficiencies identified above, the respondent's decision to summarily dismiss the appellant was infected by error, such that it should be set aside. On this basis alone, we would uphold the appeal.
- 74 However, in the event that we are incorrect as to these matters, and given the principles referred to by the Full Bench in *Director - General Department of Justice v Civil Service Association* [2025] WAIRC 00146; (2025) 105 WAIG 428 (citing and applying *Cornwell v The Queen* [2007] HCA 12; (2007) 231 CLR 260 at [105]; see too *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1; *Lockwood Security Products Pty Ltd v*

Doric Products Pty Ltd (2004) 217 CLR 274)), we will deal with the other grounds of appeal below.

Ground 2 – No breach of contract (or risk thereof)

2. The learned Commissioner erred in law in finding at [50] that the **Pay Arrangement** (in which Mr Trestrail requested a deferral of the implementation of a pay increase from about April 2019, which arrangement ceased on 1 September 2021) breached Mr Trestrail’s Employment Contract (**Contract**); and in finding in the alternative ‘should my finding on this... be incorrect’, that there is a real and substantial risk that it breaches the Contract. That is an error because there is no breach, or risk of breach, of Contract given:
 - a) The Pay Arrangement does not offend any clause of the Contract.
 - b) Alternatively, to the extent that the Pay Arrangement constitutes a departure from the provisions of the written Contract (which is not conceded), the Pay Arrangement constitutes a variation of the Contract.
 - c) Further and or alternatively, the Pay Arrangement was implemented upon Mr Trestrail’s request and a party cannot create a cause of action by their own wrong: the basic maxim of the common law is *ex turpi causa non oritur actio* – no cause of action arises out of [one’s own] wrong.
 - d) The Commissioner erred in holding at [51] – [52] that its [sic] immaterial that Mr Trestrail had no intention of pursuing a breach of contract claim because there is still a breach of contract. That is incorrect as a matter of law because the principle is that no cause of action arises.

Contentions

⁷⁵ As to this ground, the appellant contended that the learned Commissioner erred in law in concluding that the Pay Arrangement constituted a breach of the appellant’s Contract. In her reasons, the learned Commissioner came to the following conclusions at [48] to [52]:

- ⁴⁸ In his outline of evidence (Exhibit A1 [12]), Mr Trestrail states that he requested Ms Harrison to defer his pay increases in order to implement a form of ‘enforced savings’ which he considered ‘preferable to getting paid the money and putting it in the bank’.
- ⁴⁹ Implicit in Mr Trestrail’s statement at [48] above and inherent in the entire purpose and nature of the Pay Arrangement from his perspective, is that he would not receive his Remuneration Package annually, nor would he be receiving his Salary on a fortnightly basis.
- ⁵⁰ As the Pay Arrangement led to Mr Trestrail not receiving his Remuneration Package each year and not being paid his Salary fortnightly during the relevant years, I find that the Pay Arrangement breaches clauses 5.1(1) and 5.2 of the Contract. Should my finding on this matter be incorrect, then in the alternative, I find there was a real and substantial *risk* that the Pay Arrangement breaches clauses 5.1(1) and 5.2 of the Contract.

51 It is immaterial to the finding at [50] above, that Mr Trestrail had no intention of pursuing the City for the breach, ‘because I had requested the arrangement, I had no intention of making any such claims, and it would have been disingenuous of me to do so, given that I was the person who sought the arrangement’: Exhibit A1 [25].

52 Mr Trestrail’s intention may be relevant to an assessment of the likelihood of him pursuing the City for a breach of the Contract but is irrelevant to determining whether the Pay Arrangement itself breaches the Contract.

76 We do not need to consider the alternative basis of the appellant’s contentions in relation to this ground, which is reliant on the real and substantial risk issue. We have dealt with that above in ground 1A.

77 The appellant contended that the learned Commissioner was in error in her conclusion that the Pay Arrangement involved a breach of his Contract on two bases. The first was that the Pay Arrangement did not, of itself, offend any clause of the Contract. The second, and alternative basis, was that even if the Pay Arrangement did involve a contravention of the Contract, the principle that a person cannot take advantage of their own wrongdoing in order for a cause of action in breach of contract to arise, had application. Thus, according to this submission, the respondent could not face a breach of contract claim by the appellant involving his own misconduct.

78 The appellant developed these arguments in oral submissions before the Full Bench. Reference was made to the relevant principles of contract interpretation giving effect to the maxim, as referred to in Hughes D and Lewison LJ, *The Interpretation of Contracts in Australia* 2nd ed Thomson Reuters 2024 at [7.09]. Additionally, reference was made by the appellant to the decision of the New South Wales Court of Appeal in ***Drinkwater v Caddyrack Proprietary Limited*** [1997] NSWSC 431 in which Young J at 28, referred to the principle in terms that ‘The principle applies not only where someone is seeking to rely on a clause terminating a contract, but also where a party seeks to obtain a benefit under a continuing contract’.

79 On the basis that it would require the appellant to bring a claim for breach of contract, and the principle advanced by the appellant would apply, there could be no breach, as a matter of construction of the Contract, according to the appellant’s argument.

80 On behalf of the respondent, it was submitted that the learned Commissioner’s conclusions at [50] (see AB582) of her reasons, that the Contract was not complied with as a result of the Pay Arrangement, was correct. As to the appellant’s argument regarding the principle that a person cannot seek to take advantage of their own wrongdoing, the respondent submitted that even if such a defence may be available, which is not clear cut, then on the plain terms of the Contract, there was a clear breach. This did not involve any question of

interpretation of the Contract. According to its terms, the appellant was not paid what the Contract required him to be paid. The respondent's submission was that the learned Commissioner, at [52] of her reasons (see AB582), came to the correct conclusion that the appellant's intention was not relevant in determining whether the Contract had been breached, whilst accepting it may be relevant to the appellant's likelihood of pursuing a claim for breach of his Contract.

Consideration

81 The relevant provisions of the Contract, in existence prior to the Pay Arrangement commencing in 2019, were at exhibit R12 (see AB834-847). Exhibit R12 was entered into between the appellant and the respondent on 20 March 2017, which commenced on 16 April 2017. Whilst there was a further contract entered into at a later time, the relevant clauses of the contract in relation to payment of salary were the same. Clause 5.1(1) of the Contract provided as follows:

5.1 Remuneration Package

(1) The City *must pay* to the Director each year a Remuneration Package of the amount specified in item 8 of Schedule 1. (Our emphasis)

82 Item 8 of Schedule 1 set out the appellant's remuneration package referred to in cl 5.1. This provided a salary (cash component) at the time of \$227,825. By cl 6 of the Contract, the remuneration package payable was to be reviewed annually. Additionally, cl 5.2 dealt with how the appellant's salary was to be paid. It provided as follows:

5.2 Salary

The Salary *must be payable* fortnightly, in arrears, by electronic funds transfer to an account nominated by the Director. (Our emphasis)

83 From these provisions of the Contract, it is apparent that cl 5 had two elements. The first was an obligation on the respondent to pay, each year, the amount specified in item 8 Schedule 1. That annual amount, by the use of the words 'must pay' was the annual amount that the respondent was contractually bound to pay to the appellant, and not any lesser amount, in each year.

84 Second, the obligation imposed on the respondent by cl 5.2 of the Contract was to pay (albeit the word used was 'payable') the salary, meaning the salary component in item 8 Schedule 1, both fortnightly in arrears, and into a bank account nominated by the appellant. In our view, the word 'payable', as a matter of construction, and taken in the context of cl 5 as a whole, should be construed to mean 'paid'. The obligation on the respondent contained in both cl 5.1 and cl 5.2 of the Contract, was a mandatory obligation to satisfy the requirements of both subclauses.

- 85 It was not in contest that the appellant's remuneration package, and his fortnightly salary, was not paid in full because of the Pay Arrangement. By cl 5.1(1), the Contract in our view, imposed an unambiguous mandatory obligation on the respondent to pay the appellant's remuneration package as set out in item 8 Schedule 1, each year. Item 8 of Schedule 1 specified, at the time the Contract was entered into in April 2017, the salary cash component of \$227,825. This amount was required to be paid annually, less tax.
- 86 In April 2019, the appellant received a pay increase. He elected to 'postpone' the pay increase by requesting the respondent's then Human Resources Manager, Ms Harrison, to put the Pay Arrangement into effect on his behalf which she did (see AB603). Whether this was a request, as the appellant maintained, or a direction, as the respondent contended, matters not in our view.
- 87 This occurred, on the appellant's evidence, for his annual salary reviews for 2019 and 2020. The amount of the deferred salary under the Pay Arrangement was said by the appellant to be \$26,254, excluding superannuation and before tax (see AB603). The effect of the request, or direction, was that the Human Resources Manager of the respondent, with responsibility for such matters, and through whom the respondent acted, did not pay the appellant what his Contract obliged the employer to pay.
- 88 Under the terms of the Contract then in effect (see exhibit R12 AB834-865), the effect of the appellant not receiving his salary increase for 2019 and 2020, meant he was not paid his remuneration package as required by cl 5.1(1). This occurred because he was not paid, as required by this subclause of the Contract, the salary component specified in item 8 of Schedule 1. This is the inescapable conclusion based on the clear terms of cl 5.1(1) of the Contract, read with item 8 of Schedule 1.
- 89 Second, by cl 5.2 of the Contract, the salary component of the appellant's remuneration package, (as adjusted by annual reviews), was to be paid fortnightly in arrears. The use of the word 'must' made it clear that the respondent had no discretion in this respect. As to the use of the word 'payable', we do not attach any significance to this. In the context of cl 5.1(1) and cl 5 as a whole, cl 5.2 clearly meant that the respondent was obliged to pay the appellant's salary to him, and he was entitled to receive it, each fortnight. Again, this did not occur.
- 90 The annual salary payable following the 2019 and 2020 annual reviews, expressed in fortnightly amounts, was not paid to, and was not received by, the appellant. The inescapable conclusion from the above is that the appellant was not paid, and he did not receive, his salary due and payable to him under the Contract for the 2019 and 2020 years, as a consequence of the Pay Arrangement. The Contract was not complied with.

- 91 As to the application of the principle that a wrongdoer should not be able to take advantage of their wrong, there is a threshold issue with this alternative ground of appeal. It was not a matter raised at first instance. An appeal to the Full Bench under s 49 of the *Act* is to be ‘heard and determined on the evidence and matters raised in the proceedings before the Commission’: s 49(4)(a) *Act*. This reflects the principle that a party is bound by their case and departures from it on appeal should only be permitted in exceptional cases, including where the interests of justice require it: *Western Australian Prison Officers’ Union of Workers v Minister for Corrective Services* [2024] WAIRC 00139; (2024) 104 WAIG 322 at [62] (citing and applying the principles discussed in *University of Wollongong v Metwally (No. 2)* [1985] HCA 28; (1985) 60 ALR 68.
- 92 We do not consider that it would be in the interests of justice for the Full Bench to now entertain the point now raised in the alternative, as part of this appeal ground. We do not think there is merit in it. There was no ambiguity in the terms of the Contract. It was not a question of whether the appellant may or may not succeed in an action for breach of contract. The issue was simply whether the terms of cl 5 of the appellant’s Contract was complied with. It was not. The learned Commissioner did not err in reaching the conclusion that she did in this regard. This ground of appeal is not made out.

Ground 3 – No breach of *Fair Work Act*

3. The learned Commissioner erred in law by finding at [58] that the Pay Arrangement breached s323(1) of the Fair Work Act 2009 (Cth) (**FW Act**) given:
 - a) Section 323(1) is expressed as an obligation concerning the manner in which an employer ‘must pay’ the amount of salary due in money at least monthly. Under the Pay Arrangement the amount of salary increase was not due and would not be due until the Pay Arrangement ended.
 - b) The learned Commissioner erred at [57]-[58] in misconstruing *Wilkinson v Wilson Security Pty Ltd* (No 3) [2024] FCA 705 (*Wilkinson*) at [104]-[105] because that case held s323(1) is concerned with where the **employer unilaterally** withholds payment or only pays part or defers payment so that the obligation to pay monthly is not preformed. Under the Pay Arrangement the unincreased amount of salary was payable, and the deferred amount was not then payable.
 - c) Further, the learned Commission erred at [58] in finding that the Pay Arrangement breached s323(1) of the FW Act because Mr Trestrail did not document his request for it. This was an error because firstly, there was no deduction that needed to be authorised in writing under 324 FW Act and it as not being unilaterally deferred by the employer: Cf *Wilkinson* [105]; secondly, because it was documented by the payroll officer; and thirdly, because it would be perverse and contrary to the *ex turpi* principle for any party to prosecute the City for an arrangement initiated by the employee and

for the employee's benefit (noting the Commissioner's finding that the Pay Arrangement was for Mr Trestrail's benefit).

93 The learned Commissioner concluded that the Pay Arrangement breached s 323(1) of the *FW Act*, which provides as follows:

- (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
 - (a) in full (except as provided by section 324); and
 - (b) in money by one, or a combination, of the methods referred to in subsection (2); and
 - (c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

94 The learned Commissioner's reasons in this respect were set out at [56]-[59] where she said:

56 It was not disputed that s 323(1) of the *FW Act* imposed a requirement on the City to pay Mr Trestrail amounts payable to him in relation to the performance of work in full, in money and at least monthly.

57 In a recent decision, Colvin J states that the s 323(1) requirement to pay 'in full' is contravened where the employer only pays part of the amount payable to an employee in relation to the performance of work: ***Wilkinson v Wilson Security Pty Ltd (No 3)*** [2024] FCA 705 (***Wilkinson***) [104] (emphasis added):

[W]here an employer has identified an amount to be paid but withholds payment ***or pays only part*** or defers payment so that the obligation to pay monthly is not performed, then there is a contravention of s 323(1).

58 In light of the matters at [48]-[49] above, and despite the matters at [44]-[45] above, applying ***Wilkinson*** at [57] above, I find that the Pay Arrangement breaches s 323(1) of the *FW Act*.

59 The Pay Arrangement would not breach s 323(1) of the *FW Act* if the deduction was authorised in writing by Mr Trestrail pursuant to s 324(1)(a) of the *FW Act*. However, it was an agreed fact that Mr Trestrail did not document his request for the Pay Arrangement: Statement of Agreed Facts [8] at [9] above.

Contentions

- 95 In summary, the appellant contended that the learned Commissioner erred in concluding that the appellant's Ppay Arrangement contravened s 323(1) of the *FW Act*. First, the submission was made that s 323(1) of the *FW Act* concerns itself with the manner by which an employer (must pay) salary due in money and at least monthly. It was submitted that the appellant's Pay Arrangement meant that the amount of a salary increase was not at any time 'due' and would not be due until such time as the Pay Arrangement ceased.
- 96 The second point made was that the learned Commissioner, whilst relying on the decision of the Federal Court in *Wilkinson v Wilson Security Pty Ltd (No.3)* [2024] FCA 705, did so erroneously. It was submitted that *Wilkinson* was concerned with the situation where an employer unilaterally withholds payment from an employee, or only pays an employee in part or defers payment, such that the monthly obligation to pay is not discharged. It was submitted that the Pay Arrangement did not involve unilateral action by the respondent. Further, on this basis, the appellant contended that the deferred amount of salary at the time it was deferred, was not then payable by the employer to the appellant, but the unincreased amount of salary was payable and was paid.
- 97 The third issue raised by the appellant was that the conclusion reached by the learned Commissioner that s 323(1) of the *FW Act* was breached as the appellant did not document his request for such an arrangement, was in error. It was submitted that as above, given there was no unilateral deferral by the respondent, it followed that no deduction needed to be organised in writing for the purposes of s 324 of the *FW Act*. Regardless, as an alternative argument, it was submitted by the appellant that the deduction was documented, in the form of the 'spreadsheet' (see exhibit A15 at AB725-749). Finally, largely on the same basis as the appellant's denial there was a breach of his Contract, it was submitted that s 313(1)(a) of the *FW Act* does not apply in the circumstances of the Pay Arrangement initiated by the appellant. It was submitted that to conclude that it did apply, and thus place the respondent in breach of its terms, and enabling the appellant to allege a contravention, would be contrary to the principle of statutory interpretation precluding a wrongdoer from benefitting from their wrongdoing: *Thompson v Groote Eylandt Mining Co Ltd* [2003] NTCA 5 at [31]-[37].
- 98 The respondent took the view that the meaning of s 323(1) of the *FW Act* is clear. The decision of the court in *Wilkinson* was not dependent on whether the deferral of pay due to an employee is at the initiative of the employer or the employee. In this case, the respondent contended that the Contract, contrary to the submissions of the appellant, required his remuneration to be paid in full annually, and his salary to be paid each fortnight. The respondent contended that this is when the appellant's salary was 'due and payable' at that time and not at some later time.

- 99 Finally as to the submission of the appellant that the principle that the appellant could not take advantage of his wrongdoing, in the interpretation of s 323, this was rejected by the respondent. It was submitted that the terms of s 323 is clear as to its meaning. The respondent submitted that the principle relied on by the appellant, set out in *Thompson*, is an old rule, of limited application and does not apply in circumstances where the statute in question has a clear meaning: *McHugh v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs (No. 2)* [2020] FCA 843.

Consideration

- 100 We do not think that *Wilkinson* is authority for the proposition advanced by the appellant. As Colvin J concluded at [102], s 323(1) of the *FW Act* is concerned with payments being made by employers to its employees, are paid ‘with appropriate frequency, are made without deduction and are not paid in kind’. The provision concerns the manner of payment of amounts that are to be paid.
- 101 At [104], the passage cited by the learned Commissioner, Colvin J said:
- 104 On the other hand, where an employer has identified an amount to be paid but withholds payment or pays only part or defers payment so that the obligation to pay monthly is not performed, then there is a contravention of s 323(1).
- 102 There is nothing in the decision of Colvin J to suggest that s 323(1) of the *FW Act* only concerns itself with the unilateral actions of an employer. The withholding of a payment, a part payment or a deferral of a payment of an amount payable, is a contravention of s 323(1), irrespective of whether it was initiated by the employer or the employee. On the facts of this case, the action of the employer, through the conduct of the Human Resources Manager Ms Harrison, at the request of the appellant, by withholding part of the appellant’s salary, constituted a contravention of s 323(1) of the *FW Act*. No error by the learned Commissioner is established in this respect.
- 103 As to the submission that there could be no contravention of s 323(1) because the deferred amount under the Pay Arrangement was not due and payable, this contention must also be rejected. Whether an amount is ‘payable’, in this case under the Contract, depended on the terms of the instrument under which the appellant’s pay was due. We have already concluded in relation to ground 2, that the Contract obliged the respondent to pay to the appellant his remuneration in accordance with its terms. The appellant’s salary, as provided for in cl 5.2 of the Contract, was required to be paid fortnightly. This was the amount ‘payable’ by the respondent to the appellant, for the purposes of s 323(1), and no lesser

amount, unless it was authorised by the Contract. There was no authority under the Contract for the appellant to be paid a lesser amount.

- 104 This leads to the further contention put by the appellant that in some way, the ‘spreadsheet’, was a document that constituted written authority for the deduction, for the purposes of s 324(1) of the *FW Act*. This proposition must also be rejected. The ‘spreadsheet’ was not in any sense an ‘authority’ to deduct payment from the salary due to the appellant under the Contract. At its highest, it was only a record of transactions.
- 105 Finally, as to the appellant’s contention that s 323(1) of the *FW Act*, should not be construed such as to allow the appellant to benefit from his wrongdoing, for the reasons we have expressed in relation to ground two above, we do not consider this alternative argument should be entertained.
- 106 In any event, it is not a question of whether the appellant would or would not have commenced proceedings for a contravention of s 323(1). This is not a case of the appellant gaining a right under s 323(1) from his wrongdoing. As a principle of statutory interpretation, the principle only arises in cases of ambiguity in the construction of a statute, in which event, as the respondent submitted, constructional choices may be open: *McHugh* (citing and applying *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at [43] per French CJ). The underlying point being that a court or tribunal should resist a construction of a statute that will enable a person to take advantage of their own wrongdoing (See generally D C Pearce *Statutory Interpretation in Australia* 10th Edition at [2.66]). Section 323(1) of the *FW Act* does not attract this principle. This ground of appeal is not made out.

Ground 4 – No breach of tax or superannuation laws

4. The learned Commissioner erred in law at [77] and [81] in failing to find that Mr Trestrail had not breached *Income Tax Assessment Act 1997* (Cth) (ITAA) and the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA); and therefore she erred in fact and or law in finding that there was a ‘*real and substantial risk*’ that Mr Trestrail had breached the ITAA or SGAA; and further she erred in law at [111] that the Pay Arrangement ‘*arguably triggers the application of the anti-avoidance provisions ... of the Income Tax Assessment Act 1936 (Cth)*’. Those findings were wrong as a matter of law because there was no tax avoidance or any breach of taxation law or superannuation law, given the following:

ITAA

- a) Section 4.10(2) ITAA provides that: ‘*Your income tax is worked out by reference to your taxable income for the income year*’.
- b) Section 4.15(1) of the ITAA provides that: ‘*taxable income*’ is calculated by subtracting deductions from ‘*assessable income*’.

- c) Section 6.5(2) of the ITAA provides that (emphasis added): ‘assessable income’ is the ‘ordinary income you **derived** directly or indirectly from all sources’.
- d) The deferred income associated with the Pay Arrangement was not derived until the back pay was paid and therefore the Pay Arrangement did not breach the City’s PAYG obligations.

SGAA

- e) Superannuation Guarantee Ruling SGR 2009/2 at [12] states (**emphasis added**):

Meaning of ‘earnings’

12. An employee’s ‘earnings’, for the purpose of the definition of OTE, is the remuneration **paid** to the employee as a reward for the employee’s services.

- f) Therefore, the deferred remuneration associated with the Pay Arrangement only became earnings when it was paid, and the Pay Arrangement did not breach the City’s superannuation obligations.

Contentions

¹⁰⁷ The appellant contended that the learned Commissioner erred in not finding that there had been no breach by the appellant of the *Income Tax Assessment Act 1997* (Cth) or the *Superannuation Guarantee (Administration) Act 1992* (Cth). It was submitted that accordingly, the learned Commissioner was in error in concluding that there was a real and substantial risk that there had been such breaches. Furthermore, as to the learned Commissioner’s conclusion at [111] that the appellant had obtained a benefit through deferring or delaying payment of income tax, which arguably triggered the anti-avoidance provisions of the *ITA Act*, this was also in error. The underlying submission made was that there was no breach of taxation law or any tax avoidance involved in the appellant’s conduct.

¹⁰⁸ The substantive submission put was that in accordance with the *ITA Act*, ordinary income is income which is derived, whether it be directly or indirectly, from all sources (s 4-10(2) and s 6-5(2) of the *ITA Act*). The appellant submitted that this is affirmed in the ATO tax ruling TR98/1, to the effect that, using the ‘receipts’ method, which is the most appropriate, income is derived when it is received, on the basis that there must be something ‘coming in’, and for tax purposes, ‘receivability without receipt is nothing’. Accordingly, the appellant contended that it was not open for the learned Commissioner to conclude at [77] of her reasons that the appellant’s ‘full salary’ which included the deferred salary increases under the Pay Arrangement, constituted his ‘ordinary income’ as the basis for income tax calculations.

- 109 On this basis, the appellant submitted that using the Tax Ruling in assessing how income is derived by an employee, the foundation for the learned Commissioner's finding that there was a 'real and substantial risk' that the Pay Arrangement breached the respondent's PAYG withholding obligations, was incorrect.
- 110 Furthermore, as to the learned Commissioner's conclusions at [111] of her reasons that the deferral of income tax payable by the appellant, as a result of the Pay Arrangement, constituted a tax benefit, arguably bringing into play the anti-avoidance provisions of the *ITA Act*, it was contended that this was wrong. The appellant submitted that there was no tax advantage which accrued to him by the Pay Arrangement. This was because according to the appellant's submissions, the reduced salary payments between April 2019 and September 2021, did not have any impact on the appellant's tax bracket for calculating his tax obligations. The lump sum payment received when the back pay was paid to the appellant had the same PAYG withholding rate of 45% applied to it, as would have been applied had the Pay Arrangement not taken place. Accordingly, the appellant contended that there could be no avoidance of tax in these circumstances.
- 111 As to superannuation obligations, again, the learned Commissioner noted at [81] of her reasons (see AB587), that the parties did not make comprehensive submissions in relation to whether or not the Pay Arrangement affected the 'earnings' of the appellant for the purposes of the application of the *SGA Act*. However, the learned Commissioner concluded that it was 'arguable' that the appellant's full salary under his Contract, constituted the remuneration payable to the appellant as a reward for his services, for the purposes of the *SGA Act*. Despite this, the learned Commissioner concluded that there was a real and substantial risk that the Pay Arrangement did breach the respondent's superannuation obligations.
- 112 The appellant submitted that this conclusion, set out at [81] of the learned Commissioner's reasons was in error. It was also contended that such a conclusion was speculative and without a proper foundation. Furthermore, based upon the Superannuation Guarantee Ruling SGR2009/2, referred to by the learned Commissioner at [80] of her reasons, the calculation of superannuation contributions is based on the time when an employer makes a payment to an employee, and the employee's 'earnings' is remuneration 'paid to' an employee, as a reward for their services. The argument put was that as with the tax issue, the deferred remuneration under the Pay Arrangement was not earnings for the purposes of the SGR 2009/2, until the relevant amounts were paid to the appellant. On this basis it was submitted that it is wrong as a matter of law, to

conclude that there could be, in any event, a risk of a breach of the respondent's superannuation obligations in these circumstances.

- 113 The appellant also referred to s 19 of the *SGA Act*, to the effect that an employer must pay a superannuation guarantee charge if it fails to meet its superannuation obligations in respect of an employee by the relevant quarterly due date. In this respect, the relevant shortfall is as to 'the quarterly salary or wages base, for the employer, in respect of the employee'. This is further defined as including 'the total salary or wages *paid by the employer to the employee for the quarter ...*'.
- 114 Accordingly, it was the appellant's submission that the deferred salary increases under the Pay Arrangement between April 2019 and September 2021, could not have resulted in any breach by the respondent of its obligations to pay superannuation by the relevant quarterly due date, because the deferred amounts were not paid by the employer. There was a further submission made by the appellant to the effect that in any event, he voluntarily made superannuation contributions such that they would have been at least equal to the amounts payable by the respondent on his total salary, had none of it been deferred under the Pay Arrangement.
- 115 The respondent submitted that the learned Commissioner identified at [77] of her reasons, that the parties did not make comprehensive submissions in relation to any potential contravention of taxation or superannuation laws as a result of the Pay Arrangement. Accordingly, the respondent submitted that the learned Commissioner's finding that there were 'real and substantial risks' of such breaches was open. They were not unsound or speculative according to the respondent's argument. It was submitted that this does not to any extent, bring into play the *Briginshaw* principle referred to in the appellant's submissions. This only has application to the nature of evidence adduced in a proceeding to a higher standard, such that a tribunal of fact should be positively persuaded to the existence of a fact or matter in issue. If anything, the respondent contended that the learned Commissioner's views as to there being a real and substantial risk of contraventions, may constitute an incomplete legal analysis rather than incomplete evidence.
- 116 Overall, it was the respondent's contention that the conclusions reached by the learned Commissioner at [72]-[82] of her reasons were reasonable and appropriate. It was submitted that the 'complex and contrived' interpretations advanced by the appellant should not be accepted by the Full Bench. As to the issue of whether the appellant derived any benefit from the Pay Arrangement, the respondent contended that self-evidently the appellant did so. Simply put, the respondent submitted that the appellant only paid tax on amounts of salary that were deferred, sometime after payments were made to him, this being some years after any tax payable should otherwise have been paid. It was submitted that this

deferral of paying tax, as a debt, was undoubtedly a benefit to the appellant, in circumstances where the delay involved some years. This is so, despite the appellant's submission that ultimately the appellant paid more tax on the backpay amount, given that it was higher than it would otherwise have been. These included other amounts due to the appellant, as a result of errors made by the respondent in the calculation of his entitlements.

- 117 Despite all of this, it was the respondent's overarching submission that the appellant ultimately, as a result of deferring payment of tax for some years on his salary he otherwise should have been paid, conferred a benefit upon him and the appellant's 'stubborn refusal to accept the plain logic of this position' undermined the appellant's credibility, which was correctly identified by the learned Commissioner at [117] of her reasons.

Consideration

- 118 As we have noted above in relation to ground 1A, reliance cannot be placed on a finding that there is a real and substantial risk of the occurrence of an event, sufficient to sustain a finding of misconduct, applying either the ***Bi-Lo*** approach or that required by the terms of the appellant's Contract. Likewise, in our view, reliance cannot be placed upon a conclusion that there is a real and substantial risk of a contravention of the *ITA Act* and/or the *SG Act*, to support a finding that the appellant's summary dismissal was justified. In all cases, as the Contract required, as discussed above at [26]-[34], the relevant conduct must constitute, and establish, guilt of grave and serious misconduct. Alternatively, however, we agree with the appellant's submissions that it is logically inconsistent to make no finding of a breach of either the *ITA Act* or the *SG Act*, but then to conclude that there is a real and substantial risk of the same. It is not an issue of applying the ***Briginshaw*** principle, as we have mentioned above. This is not the same issue as to whether the appellant derived a benefit from the Pay Arrangement, which is a matter we discuss further below.
- 119 In any event, as to whether the *ITA Act* was not complied with by the respondent, as a consequence of the Pay Arrangement, the appellant's analysis of this issue in its submissions, summarised above, is to be preferred. Tax payable under the *ITA Act*, consistent with TR98/1, is on income received by an employee. The appellant did not receive his deferred salary until he was paid his final entitlements on the termination of his employment. It is difficult to see in those circumstances, how the respondent could have failed to comply with its PAYG obligations, when on the face of it, it deducted appropriate tax from payments actually made to the appellant at the material times.
- 120 For the same reasons, given the appellant's deferred income was not paid to him until his dismissal, as set out also in the appellant's submissions, which we

prefer, there could be no breach of the respondent's obligations under the *SG Act*. It follows, nor could there be a real and substantial risk of the same.

- 121 Therefore, it follows that the learned Commissioner was in error in concluding that there was a real and substantial risk of non-compliance with tax and superannuation legislation, as a basis for the respondent reaching its decision that the summary dismissal of the appellant was justified. Accordingly, this ground of appeal is made out.

Ground 5 – The MCE Act and the LGO Award did not apply

5. The learned Commissioner erred in law by finding at [62]-[67] that the Pay Arrangement breached the *Minimum Condition of Employment Act 1993* (WA) (**MCE Act**) and the *Local Government Officers' (Western Australia) Award 2021* (**LGO Award**) because they did not apply to the City at the time that the Pay Arrangement was in place, as:
 - a) The MCE Act and LGO Award applied on and after 1 January 2023, following the proclamation of the *Industrial Relations Legislation Amendment Act 2021* (WA), whereas the Pay Arrangement ceased in 2021.
 - b) The MCE Act and the LGO do not have retrospective application.

Contentions

- 122 As to this ground, the appellant contended that the conclusions reached by the learned Commissioner at [62] and [67] of her reasons (see AB584-585) were erroneous. This was on the basis that neither the *MCE Act* nor the *LGO Award* applied at the material time that the Pay Arrangement was in effect between April 2019 and September 2021. This was because those two instruments only had application to local government, and hence to the appellant's employment, on or after 1 January 2023, being the date on which Local Government employment and industrial relations coverage transitioned to the State industrial relations system, under the *Industrial Relations Legislation Amendment Act 2021* (WA). The appellant also noted that the CEO of the respondent, Ms Miltrup, in her Report to the respondent's Council dated 22 May 2023 (exhibit R9 at AB925-931) erroneously referred to the alleged breach of the *MCE Act* and the *LGO Award*.
- 123 On behalf of the respondent, it was accepted that the learned Commissioner erred in concluding that the Pay Arrangement contravened the *MCE Act* and the *LGO Award*. It was accepted that the Pay Arrangement ceased to have effect prior to the application of these instruments to Local Government on the transition to the State industrial relations system in January 2023. A submission was made that had the Pay Arrangement continued without being discovered, then there may

have been a likely breach of these instruments. In this sense it was submitted that these matters remain a relevant consideration.

- 124 However, the respondent submitted that the learned Commissioner's findings in these respects were only a minor part of her overall conclusions in relation to the justified summary dismissal of the appellant, and such an error does not disturb the conclusion of the learned Commissioner that the appellant's claims be dismissed.

Consideration

- 125 For the reasons identified by the parties, and as was conceded by the respondent, respectfully, the learned Commissioner erred in concluding that the *MCE Act* and the *LGO Award* applied to the appellant's employment at the time the Pay Arrangement was in effect, prior to January 2023. Accordingly, this ground of appeal is made out.
- 126 Given also that the learned Commissioner made credibility findings at [66]-[67] (see AB585) of her reasons, in relation to the appellant's denial that the *LGO Award* had application to him, this is a matter we will consider further when dealing with ground 10.

Ground 6 – Code not breached

6. It follows from the fact that the Commissioner erred in law in finding at [70] that the Pay Arrangement breaches the *FW Act* and the *MCE Act*, that therefore the Commissioner erred in law in finding that the Pay Arrangement breached paragraphs 1.4.1(e), 2.5.3(b) and 4.1.1(a) of the City's Code of Conduct because she premised those findings on the finding of breach of *MCE* and *FW Act*.

Contentions

- 127 As to this ground, the appellant submitted that given the terms of grounds 3 and 5, relating to a breach of the *FW Act*, the *MCE Act* and the *Award*, it followed that the learned Commissioner's conclusions that the appellant failed to act lawfully and within legislative requirements was not made out. Accordingly, the appellant did not contravene pars 1.4.1(e), to 5.3(b) and 4.1.1(a) of the Code of Conduct which reflect these obligations.
- 128 The respondent, on the contrary, contended for the same reasons, that there was a breach of the Code of Conduct, at least because of the contravention of the *FW Act*.

Consideration

- 129 Given that ground 5 is made out and there was no contravention of the *MCE Act* or the *LGO Award*, then these instruments could not be relied upon by the learned

Commissioner to support a finding of a breach of the Code of Conduct. However, given our conclusion in relation to ground 3, that the Pay Arrangement did contravene the *FW Act*, then the learned Commissioner's conclusion that the appellant's conduct, at least in that respect, led to a contravention of the Code of Conduct, was one open to her. This ground of appeal is not made out.

Grounds 7 and 8 – Failure to consider relevant matters

7. The learned Commissioner erred in law and fact in failing to take into account or give due weight to relevant matters, and in taking into account irrelevant matters in reaching adverse finds against Mr Trestrail and in dismissing the Applications, summarised as follows:
 - a) Relevant matters not taken into proper account:
 - (i) The previous CEO did not agree Mr Trestrail's conduct in relation to the PA amounted to serious misconduct;
 - (ii) The three regulatory authorities did not make any adverse findings or take any action against Mr Trestrail;
 - (iii) The PA was documented;
 - (iv) Mr Trestrail had an explanation for his omission to ensure better documentation;
 - (v) Mr Trestrail was denied procedural fairness in the process leading to his termination, including in relation to the Investigation Panel responsible for considering the allegations against Mr Trestrail and in relation to the Council responsible for approving the termination;
 - (vi) The CEO Ms Miltrup was demonstrably biased and prosecuted an unfair and misrepresented case against Mr Trestrail; and
 - (vii) Mr Trestrail's length of service and personal circumstances, and the treatment of Ms Harrison who was terminated with notice.
 - b) Irrelevant matters taken into account:
 - (i) There was a risk his conduct breached taxation and superannuation laws;
 - (ii) Mr Trestrail was motivated to disadvantage his wife in divorce proceedings;
 - (iii) The PA involved an abuse of his position;
 - (iv) he breached a direction not to speak to the Councillors deciding his fate; and
 - (v) He conceded the importance of documentation and that he should have done more to ensure there was better documentation of the PA.

8. The learned Commissioner erred in law and or fact by failing to consider, or give due weight to, relevant matters in reaching conclusions adverse to Mr Trestrail and in ultimately dismissing the Applications namely:
- a) The unchallenged evidence of the previous CEO, Chris Adams, who was CEO at the time of the Pay Arrangement that:
 - (i) if he had known about the Pay Arrangement he would have approved it in the same way he did other flexible remuneration payment arrangements available at the City: [30(5)];
 - (ii) although he expressed the view that the Appellant should have taken a more formal process to approve the deferral of his pay increases, he did not consider this to be significant, and it would not have led to summary termination if he had become aware of it: [30(7)];
 - (iii) he did not think the Appellant's actions should be construed as serious misconduct: [30(8)];
 - (iv) while he wasn't aware of other employees deferring pay increases in the way done under the Pay Arrangement there were other similar arrangements to effect pay banking, such as purchasing leave, to attract and retain staff: [30(9)].
 - b) The three regulatory authorities to whom Ms Miltrup made detailed reports of the Pay Arrangement, namely the Corruption and Crime Commission (CCC), Public Sector Commission (PSC) and Auditor-General did not make any adverse findings or take any action against Mr Trestrail.
 - c) The Pay Arrangement was in fact documented by the payroll officer, when an alleged absence of documentation was held to be a basis that Pay Arrangement was in breach of local government regulations and the City's Code, and a basis for the finding that Mr Trestrail intended it to be secret and deceptive.
 - d) Mr Trestrail's failure to ensure the Pay Arrangement was better documented was explicable and should have been considered in the context that:
 - (i) Mr Trestrail, like the CEO Ms Miltrup, was a very busy senior employee with a large portfolio of responsibilities and about 60 employees reporting to him upon whom he relied to carry out their duties, including any necessary documentation of his requests and directions; and
 - (ii) It was not unusual for there to be a lack or delay of paperwork at the City including by Ms Miltrup, for example submitting a leave application long after taking annual leave and the Mayor submitting mileage claims two years after they were due.

Denial procedural fairness

- e) The Commissioner failed to give due consideration to the very significant denials of procedural fairness in relation to the process of the Investigation Panel appointed by the CEO, in relation to the Council and in relation to the actual or apparent bias of the CEO in relation to Mr Trestrail.

- f) In relation to the independent Investigation Panel purportedly appointed by the CEO to investigate the Pay Arrangement matter, Mr Trestrail was denied procedural fairness in several significant respects, including:
- (i) The other 2 members of the Panel were provided with misleading information by Ms Miltrup, which exaggerated the temporal extent and quantum of the pay deferral and included Ms Miltrup's prejudicial speculative remarks that Mr Trestrail was motivated to undermine his ex-wife's claims in the divorce process.
 - (ii) In her initial correspondence to Panel members Ms Miltrup stated that the Pay Arrangement resulted in an underpayment of up to \$50,000 over the period 2019 to 2023.
 - (iii) In her emails between 6 April 2023 and 13 April 2023 (Exhibit R25) Ms Miltrup:
 - A. speculated as to Mr Trestrail's motives for the Pay Arrangement, saying:
 - 1. the pay arrangement was to reduce his income for the purposes of his divorce;
 - 2. Mr Trestrail was (wrongly) deriving a financial benefit from the pay arrangement;
 - 3. his explanation of forced savings was 'nonsensical'; and
 - B. misrepresented the Pay Arrangement, specifically:
 - 1. exaggerating that the arrangement had been in place for 'about three years';
 - 2. exaggerating the quantum of the back pay due to the Pay Arrangement, failing to point out that a portion of backpay was due the City's administrative errors that had nothing to do with the Pay Arrangement.
 - (iv) The biased and misleading statements Ms Miltrup made to the Panel members infected the Council as one of the Panel members was a Councillor.
 - (v) Mr Trestrail's responses to allegations and show cause letters were not provided to the Investigation Panel.
 - (vi) There was no report or documentation of any consideration or findings by the Panel, yet Ms Miltrup relied on the involvement and purported support of the Panel in presenting her recommendation to Council to terminate Mr Trestrail.
 - (vii) Mr Trestrail was not provided an opportunity to address the Panel. That opportunity was particularly important given the apparent bias and prejudice of Ms Miltrup in prosecuting Mr Trestrail, including in other unfounded allegations of misconduct in relation to a tenant of the City commercial premises at The Quarter and in her

communications with the 3 regulatory authorities CCC, PSC and Auditor General.

- g) In relation to the Council who had statutory responsibility under s5.37(2) of the *LG Act* to assess whether to approve or not approve Ms Miltrup's proposal to terminate Mr Trestrail, the Commissioner failed to give due consideration to the fact that he was denied procedural fairness in several significant respects including:
- (i) The Council were provided with misleading information about the matter exaggerating the temporal extent and quantum of the Pay Arrangement. The material provided by Ms Miltrup:
 - A. lacked detail of any accurate time frame for the alleged misconduct or Pay Arrangement, and instead suggests it extended over a longer period than it did;
 - B. lacked detail of an accurate statement of the quantum of the pay arrangement;
 - C. provided no evidentiary basis for factual findings or findings of serious misconduct;
 - D. contains Ms Miltrup's speculative view without any evidence that: '*...the CEO has formed the view that Phil Trestrail sought to gain a personal advantage (either through the underpayment of income, seeking a tax advantage or otherwise).*' The implication clearly is that he **wrongfully** obtained a personal advantage, otherwise there would be no reason for disciplinary action. Yet no wrong was specified.
 - (ii) The Council was not provided with relevant information including Mr Trestrail's letter dated 16 May 2023 responding to Ms Miltrup's letter requiring him to show cause why he should not be terminated for serious misconduct.
 - (iii) Ms Miltrup was the only source of information to the Council in relation to her proposal to terminate Mr Trestrail.
 - (iv) Mr Trestrail was not provided an opportunity to address the Council, or at least to ensure the material and information provided to the Council to inform its statutory function was accurate and complete. In fact, not all the material that was provided to Council by Ms Miltrup in persuading them to approve her decision has been disclosed to Mr Trestrail.

Contentions

- ¹³⁰ The appellant submitted that a failure to take into account relevant considerations or taking into account irrelevant considerations, or a decision being effected by extraneous or irrelevant matters, are grounds for appellate intervention, citing *House v The King* and *Magyar*.

- 131 In relation to failing to take into account relevant considerations, the appellant first dealt with the evidence of the former CEO of the respondent, Mr Adams. The appellant filed an outline of evidence of Mr Adams, who was the CEO of the respondent for a period of ten years from September 2012 to August 2022. The outline of evidence of Mr Adams was tendered as his evidence in chief and he was not cross-examined by the respondent. The appellant in particular referred to aspects of Mr Adams' evidence. Firstly, his evidence set out at [30.5] of the learned Commissioner's reasons (see AB570) to the effect that had he become aware of the Pay Arrangement, he would have approved it on the basis that it was a 'flexible arrangement', which were available at the respondent. Furthermore, Mr Adams gave evidence that whilst he thought the appellant should have formalised the Pay Arrangement for approval, Mr Adams did not think this was a matter of significance that would have warranted summary dismissal.
- 132 It was the appellant's submission that in light of this evidence, the learned Commissioner failed to give any or any appropriate weight to the views of the former CEO, to the effect that he did not consider that the Pay Arrangement warranted dismissal for serious misconduct. Furthermore, as noted at [30.8] and [30.9] of the learned Commissioner's reasons (see AB570), there were other 'pay banking' arrangements in place at the respondent, such as purchased leave, cashing out of annual leave and other flexible working arrangements. Mr Adams referred to these arrangements in the context of difficulty attracting and retaining staff at the respondent, and accordingly there was flexibility in relation to these matters.
- 133 The next matter raised by the appellant was that the learned Commissioner did not give any weight, or appropriate weight, to the fact that the regulatory bodies that reviewed the appellant's conduct, they being the CCC, the PSC and the Auditor-General, made no adverse findings in relation to the Pay Arrangement.
- 134 A further contention advanced by the appellant was that he did document the Pay Arrangement, through the spreadsheet prepared by the respondent's payroll officer. It was submitted that the learned Commissioner did not give any weight or gave inadequate weight to this fact, in concluding that the absence of documentation was a basis to conclude that there had been a contravention of the *FW Act*, the *MCE Act*, the *LG Act* and the Code of Conduct. Moreover, the appellant pointed to the fact that the learned Commissioner concluded at [154] and [160] of her reasons that the Pay Arrangement was deliberately undocumented.
- 135 As to this matter, the appellant further submitted that the appellant's evidence in the proceedings was to the effect that he accepted that he should have been more vigilant in relation to documenting the Pay Arrangement. It was submitted however, that his explanation for his failure to do so was the fact that as a senior

employee with a large portfolio of responsibilities and around 60 employees reporting to him, he relied upon those reporting to him to undertake their duties. It was submitted that the respondent's payroll officer, in maintaining the spreadsheet, was carrying out her duties.

- 136 It was also contended by the appellant that delays in paperwork or deficiencies in paperwork, were not unusual events at the respondent. The appellant referred in this respect, to the CEO, Ms Miltrup, submitting a leave application long after taking annual leave (see transcript at first instance p 218) and the respondent's Mayor submitting a mileage claim two years after the relevant event (see transcript at first instance p 78 and appellant's outline of evidence at [21]).
- 137 It was submitted by the appellant that none of the above matters were given any weight or appropriate weight by the learned Commissioner in determining the appellant's claims.
- 138 As to the issue of a denial of procedural fairness, the appellant referred to a number of matters in respect of which he contended that the learned Commissioner failed to give any due consideration to, including the role the Panel appointed by the CEO, the role and responsibility of the Council of the respondent, and the actual or apparent bias of the respondent's CEO towards the appellant.
- 139 As to this latter issue, the appellant submitted that the bias of the respondent's CEO was apparent on the following bases:
- (a) The Panel and the Council were misled as to the amount of the salary deferred under the Pay Arrangement, by asserting it was approximately \$50,000, but without disclosing that a significant amount of this figure was due to payments arising from administrative error by the respondent. The period of the Pay Arrangement was also inaccurately described as from being 2018-19 to 2023, rather than the actual period from April 2019 to September 2021;
 - (b) The CEO did not provide a fulsome account of the appellant's responses to the allegations to either the Panel or the Council;
 - (c) There were speculative and baseless statements made by the CEO to the Panel to the effect that the appellant was attempting to deceive his wife because of a 'messy divorce';
 - (d) The CEO had unilaterally removed a number of the appellant's duties and reporting responsibilities;
 - (e) That the CEO had previously made allegations against the appellant and sought to take disciplinary action against him in relation to one of the respondent's tenants in a shopping centre; and

- (f) In relation to (e), the CEO made various observations in relation to the appellant to the effect that he was a legal advisor to the respondent (although not an admitted legal practitioner); that he defied the respondent's Property Manager's advice to terminate the tenancy; and that he failed to report the debt of the tenant to the Council, when this was not required (see AB241-242). It was submitted by the appellant that none of these matters were put to him in the show cause process.

¹⁴⁰ A further matter raised by the appellant in relation to a lack of procedural fairness was the issue of the appellant attempting to engage with 'colleagues' at the respondent. The CEO referred to this matter in the appellant's termination of employment letter, to the effect that it was a separate ground for dismissal, that the appellant had sought to engage with the respondent's Councillors in relation to his employment dispute, which was confidential, and in breach of a direction not to do so. The appellant submitted that he was not given any opportunity of responding to this allegation prior to his dismissal.

¹⁴¹ A number of submissions were made by the appellant in relation to the role of the Panel and the CEO's interaction with it. The appellant noted the CEO's letter to the appellant of 28 March 2023, referring to the fact that 'The Deputy Mayor and an independent public sector officer will join me in reviewing your response. We will determine whether it is reasonable to define this event as minor misconduct' (see AB907). The denial of procedural fairness alleged by the appellant in relation to the Panel, can be summarised as follows on the appellant's submissions:

- (a) The panel was provided with misleading information by the CEO, as noted above, firstly as to the quantum of the underpayment of up to \$50,000 and the period over which the Pay Arrangement was in effect. This was in light of the fact that Ms Harrison notified the CEO by email of 14 March 2023 that the amount of the backpay, which included an amount due to the respondent's administrative errors, was estimated to be \$30,754 gross (see AB632). Further, the appellant submitted that at the time of the appellant's dismissal, the actual amount resulting from the Pay Arrangement was \$26,254 gross, with an amount of \$17,054 gross, resulting from the respondent's payroll errors (see [34(f)] reasons at AB576);
- (b) In correspondence to the Panel members the CEO made speculative and prejudicial comments to the effect that the Pay Arrangement was suspected to be motivated by the appellant's 'messy' divorce with his wife to understate his income (see AB915) and that in her evidence, the CEO expressed the view that she thought the divorce was messy because it had been ongoing for two years (see AB249). The appellant

contended that the same correspondence reflected the CEO's view that the appellant was obtaining a financial benefit from the Pay Arrangement and that his explanation of forced savings was 'nonsensical';

- (c) It was submitted that these statements made to the Panel, one of whom was a member of the respondent's Council, had the effect of infecting the Council in its decision making. Furthermore, the appellant submitted that the CEO also did not include the appellant's responses to the respondent's show cause letters 4 May and 16 May 2023 to the Panel (see AB870-874);
- (d) The appellant also contended that there was no evidence of any recommendations, report or documents reflecting consideration or findings by the Panel, however the CEO relied upon the Panel in support of her recommendations made to the Council that the appellant be dismissed;
- (e) That the appellant was not provided with any opportunity to address the Panel, given the appellant's assertion of actual and apparent bias of the CEO in pursuing the appellant. This includes reference by the CEO to her interaction with the CCC, the PSC and the Auditor General, without indicating that none of those bodies had made adverse findings in relation to the appellant's conduct; and
- (f) Finally, the net effect of the above according to the appellant, was the failure by the respondent to comply with its own Code of Conduct which at cl 10.2 specifies the need for procedural fairness during any investigation, including a requirement that a person receive a hearing appropriate to the circumstances, and the person hearing the matter to act without any bias.

¹⁴² In relation to the Council, the appellant contended that he was denied procedural fairness in a number of respects in relation to the involvement of the Council, and the CEO's dealings with it. This is particularly in light of the fact that under s 5.37(2) of the *LG Act*, the Council must consider whether to approve or not approve the CEO's proposal to dismiss a senior employee such as the appellant. Absent the Council's approval, the appellant submitted that he could not have been summarily dismissed, as the Council and not the CEO, are the ultimate decision maker in relation to such matters.

¹⁴³ In terms of the confidential Report by the CEO to the Council dated 22 May 2023 (see AB926-929), the appellant reiterated that it contained inaccurate and misleading information concerning the allegations against the appellant regarding the Pay Arrangement. This inaccurate information included the allegations of

breaches of various instruments; the failure by the respondent to make required quarterly superannuation contributions on the appellant's behalf; the amount of the deferred salary; and the suggestion that the appellant had committed minor misconduct as defined in s 4(d) of the *CCM Act* without disclosing that no such finding had been made by either the CCC or the PSC. Furthermore, in relation to these allegations, the appellant contended that the CEO provided the Council with no evidentiary foundation for these serious allegations.

- 144 Furthermore, the appellant contended that the views expressed by the CEO to the Council contained her speculative views as to the appellant obtaining a personal advantage through the Pay Arrangement, but without specifying how any such advantage was wrongful.
- 145 In terms of the appellant's responses to the various show cause letters issued by the CEO, the appellant contended that whilst the Council was provided with some of this correspondence, the appellant's response letter dated 16 May 2023, which contained additional information and explanations for his conduct, was not included in material given to the Council. It was submitted that these omissions were material to the Council's decision to either approve or not approve the summary dismissal of the appellant.
- 146 Further matters of procedural fairness were raised by the appellant, including that he was given no opportunity to directly provide information to the Council and nor was he given an opportunity to address it in relation to the allegations and the respondent's proposed course of action. In summary, the appellant contended that the CEO denied the appellant the opportunity to be heard by either the Panel or the Council, and additionally, she provided both with inaccurate information upon which to make decisions. In this light, the appellant contended that it is even worse that when Councillors approached him to discuss these matters, it was put as a further ground justifying his summary dismissal.
- 147 As an overarching submission, the respondent contended that the appellant's arguments in relation to these grounds should be viewed with caution and restraint, given many of the submissions of the appellant allege an assessment of evidence and the weighing of competing factors, in the exercise of a discretion.
- 148 As to the evidence of Mr Adams the respondent's former CEO, the respondent submitted that the learned Commissioner did take it into account and weighed it in the balance. The overarching submission of the respondent was that as the former CEO, it is difficult to see what weight the Commission should have placed on that evidence, given much of it was in the nature of opinion and speculation. The respondent contended that it was the present CEO, Ms Miltrup who was required to consider the matter of the Pay Arrangement, and whether the appellant, having entered into it, did the right thing. Whether Ms Miltrup's

predecessor, Mr Adams, had a different view, was ultimately of no real assistance to the Commission or alternatively, little weight could be placed upon it.

- 149 The respondent did submit however, that, as concluded by the learned Commissioner, Mr Adams' evidence did confirm that he was not aware of the Pay Arrangement, which was a further reason why the learned Commissioner's conclusion that the appellant was secretive about it should be accepted.
- 150 In relation to the PSC, the CCC and the Auditor General involvement, the respondent contended that all three bodies operate under their own legislative scheme, and apply different thresholds and standards of inquiry and investigation. Accordingly, their deliberations do not determine in an employment context, whether the appellant at the material time, engaged in serious misconduct. It was submitted that in any event, the respondent did not rely upon the findings or views expressed by these bodies in reaching its decision to dismiss the appellant.
- 151 Accordingly, it was submitted that the learned Commissioner did not err in placing little or no weight on these matters.
- 152 As to the documentation of the Pay Arrangement, the respondent contended that there was an abundance of evidence referred to by the Commission at [139]-[153] of her reasons, to support the conclusions reached. The respondent submitted that to have any prospect of success in relation to this issue, the appellant would need to demonstrate that the learned Commissioner mistook the facts and reached a conclusion that was not open on the evidence or the weight of the evidence. No attempt was made to do this by the appellant on the respondent's submission.
- 153 The respondent drew attention to the fact that it was agreed that the Pay Arrangement was not documented (see AB549) nor was there any written record or minute prepared or authored by the appellant in relation to the Pay Arrangement. And, nor did he communicate with anyone in authority about it (see AB562). It was submitted that the fact that unknown to the appellant, at the time, another person, the payroll officer, did document the arrangement through the spreadsheet, which only emerged at the conclusion of the investigation process, does not alter the findings reached by the learned Commissioner, all of which were open on the respondent's submissions. Adopting the approach in *House v The King*, the respondent contended that the Commission's findings were based on an assessment of the credibility of the appellant's evidence, and the weight accorded to that evidence by the Commission. These are matters that should not be overturned by the Full Bench, except in the clearest of cases, which is not the circumstance on this appeal.
- 154 As to the contention by the appellant that other errors or mistakes in paperwork may be made by the respondent in the past, it was submitted that these matters were not material to whether the Pay Arrangement was legitimate or proper.

- 155 In response to the appellant's submissions in relation to denial of procedural fairness, a number of submissions were made by the respondent. First, in response to the assertion by the appellant that the Panel was given misleading and exaggerated information concerning the level of the debt caused by the Pay Arrangement, the respondent submitted that this ultimately is irrelevant. It was submitted that whether the sum in issue was \$26,000 or about \$50,000, was not material to the seriousness of the respondent's allegations against the appellant, and the learned Commissioner's findings. Similarly, whether the Pay Arrangement was in place from 2019 to 2023, or from 2019 to 2021, on the respondent's submissions, makes no material difference to the ultimate outcome. This is especially so given that the Pay Arrangement did not end on the appellant's approval or request, but seemingly by chance (see AB562).
- 156 It was also contended that the appellant's criticism in this respect, is somewhat inconsistent with his later contention that the learned Commissioner erred in finding that the CEO was not obliged to involve the Panel more than she did. On this basis, if the Panel's role was limited, then the respondent submitted that the amounts involved and the timeframe would be of little consequence to the outcome.
- 157 As to this issue, the respondent contended that the role of the Panel, as found by the learned Commissioner, at [173]-[176] of her reasons, was only a very limited one. It was advisory only, and the respondent submitted that it was Ms Miltrup, as the CEO, who was to be ultimately responsible for the decision to dismiss the appellant (this of course was an error as it is the Council under s 5.37(2) of the *LG Act* that is the ultimate decision maker)
- 158 Second, submissions were made by the respondent concerning whether or not the appellant was motivated by his divorce proceedings as a reason to enter into the Pay Arrangement, and statements made by the CEO to the Panel about this matter. The respondent submitted that the learned Commissioner correctly concluded at [176] of her reasons, that nothing turned on this on the basis that her conclusions were the final decision in relation to the appellant's dismissal and this was a matter entirely for the CEO. Third, as a consequence of this, the respondent submitted that the Council could not be 'infected' by any such comments, as suggested by the appellant, arising from one of the Panel members being a member of the Council. This is further supported by the respondent's contention that it was the CEO and not the Council, who was the principal decision maker.
- 159 Fourth, the respondent submitted there was no obligation on the Panel to provide any form of written report, as its role was purely advisory. It is only the fairness and validity of the decision of the CEO, and not the Panel, that was the subject of the proceedings at first instance. Fifth, for the same reasons, given that the Panel

had no decision making role, there was no basis for any invitation to be extended to the appellant to address them. There was a basis for him to address the CEO, as the decision maker, which he did.

- 160 Finally, as to the allegation of bias by the CEO, Ms Miltrup against the appellant, this was rejected on the respondent's submissions. It was submitted that any suggestion of bias is to be assessed in light of the process followed and whether a proper and reasoned decision was made. It was submitted that in all of the circumstances the learned Commissioner came to the conclusion that the process was fair and the decision was reasonable.
- 161 In relation to the role of the Council, the respondent submitted that the learned Commissioner was correct in the conclusions that she reached at [174]-[177] of the reasons. The appellant had no entitlement to address the Council, as it was the responsibility of the CEO, as the substantive decision maker to make a decision. The role of the Council, under s 5.37(2) of the *LG Act* makes it clear that it is the CEO who is the decision maker and the role of the Council was a limited one, with oversight and a potential veto. Accordingly, the fairness of the procedure relates to the approach taken by the CEO and not the Council, and also not what the CEO may have told the Council.
- 162 As to the assertion by the appellant that the failure to provide the Council with his letter of response dated 16 May 2023, the respondent contended that there is no substance to this submission. It was submitted that the appellant's earlier letter of 4 May 2023, reflected the tenor and substance of the latter letter of 16 May 2023, as the learned Commissioner found at [183] of her reasons. This is particularly so, according to the respondent, given the limited oversight role that the Council played in the appellant's dismissal. The appellant's complaints about other matters in relation to the Council should be seen in the same light, according to the respondent.

Consideration

Former CEO

- 163 The first matter under this ground, relates to the evidence given by Mr Adams, the former CEO of the respondent. Mr Adams' evidence was in the form of a witness outline and it was tendered by consent. Mr Adams was not cross-examined. Mr Adams' evidence is reproduced in full at [30] of the learned Commissioner's reasons (see AB570) and need not be repeated. After setting out Mr Adams' evidence the learned Commissioner did not refer to it any further, other than at [136(b)] when she addressed the issue of whether the Pay Arrangement involved any secrecy. The learned Commissioner cited Mr Adams' evidence at par 4 of his witness outline, to the effect that he was not aware of the

appellant's deferral of his pay increases until after he had left his position as CEO of the respondent.

- 164 To the extent that the learned Commissioner referred to and relied upon Mr Adams' uncontroversial evidence that he was not aware of the appellant's deferral of his pay increases, it is clear that Mr Adams' evidence was not ignored. This was confirmed by the fact that the learned Commissioner set out Mr Adams' evidence in chief in full at [30] of her reasons.
- 165 There was some limited reference by the parties to Mr Adams' evidence in written and oral submissions at first instance. The appellant referred to it in opening, to the effect that his evidence showed that as the former CEO, he would have approved the Pay Arrangement, whilst at the same time he considered the appellant should have been more diligent in documenting it; that the outcome of the matter may have been different a few months earlier (presumably while Mr Adams was still the CEO); and the Pay Arrangement was similar to other arrangements in place at the respondent such as purchased leave (see p 13 transcript at first instance AB329).
- 166 The respondent referred to Mr Adams' evidence only to the extent that he said he was not aware of the Pay Arrangement, in the context of its assertion that the Pay Arrangement was conducted in secrecy, which submission was clearly accepted by the learned Commissioner (see p 142 transcript at first instance AB461). There was no other reference to Mr Adams' evidence in the parties' written submissions at first instance (see AB258-295) or in their closing oral submissions (see transcript at first instance 27 November 2023).
- 167 We are not persuaded that the learned Commissioner ignored Mr Adams' evidence. She set out in full his evidence in chief contained in his witness outline. She expressly referred to part of it upon which he relied on for the purposes of concluding that the Pay Arrangement was conducted in secrecy. This is not a case in which the court or tribunal in first instance has failed to refer to important evidence led in a proceeding, which may lead to an inference that no regard was paid to it, constituting an appealable error: *Skinner v Broadbent* [2006] WASCA 2 per Steytler J at [57].
- 168 Whilst it may have been open for the learned Commissioner to have otherwise made reference to Mr Adams' evidence, if it did not assist her in determining the matter in first instance, we are not persuaded for the following brief reasons that she erred in not doing so. Mr Adams' evidence in the main, was opinion evidence. Whilst it was admitted by consent, and the Commission is not bound by the rules of evidence, evidence such as opinion evidence and hearsay evidence, is generally accorded little weight.

169 One matter before the Commission involved a determination of the appellant's unfair dismissal claim, and a challenge to the decision by the respondent, through its CEO and also the Council, to summarily dismiss him. It was the views that they formed that were material. Whether or not Mr Adams may have approached the matter differently, is not with respect, a matter that the learned Commissioner was obliged to have regard to in reaching the conclusions that she did. Ultimately, on all of the evidence and the submissions, whether or not the conduct of the appellant, not factually in dispute, warranted his summary dismissal for misconduct, was a discretionary judgement for the Commission to reach.

170 We are not therefore persuaded that the appellant has made good his contentions in this respect.

Regulatory bodies

171 The role of the PSC and the CCC were referred to in the evidence at first instance. It was an agreed fact that the respondent's CEO, Ms Miltrup reported the appellant's conduct in relation to the Pay Arrangement to the PSC on 26 March 2023 (see AB549). The PSC subsequently notified the respondent on 4 April 2023 that it had referred the matter to the CCC (see AB549). On 27 April 2023 the CCC notified the respondent that it was not taking the matter further as it had formed the view that the appellant's conduct did not involve corrupt intent (see AB550).

172 It was common ground that neither the PSC nor the CCC reached any adverse conclusions in relation to the Pay Arrangement. The PSC referred the matter back to the respondent, seemingly in reliance on s 4(d) of the *CCM Act* under s 45M(c) of that legislation, by letter of 5 May 2023 (see exhibit A17 at AB754).

173 The referral back by the PSC was mentioned in the respondent's letter to the appellant of 11 May 2023 (see exhibit R15 at AB875-878). In the letter, Ms Miltrup refers to the CCC conclusion that it found no corrupt intent in connection with the Pay Arrangement and had closed its file. The referral back to the respondent by the PSC, was for the purposes of the respondent completing its own investigation and reaching its own conclusions in relation to the Pay Arrangement.

174 Whilst the respondent referred to the definition of 'minor misconduct' in s 4(d) of the *CCM Act*, in its letter of 11 May 2023 to the appellant, and it reached the preliminary view that the Pay Arrangement did constitute such, this plainly did not preclude consideration of whether the Pay Arrangement constituted wilful and grave misconduct, for the purposes of the appellant's Contract in cl 11.3(1)(a). For the same reason, reference to such a finding in the letter of

dismissal (see exhibit R30 at AB932-934), would not preclude a conclusion of grave and wilful misconduct under the Contract, if it was established.

- 175 Irrespective of the above, and central to this aspect of this ground of appeal, it was for the respondent as the employer, to reach a view on the effect of the Pay Arrangement, for the purposes of the Contract. The fact that neither the PSC, the CCC nor the OAG for that matter, made any findings or reached any conclusions adverse to the appellant, for their own purposes and within the confines of the relevant statutory frameworks, did not alter the respondent's obligation to be satisfied for itself, as the employer, that the contractual right to terminate the appellant's Contract without notice was satisfied.
- 176 Whether reference should have been made to the absence of any adverse findings by the PSC or the CCC, in the respondent's report to the Council, is a different issue, which we have already canvassed above at [48]-[73] in relation to grounds 8(g) and 15. These were omissions of significance.
- 177 In addition to the agreed facts, reference was made to the referrals to the PSC and the CCC in the evidence of both the appellant (see AB556) and Ms Miltrup (see AB572-573; 578-579). It is the case that in the 'Consideration' section of her reasons, from [36]-[163] (see AB580-595), the learned Commissioner did not make reference to the investigatory bodies. At [170] of her reasons (see AB596), when dealing with the appellant's allegations as to a denial of procedural fairness, the learned Commissioner referred to the reports made by Ms Miltrup to the PSC and the CCC, as a part of her reporting obligations and that this involved no denial of procedural fairness. This is plainly so.
- 178 However, there was no obligation on the learned Commissioner to refer to and make findings as to the lack of adverse conclusions by the PSC or the CCC, for the simple reason that the decision as to whether the Pay Arrangement was misconduct under the Contract, was for the employer to make. The views of the regulatory bodies were not decisive in relation to that obligation, which rested solely on the respondent. Accordingly, there is no merit in this aspect of this ground of appeal.

Documentation of the Pay Arrangement

- 179 It was an agreed fact that the appellant's request that his salary increases be deferred was not documented (see AB226). There is no challenge to the findings of fact made by the learned Commissioner at [139]-[153] of her reasons (see AB593-595), based on the evidence of the appellant and Ms Miltrup, to the effect that:
- (a) The Pay Arrangement was not documented;

- (b) Both the appellant and Ms Harrison were requested to provide documents to support the Pay Arrangement, as part of the respondent's enquiry. Neither of them could do so. This was stated in the respondent's show cause letters and the appellant's responses;
- (c) The 'spreadsheet' prepared by the respondent's then payroll officer, was not known to Ms Miltrup, at the time of her investigation, and she only became aware of it when calculating the appellant's final payments;
- (d) The respondent, under the *LG Act*, was obliged to keep appropriate records, and the appellant was aware of this obligation, as was Ms Harrison; and
- (e) In his role as the Director, the appellant's responsibilities included the oversight of legal, finance, governance and human resources for the respondent. These responsibilities required the appellant to pay close attention to detail.

¹⁸⁰ As to the allegations by the appellant that the learned Commissioner did not give any or sufficient consideration to the documentation of the Pay Arrangement by way of the spreadsheet, this is not so. At [142] of her reasons (see AB594), the learned Commissioner found that the appellant's explanation that the spreadsheet provided documentary support for the Pay Arrangement, to be an obfuscation. She did not accept that it was a genuine attempt to evidence the Pay Arrangement.

¹⁸¹ The issue with the spreadsheet is that the evidence established that neither the appellant nor Ms Harrison, authorised it or were aware of it at the material times. The appellant also accepted in cross-examination that he did not prepare a written record of the Pay Arrangement, and he did not confirm with any other person, in writing, that he had undertaken the Pay Arrangement. Ms Miltrup gave evidence that in working with the appellant over a number of years, she always knew him to be meticulous and somewhat pedantic (see AB246). Ms Miltrup's evidence was she therefore found the lack of documentation of the Pay Arrangement to be out of character for the appellant.

¹⁸² The learned Commissioner also referred to the evidence of the appellant that with his responsibility and oversight of the respondent's legal, finance, governance and human resources functions, attention to detail was a requirement of the job (see [152] reasons at AB594). On this basis, and given her findings as to the appellant's knowledge of the *LG Act* obligations to keep proper records, that these matters were well understood by the appellant (see [153] reasons at AB595).

- 183 As noted, Ms Miltrup also gave evidence in cross-examination that the first time she became aware of the spreadsheet, was when preparing the appellant's final payments. When she requested the appellant and Ms Harrison to produce documents in relation to the Pay Arrangement, they could not do so (see p 188, p 194 and p 209 transcript at first instance and also AB246). Ms Miltrup also testified that she was aware that the former payroll officer had concerns regarding the arrangement, which is why a record was kept of it by way of the spreadsheet. It is to be accepted that this latter evidence was hearsay. Whilst the Commission is not bound by the rules of evidence, hearsay is to be given little weight, unless other evidence tends to support it.
- 184 Importantly too, in the context of this issue, was the evidence of Ms Harrison to the effect that she was also aware of obligations under the *LG Act* to keep proper records, but none were kept for the Pay Arrangement and she wished in hindsight, that there were such records (see p 135 transcript at first instance and [28(m)] reasons at AB569). Also, as found by the learned Commissioner, in a letter to the respondent from MDC Legal on behalf of Ms Harrison, it was stated that the Pay Arrangement should have been put in writing 'to ensure the veracity and clarity within the City's records' (see p 138 transcript at first instance [28(o)] reasons at AB569).
- 185 In re-examination, Ms Harrison confirmed that there being no record made of the Pay Arrangement was an oversight. Importantly for present purposes, Ms Harrison, as noted above, as the Human Resources Manager for the respondent, testified that she was not aware of anyone in payroll who documented the Pay Arrangement (see p 139 transcript at first instance and [29(a)] reasons at AB570).
- 186 This latter evidence given by Ms Harrison was important. The evidence confirmed that despite being in charge of the human resources department, and reporting to the appellant, Ms Harrison had no knowledge of the spreadsheet. No one else, apart from the then payroll officer, knew of it either, at the time the Pay Arrangement was in effect. Whilst not expressly referred to by the learned Commissioner, this tends to also be supportive of Ms Miltrup's evidence noted above, that she became aware that the then payroll officer prepared the spreadsheet for her own purposes, because she had concerns about the Pay Arrangement.
- 187 As we have noted above, the factual underpinnings for the learned Commissioner's conclusion that the Pay Arrangement was secretive and deliberately undocumented, are not challenged on the appeal. This presents difficulties for the appellant. On an appeal by way of a rehearing, which the present appeal to the Full Bench is, the Full Bench is in as good a position to decide as the Commissioner at first instance, on the proper inferences to be drawn

from facts not in dispute or facts as found. Whilst respect and weight is to be given to the decision at first instance as to proper inferences to be drawn, it is for the Full Bench to reach its own conclusions and draw its own inferences and it should not shrink from doing so in an appropriate case. It is only however, in circumstances where the Full Bench considers a decision at first instance to be wrong, that it should be corrected: *Warren v Coombs & Anor* (1979) 142 CLR 531 per Gibbs ACJ, Jacobs and Murphy JJ at 537-551.

- 188 There was a substantial body of evidence relevant to the issue of lack of documentation of the Pay Arrangement entered into by the appellant, or by a person(s) on his direction. Given the circumstances in which the spreadsheet came into existence, not at the direction of the appellant or even with his knowledge, and which document no one else knew anything about until the decision to dismiss the appellant had been made, it could in no circumstances been considered as exculpatory of the appellant's conduct. The learned Commissioner's inferences drawn from the facts as agreed and as found, that the appellant intended to be secretive and that the Pay Arrangement was deliberately left undocumented, was plainly open and was correct. No error has been established by the appellant in this respect.
- 189 As to the assertion by appellant that the learned Commissioner erred in concluding that the Pay Arrangement was deliberately undocumented, as pointed out by the respondent, this was not the conclusion reached by the Commission. A full reading of her reasons at [139]-[160] (see AB593-595), establishes that she found that it was the appellant who deliberately left the Pay Arrangement undocumented.
- 190 A further issue raised by the appellant was his contention that as a busy senior executive of the respondent, with responsibility for a large number of staff, it was for others reporting to him to properly document the Pay Arrangement. The appellant accepted that he should have been more diligent in this respect. The appellant contended that the learned Commissioner paid no regard to these matters.
- 191 It is not however the case, that the learned Commissioner ignored this issue. She expressly referred to the appellant's evidence in relation to his assertions in this respect at [24(e)] of her reasons (see AB558). She referred to his evidence that he oversaw some 52 staff and that the payroll department, via Ms Harrison, managed the payroll operations and he had no direct involvement. Further reference was made to the appellant's evidence that he did not 'micromanage' staff or review details of their work, at [24(f)] of the learned Commissioner's reasons (see AB558-559).

- 192 Furthermore, reference was made by the learned Commissioner to the cross-examination of the appellant to the effect that he had direct oversight of the functions of the respondent for legal, finance, governance and human resources, and his need for attention to detail (see [25(a)] reasons at AB560). When taken to his response to the letter of 28 April 2023 from the respondent, he agreed that he should have documented the Pay Arrangement, and in his response, also acknowledged that this was an oversight ([25(tt)] reasons at AB566).
- 193 Accordingly, it is not the case that the learned Commissioner did not refer to these matters in the course of her reasons. Having found that the appellant deliberately did not document the Pay Arrangement, it is implicit that the learned Commissioner rejected the appellant's evidence that he was too busy to deal with such matters and it was a matter purely of oversight. For these reasons, and in light of the credibility findings made by the learned Commissioner adverse to the appellant, dealt with further below, the appellant has not established that the rejection of this aspect of his evidence was in error. The conclusions reached by the learned Commissioner on the evidence were open for her to reach.
- 194 Finally, the appellant submitted that the learned Commissioner did not pay regard or due regard to the appellant's contention that it was not unusual for there to be deficiencies or delays in paperwork at the respondent, in relation to employment entitlement matters. In this regard, reference was made by the appellant to a late claim for leave submitted by Ms Miltrup, and a late claim for mileage submitted by the respondent's Mayor.
- 195 The matter of delays in paperwork for such matters were referred to by the learned Commissioner when considering the evidence in chief of the appellant at [23(k)], concerning delays in performance reviews. The same issue was referred to by the learned Commissioner when considering the evidence in chief of Ms Miltrup at [33(f)] of her reasons (see AB572), when Ms Miltrup referred to correspondence between the appellant and herself, where the appellant raised the same matters. That the appellant was busy and it was a matter of oversight that he did not document the Pay Arrangement, was evidence clearly rejected by the learned Commissioner. She concluded that the appellant's lack of documentation of the Pay Arrangement was deliberate. No appealable error has been established in this respect.
- 196 In any event, irrespective of these issues, as the respondent observed in its written submissions, the fact that an organisation, with a large number of employees, may have some delay on occasions in relation to certain human resources transactions, is not relevant and cannot constitute a mitigating circumstance, if the appellant's conduct is established so as to warrant termination of employment.

Denial of procedural fairness

- 197 To the extent that this ground deals with the role of the Council, it is considered above at [48]-[73].
- 198 A plethora of allegations are raised in respect of this aspect of this ground of appeal. As to the complaint that Ms Miltrup misled the Panel in relation to the quantum of the deferred salary under the Pay Arrangement and its duration, these matters should have been expressed with more accuracy. In part however, these issues are related to the role of the Panel, dealt with below. Ultimately, as we have concluded above, it was the Council, and not the CEO that had the power to dismiss a Senior Employee. The Panel had no role in that process. The other important point is that if it the Pay Arrangement had not ceased by the payroll officer at the time in 2021 unilaterally paying the appellant his accrued salary, it would have continued on, likely undetected.
- 199 A question arose on the submissions on the appeal as to the role of the Panel. In her letter to the appellant dated 28 March 2023 (see exhibit R23 at AB905-907) Ms Miltrup stated that ‘the Deputy Mayor and an independent public sector officer will join me in reviewing your response. *‘We will determine whether it is reasonable to define this event as minor misconduct’*. This appeared to suggest that at least at this early stage of the investigation, a reasonable person in the position of the appellant would be left with the impression that the Panel, contrary to the respondent’s written submissions on the appeal (at [74]) had a role to play in determining the appellant’s fate.
- 200 The learned Commissioner referred to Ms Miltrup’s evidence at [33(j)]-[33(l)] to the effect that she sought an external ‘sounding board’ to assist in determining whether the relevant conduct was *CCM Act* misconduct and whether the concerns that Ms Miltrup had were ‘validated’ and it was appropriate to continue with the investigation. Further as to the role of the Panel, the learned Commissioner noted at [34(dd)] Ms Miltrup’s evidence that she did not produce notes of discussions with the Panel and nor did the Panel produce any form of report. Ms Miltrup’s evidence was that the advice of the Panel was for her benefit and to help her determine her views. Furthermore, at [34(ee)] Ms Miltrup’s evidence was noted to the effect that the Panel gave advice and their opinion but the ultimate decision as to the outcome of the investigation was hers.
- 201 Whilst it may be said that the Panel was initially proposed by Ms Miltrup to the appellant in her letter of 28 March 2023 to play a more formal role than it ultimately did, given the evidence of Ms Miltrup, which evidence was accepted by the learned Commissioner, as set out above, the issue is how it may have involved a denial of procedural fairness to the appellant.

- 202 As is evident from the cases discussed above, in the present circumstances the respondent was obliged to conduct as full and as extensive an investigation as was reasonable in these circumstances and give the appellant every reasonable opportunity and time to answer the allegations and to respond. It is trite to observe that in the context of unfair dismissal claims, when considering the thoroughness of an investigation by an employer, the investigatory standards of the police is not the benchmark: *Drake-Brockman* per Smith AP and Beech CC at [108] citing and applying *Schaale v Hoescht Australia Ltd* (1993) 47 IR 249 at [252]; *Heard v Monash Medical Centre* (1996) 39 AILR ¶3-203; *Amin v Burswood Resort Casino* (1998) 78 WAIG 2441 at 2442.
- 203 In this context, even a departure from a procedure initially indicated to be followed in an investigation, may not constitute procedural unfairness. The issue is not whether there is a departure from a representation as to a procedure to be followed, but whether the consequence is a demonstrated procedural unfairness to a person: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) HCA 6; (2003) 214 CLR 1 per Gleeson CJ at [34] and [37] cited and applied in *Drake-Brockman* at [110].
- 204 Thus, whilst Ms Miltrup initially indicated to the appellant in her letter of 28 March 2023 that the Panel may have had some role in ‘determining’ whether the appellant engaged in misconduct for the purposes of the *CCM Act*, and it may have been somewhat ambiguous from the perspective of the appellant, given this was ultimately not the case and Ms Miltrup considered the Panel to be a ‘sounding board’ and only Ms Miltrup would make the decision, this did not lead to procedural unfairness for a number of reasons.
- 205 First, as we have already noted above, the quantum of and the period over which the Pay Arrangement took place was not decisive of the matter of misconduct. Anything said to the Panel in this respect was not determinative. However, we accept that the errors in the quantum of the back pay and the time period over which it occurred, were material matters. This is especially given that the Acting Deputy Mayor was a member of the Panel, and considering the matters we have referred to above at [70]-[72] above. Second, as to the statement by Ms Miltrup to the effect that the appellant may have been motivated by his ‘messy’ divorce to enter into the Pay Arrangement, this was also irrelevant because as the learned Commissioner found at [175]-[176] of her reasons (see AB597), the decision taken was Ms Miltrup’s. Also, no reliance was placed on this allegation in the ultimate decision to dismiss the appellant, as we have concluded below at [238]-[240].
- 206 Third, for these same reasons, there was no entitlement in the appellant to address the Panel and nor was there any obligation on it to produce documents or a report or for it to make any form of ‘findings’. All of the allegations made by the

respondent and put to the appellant, were made by Ms Miltrup as the CEO. All the responses of the appellant were to Ms Miltrup. She took it upon herself to make the decision to recommend the summary dismissal of the appellant to the Council. The circumstances of those recommendations to the Council and its decision making raised different issues, which have been dealt with above at [48]-[73], in relation to grounds 8(g) and 15. Whilst in the Report to the Council of 22 May 2023 (see AB925-931), Ms Miltrup referred in the chronology to a 'peer review' with the CEO of the City of Perth, there was no reference made to any views expressed as a result, and that it was the CEO's determination that serious misconduct had occurred (see AB926 and also p 30 of the appeal transcript). The inclusion of the reference to the Panel itself in the Report, is a matter we comment on in dealing with other grounds of appeal.

207 Finally, as to the role of the Acting Deputy Mayor as a member of both the Panel and the Council, we have already commented more generally on this issue at [70]-[72] above, when dealing with grounds 8(g) and 15.

Ground 9 – Taking into account irrelevant matters

9. The Commissioner erred in fact and or law in having regard to irrelevant matters (and incorrect conclusions) in reaching conclusions adverse to Mr Trestrail and in ultimately dismissing the Applications namely:
 - a) While saying she was making no adverse findings of breach of taxation or superannuation laws, she erroneously found there was a *risk* of taxation/superannuation breaches, and she then found at [112] Mr Trestrail's failure to acknowledge a benefit in the deferral of tax weighs against his credibility. That is an error in so far as it assumes that Mr Trestrail avoided or minimised his tax liability. There can be no adverse credit finding in this respect.
 - b) The Commissioner made an irrelevant indirect and contradictory (non-) finding that Mr Trestrail's divorce was a motivation for the Pay Arrangement (**Pay Arrangement**) to disadvantage his wife:
 - (i) On the one hand, the Commissioner said at [115] that she made no findings whether Mr Trestrail obtained a benefit in divorce proceedings by disclosing to his ex-wife a lower income and lower superannuation balance during the Pay Arrangement than would have been the case but for the Pay Arrangement. Yet on the other hand, she found at [116] '*his refusal to concede*' that the Pay Arrangement impacted his disclosures weighs against his credibility as a witness.
 - (ii) Similarly, the Commissioner held at [118] there was no requirement to make findings about Mr Trestrail's conduct in the family proceedings; yet she held that his evidence that his divorce was

amicable was uncorroborated and, because of her adverse credit findings, he cannot be accepted.

- (iii) Additionally, it was incorrect to say that Mr Trestrail's evidence that his divorce was amicable was uncorroborated, as he adduced evidence of amicable email communications in December 2021 (Exhibits A5 and A6) and June 2022 (Exhibit A8 of PT-5 of R8), in addition to those of his lawyer subsequently in settlement negotiations.
- (iv) Further and alternatively, the Commissioner erred at [117] in rejecting Mr Trestrail's evidence that: there was no negative impact on his wife in their divorce by reason of the Pay Arrangement, which had ceased at the time of his disclosures in settlement negotiations; that he was not motivated to undermine his ex-wife's claims in the divorce by denying his wife a fair asset division, because if that had been his intention, he would have pursued the divorce years earlier when they separated, as his superannuation had since increased and his wife obtained a larger amount thereof; and further, he would not have overstated the value of his other assets including his superannuation if he intended to undermine his ex-wife's claims; and that his financial disclosures to his ex-wife relevantly advantaged her rather than disadvantaged her, including by providing responses to relevant questions about the ratio of his income to hers.
- (v) Further, while saying she did not make findings at [115], the Commissioner took into account irrelevant and incorrect matters at [113] by finding that the income the Appellant disclosed to his ex-wife in their property settlement was lower than his actual income given:
 - A. the Affidavit produced in compliance with the Order for discovery of the Appellant's family court disclosures shows that in addition to the 2020/21 tax return, the Appellant disclosed a payslip to his ex-wife showing his income after the Pay Arrangement had ceased; and
 - B. the Statement of Agreed Facts produced by the lawyers for the Appellant's ex-wife includes a statement of Family Law Act - Section 75 and 79 Factors stating that the Appellant had an earning capacity 3 to 4 times greater than his ex-wife's, which was the determining criteria (rather than the tax returns for the period of the Pay Arrangement), which on proper analysis confirms that the Pay Arrangement did not *relevantly* negatively impact the Appellant's disclosures to his ex-wife in their property settlement.
- (vi) Further, while saying she did not make findings at [115], the Commissioner took into account irrelevant and incorrect matters in saying at [114] the superannuation balance the Appellant declared to his ex-wife during their property settlement '*could have been*'

understated, when that is contradicted by a proper consideration of the evidence:

- A. The superannuation balance declared in the Application for Consent Order Kit was approximately \$20,000 greater than the actual superannuation balance at [24(h)-(i)]. This amount significantly exceeds the statutory superannuation contribution on the back pay associated with the Pay Arrangement. The back pay calculations tendered in evidence show that the Appellant paid additional superannuation contributions which exceeded the statutory contribution on the back pay; and
 - B. The Affidavit produced in compliance with the Order for discovery of the Appellant's family court disclosures confirms that the disclosures were finalised and signed after the City had processed the back pay and superannuation adjustment.
- c) The finding at [119]-[135] that the Pay Arrangement involved an abuse of his position at the City was incorrect and irrelevant because, whether or not he was Ms Harrison's director and in a dominant position in relation to her, it was not an abuse because the arrangement was not improper.
 - d) The finding that he spoke to Councillors in breach of a lawful direction, which gave rise to an independent ground of serious misconduct at [194]-[199], was an error and irrelevant because it was not a lawful and or reasonable direction to require him to rebuff Councillors who approached him, especially as they were the ones required to approve or not approve the CEO decision to dismiss him.
 - e) Mr Trestrail conceding the importance of proper documentation in local government and acknowledging that it was an oversight on his part not to ensure the Pay Arrangement was better documented were matters wrongly treated as evidence of wrongdoing and or an intention to obfuscate and or an intention to secrecy and or as a basis for adverse credit findings against Mr Trestrail:
 - (i) There was no evidence on which to conclude that it was Mr Trestrail's intention to obfuscate the lack of documentation (when in fact he was explaining it) or that the Pay Arrangement was deliberately undocumented and therefore secretive.
 - (ii) The Commissioner failed to give due weight to the evidence of Mr Trestrail and Ms Miltrup (in cross examination), that as busy senior officers with many employees reporting to them, they relied on those employees to do what is necessary to carry out their duties and implement necessary documentation. In this respect, the Commissioner also failed to give due weight to the evidence that there was documentation of the Pay Arrangement by the payroll officer.

- (iii) The finding at [136] that the Pay Arrangement involved secrecy was wrong because (a) as the Commissioner finds, it was known to (and documented by) the payroll officer and Ms Harrison and therefore was not secret; (b) the fact that then CEO, Mr Adams, did not know about it was irrelevant - what is relevant is that Mr Adams gave unchallenged evidence he did not consider it misconduct; and (c) it was incorrect to say the Pay Arrangement was only learned about “by the City” through a whistle blower complaint - the HR Manager Ms Harrison and the Payroll officer knew about it.
- (iv) Mr Trestrail’s concessions and understanding of proper documentation was irrelevant to, and or not a proper basis for, the cumulative (and speculative) findings at [142] - [154], that Mr Trestrail attempted to obfuscate the lack of documentation intended, and this undermined his credibility [142] - [145]; [147] - [154] that is was deliberately undocumented; and [155-156] this constituted a further breach of the Code; and at [160] the Pay Arrangement was ‘secret, deliberately undocumented arrangement that exposed the City to various compliance and governance risks, and [162] deliberate and serious misconduct; the onus discharged: [163].

Contentions

- 208 A number of submissions were made in relation to this ground. First, the appellant submitted that the learned Commissioner’s statement in her reasons that she made no adverse findings against the appellant in relation to breach of taxation or superannuation laws, was inconsistent with her subsequent finding that there was a risk of such prejudice. Further, her finding at [112] of her reasons (see AB590) to the effect that the appellant’s refusal to concede that deferring or delaying paying tax conferred a benefit on him, weighed against his credibility as a witness was erroneous, in circumstances where there was no finding that the appellant did avoid or minimise any tax liability.
- 209 Second, the appellant contended that a number of the learned Commissioner’s findings in relation to the appellant’s divorce were erroneous. At [115] of her reasons (see AB590), the appellant contended that no findings were made whether the appellant did obtain any benefit in connection with his divorce proceedings, by disclosing a lower income and lower superannuation balance to his ex-wife, whilst the Pay Arrangement was on foot. However, the appellant then submitted that inconsistent with this, the learned Commissioner found at [116] of her reasons, that the appellant’s refusal to make any concession in this regard weight against his credibility as a witness.
- 210 Next, as to the learned Commissioner’s conclusion at [118] of her reasons (see AB590), that she was not required to make findings in relation to the appellant’s conduct in the Family Court proceedings, but then noted that the

appellant's evidence that those proceedings were amicable, was not corroborated, and could not be accepted given her adverse credit findings made against the appellant, was challenged. The appellant submitted that this conclusion in relation to lack of corroboration as to the amicable divorce proceedings, was inconsistent with evidence adduced by the appellant through written communications in December 2021 (see AB660-666) and June 2022 (see AB239). In this respect too, the appellant contended that the learned Commissioner erroneously rejected the appellant's evidence that had it been his intention to understate his income and assets in the divorce proceedings, then he would have pursued divorce proceedings much earlier given the growth in his superannuation, and nor would he have overstated the value of his assets as found by the learned Commissioner. The appellant contended that if anything, his disclosures to his ex-wife relevantly advantaged her rather than causing her disadvantage.

- 211 Furthermore, the appellant submitted that the findings made by the learned Commissioner at [113], that the appellant's income disclosed to his ex-wife in their property settlement was lower than his actual income, was inconsistent with evidence he adduced, including his 2020/21 tax return and a payslip disclosing his income following the cessation of the Pay Arrangement (see AB807).
- 212 It was also submitted by the appellant that these conclusions reached by the learned Commissioner were irrelevant, because under the *Family Law Act 1975* (Cth), the appellant's earning capacity relative to that of his ex-wife, is the determining factor rather than actual income in any particular tax year. On this basis, the appellant contended that the Pay Arrangement itself did not relevantly have a negative impact in relation to the appellant's disclosures made in the Family Court proceedings. Further, whilst the learned Commissioner stated that no specific findings were made in relation to the Family Court proceedings, the appellant contended that the learned Commissioner's finding at [114] of her reasons (see AB590) in relation to superannuation contributions, which 'could have' led to an understatement of his superannuation balance in the Family Court proceedings, was inconsistent.
- 213 The appellant contended that this was an erroneous and irrelevant matter because on the evidence, the appellant's superannuation balance declared as a basis for an application for consent orders in the Family Court proceedings, was an amount approximately \$20,000 higher than his actual superannuation balance (see [24(h)-(i)] reasons at AB559). It was submitted that this amount significantly exceeded the statutory superannuation contributions payable on the deferred salary under the Pay Arrangement, and revealed that the appellant made additional superannuation contributions which exceeded the statutory contributions on the deferred salary (see exhibit A4). It was further submitted

that the appellant's evidence in the Family Court proceedings for consent orders were finalised after the appellant's backpay and superannuation adjustment had been made (see AB830).

- 214 The appellant further contended that the learned Commissioner took into account irrelevant matters and made erroneous findings in relation to her conclusion that the appellant abused his position relative to his subordinate Ms Harrison. The appellant submitted that regardless of whether he was Ms Harrison's Director and superior, there was no abuse of his position because the Pay Arrangement itself was not improper. The appellant referred to evidence given by Ms Harrison to the effect that had she been asked to do something 'dodgy' she would have refused, and may have escalated the matter higher in the hierarchy of the respondent. The appellant also referred to evidence given by Ms Harrison that from time to time, she disagreed with the appellant on some work matters and resisted his initiatives.
- 215 As to the learned Commissioner's conclusion that the appellant, in speaking to some Councillors, was a breach of a lawful direction, as set out in the show cause letters from the CEO, which also supported dismissal for serious misconduct, this was said to be erroneous and irrelevant. It was so described because the appellant submitted that the respondent's direction given in this respect was neither lawful nor reasonable. It could not apply where Councillors approached the appellant, in the context that the Councillors were required to either approve or not approve the CEO's recommendation to summarily dismiss him.
- 216 In this respect, the appellant also referred to the two letters to him from the respondent dated 28 April and 11 May 2023 in relation to the issue of confidentiality (see exhibits R13 and R15). It was submitted that the content of the direction in both letters was ambiguous because it firstly directed him not to discuss the contents of the correspondence with any of 'his colleagues'. The paragraph in the letter went on to state that if he did discuss the content of the correspondence 'with anyone', this would constitute serious misconduct. The appellant submitted that these references were inconsistent and ambiguous and should be construed consistent with the first direction, that he not discuss the confidential matter with any of 'his colleagues', which does not include Councillors.
- 217 Furthermore, the appellant contended that based on his evidence given in the proceedings (see AB443), he did not discuss the content of the confidential correspondence with Councillors. Furthermore, his evidence was that those Councillors who spoke to him, did not consider that the conduct he engaged in was serious misconduct (see AB444) and nor at the time, did he anticipate that his summary dismissal was about to occur. It was further contended that such a conversation, between the appellant and Councillors, could never constitute

serious misconduct, when those same Councillors are required to decide the case against him. It was submitted by the appellant that if the direction was as contended by the respondent, then it was neither lawful nor reasonable, because if a Councillor approached him, it would place him in an untenable position.

- 218 The appellant made a number of submissions in relation to the learned Commissioner's findings concerning the lack of documentation of the Pay Arrangement. First, the appellant contended that the concession he made that it was an oversight by him to not ensure that there was better documentation of the Pay Arrangement, was taken by the learned Commissioner as evidence of the appellant's intention to obfuscate and keep secret the arrangement, and which formed the basis for adverse credit findings against the appellant. The appellant submitted that there was no evidence to support the finding of obfuscation and nor was there evidence to support a finding that the Pay Arrangement was deliberately secretive and not documented for that reason.
- 219 Furthermore, the appellant contended that his pay records and personnel file showed the payments that he received and was entitled to receive which involved no concealment or attempt to alter the record. The appellant submitted that he openly discussed the arrangement with senior colleagues. The appellant contended that the learned Commissioner's conclusion at [138] of her reasons (see AB593) that the appellant's evidence in this regard was not credible, was wrong. The appellant also contended that it was erroneous for the learned Commissioner to conclude that the Pay Arrangement was a secret, when acknowledging that both Ms Harrison and the payroll officer were aware of it. Further, whether the former CEO, Mr Adams, who gave evidence in the proceedings, was aware of the Pay Arrangement or not was irrelevant according to the appellant. The appellant contended that what was relevant was Mr Adams' evidence that he did not consider the Pay Arrangement as constituting misconduct.
- 220 As to the absence of documentation of the Pay Arrangement, the appellant submitted that it was erroneous for the learned Commissioner to take this into account, in light of the evidence of both the CEO and the appellant, that they were busy senior officers, with many employees reporting to them, and to rely upon their reports to undertake any necessary documentation in support of their duties (see AB505).
- 221 Furthermore, the appellant also contended that his concession in relation to understanding the need for better documentation of the Pay Arrangement, was irrelevant to and should not have been taken into account in the learned Commissioner's findings adverse to his credibility, that the appellant attempted to obfuscate this fact, and that the lack of documents was a deliberate step.

- 222 In relation to the question of taxation, and the obtaining of a benefit, the respondent reiterated its submissions made in relation to this matter in ground 4. The respondent referred to its previous submission that delaying paying some tax, by delaying his income, is a delaying paying a debt, which was a benefit to the appellant.
- 223 In relation to the appellant's divorce, the respondent made a number of submissions in reply. First, it was contended that contrary to the appellant's contentions, the learned Commissioner did not make a finding that the appellant's divorce was a motivation for the Pay Arrangement. However, the respondent contended that the learned Commissioner's conclusion at [116] of her reasons that the appellant's refusal to accept that the Pay Arrangement impacted the disclosures made to his ex-wife in the property settlement, weighed against his credibility as a witness, was open. It was submitted that given the relevant appeal principles, such findings should not be lightly interfered with by the Full Bench on appeal, and in any event, were consistent with the evidence given.
- 224 The same applies to the learned Commissioner's rejections of the appellant's evidence that his divorce was amicable. The respondent contended that given the Commission's observations as to the appellant's credibility, it is insufficient to point to selected documents that the respondent described as self-serving, produced by the appellant, to challenge such a conclusion.
- 225 As to the appellant's assertion that the learned Commissioner rejected the appellant's evidence that had he intended to disadvantage his ex-wife, then he would have pursued the divorce years earlier, the respondent submitted that there was no such finding made by the Commission. This applied to a number of the appellant's submissions in relation to this issue, where the appellant, according to the respondent, simply failed to address the learned Commissioner's conclusions in relation to the Family Court proceedings at [115]-[116] of her reasons.
- 226 Furthermore, the learned Commissioner's finding at [113] of her reasons that the income disclosed for the 2019/20 and 2020/21 income years was lower than his actual income, which was disclosed to his ex-wife in the property settlement proceedings, was factually correct. This was a matter relevant to credibility as the learned Commissioner found. A similar conclusion may be reached according to the respondent's submissions, about the learned Commissioner's finding at [114] in relation to the appellant's superannuation contributions.
- 227 In relation to the findings of the learned Commissioner at [119]-[135] of her reasons in relation to the alleged use of the appellant's position as a Director, the respondent contended that all of these findings were open on the evidence. It was submitted that the Commission concluded that the appellant failed to acknowledge what she described as the 'core issue', being the power dynamic

between himself as the Director and his subordinate the Human Resources Manager, Ms Harrison. Furthermore, the respondent contended that it was open for the learned Commissioner to conclude that the appellant, in asserting that the Pay Arrangement was entered into solely in his capacity as an employee and not as a Director, was disingenuous and a further basis on which a finding could be made that he accordingly abused his position. The respondent contended that none of these findings involve an error warranting Full Bench intervention.

- 228 As to the breach of the direction given by the respondent to the appellant not to discuss the content of the show cause letters, the respondent submitted that the relevant findings of the learned Commissioner at [194]-[199] of her reasons were not in error and were open on the evidence. The respondent contended that there was nothing lawful or unreasonable in its direction to the appellant not to discuss the disciplinary matters with other persons in the respondent's organisation. It was clear in the correspondence that the appellant was not to discuss the content of the correspondence with other persons. It was the respondent's submission that the appellant ignored this direction in relation to Councillors, and if he was approached by a Councillor, he could have simply referred to the direction and that he was unable to discuss those matters. The respondent contended there was simply no error in the learned Commissioner's conclusions as to these matters.
- 229 As to the documentation of the Pay Arrangement, in relation to this particular ground, the respondent repeated and relied upon its earlier submissions concerning the same issue.

Consideration

Tax

- 230 The question of whether the respondent was exposed to a liability for a breach of the *ITA Act*, and whether the appellant obtained some benefit from the Pay Arrangement, are separate issues. Simply because the Pay Arrangement may not have exposed the respondent to a contravention of the *ITA Act*, by not deducting appropriate tax from the appellant's salary, does not mean that the appellant did not derive a benefit from the Pay Arrangement.
- 231 The appellant gave evidence in cross-examination to the effect that he had obtained no tax benefit from the Pay Arrangement. He testified that he had not deferred paying tax because he would not pay tax on money he had not received. The appellant's evidence was as he had not received a benefit because 'there is no benefit in not paying tax on money you have not received' ([25(w)]-[25(x)] reasons at AB563). At [111] of her reasons, the learned Commissioner concluded that in the absence of any submissions on the issue from the parties, she would not make any findings as to whether the Pay Arrangement constituted tax avoidance under the *ITA Act*.

232 At [112], however, despite this, the learned Commissioner found that the appellant's refusal to concede that delaying or deferring paying tax was a benefit to him, was a matter that weighed against his credibility. We have already dealt with the issue of the learned Commissioner's conclusions in relation to risks of statutory contraventions in ground 1A above, and we need not repeat our conclusions in this respect. However, it is to state the obvious that the deferral of payment of a tax obligation means that an individual retains money they would otherwise have to pay for a period of time, until it is ultimately paid. The appellant's steadfast refusal to acknowledge this obvious point was not an irrelevant consideration in the learned Commissioner's assessment of the credit of the appellant. There is no substance to this sub-ground.

Family Court proceedings

- 233 There was a considerable amount of evidence led and submissions made at first instance in relation to the appellant's property settlement proceedings arising from his divorce. The appellant was cross-examined about this matter as recorded in the learned Commissioner's reasons at [25(dd)]-[25(hh)] and [25(qq)] which included his affidavit in the Family Court proceedings and his various disclosures; the appellant's evidence in chief recorded at [24(g)]-[24(i)] to the effect that his divorce was entirely amicable and there was nothing 'messy or acrimonious' about it; and matters concerning disclosure of his earning capacity, superannuation and other assets.
- 234 The appellant was also further examined about these matters at pp 71-72 of the transcript at first instance and was cross-examined further about them at pp 118-120 of the transcript at first instance. It would appear that it was the appellant himself who raised the question of his divorce proceedings, and not Ms Miltrup. This was in response to what he apprehended was a suspicion by Ms Miltrup, that the reason for the Pay Arrangement was to hide his income from his former wife in the Family Court proceedings.
- 235 This evidence was the subject of consideration and at least partial findings by the learned Commissioner. At [113], she stated that as the appellant's income declared to the ATO for the 2019-20 and 2020-21 tax years was less than his actual income, this would mean that the income disclosed to his former wife in the Family Court proceedings was lower than what it actually was (see AB590). Furthermore, at [114], the learned Commissioner concluded that as a consequence of this, the superannuation amount that the appellant declared in the Family Court proceedings could have been understated (see AB590).
- 236 As to this sub-ground generally, we first observe that the learned Commissioner did not make any findings to the effect that the Pay Arrangement was motivated by the appellant's divorce proceedings in the Family Court. The learned

Commissioner, at [113]-[118] of her reasons (see AB590) referred to the evidence given by the appellant and summarised by her to which we have just referred (see AB559). This was to the effect that the appellant's divorce was amicable; that he and his wife separated in 2010 but did not then divorce at that time because their children were young; that the property settlement took place in late 2021 to early 2022; and evidence was given as to overstatement of the appellant's superannuation balances. The appellant was cross-examined on this evidence as referred to in the references made above (see AB564-565).

- 237 The learned Commissioner then discussed this evidence and the submissions made by the parties. She noted the parties did not make comprehensive submissions on these matters and therefore she could not make findings on the issues. However despite this, the learned Commissioner at [117]-[118] of her reasons (see AB590) referred to the appellant's refusals to concede that his income declared to the ATO and his superannuation balances, were lower as a result of the Pay Arrangement, and this weighed against his credibility. It was also stated that the appellant's evidence that his divorce from his ex-wife was amicable was uncorroborated, and in light of other credit findings adverse to the appellant, the learned Commissioner was not able to accept the appellant's evidence on this issue.
- 238 Whilst the parties on the appeal, and at first instance, and the learned Commissioner in her reasons, dealt with this matter in some detail, in our view, the matter of the appellant's Family Court property settlement proceedings was not relevant to his dismissal for misconduct. First, whatever occurred between the appellant and his former wife in relation to the division of their property, were not matters relevant to the appellant's position and responsibilities as a Director of the respondent. Second, there was no reference at all to the appellant's divorce or the Family Court property settlement proceedings in any of the show cause letters from the respondent to the appellant, or in his responses. It was not mentioned in the Report prepared by Ms Miltrup and provided to the Council and it did not appear in the respondent's letter of dismissal, sent to the appellant the day after the Council meeting on 22 May 2023.
- 239 Crucially also, Ms Miltrup in cross-examination, said that she could not determine if the appellant's divorce from his former wife was a motivation for the Pay Arrangement and she did not make any reference to it in the show cause letters (see pp 199-200 transcript at first instance). There was some fleeting reference to the suggestion of the appellant having a 'messy divorce' and Ms Miltrup's suspicion that the Pay Arrangement was motivated by the appellant understating his income in an email exchange between Ms Miltrup and Ms Reynolds on 6 April 2023 (see AB914-915). However, in the

cross-examination of Ms Miltrup to which we have referred, she described these matters as ‘gossip’.

- 240 Whether the appellant may have understated his income and asset position in the property settlement proceedings in the Family Court may no doubt be a matter of concern to the Family Court. But it was not a matter of relevance or concern in our view, for his former employer in relation to his duties as a Director, and nor the Commission, in circumstances where no reliance could be or was, placed on it, to support the appellant’s summary dismissal. In essence, with respect, this issue was a ‘red herring’. Therefore, to the extent that the learned Commissioner was led by the parties to place any weight on these matters for the purposes of her credibility assessment of the appellant, this was in error.

Abuse of position

- 241 The appellant stood in a position of seniority in the respondent’s organisation as a Director. He was responsible for the human resources function and Ms Harrison, as the respondent’s then Human Resources Manager, was responsible to the appellant and she reported to him in that capacity. The conclusions of the learned Commissioner at [130] and [132] of her reasons (see AB592) that the appellant’s request to implement the Pay Arrangement was not in his capacity as just an employee, and could not be disconnected from his position as a Director and the ‘power dynamic and hierarchical relationship’ between them, was plainly open. This finding was also consistent with the letter written by the appellant’s solicitors on behalf of Ms Harrison, for whom they then acted, in which reference was made to Ms Harrison’s capacity to question the appellant’s request to implement the Pay Arrangement, and the relevance of the appellant as Ms Harrison’s ‘direct line manager and as a Director’ (see [119] reasons AB591).
- 242 This sub-ground of appeal is not made out.

Councillors

- 243 As to the direction by the CEO of the respondent to the appellant not to discuss the content of the letters of 28 April 2023 and 11 May 2023 (see exhibits R13 and R15), we do not accept the appellant’s argument that the content of the letters were ambiguous. For someone in the appellant’s position, as a senior executive of the respondent with extensive human resources management experience, and being responsible for the human resources function, the appellant should have known better. In disciplinary matters a direction not to discuss the disciplinary process with others is a common feature of such processes in order to preserve the confidentiality of the relevant matters in question. The tenor of the direction in both letters was clear, despite the infelicity of expression.
- 244 It was not in dispute that despite the direction in both letters that the appellant did, when Councillor(s) approached him, speak to them. It was open for the

appellant to decline to engage with them in those circumstances, by citing the obligation on him in the letters not to discuss matters in connection with the disciplinary proceedings.

245 Therefore, the learned Commissioner was not in error to conclude that the appellant did not comply with the obligation on him in this respect. Given our broader conclusions above, as to the role of the Council as the ultimate decision maker, a failure to comply with the obligation in the letters, was a disciplinary matter, but not one in our view that could warrant summary dismissal for misconduct.

Documentation of the Pay Arrangement

246 We have already dealt with this matter at [179]-[196] of these reasons as set out above, when dealing with grounds 7 and 8.

247 As to the numerous allegations advanced by the appellant in relation to this issue, we are not persuaded that the learned Commissioner erred in reaching the conclusions and drawing the inferences that she did at [136]-[156] of her reasons, regarding the lack of documentation of the Pay Arrangement and its secrecy (see AB593-595).

248 For the reasons we have already expressed above in relation to the documentation issue, the matters taken into account by the learned Commissioner were not irrelevant considerations. The short point is that the only person in authority who was able to approve the Pay Arrangement was Ms Miltrup, as the respondent's CEO. The undisputed evidence was that she was unaware of the arrangement until it came to her attention from a 'whistleblower'. This sub-ground of appeal is not made out.

Ground 10 – Credit findings

The Commissioner erred in fact or law in making adverse credit findings and ultimately finding at [115] and [139] that any assertions made by Mr Trestrail cannot be accepted where unsupported by other evidence, by placing undue weight on irrelevant matters, including:

- (a) at [53], finding that Mr Trestrail failing to concede the 'minor point' that his conduct had the effect of the Contract not being complied with, when there was no breach of the Contract;
- (b) at [66]-[67], finding that Mr Trestrail was argumentative and sometimes evasive for challenging his applicability to the Local Government Officers' (Western Australia) Award 2021, when as a matter of law it did not apply to him during the Pay Arrangement. In any event, disagreeing with a proposition put by the opposing party in adversarial proceedings should not result in a finding that he lacked credibility or was argumentative and evasive;

- (c) at [112], finding that Mr Trestrail refusing to concede that the deferral of paying tax provides a benefit, when he was disputing that he *wrongfully* obtained an improper benefit;
- (d) at [116], finding that Mr Trestrail refusing to concede that the Pay Arrangement impacted his disclosure to his ex-wife in their property settlement, for the reasons stated in grounds 9(b)(iv) to 9(b)(vi) above.
- (e) at [117], finding that Mr Trestrail refusing to concede that he reported a lower income to the ATO and his superannuation balance was therefore also lower, for the reasons stated in grounds 9(b)(i) and 9(b)(iv) to 9(b)(vi) above.

Contentions

- 249 The appellant made a number of submissions concerning the learned Commissioner's adverse credit findings at [116]-[117] and at [138], to the effect that they were erroneous and not supported by the evidence.
- 250 First, it was contended that the learned Commissioner erroneously took into account at [53] of her reasons, that the appellant failed to concede that the Pay Arrangement meant the Contract was not complied with, and described it as a 'minor point'. The appellant contended that there was no such breach of the Contract. Second, in relation to her findings at [66]-[67] of her reasons, that the appellant was evasive and argumentative in challenging the application of the *LGO Award* to his employment, in circumstances where it did not apply, simply because the appellant took issue with propositions put to him by the respondent's counsel in cross-examination, was not a basis of itself, to make adverse credibility findings.
- 251 Third, in taking into account findings that the learned Commissioner made at [112], regarding the refusal by the appellant to concede that the deferral of paying tax, was a benefit, when in fact the appellant was refusing to concede that he wrongly did so, was said to be in error. Fourth, the learned Commissioner's finding at [116] that the appellant, in not conceding that the Pay Arrangement impacted his disclosures to his ex-wife in the Family Court proceedings was at odds with her earlier finding at [115], and was not a matter upon which she could make accurate findings, as they were not dealt with by the parties through comprehensive submissions.
- 252 Finally, the learned Commissioner's adverse credibility finding at [117], in relation to the appellant's refusal to concede that he reported a lower income to the ATO and he also had a lower superannuation balance, were erroneous, for the same reasons that he submitted the learned Commissioner was in error in finding that the Pay Arrangement was motivated by the appellant's divorce and an attempt to disadvantage his ex-wife.

253 In relation to credibility findings made by the learned Commissioner, the respondent submitted that such findings were made after careful consideration of the evidence and the issues raised in the proceedings. On some occasions, credibility findings were made to the effect that the Commission preferred the evidence of the CEO, Ms Miltrup rather than the evidence of the appellant. The respondent referred to multiple occasions on which the learned Commissioner made credibility findings against the appellant at [66]-[67], [106], [116]-[117], [138], [142], [145], [150] and [166]-[167] of her reasons. It was submitted that having regard to the relevant appellate principles, these credibility findings cannot be lightly overturned. Any submission of the appellant contained in his grounds of appeal, that simply assert that the appellant's evidence should be accepted or preferred, should be rejected on the respondent's submissions.

Consideration

254 As to grounds of appeal generally in relation to challenges to findings of fact involving credibility assessments of witnesses, considerable restraint is to be exercised by an appeal court. Findings based on credibility should not be overturned unless it can be demonstrated that the decision at first instance is 'glaringly improbable' or 'contrary to compelling inferences': *Fox v Percy* (2003) 214 CLR 118 per Gleeson CJ, Gummow and Kirby JJ at 128 (see too: *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472 and 479). However, failing to weigh up all relevant considerations or taking into account irrelevant considerations, provides a basis for an appeal court to review findings based on credibility: *State Rail Authority (NSW) v Earthline Construction Pty Ltd (in liq)* (1999) 73 ALJR 306 per Kirby J at 331-332.

255 We have touched on the learned Commissioner's credibility findings that she made at [5(k)] above. Specifically, those made were:

- (a) In referring to the appellant's evidence at [25(jj)] and [25(pp)] of her reasons (see AB564-565) that despite his salary being paid fortnightly and his remuneration package reviewed annually, there was no breach of his Contract or the *LGO Award*, and a delay in payment of tax and the calculation of superannuation on an incorrect rate as a result of the Pay Arrangement, the appellant's refusal to concede these matters was inexplicable;
- (b) In referring to the parties agreed (but erroneous) position that the *LGO Award* applied to the appellant's employment, the appellant's refusal to concede the application of the *LGO Award* was indicative of his demeanour (at [66] reasons);

- (c) In referring to the *LGO Award* obligation for payment of salary to be made at least fortnightly, the appellant's refusal to concede he was not paid his full salary fortnightly weighed against his credibility (at [67] reasons);
- (d) That the appellant's refusal to concede that his deferral or delaying of paying tax was a benefit to him, weighed against his credibility as a witness (at [112] reasons); and
- (e) In relation to the appellant's disclosures in the Family Court proceedings concerning the property settlement with his former wife, the appellant's refusal to accept that the Pay Arrangement impacted his disclosures in those proceedings also weighed against his credibility as a witness (at [116]-[117] reasons).

256 As to the finding at [53] of the learned Commissioner's reasons, that the appellant's refusal to accept that the Pay Arrangement meant his Contract was not being complied with, we have dealt with the obligation's created by the Contract when considering ground 2 at [81]-[92] above. The learned Commissioner's conclusion that the Contract was not complied with because of the Pay Arrangement was plainly correct. The appellant's refusal to concede what was an obvious issue did detract from his credibility, and the learned Commissioner's conclusion in this respect should not be disturbed.

257 Given that for the purposes of the appeal it was accepted that the *LGO Award* did not apply to the appellant's employment at the material time that the Pay Arrangement was in effect, the learned Commissioner's findings on credibility at [66]-[67] of her reasons concerning this issue was affected by error and cannot stand.

258 As to the finding at [112] of her reasons, we consider that the conclusion that the appellant's refusal to concede that the deferral of the payment of tax was a benefit to him provided a sound basis for the learned Commissioner to consider that this weighed against the appellant's credibility. Whilst we have concluded at [118]-[119] above that the appellant did not place the respondent in the position of breaching the *ITA Act* as a consequence of the Pay Arrangement, the derivation of a benefit is a different issue.

259 As a matter of logic and common sense, the deferral by the appellant of his salary increase as a result of the Pay Arrangement, meant that he was also deferring paying tax on income he would otherwise have been in receipt of at the material time. As a form of 'enforced savings', as the appellant described it, in relation to which he appeared to be using the respondent as a private banking facility, to steadfastly refuse to accept that the deferral of paying tax was of a benefit to him,

was a matter that the learned Commissioner was entitled to take into account in weighing the appellant's credit. No error has been demonstrated in this respect.

260 Finally, in relation to the learned Commissioner's findings at [116]-[117] regarding the Family Court proceedings, we have dealt with these issues at [233]-[240] above. Given that the Family Court matters involving the appellant, gave rise to matters which were simply speculation and 'gossip' based on Ms Miltrup's evidence, and formed no ground for the respondent's decision to summarily dismiss the appellant, assertions as to motivations of this kind for the Pay Arrangement, were not relevant to take into account and the learned Commissioner's findings at [116]-[117], as matters material to the appellant's credibility, also cannot stand.

Ground 11 – Analogous pay saving measures

11. The Commissioner erred in law and or fact by finding that the Pay Arrangement was not at all akin to other pay deferral arrangements, namely:

- a) At [83]-[84] Pay increase deferral from a delay in the City completing performance reviews because the performance reviews are documented. That is wrong because the Pay Arrangement was documented by payroll.
- b) At [85] that the Pay Arrangement was not akin to pay deferral due to delay in performance reviews because they are budgeted. That is wrong because his pay increase was also budgeted. Further, deferrals resulting from delayed performance reviews are not authorised by the employee's employment contract.
- c) At [86]-[91] that it was not akin to purchased leave. That is wrong because it is akin in the sense that it results in delayed income, and it is not provided for by the employee's employment contract.
- d) At [92]-[97] paying more tax as a method for savings bears no resemblance to Pay Arrangement because it would be an authorised deduction under ss 324(1(a) or (d) of the FW Act or ss 17D(1)(a) or (c) of the MCE Act. That is wrong because it is akin in the sense it results in the employee receiving money income at a later date (and grounds 3 and 5 above deal with why it was an error to find the Pay Arrangement amounted to a deduction in breach of the FW Act and or MCE Act). And it is akin to the Pay Arrangement in the sense that it is a delay in pay increase.

Contentions

261 The appellant also contended that the learned Commissioner was in error in concluding that the Pay Arrangement was not similar to other arrangements such as delays in pay increases from performance reviews by the respondent. It was submitted that the distinguishing factor of performance reviews being documented was erroneous, when on the appellant's submission, the Pay

Arrangement was also documented by the payroll officer at the material time (see AB725-749). As to the learned Commissioner's conclusion at [85] that performance reviews are budgeted, this was also an erroneous distinction, as the appellant submitted that his salary increases were also budgeted. As an additional matter, the appellant submitted that delays in payment of salary arising from delayed performance reviews are not authorised by an employee's contract of employment, and they all necessarily involve a deferral of tax and superannuation liabilities.

- 262 For similar reasons, the appellant contended that the learned Commissioner erred at [86]-[91] in concluding that the Pay Arrangement was not similar to an employee purchasing additional leave.
- 263 Further, the appellant contended that the learned Commissioner's conclusions at [92]-[97] that employees who have enforced savings by paying more income tax as required each financial year in order to receive a larger refund, was distinguishable from the Pay Arrangement. The appellant contended that the learned Commissioner was in error in relying upon relevant provisions of the *FW Act* in ss 324(1)(a) or (d) or ss 17D(1)(a) or (c) of the *MCE Act*. The appellant submitted such an arrangement is similar, as it results in an employee receiving income at a later date, which means that any pay increase is delayed.
- 264 The respondent submitted that all of the learned Commissioner's conclusions that she reached at [83]-[91] were open and those conclusions were correct. The Pay Arrangement was unlike any other arrangements at the respondent, such as purchase leave and there was no error in the Commission's conclusions in this respect.

Consideration

- 265 As to this ground we have briefly summarised the learned Commissioner's findings at [5(j)] above. Specifically, the learned Commissioner found:
- (a) As to back pay arising from delays in completing performance reviews, the Pay Arrangement was not akin to this because performance reviews are documented and the back pay is budgeted for;
 - (b) As to purchasing additional annual leave, this is subject to a formal policy of the respondent and requires approval. Accordingly, it does not infringe either the *FW Act* or the *MCE Act* in relation to deductions from an employee's pay and variations to such arrangements. Purchased leave is also transparent in that it involves debits and credits and provision is made for it in the respondent's accounts. Finally, purchased leave is time limited in accordance with the terms of the respondent's policy (see exhibit R7);

- (c) As to the assertion that some employees of the respondent in the past had paid more tax than they were required to in order to receive a greater tax refund, the learned Commissioner, if such a practice did occur, rejected that it was akin to the Pay Arrangement. She concluded that such an arrangement would be an authorised deduction under the *FW Act* and the *MCE Act*. It would also be time limited in that an employee would receive the amount of overpaid tax in their annual tax refund and this would also involve no alteration to an employee's annual income and tax payable for each financial year; and
- (d) As to the assertion by the appellant that the Pay Arrangement was analogous to a delayed expense reimbursement claim, such claims are to be made in writing and supported by evidence that the expense was incurred in the performance of an employee's duties. By its nature, such a claim is a reimbursement of monies already expended by an employee. Finally, there is no alteration to an employee's income, tax liability or superannuation contributions resulting from such a claim (see generally reasons at [83]-[102] at AB587-589).

²⁶⁶ We are not persuaded that there is any substance to this ground of appeal. For the reasons identified by the learned Commissioner, the Pay Arrangement bears no resemblance to these other circumstances. At the end of the day, the Pay Arrangement was an unauthorised arrangement that the appellant himself entered into for his own benefit, which arrangement was not available to other staff members of the respondent, and which arrangement lacked any transparency or accountability.

Ground 12 – Error of factual finding

12. The Commissioner erred in law and or fact by finding at [141] that the payroll officer's documentation had not been previously disclosed to or known by Ms Miltrup before she processed his termination pay. Contrary to Ms Miltrup's evidence at [34(o)] that she only became aware of the existence of the payroll officer spreadsheet recording the Pay Arrangement when processing Mr Trestrail's termination pay:
 - a) Ms Miltrup was made aware of it by Ms Harrison's email to Ms Miltrup of 14 March 2023 (Exhibit A2) and in a letter from MDC Legal dated 12 May 2023 with subject 'Ms Kayla Harrison Response to Show Cause Letter' (Exhibit R17).
 - b) The Appellant's Show Cause response dated 16 May 2023 (Exhibit R28) also referred to documentation maintained by the payroll officer.
 - c) Ms Miltrup also made reference to the spreadsheet in the Appellant's Termination Letter, which was dated at least one week prior to the termination payment being made to the Appellant.

Contentions

- ²⁶⁷ The appellant submitted that the learned Commissioner made a factual error at [141] of her reasons in finding that the respondent's CEO had not previously known of or had disclosed to her, the payroll officer's spreadsheet, when processing the appellant's final pay. It was submitted that this finding was inconsistent with a letter from the appellant's solicitors dated 12 May 2023 written on behalf of Ms Harrison, to the CEO, which referred to the spreadsheet prepared and maintained by the payroll officer, and that it was accessible to all human resources staff, the Director - Corporate Services and the CEO. It was also contended that the learned Commissioner's finding in this respect was at odds with the CEO's evidence that she was informed by an employee through an anonymous report that the appellant had the Pay Arrangement in place, which report was made around 9 March 2023, and that the report included that a spreadsheet had been produced.
- ²⁶⁸ Furthermore, the appellant submitted that the learned Commissioner's finding at [141] was also inconsistent with the appellant's show cause response letter of 16 May 2023 (see AB923), and also the letter of dismissal signed by the CEO (see AB933), which was dated prior to the summary dismissal of the appellant on 23 May 2023 and the subsequent processing of his final termination payment.
- ²⁶⁹ As to this ground the respondent submitted that the assertion that the Pay Arrangement was not concealed and was documented is a repeated assertion made at various points in the appellant's submissions. This is so. It was contended by the respondent, that such repeated submissions are merely a 'house of cards'. As set out at [16] of the respondent's written submissions on the appeal, the fact that the Pay Arrangement was not documented was an agreed fact. The appellant agreed in cross-examination that there was no written record or minute or other document prepared by him in relation to the Pay Arrangement. Ms Harrison, the Human Resource Manager at the relevant times, also agreed that there was no written record of the Pay Arrangement and she searched but did not succeed in finding one (see AB569).
- ²⁷⁰ Furthermore, the respondent contended that it was the unchallenged evidence of Ms Miltrup, that the first time she had knowledge of the 'spreadsheet' was when the appellant's termination of employment entitlements were being calculated, (see AB507). Accordingly, it was the respondent's submission that there was no factual error. Whilst the spreadsheet was generated, this was not a document that the CEO was aware of, nor was the Human Resources Manager aware of it until after the decision to dismiss the appellant had been made, and following the investigation process. Additionally, the appellant never approved, knew of or requested, such a written record at any time while the Pay Arrangement was in effect. The respondent contended that the appellant only became aware of it after

the decision was made to dismiss him. The respondent submitted that the learned Commissioner correctly concluded that the appellant deliberately did not record or document the Pay Arrangement, because he wished it to remain a secret.

Consideration

- ²⁷¹ The learned Commissioner found at [141] of her reasons, that based on her cross-examination, Ms Miltrup became aware of the ‘spreadsheet’ for the first time when she was processing the appellant’s final pay (see [34(o)] reasons at AB577 and 593). The learned Commissioner concluded that this provided further support to the conclusion that despite requests to both the appellant and Ms Harrison by Ms Miltrup, that the Pay Arrangement and its documentation had not been previously disclosed to Ms Miltrup.
- ²⁷² Regardless of whether reference was made to the spreadsheet in correspondence from Ms Harrison’s solicitors dated 12 May 2023, Ms Miltrup gave evidence that she was not aware of it prior to the appellant’s dismissal. It was open to the learned Commissioner to accept this evidence, especially given that it was an agreed fact that the Pay Arrangement was not documented; that the appellant’s evidence was that she did not prepare or authorise any written record of the Pay Arrangement; that, contrary to the letter from Ms Harrison’s solicitors dated 12 May 2023, Ms Harrison’s evidence was that there was no written record of the Pay Arrangement and, that when asked by Ms Miltrup for any documents to evidence it, she could not locate any.
- ²⁷³ As contended by the respondent in its submissions summarised above in relation to this ground, regardless of these matters, even if Ms Miltrup was mistaken as to when she became aware of the spreadsheet, it was proximate to the decision taken to summarily dismiss the appellant. Furthermore, for the reasons set out at [188], a document prepared by the respondent’s then payroll officer, not at the direction of the appellant or Ms Harrison, which the appellant was not even aware of, could not in any sense, be exculpatory in favour of the appellant. This ground of appeal is not made out.

Ground 13 – Denial of procedural fairness

13. The Commissioner erred in law and or fact by finding that the City’s investigation was thorough and comprehensive at [168]-[172] which error is evidenced from the following matters:
 - a) The City’s investigation was really Ms Miltrup’s investigation. That investigation was profoundly lacking in procedural fairness for the reasons set out in grounds 8e) to 8g) above.
 - b) Ms Miltrup’s investigation failed to confirm that the Pay Arrangement ceased 19 months prior to the investigation commencing and that the City

subsequently underpaid the Appellant for a further 13 months owing to mistakes made by the former payroll officer. Despite Ms Miltrup having been advised of this by email from Ms Harrison dated 14 March 2023, this was expressly stated by the City in the proceedings not to be admitted, and it was only admitted by Ms Miltrup under cross examination at hearing: [34(f)].

- c) Ms Miltrup's investigation also failed to determine the amount of back pay attributable to the Pay Arrangement as opposed to the amount attributable to mistakes made by the City, and on the contrary Ms Miltrup repeatedly exaggerated to others (the Investigation Panel, the CCC, the PSC, the Council) that the quantum and period of the Pay Arrangement included those periods and amounts after August 2021 that were due to the City administrative errors.
- d) Ms Miltrup did not provide all of Mr Trestrail's responses to the allegations and show cause letters to the Investigation Panel or the Council. On the contrary, she provided misleading, incorrect and highly prejudicial information to the Panel and the Council.
- e) There was no evidence the City spoke to the former CEO (who was the CEO for the entire period that the Pay Arrangement was in effect) or that the City had received advice that taxation and superannuation legislation was breached as alleged, nor did the City provide evidence that it contacted the Tax Office or the relevant superannuation fund to test allegations regarding breaches of the ITA Act or the SGA Act.
- f) In the termination letter, Ms Miltrup made clear that a 'separate' ground of summary termination was that: *'the City has also been made aware of your attempts to engage City employees in conversation in relation to this confidential employment matter, in direct breach of the reasonable and lawful direction issued to you in the Show Cause Letter and the Second Letter (which in itself, is a separate ground for termination).'*² The appellant was denied procedural fairness in relation to this ground as it was not put to him as one of the allegations for his response before he was terminated. It is also an allegation that was not put to the appellant in accordance with the rule in *Browne v Dunn* and was unsupported by any real evidence in the proceedings.

Contentions

²⁷⁴ In relation to this ground, the appellant referred to the learned Commissioner's findings at [168]-[172] of her reasons. A number of submissions were made in this respect. The appellant repeated his submissions in relation to the alleged denial of procedural fairness in relation to the process undertaken by the Panel appointed by the CEO, the conduct of the Council and the actual or apparent bias of the CEO in relation to the appellant. In addition to the earlier matters raised, the appellant contended that the CEO's investigation omitted to confirm that the Pay Arrangement had stopped some 19 months prior to the commencement of the

investigation. Furthermore, that the respondent had underpaid the appellant for a period of 13 months due to mistakes made by the respondent's payroll officer. The appellant also contended that despite the CEO being advised of this by Ms Harrison in an email dated 14 March 2023, the respondent maintained a denial of this fact and only conceded it under cross-examination through the CEO.

- 275 The respondent repeated and relied upon its earlier submissions concerning alleged denial of procedural fairness when addressing ground 8. The respondent accepted that the issue of the appellant speaking with Councillors was not a matter raised with him prior to the notification of his summary dismissal. However, in mitigation, the respondent contended that the decision by that time had been made to dismiss the appellant for the various reasons set out in the respondent's letter. Ultimately, it was the respondent's submission that the failure to afford the appellant an opportunity to comment on this matter of breaching a direction not to speak to Councillors about the disciplinary action, would have made no difference to the outcome.

Consideration

- 276 The substance of the allegations arising on this ground overlays other grounds of appeal that we have already dealt with in grounds 8(g) and 15 at [48]-[73] above and grounds 7 and 8 at [197]-[207] above. We need not repeat our conclusions in these respects. As to sub-ground 13(b) regarding the timing of the cessation of the Pay Arrangement, it is to be accepted that Ms Miltrup was in error as to the period over which the Pay Arrangement was in effect. It appears that she understood initially that the Pay Arrangement was in effect from April 2019 to March 2023. It was not until Ms Miltrup's cross-examination however, that she accepted that in fact the Pay Arrangement came to an end in about August or September 2021 (see transcript at first instance at p 182). The learned Commissioner referred to this and the fact that Ms Miltrup accepted that of the about \$46,000 in backpay paid to the appellant on termination of his employment, some \$26,000 was the result of the Pay Arrangement and the rest resulted from prior payroll errors made by the respondent (see transcript at first instance p 182 and [34(f)] reasons at AB576).
- 277 As we have adverted to above, surprisingly, in none of the correspondence passing between Ms Miltrup and the appellant, by way of the show cause letters and responses, was the time frame of the Pay Arrangement set out. The appellant did not recall the timeframe but stated that he received his outstanding pay increases in 2021 (see exhibit R24 at AB909). The correspondence from Ms Miltrup to the appellant referred to the Pay Arrangement taking place over 'several years' or words to that effect (see exhibit R23 at AB905 and exhibit R15

at AB877). As we have noted earlier, no reference to the time period over which the Pay Arrangement was in effect was in the CEO's Report to the Council, seeking the confirmation of the summary dismissal of the appellant (see exhibit R29 at AB925-931). Nor was there any reference to this in the letter of dismissal from Ms Miltrup to the appellant (see exhibit R30 at AB932-934).

- 278 However, even on the basis of the uncontested evidence, that the identification of the time period over which the Pay Arrangement was in effect was a result of an error by the respondent's payroll advice to Ms Miltrup, this does not necessarily mean that the investigation involved a denial of procedural fairness in this regard. The fact of the Pay Arrangement remained. Additionally, as we have already mentioned, it must be borne in mind that but for the inadvertent cessation of the Pay Arrangement by the then payroll officer, who mistakenly paid the appellant his accrued salary entitlements in 2021, the Pay Arrangement would have simply continued beyond that time, indefinitely or until otherwise brought to an end.
- 279 As to sub-ground 13(e) there was no obligation on the respondent to speak to the former CEO of the respondent. It was Ms Miltrup who was the CEO at the time of the discovery and the investigation into the appellant's conduct. In any event, as noted at [30] of the learned Commissioner's reasons (see AB570), the former CEO was not aware of the Pay Arrangement. It is thus clear that the appellant did not seek the approval of the former CEO for the Pay Arrangement either. There was also no obligation on the respondent to reveal to either the appellant or to his solicitors, advice received in relation to the taxation and superannuation issues, as correctly found by the learned Commissioner at [177] of her reasons (see AB597).
- 280 As to the further written submissions of the appellant at [146]-[148], these written submissions do not relate to this ground of appeal.

Ground 14 – Investigation panel

14. The Commissioner erred in law and or fact by finding at [173] that Ms Miltrup was not obliged to involve the Panel more extensively than she did by reason, given that:
 - a) In her letter Suspected Minor Misconduct dated 28 March 2023 (Exhibit R23), Ms Miltrup advised Mr Trestrail that the panel '*would determine whether it is reasonable to define this event as minor misconduct*'.
 - b) Contrary to that, Ms Miltrup gave evidence that she only formed the panel to '*sense check whether she was perceiving the situation correctly*' and as '*an external sounding board to gauge whether others perceived it as unusual and worthy of consideration under the CCM Act definition of misconduct*': at [33(j)].

Contentions

- 281 This ground relates to the Panel. The appellant maintained that the learned Commissioner's conclusion at [173] of her reasons that the CEO was not obliged to involve the Panel more extensively than she did was erroneous. This was because according to the appellant's submissions, by letter of 28 March 2023 (exhibit R23 and AB905-907), the respondent informed the appellant that the Panel 'would determine whether it is reasonable to define this event as minor misconduct'. The appellant contended that this was contrary to the CEO's evidence that she only formed the Panel as a sounding board and to check whether she was 'perceiving the situation correctly' (see AB474).
- 282 The effect of the above on the appellant's submissions, is that the CEO misled both the Council and the appellant in overstating the role of the Panel in making her recommendation to the Council that the appellant be summarily dismissed. The appellant submitted that the net effect of this was to portray to the Council, that the CEO's own views were those of a Panel of three.
- 283 As to this specific matter, the respondent repeated and relied upon its earlier submissions in relation to ground 8.

Consideration

- 284 We have already mentioned that there was some divergence between what Ms Miltrup said to the appellant in her letter of 28 March 2023 (exhibit R23 at AB907) which referred to the Panel as to 'determine whether it is reasonable to define this event as minor misconduct' and Ms Miltrup's evidence as to these matters in cross-examination (transcript at p 155 transcript at first instance AB474). In her Report to the Council (exhibit R29 at AB928) Ms Miltrup referred to 'seeking a confidential peer review' in relation to the potential misconduct matter. As we have already mentioned, she referred to the CEO of the City of Perth but not the Acting Deputy Mayor, who was also involved. There is some inconsistency between Ms Miltrup's evidence that the Panel was merely to 'sense check' the situation, and her Report to the Council, which we have dealt with above in relation to grounds 8(g) and 15.
- 285 It was a matter for Ms Miltrup how she used the Panel. Despite the content of her letter of 28 March 2023, the learned Commissioner was not in error in concluding effectively as such. However, importantly, the way in which the Panel was referred to in the Report to the Council, as dealt with at [48]-[73] above, and reference to a 'judgement call' (see AB928), carries with it an inference that the Panel was supportive of the CEO's 'judgment call' that she made, and it was used to bolster the case for summary dismissal. One cannot exclude the possibility that the Council may have been reassured by reference to the Panel in the Report. This is also consistent with Ms Miltrup's evidence cited

by the learned Commissioner at [34(ee)] of her reasons (see AB580) to the effect that whilst Ms Miltrup saw the decision as to whether the appellant had committed misconduct as her decision, as to the role of the Panel, ‘their advice supported her conclusion that serious misconduct had occurred’.

²⁸⁶ As to whether the appellant was misled by or disadvantaged by reference to the role of the Panel, we have dealt with this issue at [201]–[206] above. In relation to this ground, ultimately, the appellant was not denied an opportunity to fulsomely respond to the issues raised in the various show cause letters because of anything to do with the Panel. The appellant responded fully and comprehensively in respect of his contentions.

Ground 16 – Failure to consider appellant’s personal circumstances

16. The learned Commissioner also erred in law and or fact in failing to give proper consideration in assessing whether the employer’s right to terminate was exercised so harshly and or oppressively as to amount to an abuse of that right having regard to:
 - a) The personal circumstances of the applicant including his 10 years of unblemished service with positive performance reviews, and that he was highly regarded by his colleagues, councillors and stakeholders, including the former CEO;
 - b) The serious consequences of summary termination on the applicant’s future employment, career and reputation;
 - c) The difficulty he (and his partner) would face remaining in the small, remote town of Karratha in which he had settled in over the last eleven years; and
 - d) The different outcome the City applied to Ms Harrison in terminating her employment with notice, given that disparity of treatment of employees may render a dismissal unfair: *CFMEU v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 3787 at 396.

Contentions

²⁸⁷ Finally, the appellant submitted that the respondent failed to take into account the appellant’s exemplary work record and 11 years of unblemished service with the respondent. Furthermore, it was submitted that the appellant was highly regarded by his colleagues at the respondent, Councillors and others having dealings with the respondent, and the respondent’s previous CEO. Having lived in Karratha for 11 years, the appellant submitted that his summary dismissal had serious consequences on him in relation to his career, reputation and future employment prospects. As he was unable to find suitable alternative work in Karratha, he has only been able to obtain part-time employment at a fraction of his previous remuneration.

288 Additionally, both the appellant and his partner relocated to Mandurah in September 2023, due to difficulties remaining in Karratha. The appellant noted that the outcome for him was vastly different to the circumstances applying to Ms Harrison, who had her employment terminated on notice. It was submitted that this disparity in treatment was a relevant factor in the fairness of the appellant's dismissal: *CFMEU v BHP Billiton Iron Ore Pty Ltd* [2004] WAIRC 13424; (2004) 84 WAIG 3787.

289 The respondent contended that the learned Commissioner did refer to and consider the personal circumstances of the appellant and recorded the evidence he gave about these matters at [23(s)] and [24(p)] of her reasons. The consideration of these matters was submitted to be a part of the exercise of the Commission's overall discretion, and a matter which ought not be overturned on appeal in accordance with appellate intervention principles.

290 Insofar as the appellant referred to the treatment of Ms Harrison, the respondent submitted that her circumstances were very different to the appellant's circumstances. This included the fact that:

- (a) It was the appellant and not Ms Harrison who instigated the Pay Arrangement and she derived no benefit from it;
- (b) She was the appellant's subordinate; and
- (c) An investigation into her conduct in relation to the Pay Arrangement took place and she was dismissed because of it.

291 The respondent contended that given the above factors, there was a compelling logic in the respondent's treatment of Ms Harrison and the appellant's claim in this regard is without merit.

Consideration

292 In his response letter of 16 May 2023 (exhibit R28 at AB921-924), the appellant referred to the impact of a dismissal on him and his partner. He referred to the fact that both had made Karratha their home for over a decade. Furthermore, he submitted that he had 11 years of unblemished service with the respondent. The appellant also made reference to the difficulty he would face in obtaining a similar position given his age and the stage of his career that he had reached. He also referred to the loss of housing and his vehicle, leading to both he and his partner having to leave Karratha, with his partner also having to resign her position with the respondent, and the resulting financial hardship.

293 It is trite that in a claim of unfair dismissal, the question is not the exercise of the legal right of the employer to terminate a contract of employment, but whether the legal right to terminate has been exercised harshly, oppressively or unfairly. In the present case concerning allegations of misconduct, whether conduct

constitutes such is a conclusion of fact and is not a discretionary decision: *Garbett* per Hasluck J at [31] (citing and applying *Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch* (1992) 46 IR 98 per Franklyn J). Whether, having made such a finding, the Commission considers a dismissal for misconduct to be unfair, involves a discretionary step in the decision making process. In reaching that decision, the Commission needs to consider any mitigating circumstances relating to the misconduct and the employee's record of service with the employer, and any other circumstances relevant to the employee: *Drake-Brockman* at [66].

294 In this case, the learned Commissioner in her reasons referred to the evidence of the appellant at [23(s)], largely reflecting his response of 16 May 2023. She also referred to the appellant's partner having to leave Karratha because of the loss of housing at [24(p)] (see AB557-558 and 560). At [187] of her reasons, the learned Commissioner referred to the relevant principles discussed in *Drake-Brockman* at [66], noted above, in the context of the respondent's letter of termination of employment, which acknowledged these matters raised in mitigation by the appellant.

295 It is not the case, as was contended by the appellant, that no regard was had to these matters. The Commission had regard to the appellant's evidence, and the respondent's consideration of the mitigating circumstances, but concluded overall that the appellant had not discharged the persuasive burden on him. We reach this conclusion within the confines of this ground of appeal, which of course, is subject to our conclusions in respect of the other grounds of appeal, especially grounds 8(g) and 15, dealt with above.

296 As to the disparity of treatment argument in sub-ground 16(d), we are not persuaded that this sub-ground has merit. The circumstances in *BHP Billiton* are materially distinguishable from those of the present case. That case turned on differing disciplinary penalties imposed on train drivers at the same classification levels, resulting from failures to observe rail signals on the company's rail network. It has no application to these proceedings.

Conclusions

Powers of the Full Bench

297 For the foregoing reasons, but in particular having regard to our conclusions in relation to grounds 8(g) and 15, we would uphold the appeal.

298 The powers of the Full Bench in the exercise of its jurisdiction under s 49 of the *Act* are set out in ss 49(5), 49(6) and 49(6a). These provide as follows:

- (5) In the exercise of its jurisdiction under this section the Full Bench may, by order –
 - (a) dismiss the appeal; or

- (b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or
 - (c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.
- (6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied must be in terms which could have been awarded by the Commission that gave the decision.
- (6a) The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

299 In this case the Full Bench has considered all of the evidence and the material before the learned Commissioner at first instance in detail, in the course of dealing with all of the appeal grounds. Given the circumstances of this particular case, we consider that it would be appropriate for the Full Bench to determine the outcome of the matter at first instance for itself, by varying the Commission's decision and not remitting it for further hearing and determination. We consider that there is sufficient evidence before the Full Bench for it to make its own decision, having regard to s 49(6a) of the *Act*.

Approach to concurrent claims

300 In the case of concurrent unfair dismissal and denied contractual benefits claims, in determining remedy if both are made out, it is important to recognise that the relief open in relation to such claims, in relation to monetary compensation, is not the same. An order for the payment of a liquidated sum under a contract is the payment in the nature of a debt. This may include sums for payment for wages or salary for work performed, which have not been recovered, or other entitlements, including fixed sums payable on termination of employment. The obligation on the innocent party to mitigate their loss has no application to such circumstances, because a debt is not 'a mere breach of contract: it is rather the detention of a sum of money: *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 567 (cited in Ian Neil and David Chin *The Modern Contract of Employment* Second Edition at [13.70]).

301 Alternatively, the payment of an amount in recognition and in lieu of a period of notice of termination of employment for example, whether by an express or implied term, required to be, but not given, will be, where the employment relationship has come to an end, a claim in the nature of unliquidated damages for breach of the contract of employment. A claim of this kind, will be subject to the usual principles applicable to damages for a breach of contract, including an obligation on the injured party to mitigate their loss and consideration of any

applicable contingencies. An award of damages in such cases is still an award of a denied contractual benefit: *Cool or Cosy* per EM Heenan J at [63]-[78].

- 302 In the case of concurrent claims such as the present, it is appropriate to deal with the denied contractual benefits claim first, and any remedy that ought be ordered. Having done so, then, in relation to the unfair dismissal claim, in the case where reinstatement or re-employment is not ordered, the Commission should consider, in light of the award of damages or payment of a debt, what further compensation should be ordered under s 23A(6) of the *Act*: *Cool or Cosy* per Steytler J at [29]-[30]; per Pullin J at [53]-[54] and EM Heenan J at [66]-[67].

The outcome

- 303 For all of the foregoing and the following reasons, we consider that the appellant's summary dismissal was wrongful, to the extent that the conduct of the appellant did not satisfy the requirements of cl 11.3(1) of the Contract, enabling the Contract to be summarily terminated by the respondent without payment. We do not consider that the conduct of the appellant could be regarded as a serious breach of the Contract. As we have concluded, the Pay Arrangement entailed the appellant not receiving his full remuneration in accordance with cl 5 of the Contract. This placed the respondent in the position, as found by the learned Commissioner, where it did not pay the appellant's full salary owed to him in accordance with the terms of the Contract, when it increased following performance reviews.
- 304 This was not a breach of the Contract committed by the appellant. It can only be characterised as the appellant, by his conduct, inducing the respondent to breach the Contract. The respondent did not point to any other breach said to have been committed by the appellant, that could be characterised as serious. In any event, even if the failure of the appellant to receive his full remuneration as required by the Contract could be regarded as a breach by him of the Contract, given the circumstances of it, and the consequences, we do not consider that it taken alone, could be regarded as a serious breach for the purposes of cl 11.3(1) of the Contract.
- 305 Thus the question for determination turned on whether the conduct of the appellant, could be regarded as 'wilful or grave misconduct' for the purposes of cl 11.3(1)(a) of the Contract. Definitionally, the concept of 'grave' is little different to 'serious'. We have set out the relevant principles in relation to an employer's right to summarily dismiss an employee at [18]-[20] and [59] above. It must normally be established that the employee disregarded an essential condition of the contract of employment so as to amount to a repudiation of the contract. Relevant too, is the consequences of the repudiation.

306 Whilst each case will turn on its own facts, as an illustration, is the case of *Jupiter General Insurance Co Ltd v Adeshire Bomanji Shroff* (1937) 3 All ER 67. In this case, the employee was a manager in an insurance business and worked in the life insurance department. The managing director of the firm refused to insure an individual for reasons the manager was aware of. It involved an exceptional risk to the business. Despite this, the manager issued a life insurance policy to the individual, whilst being aware of the managing director's concerns resulting from which, he was summarily dismissed.

307 On appeal from the High Court, the Privy Council considered the circumstances in which a single act of misconduct would justify summary dismissal without notice. When considering the one act of misconduct, consideration was given to the consequences of it. As to this, Lord Maugham for the Privy Council, said at 74:

the test to be applied must vary with the nature of the business and the position held by the employee, and decisions in other cases are of little value. We have here to deal with the business of life insurance. A mistake in accepting a risk may lead to a very considerable loss, and repetition of such mistakes may lead to disaster. The undertaking is one in which the undertaking of each individual risk is necessarily hazardous, and it is only by unremitting care and prudence that the business can profitably be carried on. If an officer of a life insurance company, whatever his motive may be, withholds from his superiors information which will in all probability lead them to refuse a risk, *and a fortiori* if it is one of exceptional character and magnitude, it would seem to be very difficult for his superiors to be confident that he will, in the future, properly carry out important duties entrusted to him. In other words, if a person in charge of the life assurance department, subject to the suspension of superior officers, shows by his conduct or his negligence that he can no longer command their confidence, and if, when an explanation is called for, he refuses apology or amendment, it seems to their Lordships that his immediate dismissal is justifiable.

308 In this case, the appellant's conduct did not involve fraud or dishonesty in terms of misappropriating funds of the respondent. It did not expose the respondent to a significant financial risk of any measurable quality. It did not involve any corrupt conduct. It is to be regarded as a single act because whilst the appellant's salary payments were not fully passed on to him as they should have been, periodically, when they fell due, as a course of conduct, it arose from a single act by the appellant to request Ms Harrison to have the respondent's payroll department withhold his salary increments. It was the Pay Arrangement and its surrounding circumstances that were in issue. There was no further act of misconduct relied on by the respondent at first instance.

309 An example of a case involving dishonesty was *BGC (Australia) Pty Ltd v Phippard* [2002] WASCA 191; (2002) 82 WAIG 2013. In this matter, the General Manager of a contracting business dishonestly claimed reimbursement of

expenses to which he was not entitled. As the General Manager, he was to set an example. The Industrial Appeal Court held that, in reliance on *Concut*, misconduct involving dishonesty would ordinarily, without more, justify summary dismissal: per Hasluck J at [20]-[22]; Anderson and Parker JJ agreeing.

- 310 In the circumstances of this case, whilst falling short of conduct justifying summary dismissal, and cl 11.3(2) of the Contract having no application and there being no evidence or argument at first instance that it had any role to play in the appellant's dismissal, the conclusion must be reached that the appellant has been denied by the respondent, a benefit under his contract of his employment, that being the benefit prescribed by cl 11.2 of the Contract.
- 311 In relation to the appellant's unfair dismissal claim therefore, based on the reasons we have set out in the fullness of these reasons, the respondent could not have had reasonable grounds, based on an honest and reasonable belief, that the appellant committed an act(s) of wilful and grave misconduct. As to procedural fairness, which, given the circumstances of this case, is a most important consideration, for the reasons set out at [48]-[73] above, in relation to the role of the Council and in particular, the Report to it recommending the summary dismissal of the appellant, the dismissal was fundamentally procedurally unfair.

In the alternative

- 312 However, but for our conclusion that the respondent did not establish that it had grounds to summarily dismiss the appellant for misconduct and that the dismissal was procedurally unfair because of the effect of s 5.37(2) of the *LG Act*:
- (a) The appellant was in a senior position as a Director and was required to set an example, especially given his responsibilities for human resource management and corporate governance;
 - (b) As a Director he had a level of influence over other employees, in this case especially, Ms Harrison as the Human Resources Manager;
 - (c) Whilst the appellant attempted to downplay this relationship, as found by the learned Commissioner, the dynamic of the superior/subordinate relationship had a role to play in the appellant's conduct;
 - (d) The Pay Arrangement did constitute a personal 'savings plan' that was a benefit to the appellant, despite his denial of such a benefit. It is difficult to see why a person would take such a step if it did not involve any form of benefit;
 - (e) The Pay Arrangement was not available to any other employee of the respondent;
 - (f) The Pay Arrangement was not authorised by the CEO and it was highly irregular. The appellant used the respondent, as we have noted earlier in these reasons, as his personal banking facility;

- (g) The Pay Arrangement was not documented at the initiative of the appellant, for transparency purposes. In a regulated environment such as local government, it should have been; and
- (h) As a result of the above, it would have been open for the CEO and the Council to have lost confidence in the appellant justifying the termination of his employment at will.

Reinstatement

- 313 Consideration needs to be given to the appellant's claim for reinstatement under s 23A(3) of the *Act*. This was the appellant's claim at first instance and on the appeal, should the Full Bench deal with the claims itself rather than remit the matter for further hearing and determination. It was submitted that the appellant should be reinstated without loss of entitlements. On the other hand, the respondent submitted that should the Full Bench consider that the summary dismissal of the appellant was unfair, then reinstatement of the appellant would not be practicable.
- 314 This submission was on the footing that on the evidence and the findings made by the learned Commissioner, the relationship between the appellant and the CEO, Ms Miltrup, had irretrievably broken down. It was submitted that Ms Miltrup had formed the view that the appellant had engaged in deceptive and dishonest conduct. She was the subject of the Code of Conduct complaint by the appellant which the respondent considered was a form of retaliation by the appellant (see [25(zz)] and [33(v)] at AB566 and 575).
- 315 We think it is clear that given the seniority of the position the appellant held with the respondent, and the breakdown in trust and confidence between the appellant and the CEO, in the context of the need for a close working relationship between them, and having regard to our views at [312(h)] above, reinstatement would be impracticable. Accordingly, consideration needs to be given to whether an order of compensation should be made under s 23A(6) of the *Act*, having regard to ss 23A(7) and 23A(8) of the *Act*.

Compensation for loss

- 316 As to the matter of compensation for loss, resulting from his unfair dismissal, at the conclusion of the hearing of the appeal, some consideration was given to the approach the Full Bench should take in the event that the appeal were to be upheld, and the form of any orders that should be made. For example, at first instance, there was little evidence of the appellant's steps taken to find other employment, apart from some brief evidence regarding work the appellant had obtained elsewhere for a mining company, on a part-time contract for six months which he commenced on or about 9 October 2023 (see generally transcript at first instance at pp 76-77 and exhibit A13). Whether the appellant has received

income from any other sources is unknown. Also, whether the appellant suffered any other loss or injury as a consequence of his unfair dismissal, in the circumstances in which we have found it to be, may also be relevant, and is presently unknown.

Future course

- ³¹⁷ Given the above, the Full Bench directs the parties to confer within 14 days, as to the terms of orders to issue. In the event that the parties cannot agree, the Full Bench will relist the appeal to hear further submissions.