FEDERAL COURT OF AUSTRALIA

Briant v Martin [2020] FCA 1009

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| File number: |  |
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| Judge: | **SNADEN J** |
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| Date of judgment: | 17 July 2020 |
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| Catchwords: | **INDUSTRIAL LAW** – applicant dismissed (or purportedly dismissed) from office of secretary of a branch of the Independent Education Union – respondents effected (and otherwise treated as valid) that dismissal – whether applicant guilty of substantial breaches of union rules or gross misbehaviour – whether applicant’s dismissal or purported dismissal was effected contrary to the rules of the union**PRACTICE AND PROCEDURE –** application forinterlocutory relief under s 164(4) of the *Fair Work (Registered Organisations) Act 2009* (Cth) – appropriateness of directions for the observance of union rules – application for interlocutory relief dismissed  |
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| Legislation: | *Fair Work (Registered Organisations) Act 2009* (Cth) – ss 164, 164A, 323 and 329*Federal Court Rules 2011* (Cth) – r 34.06  |
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| Cases cited: | *AMWU & anor v McCain Foods (Aust) Pty Ltd* [2012] FCA 1126*Australian Workers’ Union v Bowen (No 2)* (1948) 77 CLR 601*Blackadder v Ramsey* (2005) 221 CLR 539*Cleworth v Barrow* (1978) 20 ALR 359*Cook v Crawford* (1981) 52 FLR 1 *Johnson v Beitseen* (1988) 41 IR 395*Johnston v Cameron* [2002] FCA 948 *Joyce v Christofferson* (1990) 26 FCR 261*Lynch v Hodges* (1963) 4 FLR 348*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Citizenship v Yucesan* (2008) 169 FCR 202*Re Ferguson* (1995) 58 FCR 106*Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238*Steuart v Oliver & Ors (No 2)* (1971) 18 FLR 83Magner, *Joske’s Law and Procedure at Meetings in Australia* (Thomson Reuters, 11th ed, 2012) Lang, *Horseley’s Meetings: Procedure, Law and Practice* (LexisNexis, 7th ed, 2015) |
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| Date of hearing: | 13 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords  |
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ORDERS

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|  | VID 429 of 2020 |
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| BETWEEN: | ANGELA BRIANTApplicant |
| AND: | BRUCE MARTINFirst RespondentLUCY REEVESSecond RespondentROBERT THOMAS (and others named in the Schedule)Third Respondent |

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| JUDGE: | SNADEN J |
| DATE OF ORDER: | 17 JULY 2020 |

THE COURT ORDERS THAT:

1. The application for interlocutory relief contained within the applicant’s originating application dated 24 June 2020 is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SNADEN J:

1. By an originating application dated 24 June 2020, the applicant seeks relief under ss 164(1) and 164A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (hereafter, the “**Act**”). The applicant is a former—and, potentially, the current—branch secretary of the Independent Education Union of Australia (hereafter, the “**Union**”), which is an organisation registered as such pursuant to the Act. The Union represents (perhaps amongst others) school teachers at non-government schools. The relief that the applicant seeks pertains to her removal, or purported removal, from the office of secretary of the Union’s Western Australian branch (hereafter, the “**Branch**”).
2. The application was the subject of a rule to show cause, which the court granted under r 34.06 of the *Federal Court Rules 2011* (Cth) on 26 June 2020. In addition to the relief referred to above, the applicant’s originating process also makes a claim for interlocutory relief under s 164(4) of the Act. The application for a rule to show cause and for the interlocutory relief to which the applicant laid claim came before me in my capacity as duty judge. After the rule to show cause was granted, directions were made as to the filing and service of affidavits and submissions directed to the question of what, if any, interlocutory relief ought to be granted. That question was the subject of a hearing on 13 July 2020 and it is to it that these reasons relate.
3. The respondents collectively comprise the Branch’s executive team (I will refer to them, hereafter and collectively, as the “**Branch Executive**”, and references hereafter to that singular body should be understood as references to the collection of individuals who constitute it). By resolutions passed in May of 2020, they imposed certain restraints upon the manner in which the applicant was to discharge her role as Branch secretary and, later, removed (or purported to remove) her from that role altogether.
4. The applicant maintains that those resolutions were effected contrary to the Union’s rules. She moves the court for interlocutory injunctive relief requiring that the respondents observe the rules of the Union by not giving any effect to, or not treating as valid, their decision to dismiss her from her office of Branch secretary; and by not otherwise placing constraints on her fulfilment of that office. In effect, she seeks to be reinstated to her position as secretary of the Branch and to be relieved of the constraints that the respondents imposed (or purported to impose) upon her prior to her dismissal (or purported dismissal).
5. For the reasons that follow, I decline to grant the interlocutory relief that is sought.

# Evidence

1. The applicant relies upon three affidavits: one that she affirmed on 24 June 2020, another that she affirmed on 7 July 2020 and a third that she affirmed on 13 July 2020. Each was read without objection.
2. The respondents rely upon five affidavits, namely:
3. an affidavit sworn by the first respondent on 9 July 2020;
4. an affidavit sworn by the seventh respondent on 9 July 2020;
5. an affidavit affirmed by the respondents’ solicitor, Daniel Stojanoski on 9 July 2020;
6. a further affidavit affirmed by Mr Stojanoski on 10 July 2020; and
7. a third affidavit affirmed by Mr Stojanoski on 12 July 2020.

Each of those affidavits was read without objection.

1. The parties also filed comprehensive and helpful written submissions, for which I record the court’s gratitude.

# Principles to be applied

1. The Union is an organisation registered under the Act. Like all such organisations, it operates pursuant to rules that are made and enforced under the statutory regime to which the Act gives effect. Those rules (hereafter, the “**Union’s Rules**”) provide for the way in which—and the offices and bodies *by* which—the functions of the Union are divided and discharged.
2. The applicant’s claim for interlocutory injunctive relief is premised upon s 164 of the Act, which provides as follows (by means of subsections that, for reasons neither apparent nor material, are not entirely consecutive):

**164 Directions for performance of rules**

*Application for order directing performance of rules*

(1) A member of an organisation may apply to the Federal Court for an order under this section in relation to the organisation.

Note: For the meaning of ***order under this section***, see subsection (9).

(2) Before making an order under this section, the Court must give any person against whom the order is sought an opportunity of being heard.

(3) The Court may refuse to deal with an application for an order under this section unless it is satisfied that the applicant has taken all reasonable steps to try to have the matter that is the subject of the application resolved within the organisation.

*Court may make interim orders*

(4) At any time after the making of an application for an order under this section, the Court may make any interim orders that it considers appropriate and, in particular, orders intended to further the resolution within the organisation concerned of the matter that is the subject of the application.

(5) An order under subsection (4) continues in force, unless expressed to operate for a shorter period or sooner discharged, until the completion of the proceeding concerned.

*Definition*

(9) In this section:

***order under this section*** means an order giving directions for the performance or observance of any of the rules of an organisation by any person who is under an obligation to perform or observe those rules.

1. Inherent in the applicant’s case is a contention that the Branch Executive has operated and is operating in contravention of the Union’s Rules insofar as it (first) imposed restrictions upon the manner in which the applicant was to discharge her duties, and (second) effected and treated as valid her removal from the office of Branch secretary. It is to those alleged contraventions that the applicant seeks to put a stop, including on an interlocutory basis.
2. Various of the Union’s Rules assume present significance. As is often the case with similar organisations, the Union’s Rules constitute the Union as a federation comprising various (mostly state-based) branches. Each such branch operates more or less autonomously, subject to oversight by a federal executive (which operates on a day-to-day basis) and a federal council (which operates periodically). Reflecting that federal structure, the Union’s Rules are divided into parts: one containing rules that apply across the Union (hereafter, the “**Federal Rules**”), one that contains rules specific to the operation of all branches (hereafter, the “**Branch Rules**”) and then a series of discrete parts that apply to individual branches (one of which—hereafter, the “**WA Branch Rules**”—applies to the Branch). Although not material to this matter, it appears that the discrete individual branch rules (including the WA Branch Rules) operate to the exclusion of the Branch Rules, at least to the extent of any inconsistency.
3. Rule 23 of the Federal Rules deals with the dismissal of the Union’s office bearers (including the office bearers within its branches). It provides (and provided) as follows:

**23 – dismissal of officer**

(a) The Federal Executive may, by summons in writing, call upon a member whom the Federal Executive and/or the Branch Executive alleges is acting or has within the preceding twelve months committed any offence against these Rules or the Rules of the Branch in which their membership lies, to attend a hearing of the charge. At such a hearing, the member shall be required to demonstrate why they should not be reprimanded, fined or expelled from the Union.

(b) Subject to any provision in Branch rules to the contrary a Branch Executive by a two-thirds majority may dismiss from office an officer of that Branch of the Union or a member of that Branch Executive found guilty, in accordance with the Rules of Union and any relevant Rules of the Branch, of misappropriation of the funds of the Union or of the Branch, a substantial breach of the Rules of the Union or of the Branch, or gross misbehaviour or gross neglect of duty or who has ceased according to the Rules of the Union to be a member of the Union.

(c) Any charge on the basis of which a procedure for dismissal is based must be in writing, setting out the particulars of the alleged violation of rules, gross misbehaviour or gross neglect of duty. The person concerned shall be given no less than two weeks notice of any meeting which is to decide the matter of a dismissal, which notice shall be accompanied by the written charge. The person charged shall be given reasonable opportunity to attend the meeting at which the charges are heard, and of being heard in his or her defence. If the person charged prefers, he or she may answer the charge in writing.

1. Rule 6 of the WA Branch Rules—despite being headed “branch conference and the election of delegates”—makes provision for the Branch Executive. By r 6.1, the Branch Executive is designated as “[t]he governing body of the Branch”. It consists of various office bearers (WA Branch Rules, r 6.2), for whose election by the Branch membership provision is separately made (WA Branch Rules, rr 6.3-6.5; Federal Rules, r 17). The Branch Executive meets at least biannually (WA Branch Rules, r 6.6).
2. Rule 7 of the WA Branch Rules invests various powers in the Branch Executive. The chapeau to that rule recognises that the “…Branch Executive shall have power to control and manage the business and affairs of the Branch subject always to the Federal Rules and the Branch Rules”. The remainder enumerates a series of specific powers exercisable by the Branch Executive, none of which need here be recited.
3. Rule 8 of the WA Branch Rules sets out the duties of the Branch’s office bearers. Rule 8.1 lists those of the Branch’s secretary. They include, relevantly:
4. to be “the Chief Administrative Officer of the Branch” (WA Branch Rules, r 8.1(a));
5. to be, subject to the Union’s Rules, “…empowered to make any decisions as necessary in the day to day affairs of the Branch…” (WA Branch Rules, r 8.1(b));
6. to be, in consultation with the president and vice president of the Branch, “…responsible for the employment and dismissal of administrative staff of the Branch…” (WA Branch Rules, r 8.1(c));
7. subject to the Union’s Rules, to “…define the duties and direct the work and function…of the Branch officials and employees” (WA Branch Rules, r 8.1(d));
8. to “…ensure the prompt banking of all mon[ey]s received by the Branch” (WA Branch Rules, r 8.1(n)); and
9. to “keep or cause to be kept in appropriate books of account a correct statement of all mon[ey]s received and expended by or on behalf of the Branch” (WA Branch Rules, r 8.1(p)).
10. Rule 8.2 confers duties upon the Branch’s president, including to:
11. preside over meetings of the Branch Executive; and
12. convene such meetings “…through the Branch Secretary”.
13. Save for mandating that the Branch Executive meet at least twice every year and for investing in the Branch president a capacity to convene such meetings “through the Branch Secretary”, the Union’s Rules appear otherwise to be silent on how meetings of the Branch Executive should be conducted.
14. The parties were more or less aligned as to the principles that the court must apply in considering whether or not to grant interlocutory relief in a case such as this one. By her written submissions favouring a grant of interlocutory relief, the applicant contended as follows (references omitted):

The power to make the order under s 164 and 164A is a function of the conferral of the jurisdiction on the court. The court can make interim orders ‘that it considers appropriate’: ss 164(4). The section does not import the law governing the grant of interlocutory injunctions. One purpose of an interim order under s 164 reflects that of interlocutory injunctions, namely to maintain the status quo to enable[ ]the court to do justice at trial. However, there may be little difference in practical application between the usual test for interlocutory injunctions and the statutory test. What is likely to occur at trial, if the evidence remains the same, is relevant in determining if relief should be granted. It will only be [in] rare cases that a court, satisfied there has been a failure to perform or observe the rules, will deny relief to remedy the contravention.

1. I adopt that statement of principle. To it I should add only one qualification: namely, that it will be rare for the court to be “satisfied”, on an interlocutory basis, that there has been a failure to perform or observe an organisation’s rules. Necessarily, that is a question that lies for determination at the trial stage. At the interlocutory stage, the court’s attention is as to whether or not there is a *prima facie* case that there has been a failure to perform or observe an organisation’s rules.
2. In *Johnston v Cameron* [2002] FCA 948, [98]-[100] (Weinberg J), this court made the following observations about the principles to be applied in an application for interlocutory relief under a legislative predecessor of s 164 of the Act:

There is authority for the proposition that the usual test for interlocutory injunctions, namely, that there be a serious question to be tried, and that the balance of convenience favour the grant of such an injunction, may not be applicable under s 209: *McGee v Sanders (No 2)* [1991] FCA 554; (1991) 32 FCR 397 at 402-403 and *Adlam v Noack* (1998) 90 IR 31 at 34-35.

In the former case, Gray J concluded that s 209(4) required the Court to do justice as best it can when confronted by an application for interim orders. In the latter case, von Doussa J observed that one of the primary considerations in determining whether or not to make interim orders "must be the efficient and effective working of the Union pending the final resolution of the proceedings".

There seems to me to be little difference, in practical application, between the usual test for interlocutory injunctions, and the test propounded for use under s 209. For the sake of convenience I propose to adopt the traditional language associated with the usual test, though bearing in mind the need to apply that test with some flexibility.

1. Respectfully, I agree. As his Honour did on that occasion, I shall employ “the traditional language associated with the usual test” but I shall do so conscious of the qualifications thereupon to which the authorities refer.

# Background facts

1. The applicant submits that her removal from office as secretary of the Branch and the earlier imposition upon her of constraints upon the manner in which she was to discharge that office each involved contraventions by the respondents of various of the Union’s Rules. To understand those submissions, it is, of course, necessary to delve into the background facts that have led to the present application. Few, if any, of them are in contest.
2. The applicant became the secretary of the Branch in July 2015. In December 2019, she was re-elected to that office for a further three-year term.
3. In September 2019, another union—the Australian Services Union, which represents the employees of the Branch (or some of them)—made complaints about the applicant’s conduct toward some of its members. Those complaints—the existence and initial management of which the applicant did not bring to the Branch Executive’s attention (a fact that assumes some potential significance presently)—were ultimately the catalyst for an investigation that was undertaken at the instigation of the Branch Executive (or, perhaps more accurately, certain members thereof) by a solicitor, Mr Cory Fogliani. Mr Fogliani apparently prepared legal advice arising from his investigation, over which the Branch Executive has (or those members thereof who commissioned it have) maintained a claim of privilege. The applicant has not seen that report (and it is not in evidence before me). The evidence suggests that it was based heavily upon a brief that Mr Fogliani compiled for the purposes of supplying his advice. That brief or “evidence book” (or a draft thereof, the content of which did not materially differ from that of its final form) *was* provided to the applicant.
4. Mr Fogliani’s advice (hereafter, the “**Fogliani Report**”) preceded a meeting of the Branch Executive on 6 May 2020. At that meeting, a series of resolutions were passed concerning misconduct “charges” that were to be laid against the applicant. It was resolved that the first respondent (the president of the Branch) should prepare and serve written charges upon her and that a special meeting of the Branch Executive take place on 22 May 2020. It was also resolved that the applicant would be made subject to various controls concerning her ability to make certain payments on the Branch’s behalf, and that she was not to attend the Branch office or communicate with Branch staff unless authorised by the Branch’s president to do so.
5. A written statement of charges—23 in total—was presented to the applicant on 7 May 2020. It is neither convenient nor necessary to recite the charges in detail here. Broadly, they concerned allegations that the applicant had:
6. failed to disclose to the Branch Executive the existence of complaints made against her by some of its staff about the manner in which she had treated or tended to treat them;
7. failed to properly account for certain funds received on behalf of the Branch;
8. acted unreasonably toward Branch staff; and
9. obtained and/or failed to disclose that she had obtained personal benefits—mostly in the form of air travel and related benefits—at the Branch’s expense.
10. On 21 May 2020—the day before the special Branch Executive meeting that had been scheduled to determine the charges that had been laid against the applicant—the applicant provided to the Branch Executive a comprehensive written response to each of the charges laid against her. That response ran to more than 90 pages (including documentary attachments).
11. The meeting of 22 May 2020 took place as scheduled. It lasted approximately seven hours. At its commencement, the applicant sought to have her solicitor, Mr Gavin MacLean, attend but the meeting resolved not to permit that. Mr Tony Walker—a former member of the Branch Executive—attended. Two members of the Branch Executive—the third and fourth respondents—participated by telephone (one because she was located some 2,000 kilometres away in Broome, the other for health reasons). The remainder—that is to say, the other respondents—attended the meeting in person.
12. The bulk of the 22 May 2020 meeting was devoted to ventilating the charges that had been laid against the applicant and her responses to them. The first respondent, apparently speaking from a lengthy written document (referred to hereafter as the “**Martin Notes**”), particularised each of the discrete allegations. After each was so described, the applicant was given (and availed herself of) an opportunity to provide her response.
13. Once all of the charges had been discussed, the applicant and the first respondent recused themselves from the meeting, leaving the remaining Branch Executive members to consider whether or not the applicant should be found guilty of each charge. Those deliberations resulted in “guilty” findings in respect of 19 of the 23 charges that were laid.
14. Once those deliberations had concluded, the applicant came back into the meeting and was informed of the findings. She was then asked to (and did) make submissions about whether or not her commission as secretary of the Branch should be terminated. After those submissions were made, the applicant and the first respondent again left the meeting to allow the remaining Branch Executive members to deliberate upon her fate. The Branch Executive resolved to dismiss the applicant from her position as secretary of the Branch.
15. Other steps were later taken concerning the applicant’s membership of the Union and her status as a delegate to its Federal Council. The parties have since resolved disputes concerning those steps and they no longer feature as issues to which attention need presently be given. The respondents did not invite the court to “refuse to deal” with the applicant’s application for interlocutory relief on the basis identified in s 164(3) of the Act (see above, [10]).

# *Prima facie* case

1. There are two aspects to the applicant’s case. The first—and, on any view, primary—aspect concerns her purported dismissal from the office of Branch secretary. The second concerns the constraints that were imposed upon her discharge of that office at the meeting of 6 May 2020 (above, [26]). The analysis that follows concerns the first of those two aspects.
2. The applicant identified 13 separate bases upon which she maintains, on a *prima facie* case basis, that the court ought to grant interlocutory injunctive relief to restrain the respondents from treating as valid her purported dismissal from the office of Branch secretary. By her written submissions, she helpfully grouped them into four discrete groups, to which I shall now turn.

## 1. Breaches of procedural fairness

1. The applicant maintains that the Branch Executive, in prosecuting and determining the charges that were laid against her, was obliged to afford her procedural fairness. She says that it failed to discharge that obligation in two ways, namely by:
2. not providing her with each of the Fogliani Report and the Martin Notes ahead of the 22 May 2020 meeting; and
3. permitting Mr Walker to attend the 22 May 2020 meeting, despite his not being a member of the Branch Executive.
4. I do not consider that there is much that can be made of the respondents’ failure to provide the applicant with the Fogliani Report or the Martin Notes. The applicant’s entitlement to procedural fairness in connection with the prosecution and determination of the charges against her was, primarily if not entirely, a function of r 23 of the Union’s Rules (above, [13]). She was entitled to written particulars of the charges against her, to at least two weeks’ time between the point of receiving those written particulars and the point at which they would be determined, to a reasonable opportunity to attend the meeting at which that determination would be made, and to be heard (in person or in writing) as to her defence or defences to the charges so laid. All of those stipulations were met (and there is no suggestion otherwise).
5. The applicant’s submissions proceed on the basis that she was entitled to receive any and all of the documents (including privileged documents) that had been prepared and supplied to the Branch Executive in connection with the charges laid against her. Even assuming that the Branch Executive was obliged to afford the applicant copies of “every item of material on which [it] relied” (see *Joyce v Christoffersen* (1990) 26 FCR 261, 298-299 (Gray J)), two observations bear noting.
6. First, it is very unlikely that any such obligation (assuming that there was one here) extended to privileged documents. It was not suggested that the privilege claimed in respect of the Fogliani Report inured to the benefit of the Union, as opposed to those who commissioned it. Even if it did, it remains unclear that the applicant—who, it must be remembered, was the apparent subject of Mr Fogliani’s advice—might nonetheless have been entitled to inspect it, much less expect that it would be volunteered. Such an entitlement would seem very difficult to reconcile with what surely was (or is) the applicant’s obligation to avoid the kind of obvious conflict of interest to which her obtaining of the advice would almost certainly have given rise.
7. Second, in the case of the Martin Notes, the evidence is that the Branch Executive (or those of its members that deliberated upon the applicant’s guilt of the charges that were laid against her) did not rely upon them. Indeed, although initially circulated, copies of those notes were taken from the members of the Branch Executive and placed in a pile in the middle of the meeting table. That occurred at the applicant’s request; and after she requested, was provided with *and* perused (at least casually) a copy of them. Even assuming that the respondents were obliged to afford the applicant a copy of the Martin Notes ahead, or well ahead, of the 22 May 2020 meeting, it is difficult to see how their subsequent determination of the charges could be impugned as the product of procedural unfairness in circumstances where the applicant knowingly consented to (or, at least, did not oppose) their embarking down that path.
8. On any view, the charges that were laid against the applicant were the subject of exhaustive explanation, both by the first respondent and by the applicant herself. The suggestion that there might have been material before the Branch Executive that was not brought to the applicant’s attention, such that she might be thought to have been relevantly denied procedural fairness, is unconvincing.
9. Similarly, I do not consider that anything material follows from the attendance of Mr Walker at the 22 May 2020 meeting. The evidence (albeit as yet untested) suggests that none of the Branch Executive members who voted to find the applicant guilty of any of the charges laid against her, or to dismiss the applicant from her position, was minded to do so on account of any pressure or persuasion from Mr Walker. His mere presence at the meeting is unlikely to be a sufficient basis upon which to invalidate the business that it transacted: *Steuart v Oliver & Ors (No 2)* (1971) 18 FLR 83, 84 (Joske J, with whom Spicer CJ and Smithers J agreed); *Lynch v Hodges* (1963) 4 FLR 348, 350-351 (Dunphy J, agreeing with Spicer CJ and Joske J); and Eilis Magner, *Joske’s Law and Procedure at Meetings in Australia* (Thomson Reuters, 11th ed, 2012), [7.20]. Although I cannot entirely discount the possibility that the applicant might establish, at the trial, what she now submits on an interlocutory basis, I do not consider that she has much prospect of doing so.
10. The applicant’s submissions concerning procedural fairness are, with respect, unconvincing. Even supposing that they rise to the standard of a *prima facie* case, I do not consider them to be strongly arguable.

## 2. Breaches of meeting procedure

1. The applicant next attacks the procedure by which the Branch Executive came to consider the charges that were laid against her. Three submissions are advanced in that regard, namely that:
2. the 22 May 2020 meeting was not called in accordance with the requirements of the Union’s Rules;
3. it was not appropriate for the Branch Executive, insofar as concerned the charges laid against the applicant, to assume the position of both complainant and arbiter; and
4. the 22 May 2020 meeting was invalid on account of the fact that two Branch Executive members attended it by telephone.
5. Respectfully, none of those submissions is convincing.
6. The respondents submit that the Union’s Rules, properly construed, do not require in-person attendance at meetings of the Branch Executive. The relevant rules speak merely of Branch Executive members “meet[ing]” and “attend[ing]” meetings. There is no reason, they say, why those terms should be understood to require physical presence at meetings. Nor is there any reason to think that the two Branch Executive Members who appeared by telephone were relevantly unable to participate in the meeting.
7. The applicant, by contrast, points to another aspect of the Union’s Rules that specifically contemplates the conducting of votes by “…post, telephone or any other means…” There are other rules applicable to other branches that similarly contemplate meetings being held otherwise than in person. The WA Branch Rules governing the conduct of Branch Executive meetings do not replicate those terms. The express contemplation of participation in meetings (or votes) by telephone in other forums should, she says, be understood as an implied prohibition against equivalent participation in meetings of the Branch Executive.
8. There is a serious question to be tried as to whether the Union’s Rules permit telephonic attendance at Branch Executive meetings. I do not, however, consider persuasive the proposition that they don’t. Union rules, like articles of association, are instruments of corporate governance “…intended to endure and to be capable of operating with flexibility in changing circumstance[s]”: *Re Ferguson* (1995) 58 FCR 106, 111 (Branson J). The apparent (if not obvious) purpose of requiring that members of the Branch Executive meet from time to time is to ensure that they are kept abreast of issues concerning the administration of the Branch and that they have a forum in which to ventilate whatever they might consider requires ventilation. The facilitation of that exchange requires that they have a forum in which views can be adequately communicated and understood, and in which their powers of persuasion might be brought to bear upon fellow executive members when circumstances require it. Particularly in light of modern technologies, those are not measures that necessarily require in-person attendance at meetings: see *Minister for Immigration and Citizenship v Yucesan* (2008) 169 FCR 202, 208-209 [21]-[26] (Emmett, Stone and Edmonds JJ) and the authorities to which their Honours there refer.
9. Similarly, the fact that the 22 May 2020 meeting was not called “through” the applicant (as, she maintains, the Union’s Rules required) is unpersuasive. The 22 May 2020 meeting was called in consequence of a resolution that the Branch Executive passed on 6 May 2020. I would be very slow to accept that the Branch Executive lacked a power to determine for itself when its own meetings should occur. To so conclude would seem to be inconsistent with the notion of a Branch Executive sitting at the apex of Branch-level decision making. Further, if the convening of the 22 May 2020 meeting required the input of the secretary, that would have the anomalous effect that a secretary could (absent a court order) avoid being made answerable to otherwise valid misconduct charges simply by refusing to convene a meeting at which they might be determined. There is no suggestion that the applicant would have traversed that path here; but it underlines why the Branch Executive should, I think, be understood to have had the power that it purported to exercise on 6 May 2020.
10. In any event, none of the members of the Branch Executive—including the applicant herself—raised any objection to the meeting having been called in the way that it was. There is, I think, a strong argument that any irregularity that might otherwise have attended it was waived. On that point, the applicant maintained that such an irregularity (if there was one) was not for the members of the Branch Executive to waive: waiver, she maintained, required the consent of the Union’s members (or at least those associated with the Branch). Although I needn’t (and don’t) dismiss that contention as wrong, it seems to be at odds with authority: *Johnson v Beitseen* (1988) 41 IR 395, 417 (Gray J); see also A D Lang, *Horseley’s Meetings: Procedure, Law and Practice* (LexisNexis, 7th ed, 2015), [4.11] and Magner, [28.15]. Assuming (as I do) that it is arguable, I do not consider that it is strongly so.
11. Nor do I consider that it is strongly arguable that the Branch Executive was precluded from deciding that the applicant should answer the charges laid against her (or from thereafter determining her guilt in respect of them). It is the case that, at its 6 May 2020 meeting, the Branch Executive resolved that the applicant should be charged in accordance with what was then a draft notice of charges, the content of which appears to have been the subject of some earlier discussion. The respondents contended that that should be understood merely as an acknowledgement by the Branch Executive that the charges that the first respondent had put together should proceed to a formal hearing before the Branch Executive; and that the bringing of the charges themselves was effected not by the Branch Executive but by the first respondent. That might be so but the applicant’s alternative construction of the events is equally—and, I think, probably more—plausible.
12. I do not, however, consider that it is likely to matter much by whom the charges were laid. There is at least a *prima facie* case that the Branch Executive lacks the power to lay charges that might then be determined under r 23(b) of the Federal Rules. I doubt, however, that it is strongly arguable. As has already been stated, the Branch Executive is the Branch’s supreme decision-making body. The WA Branch Rules confer upon it a broad power to control and manage the business and affairs of the Branch: WA Branch Rules, r 7.1 (above, [15]). Without concluding either way, I would be slow to accept that the conferral upon the Branch Executive of a jurisdiction to determine charges laid against office bearers should impliedly limit that broad power to control and manage the Branch’s affairs (specifically, by preventing it from laying such charges). Particularly would that be so given that the Branch Executive would typically be well-placed—and, in some cases, would be best- or even exclusively-placed—to conclude that the proper control or management of the branch should require that course.
13. True it is that charges brought by the Branch Executive could have been determined by the Union’s Federal Council under r 23(a) of the Federal Rules. Nonetheless, it is not axiomatically the case that the members of the Branch Executive, merely by authorising the laying of charges and establishing a process by which they might be heard, exposed themselves as “invincibly biased” against the applicant, such that their later deliberations might validly be impugned: see, in that vein, *Australian Workers’ Union v Bowen (No 2)* (1948) 77 CLR 601. A distinction is fairly drawn between a decision to subject an office bearer to misconduct charges (on the one hand) and the prosecution of those charges (on the other). On the evidence as it presently stands, it would appear that the Branch Executive did no more than the former. It was the first respondent that drove the prosecution of the charges that were laid against the applicant (and, it should be remembered, he participated neither in the deliberations upon her guilt in respect of them, nor the consideration of what penalty should be imposed in light of that guilt).
14. The applicant’s submissions concerning the procedure by which the charges against her came to be heard are, with respect, unpersuasive. Even supposing (as I do) that they rise to the standard of a *prima facie* case, I do not consider them to be strongly arguable.

## 3. Findings of gross misbehaviour

1. The applicant advances a number of attacks against the Branch Executive’s findings (reached at its 22 May 2020 meeting) that she was guilty of gross misbehaviour or substantial breaches of the Union’s Rules. There are multiple dimensions to those submissions. Before exploring them, it is appropriate to note what is contemplated by the concepts to which r 23 of the Federal Rules relevantly gives voice: namely, “substantial breach” of the Union’s Rules and “gross misbehaviour”. Of the 23 discrete charges that were laid against the applicant, two alleged that she had committed a substantial breach of the Union’s Rules and the remainder alleged that she had grossly misbehaved. The two alleged breaches of the Union’s Rules concerned the manner in which she had handled a sum of money apparently donated to the Branch by another member of the Branch Executive.
2. The applicant submitted that those concepts—substantial breach and gross misbehaviour—were inapt to describe any of the conduct subsumed within the 23 charges that were laid against her. It was not, she contended, reasonably open to the Branch Executive, to conclude otherwise. Moreover, her submission continued, even assuming that the Branch Executive did not act unreasonably in drawing the conclusions that it drew, those conclusions were nonetheless wrong, such that the jurisdictional precondition upon which her removal from office under r 23 of the Federal Rules depended was not established.
3. The submissions before me did not delve in detail into what is contemplated by a “substantial breach” of the Union’s Rules. It is at least arguable that the conduct at the centre of the two charges in respect of which the Branch Executive held the applicant guilty of having committed such breaches was, in fact, not conduct in respect of which such findings could properly be made. Conceptually, “substantial” imports notions of perception and degree that, by their very nature, are open to debate. That debate, of course, arises here only insofar as there was a breach of relevant rules and it is convenient to consider that question presently.
4. By their findings in respect of the two “substantial breach” charges, the respondents concluded that the applicant had contravened rr 8.1(n) and (p) of the WA Branch Rules (above, [16(5) and (6)]). Each contravention pertained to a cash donation made to the Branch by another Branch Executive member, apparently for the purpose of rewarding Branch staff. The applicant received those moneys and retained possession of them for a time; she neither banked the funds nor accounted for them in appropriate books of account. She maintains that the purpose for which the funds were apparently donated—namely, to distribute as rewards to the Branch’s staff—was not one to which she could validly give effect. Therefore, she says, she resolved not to receive the funds on the Branch’s behalf; but she did not immediately decline to accept them for fear of affronting the donor.
5. It is at least arguable that the applicant’s conduct did not amount to a substantial breach of either relevant rule. It would appear—I say without concluding—that it breached them both; but whether it did so in a manner apt to be described as “substantial” is open to debate. There is at least some basis for thinking that the non-banking or non-accounting of *any* cash donation, no matter the purpose or intent that animated it, should constitute a serious deviation from the important financial obligations that attached to the applicant’s role. It might be ambitious to think that the court would conclude, at trial, that the respondents could not reasonably have formed the views about those two charges that they did. Although I consider that there is a *prima facie* case regarding those conclusions (or, more accurately, regarding the respondents’ decision to remove the applicant from her role as secretary of the Branch in consequence, or part consequence, of them), I do not consider it to be, in either case, especially strong.
6. The remainder of the charges laid against the applicant accused her of gross misbehaviour. Again, the applicant invites the court to conclude, at least on a *prima facie* case basis, that none of the conduct to which any of those charges related was capable of constituting gross misbehaviour.
7. Rule 23 of the Federal Rules does not define “gross misbehaviour”. In cases dealing with alleged contraventions of the rules of industrial associations such as the Union, courts have recognised that the existence of “gross misbehaviour”, insofar as it might manifest in the conduct of an official, is a question to be determined by the association: *Cleworth v Barrow* (1978) 20 ALR 359, 369 (JB Sweeney, Evatt and Keely JJ). The existence or otherwise of “gross misbehaviour” is not typically, in that sense, a jurisdictional fact: *Joyce v Christofferson* (1990) 26 FCR 261, 268 (Gray J). In *Cook v Crawford* (1981) 52 FLR 1 (Evatt J), this court observed (at 65), in respect of accusations not dissimilar to those presently in issue:

The concept of gross misbehaviour connotes a marked departure from the standards by which responsible and competent union officials habitually govern themselves. The best judges of the requirements of such standards and the degree of departure therefrom were the members of the executive themselves.

1. I confess some sympathy for the applicant’s submission that her conduct (or at least aspects of it)—about her engagement in which, it should be noted, there was no material contest—did not rise to the standard of gross misbehaviour. Nonetheless, it is difficult to see how she might establish that those conclusions were vitiated for want of reasonableness (in the legal sense contemplated by authorities such as *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611), as the authorities seem to require.
2. The applicant does not suggest that the respondents, insofar as they drew adverse conclusions about her conduct, were actuated by malice, factional politics or some other improper purpose. No such purpose is apparent. On the contrary—and regardless of whether the court might draw the same conclusions—it appears to have been open to the respondents reasonably to conclude, for example, that the applicant engaged in gross misbehaviour by failing to disclose to the Branch Executive the existence of complaints against her. That is something that a branch secretary might reasonably be expected to disclose; and something that, if not disclosed, could potentially lead to a finding of the kind that was made in this case (namely, that the applicant committed an act of gross misbehaviour). That the applicant’s failure to disclose the complaints was a function of her desire to maintain confidentiality (itself a function of the mediation process upon which she had embarked in respect of the complaints in question) or her expectation that the respondents would learn of them by other means is neither here nor there. It appears to remain the case that the respondents’ conclusion was open to them.
3. Similarly, it appears to have been open to the respondents to conclude that the applicant engaged in gross misbehaviour by:
4. returning the $500 cash donation that had previously been made to the Union (in that it is not ordinarily in the Branch’s interests to forego donations, even those purportedly made for a specific, even unachievable purpose);
5. treating a staff member of the Branch in the manner that was alleged (in that any behaviour short of respectful, professional courtesy might be open to legitimate or defensible criticism);
6. using Branch funds to obtain travel and related benefits in circumstances where her doing so placed (or arguably placed) her personal interests in conflict with those of the Branch (in that she was, as secretary of the Branch, very likely obliged to avoid such conflicts of interest); and
7. failing to disclose to the Branch Executive the existence of those conflicts (in that it might reasonably be expected that she should do so).
8. Again, those are all conclusions that might be open to challenge. The applicant’s contentions in those regards are, in each instance (and by their nature), at least arguable; but there is a degree of ambition to each, such that I do not consider them strongly so.
9. Similarly, I do not accept that the respondents’ conclusions in respect of some of the charges laid against the applicant were internally or inherently illogical or inconsistent. The applicant notes, for example, that she was found not guilty of gross misbehaviour constituted by her use of Branch funds to pay for a business-class upgrade on a personal flight that she took from Melbourne to Perth in January 2019; yet *was* found guilty of gross misbehaviour for failing to disclose to the Branch Executive the fact that she had done so. Although, again, that alleged illogicality might well be arguable, I do not think that it is strongly so. The Branch Executive was, it appears, at liberty to conclude that the conflict (as between the applicant’s personal interests and those of the Branch) that arose from the use of those funds was not sufficient to constitute that use as gross misbehaviour. Equally, however, it appears to have been at liberty to conclude that that use of funds gave rise, nonetheless, to a conflict of interest, the non-disclosure of which was sufficient to constitute gross misbehaviour. The applicant’s prospects of establishing, at trial, the want of logic or consistency alleged do not appear to me to be strong.
10. The applicant also complained that some of the respondents’ findings are irreconcilably inconsistent. She points out, for example, that she was found not guilty of gross misbehaviour comprising of her failure to disclose a conflict of interest that was said to have arisen from her use of Branch funds to pay for flights between Hobart and Perth in February of 2019; yet was found guilty of gross misbehaviour comprising equivalent failures that arose from similar uses of branch funds for other flights. Again, that internal inconsistency might well be arguable (in the sense that it might be said that some of the respondents’ conclusions were legally unreasonable) but I do not think that it is strongly so. It does not translate from the fact that the respondents considered one instance of conduct not to be gross misbehaviour that they were obliged to reach the same conclusion in respect of other, similar instances. At issue is whether it was open on the evidence for them reasonably to conclude as they did. It appears as though it was—which is to say that the applicant’s contentions to the contrary, however arguable, are not strongly so.

## 4. Imposition of a single penalty

1. By her written submissions in favour of interlocutory relief, the applicant observed (references omitted):

After finding Ms Briant guilty of 19 charges, the respondents took one vote about whether the penalty of dismissal should be imposed. There were not separate votes for each charge. The respondents have imposed a single penalty for all charges, not the same penalty for each charge. If one or more of the guilty findings was not for a substantial breach of the rules or gross misbehaviour due to the reasons [identified elsewhere in those submission], the Respondents have imposed the penalty of dismissal in a manner contrary to the rules.

1. The respondents accepted the force in that submission, as do I. It is not so much a discrete basis upon which the court might exercise its discretion to grant interlocutory injunctive relief; but rather an observation that, in order to succeed at trial, the applicant likely needs only to establish one of the other 12 bases upon which she seeks to impugn her dismissal as contrary to the Union’s Rules.

## Conclusions on *prima facie* case

1. The applicant has a *prima facie* case for the interlocutory relief that she seeks (at least insofar as it is directed to her purported dismissal from the office of Branch secretary). Some aspects of her case are stronger than others. Most I do not consider persuasive; but it could not be said that the submissions that the applicant advances are hopeless or foredoomed to fail. There are serious questions to be tried.

# Balance of convenience

1. Both sides led evidence about why interlocutory relief in the form of the applicant’s effective reinstatement to the office of Branch secretary should or should not be granted. The applicant’s evidence was to the effect that:
2. her dismissal has left her unemployed and, at 65 years of age, her prospects of employment in a similar field are limited;
3. to meet her ongoing living expenses, she will be required to access her superannuation, which will be “highly disadvantageous to her”;
4. her dismissal has visited adverse mental health effects, which will not be alleviated unless she is reinstated (or effectively reinstated); and
5. she is presently being denied the fulfilment and enjoyment that she would otherwise derive from her work as the Branch secretary.
6. The respondents’ evidence concentrates upon the problems that, it says, beset the Branch when the applicant was at its helm. It has led evidence about a number of workers’ compensation claims lodged against the Union by employees who claimed to have been inappropriately treated by the applicant. Some of those applications were accepted by the Union’s insurer. Some of the employees that have complained about the applicant’s conduct have only returned to work since the applicant’s dismissal (in one case, from leave; in another, after having resigned). The respondents are concerned that, if the applicant is reinstated (or effectively reinstated), some of the Branch’s staff will resign. The applicant submits that those concerns are overblown and not sustained by the evidence (including the evidence that was led about the workers’ compensation claims recently lodged against the Branch). That contest cannot be resolved at this juncture; but I am satisfied that there is at least some basis for the respondents’ concerns.
7. Furthermore, the respondents have led evidence about additional investigations into the applicant’s conduct that have taken place since her dismissal. They suggest that the applicant may have engaged in other instances of misconduct prior to her dismissal, including in the form of misappropriation of Union funds.
8. In the absence of a proper basis to do so, I draw no conclusions about the significance of the new allegations of misconduct (or potential misconduct) now advanced against the applicant. I accept, however, that the concerns held about the Branch staff who have complained about how the applicant treated them are legitimately held (which is not to conclude that the complaints themselves are necessarily well-founded) and that there is at least some basis for concern that the applicant’s return as secretary of the Branch might visit adverse consequences for at least some of those staff and the Branch more generally.
9. In contrast, the prejudice to the applicant of a refusal to grant interlocutory relief is less dire (or potentially so). Had it been otherwise, it might be expected that the applicant would have made her claim for interlocutory relief far more quickly than she did. She was aware from 6 May 2020 that she was to face disciplinary charges and, presumably, potential removal from office. From 22 May 2020 (or the early hours of 23 May 2020), she was aware that that removal was to occur. For some reason, it was not until more than a month later that she filed her originating application. The applicant offered no evidential explanation for that delay and none is apparent (even taking account of the lengthy affidavit that she filed in support of her suit).
10. Further, there is no evidence before the court that the applicant faces an immediately precarious financial future. The applicant was paid nearly $180,000.00 per annum as Branch secretary. During the week following her dismissal (or purported dismissal), she received from the Union a termination payment of more than $66,000.00 (gross). She has apparent access to superannuation funds (in a sum or sums not disclosed by the evidence). Notwithstanding her present unemployment, her financial position appears to be relatively secure; at least secure enough to suppose that interlocutory injunctive relief is not urgently required on financial grounds.
11. The applicant’s inability to draw the usual fulfilment associated with working is not insignificant and is properly to be taken into account: *Blackadder v Ramsey* (2005) 221 CLR 539, 549 (Kirby J), 566-567 (Callinan and Heydon JJ); *AMWU & anor v McCain Foods (Aust) Pty Ltd* [2012] FCA 1126, [47]-[48] (Bromberg J). I do so.
12. The applicant also raised concerns about the Branch operating without a secretary. The WA Branch Rules, she said, make no provision for an acting secretary, nor for the discharge of the duties conferred upon that office in the case of a casual vacancy. The applicant contended that the court ought to reinstate (or effectively reinstate) her to the position of Branch secretary so that the Branch can function in the manner that its rules contemplate. I do not accept that the Branch is unable to properly or effectively function in the absence of its secretary. Casual vacancies occur. I would be slow to interpret the Union’s Rules in such a way as might require, or even suggest, that the operations of a branch should be meaningfully curtailed for so long as one exists in respect of the office of its secretary. Even assuming that there might be such an operational impact, there is at least one statutory mechanism through which it might be addressed: the Act, s 323. In my view, the existence of the present vacancy is not a matter that materially affects where it is that the balance of convenience in this case lies.
13. Weighing up the various (and relative) prejudices that the parties (and others) stand to endure in the event that interlocutory relief were or were not granted, I am not satisfied that the balance of convenience inclines in the applicant’s favour. In my view, the obvious solution to those relative prejudices—and one that the court may be able to accommodate—is to expedite the matter to trial. The respondents indicated their willingness to submit to that course. It is unlikely to be one that the applicant might oppose.

# Conclusion

1. Having regard to the relative strengths and weaknesses of the submissions that the parties have advanced, and to the relative prejudices that a grant of interlocutory relief in the form of the applicant’s reinstatement (or effective reinstatement) to the office of Branch secretary will or will not visit upon them (and others)—and reflecting upon those factors in combination with one another (rather than as isolated considerations), as the authorities require (see, for example, *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238, 261 [67] (Dowsett, Foster and Yates JJ))—I do not consider that it is appropriate to exercise the court’s discretion in the applicant’s favour.
2. The applicant’s claim for interlocutory relief to prevent the respondents from maintaining the constraints that were imposed (or purportedly imposed) upon her at the 6 May 2020 meeting (above, [26]) must, in consequence of my conclusion about her effective reinstatement, also fail. Necessarily, that secondary aspect of the applicant’s case for interlocutory relief was dependent upon her effective reinstatement to the role of Branch secretary. Absent that effective reinstatement, the 6 May 2020 constraints are of no present relevance, as there are no rules of the Union whose observance the applicant might seek to enforce in connection with the discharge of her office. Had I reached a different view about the applicant’s effective reinstatement, it is likely that I would also have granted interlocutory relief directed toward the removal of those constraints.
3. The applicant’s application for interlocutory relief is dismissed. The matter will be referred back to the court’s registry for allocation to a docket judge in the usual way. Section 329(1) of the Act likely precludes any order for costs and, in any event, the respondents did not seek one. No such order will be made.

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| I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Snaden. |

Associate:

Dated: 17 July 2020

SCHEDULE OF PARTIES

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|  |  |
| Respondents |  |
| Fourth Respondent: | GWEN MCDERMOTT |
| Fifth Respondent: | ANDREW MILNE |
| Sixth Respondent: | PATRICIA SCRIVENER |
| Seventh Respondent: | HELEN KEOGH |
| Eighth Respondent: | MAXINE BRAHIM |